



## OVERVIEW OF THE COLORADO OPEN RECORDS ACT

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The Colorado Open Records Act (CORA)<sup>1</sup> creates a presumption in favor of public access to government documents. This *issue brief* addresses CORA's two threshold questions: 1) what is and is not considered a public record; and 2) which public records are exempt from disclosure. It also briefly outlines CORA's requirements for responding to an open records request.

### Public Records Generally

CORA defines public records to include all writings made, maintained, or kept by the state, any agency, institution, political subdivision of the state, local government-financed entity, or nonprofit corporation incorporated by a state-supported higher education institution's governing board. "Writings" include all documentary materials, regardless of physical form, including but not limited to digitally stored data, books, papers, photographs, cards, tapes, and recordings. However, "public records" do not include criminal justice records or any records made, maintained, or kept by a criminal justice entity, which are instead subject to the Colorado Criminal Justice Records Act. CORA includes several other exceptions to the definition of "public records," including records related to CollegenInvest programs; certain records kept by institutionally related foundations; expenditures by an institutionally related health care foundation to an institution for medical or health care; and a public agency's information security plans.

### Elected Officials' Correspondence

In addition, public records include all correspondence of elected officials, including communications sent via U.S. mail, private courier, and electronic mail, unless the correspondence falls into one of the following four categories. First, elected officials' correspondence is not considered to be a public record if it is work product, which includes materials assembled for the benefit of elected officials by one of the General Assembly's staff agencies for the purpose of assisting an elected official in reaching a decision within the scope of their authority, and documents related to the drafting of bills or amendments. Work product also includes research performed by Legislative Council Staff, when the research is requested by a member of the General Assembly and is identified by the member as being in connection with pending or proposed legislation.

Second, correspondence of elected officials is not considered a public record if it is without a demonstrable connection to the exercise of functions required or authorized by law or rule, and does not involve the receipt or expenditure of public funds. This includes messages sent in furtherance of personal relationships, even if sent while being compensated by public funds or using publicly owned computer equipment.

Correspondence from a constituent to an elected official is also not considered a public record when it clearly implies that the constituent expects it to be confidential or is for the purpose of requesting an elected official's assistance in a personal and private matter. Finally, elected officials' correspondence is not considered a public record when such disclosure would be contrary to

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<sup>1</sup>Section 24-72-200.1 C.R.S.

state or federal law; contrary to Senate or House lobbying practices rules; or prohibited by Colorado Supreme Court rules, such as material protected by attorney-client privilege.

### **Records That Are Exempt From Disclosure**

In accordance with CORA's general presumption that public records shall be open for inspection by any person at reasonable times, the law details specific instructions about how and when public records must be made available for inspection. It also outlines several key scenarios in which a public record is exempt from disclosure. This brief focuses on two of these scenarios: a) documents that are exempt from disclosure on the grounds that their disclosure would be contrary to the public interest; and b) documents that are protected from inspection except by the person in interest. Whenever a records custodian denies access to a requested record, the applicant may request, in writing, an explanation of the grounds for the denial, including a citation to the specific provision of law or regulation protecting the record from disclosure.

A custodian of records may deny a request to inspect certain public records if their disclosure would be contrary to the public interest. These types of records include the specific details or research projects conducted by a state institution, including but not limited to research undertaken by the General Assembly's staff agencies conducted in furtherance of pending or anticipated legislation. It also includes test questions, scoring keys, and examination data relating to administration of a licensing examination, employment examination or academic examination.

Records received, made, or kept by a crime victim compensation board, a witness protection board, and the Safe2Tell program are also protected from disclosure, as are electronic mail addresses provided by a person to a subdivision of the state for the purpose of future communication between the person and the state subdivision. The details of security arrangements or investigations are protected, including records of public spending on such. In addition, records of ongoing civil or administrative investigations conducted by an agency of the state in furtherance of its statutory authority to protect the public health, welfare, or safety are protected, unless the investigation focuses on a person inside the investigative agency.

CORA directs records custodians to deny requests for inspection of certain records except to

the person in interest, i.e. the person who is the subject of the record. Most significantly, this exemption includes records protected under the "deliberative process" privilege, which protects disclosure "likely to stifle honest and frank discussion within the government."<sup>2</sup> The Colorado Supreme Court has found that the purpose of this privilege is to protect the frank exchange of ideas and opinions critical to the government's decision making process, where disclosure would discourage such discussion in the future.

Person-in-interest records also include medical records, mental health records, veterinary medical records, personnel files, and records of sexual harassment complaints and investigations. Records custodians may not disclose scholastic achievement records, library records, or elementary or secondary school students' addresses and telephone numbers. This section of CORA also protects trade secrets, privileged information, and confidential commercial, financial, geological and geophysical data.

### **Responding to an Open Records Request**

Under CORA, public records must be open for inspection by any person at reasonable times. Moreover, the right to inspect public records also includes the right to request a copy of the record. Agencies may charge a reasonable fee, not to exceed the actual cost, of transmitting paper copies or generating or manipulating data in a form not used by the agency. Agencies may also charge a research and retrieval fee after the first hour of research, charging up to \$30 per hour, if they have published a written policy covering such fees prior to receiving a request.

CORA defines "reasonable time" to be three working days or less, which may be extended by an additional seven working days when there are extenuating circumstances such as an over-broad request, a request made to an agency experiencing a period of peak demand, a request made to the General Assembly or one of its service agencies during the legislative session, or a request that covers such a large volume of records that they cannot be prepared within three days. The records custodian must identify such circumstances in writing, within the original three-day period, to the person making the request. In the event that a records custodian has custody of correspondence with an elected official, the custodian must consult with the official before disclosing the records.

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<sup>2</sup>Section 24-72-204 (3)(a)(XIII) C.R.S.