

COUNTY COURT, SUMMIT COUNTY, COLORADO 501 N. Park Avenue P.O. Box 269 Breckenridge, CO 8044	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
PEOPLE OF THE STATE OF COLORADO Plaintiff  v.  HANNIBAL, EVAN, Defendant	
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<b>MOTION TO QUASH SUBPOENAS ISSUED TO CAIC EMPLOYEES—          ETHAN GREENE AND JASON KONIGSBERG</b>	

The Colorado Avalanche Information Center (“CAIC”), by and through the undersigned Assistant Attorney General, respectfully requests that this Court quash the subpoenas issued by the People in the above-captioned matter to Mr. Ethan Greene and Mr. Jason Konigsberg, both of whom are CAIC employees. In support of the Motion, CAIC states as follows:

**BACKGROUND**

1. On or about February 18, 2021, undersigned counsel accepted service of the witness subpoenas in this matter on behalf of the CAIC. The subpoena commands Mr. Ethan Greene and Mr. Jason Konigsberg, both employees of the CAIC, to appear and give testimony at a trial currently scheduled for March 25-26, 2021.

2. Undersigned counsel has been informed by Deputy District Attorney Cava in Colorado’s Fifth Judicial District Attorney’s Office the People intend to call Mr. Konigsberg to testify for evidentiary purposes potentially including CAIC

reports, photographs, and GoPro video. Additionally, the DDA informed undersigned counsel that Mr. Greene is being called to provide his expert opinion related to, among other things, avalanches generally, snow science and the snow conditions that led to the avalanche that occurred on March 25, 2020.

3. Mr. Greene is the Director of CAIC and Mr. Konigsberg is an Avalanche Forecaster employed by CAIC.

4. The CAIC is an information center within the Colorado Department of Natural Resources, Executive Director's Office ("DNR"). The CAIC is a small agency, with only 20 staff, some of whom are seasonal.

5. The General Assembly created the CAIC with the purpose of providing avalanche forecasting information and education to the State, the public, and industry. C.R.S. § 24-33-116(1). CAIC is specially charged with providing assistance to and cooperating with the general public, industries, and agencies of state government to "promote safety by reducing the impact of avalanches on recreation, industry, and transportation" in Colorado through forecasting and education. C.R.S. § 24-33-116(1).

6. Avalanche forecasting and promoting public safety is the primary function of the CAIC. The mission of the CAIC is to provide avalanche information, education and promote research for the protection of life, property, and the enhancement of the state's economy. CAIC carries out its statutory objectives and mission by providing general information on avalanches as well as descriptions of current mountain weather and forecasts of avalanche conditions. CAIC's employees carry out its mission by researching and compiling data about the snowpack, atmospheric, climatological, and topographic conditions related to the avalanche. CAIC then uses this information to better forecast avalanche conditions.

7. CAIC often conducts post-avalanche investigations, including interviews with people to get a better understanding of the conditions and other relevant facts that led to the avalanche. Although CAIC collects a variety of information utilized in generating a report, CAIC is particularly informed by public observations and information (interviews, photographs, videos) provided by people directly involved in the avalanche. CAIC relies upon voluntary participation and candid disclosure of observation information in generating reports. The data from individual avalanches gathered by CAIC's experts refines the agency's forecasting techniques and provides a broad research database for use by interested persons. The information collected by CAIC is generally available to the public and industry, and CAIC provides training utilizing publicly available information to reduce the risk of avalanches.

8. The information CAIC collects from avalanche investigations is compiled into a report that becomes part of a national database on human and avalanche interactions in the United States. The report is then used by the public, researchers, and avalanche safety groups to examine the human-avalanche interaction in an effort to avoid similar conditions in the future.

9. At issue in this matter is an avalanche incident that occurred on March 25, 2020 over the Loop Road which is located above the Eisenhower Tunnel on the West side of I-70. Mr. Konigsberg, on behalf of CAIC, investigated the avalanche and worked in coordination with his supervisor, Mr. Greene, to collect supportive documentation and observational information allowing them to prepare a report. CAIC was in communications with Defendants Mr. Hannibal and Mr. DeWitt regarding the March 25, 2020 avalanche. In addition to conducting post-avalanche interviews, CAIC was voluntarily provided photographs and a GoPro video by Defendants. All of the information provided was utilized in developing the CAIC's final published report on the March 2020 avalanche.

10. CAIC, Mr. Greene, and Mr. Konigsberg are not parties to this case and CAIC has made available all relevant public records, including the final report, relating to this avalanche.

11. Nonetheless, the People presently seek to elicit expert testimony from Mr. Greene and Mr. Konigsberg<sup>1</sup> at the trial in this case set for March 25-26, 2021. As discussed below, the witness subpoenas should be quashed because: (1) involvement of CAIC staff as experts in this criminal matter is unduly burdensome and unreasonable, and CAIC employees appearing as an expert on behalf of the People could have an unintended adverse "chilling" impact on the CAIC's ability to gather important information from people involved in avalanches; (2) Mr. Greene and Mr. Konigsberg cannot be asked to express any opinion that would be protected under the deliberative process privilege; (3) Mr. Greene and Mr. Konigsberg are not authorized to, and therefore cannot, testify on behalf of the CAIC or DNR in this matter; and (4) to the extent the People request an opinion based on scientific, technical, or other specialized knowledge within the scope of Colorado Rules of Evidence 702, such request is impermissible because Mr. Greene and Mr. Konigsberg, as CAIC employees, cannot be compelled to testify as an expert witness.

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<sup>1</sup> It is undersigned counsel's understanding that the testimony sought from Mr. Konigsberg may not be expert testimony, but primarily for evidentiary purposes. Nevertheless, out of an abundance of caution, Mr. Konigsberg is included in this motion to quash as though the People will consider him an expert and might ask questions based on his specialized knowledge.

## ARGUMENT

### **I. Mr. Greene and Mr. Konigsberg’s subpoenas should be quashed pursuant to Crim. P. Rule 17 because they are unduly burdensome, and compliance would be unreasonable or oppressive.**

12. Neither the CAIC nor any of its employees are a party to this criminal case. Subpoenaing two CAIC employees to testify regarding their factual investigation into an avalanche incident unduly burdens CAIC’s limited resources and, moreover, is unreasonable because the documents have already been provided and are publicly available. CAIC’s documents are the best factual evidence available regarding the investigation conducted and conclusions reached by CAIC related to this specific avalanche event.

13. In addition, the CAIC appearing as experts on behalf of the People could result in a “chilling” effect and be potentially impactful to the CAIC’s ability to gather candid information from people involved in avalanches. CAIC involvement in this matter could negatively impact people’s willingness to interview with CAIC and freely share photographs, videos, and other relevant information out of fear such information could be used against them later in a criminal matter. Although such a chilling impact may be speculative, if it were to occur it would impede the CAIC’s information-gathering ability, impacting its ability to meet its statutory obligations and mission.

14. This Court does have the authority and discretion to consider a motion to quash witness subpoena under Crim. P. Rule 17. Although Crim. P. Rule 17(c) related to the production of documents expressly authorizes that a “court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive”, relevant caselaw has found a court has similar authority and discretion to consider a motion to quash a witness subpoena under Crim. P. Rule 17(a) if found to be unreasonable or oppressive under the facts. See, *People v. Bothers*, 308 P.3d 1213 (Colo. 2013) (We begin with the notion that it is within the sound discretion of the trial court to decide when and under what circumstances to take up a motion to quash a witness subpoena). Although the facts in *Brothers* are related to a preliminary hearing, it is clear from the Court’s discussion that Crim. P. Rule 17(a)’s silence as to motions to quash is not an outright prohibition to filing a motion to quash witness subpoena. Therefore, this Court should exercise its discretion based on the facts presented below and quash these subpoenas.

15. As they do for many avalanches state-wide, CAIC staff responded to the March 25, 2020 avalanche and gathered information to include in their incident report. CAIC staff spoke to both Mr. Hannibal and Mr. DeWitt about the avalanche,

and they voluntarily provided CAIC photographs and a copy of the GoPro video footage of the avalanche. CAIC routinely talks to anyone involved in an avalanche and relies upon these candid post-avalanche interviews when assessing the conditions of an avalanche. For human-caused avalanches the CAIC incident reports do not opine on fault, but rather focus on the events leading to the avalanche, the cause of the avalanche, existing snow conditions, and the rescue effort.

16. There is genuine concern by CAIC that if CAIC employees appear as an expert witness in a criminal matter it could adversely impact their ability to gather relevant information from persons involved in an avalanche. The more involved CAIC is in this criminal matter the more it looks like they are working in coordination with law enforcement, rather than in cooperation with local law enforcement, resulting in a chilling effect to the detriment of CAIC's mission.<sup>2</sup>

17. The subpoenas are also unreasonable and unduly burdensome because they require CAIC employees to engage in litigation to which they are not a party, taking CAIC employees away from their public duties—particularly burdensome and impactful during the winter months. CAIC's resources are extremely limited, and it has a compelling interest in preventing parties from utilizing its staff as experts. This winter season Colorado has seen an unprecedented number of avalanche accidents, and although the CAIC does not investigate every avalanche, their resources are already stretched to the limits for the avalanche investigations they do conduct. In addition to investigation and forecast related work, Mr. Greene's workload is equally busy with running this State agency and managing its resources. To command that Mr. Greene step away from his diverse responsibilities, during the CAIC's busiest month of the winter season, is unreasonable and impactful to the important work of this agency generally and Mr. Greene specifically.

18. The subpoena is also unreasonable and unduly burdensome because it could, depending on the nature of testimony elicited, effectively place two CAIC employees in the position of being forced to "choose sides" in this criminal matter. The purpose of CAIC is to collect and provide unbiased information to the public, industry, and governmental agencies regarding avalanche forecasting and safety; CAIC does not investigate and reach conclusions regarding avalanche cause and effect for use by parties in civil or criminal litigation. Forcing CAIC's employees to

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2. That exact concern has played out in the press, and it is being suggested to the backcountry community to exercise caution when talking to the CAIC after avalanches. <https://coloradosun.com/2020/10/18/criminal-charges-avalanche-colorado/>

participate in this matter as an expert on behalf of the People undercuts this neutral stance. The CAIC wants to avoid any misunderstanding or public misconception that the information it is collecting during the course of its investigations can constitute “evidence” in a criminal matter.

19. Finally, the subpoena of Mr. Greene is also unreasonable and unduly burdensome because Mr. Greene will be out of state on a pre-arraigned trip on March 25-26. Commanding his in-person appearance at trial would unreasonably interfere with this trip, likely requiring rescheduling. Although he could try to make arraignments to appear virtually at the hearing, he is unsure of the internet capabilities of his destination.

**II. The Court should quash the subpoenas because the testimony of state employees is prohibited to the extent it involves deliberative process privilege.**

20. The deliberative process privilege (sometimes referred to as the “official information,” “governmental,” or “executive” privilege) is a long-standing common law and statutory privilege protecting governmental deliberations and communications relating to agency decisions. *Rodgers v. Hyatt*, 91 F.R.D. 399, 405 (D. Colo. 1980). The deliberative process privilege is intended to protect the government’s decision-making process, its consultative functions, and the quality of its decisions. *City of Colorado Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998); *see also Gilpin County Board of Equalization v. Russell*, 941 P.2d 257 (Colo. 1997)(*en banc*). (The basic purpose of the privilege is to protect the thoughts, ideas, and analytical process by which an agency reaches a decision, as well as the entire administrative reasoning process.)

21. The deliberative process privilege has been recognized and upheld by the Colorado Supreme Court. *City of Colorado Springs*, 967 P.2d at 1050. The U.S. District Court for District of Colorado has also affirmed the privilege. *See Olmsted v. McNutt*, 188 F.R.D. 386, 388 (D. Colo. 1999).

22. The People as well as Defense counsel may ask questions of CAIC staff that elicit responses related to Mr. Greene’s or Mr. Konigsberg’s mental processes, privileged deliberative communications, or procedures utilized by the CAIC in the administrative process utilized to develop and publish their investigative report. Such testimony clearly falls within the deliberative process privilege. Therefore, pursuant to the cases cited *supra*, the deliberative process privilege applies, and the subpoena should be quashed.

**III. The Court should quash the subpoenas because State employees cannot be required to present expert testimony against their will.**

23. The People intend to seek expert opinion testimony related to CAIC's official investigation into the March 25, 2020 avalanche and snow conditions and have endorsed Mr. Greene as their expert. See, Notice of Expert Witness Endorsement filed February 17, 2021. The CAIC's employees are the State's experts for avalanche forecasting, and the opinions regarding the avalanche and snow conditions sought from Mr. Greene and Mr. Konigsberg are based upon their "scientific, technical, or other specialized knowledge," which amounts to CAIC's employees testifying as experts under Colorado Rules of Evidence 702 and compelling their expert testimony is impermissible.

24. The People have not retained Mr. Greene or Mr. Konigsberg to provide expert witness testimony in this matter. Moreover, the DNR has not consented to Mr. Greene or Mr. Konigsberg accepting such outside employment. See, 4 C.C.R. 801-1, § 1-13 (prohibiting state employees from accepting outside employment without prior approval). Further, Colorado Personnel Rules prohibit Mr. Greene and Mr. Konigsberg from being retained as an expert if the testimony may give preferential treatment or result in the loss of impartiality. 4 C.C.R. 801-1, § 1-14 (Employees may engage in outside employment with advance written approval from the appointing authority. The appointing authority shall base approval on whether the outside employment interferes with the performance of the state job or is inconsistent with the interests of the state, including raising criticism or appearance of a conflict).

25. Under the Colorado Personnel Code, Colorado law prohibits a state employee from engaging in any "activity which creates a conflict of interest with his duties as a state employee." C.R.S. § 24-50-117. The Personnel Rules implementing this provision prohibit any "outside employment or activity that is directly incompatible with the duties and responsibilities of the state employee's position." 4 C.C.R. 801-1, § 1-13. "Incompatibility" includes the occurrence or "reasonable inference" of "preferential treatment, impediment of government efficiency or economy, loss of complete independence and impartiality, decision making outside official channels, disclosure or use of confidential information acquired through state employment." *Id.* Any testimony by CAIC employees could create a "reasonable inference" of "preferential treatment" in favor of the People and must be prevented or limited by this Court.

26. Finally, State employees cannot be required to present expert testimony against their will. See *Ondis v. Pion*, 497 A.2d 13, 18 (R.I. 1985) (holding

state employees cannot be required to present expert testimony against their will. It is the obligation of a party who desires expert testimony to obtain the services of a qualified person on a voluntary basis). This principle is applicable to experts employed by the government. *Matter of Browning*, 480 N.Y.S.2d 671 (Fam. Ct. 1984). Although not controlling law here, they are compelling and persuasive examples of the difficulties associated with compelling expert testimony from a state employee against their will.

27. The People should not be able to compel a State employee to appear in a criminal matter and provide expert testimony against their will. Undercutting the public's perception of the impartial role of CAIC's employees is critically problematic for an agency whose central role is providing unbiased information to the public, industry, and other governmental agencies regarding avalanche risk and safety throughout Colorado.

### **CONCLUSION**

THEREFORE, CAIC respectfully requests that the Court exercise its discretion and quash the subpoenas issued to Mr. Ethan Greene and Mr. Jason Konigsberg as unduly burdensome, unreasonable and oppressive as authorized in Crim. P. Rule 17.

Respectfully submitted this 26 day of February, 2021.

Philip J. Weiser  
Attorney General

/s/ Jeff M. Fugate

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JEFF M FUGATE, 37679  
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Center

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within *Motion to Quash Subpoenas Issued to CAIC Employees—Ethan Greene and Jason Konigsberg* upon all parties herein by Colorado Courts E-filing System, this 26th day of February, 2021 addressed as follows:

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