

CHAPTER 286

GOVERNMENT - STATE

SENATE BILL 17-040

BY SENATOR(S) Kefalas, Gardner, Aguilar, Cooke, Court, Donovan, Fenberg, Fields, Garcia, Guzman, Jones, Kerr, Zenzinger, Grantham;
also REPRESENTATIVE(S) Pabon, Kennedy, Singer, Weissman, Young, Duran.

AN ACT**CONCERNING PUBLIC ACCESS TO FILES MAINTAINED BY GOVERNMENTAL BODIES.**

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 24-72-203, **add** (3.5) as follows:

24-72-203. Public records open to inspection. (3.5) (a) EXCEPT AS OTHERWISE REQUIRED BY SUBSECTION (3.5)(b) OF THIS SECTION:

(I) IF A PUBLIC RECORD IS STORED IN A DIGITAL FORMAT THAT IS NEITHER SEARCHABLE NOR SORTABLE, THE CUSTODIAN SHALL PROVIDE A COPY OF THE PUBLIC RECORD IN A DIGITAL FORMAT.

(II) IF A PUBLIC RECORD IS STORED IN A DIGITAL FORMAT THAT IS SEARCHABLE BUT NOT SORTABLE, THE CUSTODIAN SHALL PROVIDE A COPY OF THE PUBLIC RECORD IN A SEARCHABLE FORMAT.

(III) IF A PUBLIC RECORD IS STORED IN A DIGITAL FORMAT THAT IS SORTABLE, THE CUSTODIAN SHALL PROVIDE A COPY OF THE PUBLIC RECORD IN A SORTABLE FORMAT.

(b) A CUSTODIAN IS NOT REQUIRED TO PRODUCE A PUBLIC RECORD IN A SEARCHABLE OR SORTABLE FORMAT IN ACCORDANCE WITH SUBSECTION (1)(a) OF THIS SECTION IF:

(I) PRODUCING THE RECORD IN THE REQUESTED FORMAT WOULD VIOLATE THE TERMS OF ANY COPYRIGHT OR LICENSING AGREEMENT BETWEEN THE CUSTODIAN AND A THIRD PARTY OR RESULT IN THE RELEASE OF A THIRD PARTY'S PROPRIETARY INFORMATION; OR

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(II) AFTER MAKING REASONABLE INQUIRIES, IT IS NOT TECHNOLOGICALLY OR PRACTICALLY FEASIBLE TO PERMANENTLY REMOVE INFORMATION THAT THE CUSTODIAN IS REQUIRED OR ALLOWED TO WITHHOLD WITHIN THE REQUESTED FORMAT, IT IS NOT TECHNOLOGICALLY OR PRACTICALLY FEASIBLE TO PROVIDE A COPY OF THE RECORD IN A SEARCHABLE OR SORTABLE FORMAT, OR IF THE CUSTODIAN WOULD BE REQUIRED TO PURCHASE SOFTWARE OR CREATE ADDITIONAL PROGRAMMING OR FUNCTIONALITY IN ITS EXISTING SOFTWARE TO REMOVE THE INFORMATION.

(c) IF A CUSTODIAN IS NOT ABLE TO COMPLY WITH A REQUEST TO PRODUCE A PUBLIC RECORD THAT IS SUBJECT TO DISCLOSURE IN A REQUESTED FORMAT SPECIFIED IN SUBSECTION (1)(a) OF THIS SECTION, THE CUSTODIAN SHALL PRODUCE THE RECORD IN AN ALTERNATE FORMAT OR ISSUE A DENIAL UNDER SECTION 24-72-204 AND SHALL PROVIDE A WRITTEN DECLARATION ATTESTING TO THE REASONS THE CUSTODIAN IS NOT ABLE TO PRODUCE THE RECORD IN THE REQUESTED FORMAT. IF A COURT SUBSEQUENTLY RULES THE CUSTODIAN SHOULD HAVE PROVIDED THE RECORD IN THE REQUESTED FORMAT, ATTORNEY FEES MAY BE AWARDED ONLY IF THE CUSTODIAN'S ACTION WAS ARBITRARY OR CAPRICIOUS.

(d) ALTERING AN EXISTING PUBLIC RECORD, OR EXCISING FIELDS OF INFORMATION PURSUANT TO THIS SUBSECTION (3.5) TO REMOVE INFORMATION THAT THE CUSTODIAN IS EITHER REQUIRED OR PERMITTED TO WITHHOLD, DOES NOT CONSTITUTE THE CREATION OF A NEW PUBLIC RECORD.

(e) NOTHING IN THIS SUBSECTION (3.5) RELIEVES OR MITIGATES THE OBLIGATIONS OF A CUSTODIAN TO PRODUCE A PUBLIC RECORD IN A FORMAT ACCESSIBLE TO INDIVIDUALS WITH DISABILITIES IN ACCORDANCE WITH TITLE II OF THE FEDERAL "AMERICANS WITH DISABILITIES ACT OF 1990", 42 U.S.C. SEC. 12131 ET. SEQ., AND OTHER FEDERAL OR STATE LAWS.

SECTION 2. In Colorado Revised Statutes, 24-72-204, **amend** (2)(a)(VIII)(A), (3)(a)(I), and (5) as follows:

24-72-204. Allowance or denial of inspection - grounds - procedure - appeal - definitions. (2) (a) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

(VIII) (A) Specialized details of EITHER security arrangements or investigations OR THE PHYSICAL AND CYBER ASSETS OF CRITICAL INFRASTRUCTURE, INCLUDING THE SPECIFIC ENGINEERING, VULNERABILITY, DETAILED DESIGN INFORMATION, PROTECTIVE MEASURES, EMERGENCY RESPONSE PLANS, OR SYSTEM OPERATIONAL DATA OF SUCH ASSETS THAT WOULD BE USEFUL TO A PERSON IN PLANNING AN ATTACK ON CRITICAL INFRASTRUCTURE BUT THAT DOES NOT SIMPLY PROVIDE THE GENERAL LOCATION OF SUCH INFRASTRUCTURE. ~~Nothing in this subparagraph (VIII)~~ SUBSECTION (2)(a)(VIII) prohibits the custodian from transferring records containing specialized details of EITHER security arrangements or investigations OR THE PHYSICAL AND CYBER ASSETS OF CRITICAL INFRASTRUCTURE to the division of homeland security and emergency management in the department of public safety, the governing body of any city, county, city and county, or other political

subdivision of the state, or any federal, state, or local law enforcement agency; except that the custodian shall not transfer any record received from a nongovernmental entity without the prior written consent of the entity unless such information is already publicly available.

(3) (a) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law; except that any of the following records, other than letters of reference concerning employment, licensing, or issuance of permits, shall be available to the person in interest under this subsection (3):

(I) Medical, mental health, sociological, and scholastic achievement data, AND ELECTRONIC HEALTH RECORDS, on individual persons, other than scholastic achievement data submitted as part of finalists' records as set forth in ~~subparagraph (XI) of this paragraph (a)~~ SUBSECTION (3)(a)(XI) OF THIS SECTION and exclusive of coroners' autopsy reports and group scholastic achievement data from which individuals cannot be identified; but either the custodian or the person in interest may request a professionally qualified person, who shall be furnished by the said custodian, to be present to interpret the records;

(5) Except as provided in subsection (5.5) of this section, any person denied the right to inspect any record covered by this part 2 OR WHO ALLEGES A VIOLATION OF SECTION 24-72-203 (3.5) may apply to the district court of the district wherein the record is found for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record; except that, at least three business days prior to filing an application with the district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing said custodian that the person intends to file an application with the district court. Hearing on such application shall be held at the earliest practical time. Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing applicant in an amount to be determined by the court; except that no court costs and attorney fees shall be awarded to a person who has filed a lawsuit against a state public body or local public body and who applies to the court for an order pursuant to this subsection (5) for access to records of the state public body or local public body being sued if the court finds that the records being sought are related to the pending litigation and are discoverable pursuant to chapter 4 of the Colorado rules of civil procedure. In the event the court finds that the denial of the right of inspection was proper, the court shall award court costs and reasonable attorney fees to the custodian if the court finds that the action was frivolous, vexatious, or groundless.

SECTION 3. In Colorado Revised Statutes, **repeal** 24-72-206 as follows:

~~**24-72-206. Violation - penalty.** Any person who willfully and knowingly violates the provisions of this part 2 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment.~~

SECTION 4. Act subject to petition - effective date. This act takes effect at

12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 9, 2017, if adjournment sine die is on May 10, 2017); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Approved: June 1, 2017