

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

DIRECTOR

Dan L. Cartin

DEPUTY DIRECTORS

Sharon L. Eubanks
Julie A. Pelegrin

REVISOR OF STATUTES

Jennifer G. Gilroy

ASSISTANT DIRECTORS

Duane H. Gall
Deborah F. Haskins
Bart W. Miller

PUBLICATIONS COORDINATOR

Kathy Zambrano



COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE
091

DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157

EMAIL: OLLS.GA@STATE.CO.US

MANAGING SENIOR ATTORNEYS

Jeremiah B. Barry Jason Gelender
Christine B. Chase Robert S. Lackner
Michael J. Dohr Thomas Morris
Gregg W. Fraser

SENIOR ATTORNEYS

Jennifer A. Berman Nicole H. Myers
Brita Darling Jery Payne
Edward A. DeCecco Jane M. Ritter
Kristen J. Forrestal Richard Sweetman
Kate Meyer Esther van Mourik

SENIOR ATTORNEY FOR ANNOTATIONS

Michele D. Brown

STAFF ATTORNEY

Yelana Love

AGENDA

Committee on Legal Services

September 29, 2016

9:00 a.m.

HCR 0112

1. Recommendation for extension of the publications contract with Lexis-Nexis for the Colorado Revised Statutes.
Staff: Jennifer Gilroy, Revisor of Statutes
2. Update on the Title 12 Recodification Study Project.
Staff: Christy Chase and Thomas Morris
3. Appointment of two nonlegislative attorney members to the Statutory Revision Committee.
Staff: Kate Meyer
4. Consideration of Adoption of a Revised Retention of Records Policy for Legislative Member Files.
 - a. Field Trip to the Capitol Sub-basement to See Conditions Where Member Files and Books are Stored.
 - b. Opportunity for Committee Members to Review One of Their Member Files.
 - c. Recommendations for Updating Policies on Member Files.
Staff: Debbie Haskins

5. Next Meeting: November 17, 9:00 a.m. - HCR 0112
6. Other.

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MEMORANDUM

TO: The Committee on Legal Services

FROM: Office of Legislative Legal Services

DATE: September 14, 2016

SUBJECT: Recommendation to Extend the Publications Contract for the Colorado Revised Statutes ¹

Statement of Issue

LexisNexis is the contract printer and distributor of the Colorado Session Laws and the Colorado Revised Statutes. The General Assembly is currently in the fourth year of a 5-year contract with LexisNexis, that will expire on December 31, 2017. The process for entering into a new contract is governed by statute. Section 2-5-105, C.R.S., gives the Committee on Legal Services the option either to extend the current contract with LexisNexis for up to an additional 5 years or to put the contract out for bid. The issue presented is whether the Committee on Legal Services should extend the current contract and, if so, for how long or whether it should put the contract out for bid.

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

Staff Recommendation

Staff recommends that the Committee extend the contract with LexisNexis for 5 more years.

The statute permits the Committee on Legal Services (Committee) to extend the existing contract with LexisNexis for the production and distribution of the Colorado Session Laws and the Colorado Revised Statutes for an additional 5 years if the Committee determines that an extension would be in the public interest.² In addition, it directs the Committee to consider the economic, fiscal, and tax impacts of the award of a contract following a bid process or the extension of an existing contract on the state of Colorado, its citizens, and its businesses.³

Based on the public interest and economic, fiscal, and tax advantages, as well as consideration of staff resources, the Office of Legislative Legal Services (OLLS) recommends that the Committee extend the current contract with LexisNexis for an additional 5 years as discussed more fully below.

Discussion

1. Obligation to Publish the Law - Publications Contract Process.

Colorado Session Laws. The Colorado Constitution directs the General Assembly to provide for the publication of the laws passed at each session⁴, and state statute directs the revisor of statutes to prepare for publication a copy of all the laws passed at each session of the General Assembly.⁵ The resulting publication is commonly known as the Colorado Session Laws, currently published in both softbound volumes and in electronic format online.

Colorado Revised Statutes. The laws are further codified in the form of the Colorado Revised Statutes (CRS) which are compiled, edited, arranged, and prepared for

² Section 2-5-105 (3)(b)(I), Colorado Revised Statutes.

³ Section 2-5-105 (3)(f), Colorado Revised Statutes.

⁴ Section 8 of Article XVIII of the Colorado Constitution.

⁵ Section 24-70-223, Colorado Revised Statutes.

publication pursuant to statute.⁶ Since 1997, the CRS have been published in annual, softbound books. There are 24 volumes in the 2016 CRS set, which includes the 2-volume index and 2 volumes dedicated to the rules of the Colorado Supreme Court, also published pursuant to statute.⁷ The statutes and court rules are also published online, in DVD format, and in downloadable ebooks; however, only the print version of the CRS may be relied upon as the official version.⁸

Publications Contract. The work of formatting, printing, binding, and distributing the statute books must be performed pursuant to a contract that is bid and awarded in a manner directed by the Committee using standard bidding practices such as requests for information, requests for proposals, or other standard vendor selection practices as the Committee may determine (publications contract or contract).⁹ If the Committee finds that economy and efficiency will be achieved, it may combine the contract for the publication of the Session Laws with that for the publication of the CRS. The Committee has exercised this option for at least the past two decades.

New Contracts. The Committee may extend an existing publications contract for one additional term of up to 5 years if it finds that the extension would be in the public interest; however, a contract must be put out for bid at least every 10 years.¹⁰ A new contract, whether the result of an extension of a current contract or a bid process, must be awarded at least 6 months prior to the expiration of the existing contract.¹¹

Contracts must be awarded to the lowest responsible bidder or bidders.¹² In determining the lowest responsible bidder or in determining whether to extend a contract, the Committee must take into consideration the economic, fiscal, and tax impacts of the award or extension on the state of Colorado, its citizens, and its businesses.¹³

⁶ Section 2-5-105, Colorado Revised Statutes.

⁷ Section 2-5-102 (2)(d), Colorado Revised Statutes.

⁸ Sections 2-4-207, 2-5-105 (2), and 2-5-118 (1)(a) and (4), Colorado Revised Statutes.

⁹ Section 2-5-105 (2), Colorado Revised Statutes.

¹⁰ Section 2-5-105 (3)(f), Colorado Revised Statutes.

¹¹ Section 2-5-105 (3)(a), Colorado Revised Statutes.

¹² Section 29 of Article V of the Colorado Constitution; section 2-5-105 (3)(a) and (f), Colorado Revised Statutes.

¹³ Section 2-5-105 (3)(a) and (f), Colorado Revised Statutes.

2. Current Publications Contract - Committee options - deadlines.

The General Assembly is in the fourth year of a 5-year publications contract with LexisNexis to format, print, bind, and distribute the Colorado Session Laws and the CRS. The General Assembly has had a publications contract with LexisNexis since 2002, having extended that original contract for an additional 5 years in 2007. The Committee last put the contract out for bid in 2011 and completed the process in June of 2012. Three companies submitted bids at that time, and the Committee awarded a 5-year contract to LexisNexis -- the current contract.¹⁴ The current LexisNexis publications contract will expire December 31, 2017.

The Committee may extend the current contract for up to an additional 5 years if it determines that an extension would be in the public interest or it may put the contract out for bid. The new contract, whether the result of an extension or bidding process, must be in place no later than June 30, 2017, six months prior to the December 31, 2017, expiration date of the existing contract.

If the Committee decides to put the contract out to bid, staff will prepare a timeline for the request for proposals (RFP) process for the Committee's consideration. When the Committee last sought bids in 2011, the timeline spanned approximately 18 months (see attached Proposed Timeline for C.R.S. Publications RFP dated 9/28/2010). Should the Committee elect to proceed with a bidding process rather than an extension of the existing contract, the equivalent timeline would need to be compressed in half. In order to meet the June 30, 2017, deadline, the process would need to begin immediately and a significant portion of the process would necessarily occur during the 2017 legislative session (see attached timeline chart).

3. Public Interest.

The statute permits the Committee to extend the current contract for up to 5 more years if it finds that an extension would be in the public interest. If the Committee determines an extension is not in the public interest, it should put the contract out to bid. An extension of the current contract with LexisNexis serves the public interest as follows:

¹⁴ A fourth company submitted a bid strictly for the creation of a digital application for the Colorado Revised Statutes.

- LexisNexis has done an excellent job of meeting (or, in many cases, exceeding) its contractual publication obligations in a professional and reliable manner. The books are attractive, durable, and meet the General Assembly's specifications; they are delivered in a timely and dependable manner. LexisNexis turned around our CRS in record time this year, preparing and shipping the books in less than 3 weeks!
- The OLLS has developed an excellent, mutually respectful working relationship with its partners at LexisNexis, communicating regularly regarding all aspects of the publications process, including developing a system of translating the office's dated SGML document markup language to a more contemporary language that is consistent with industry standards.
- Although not part of any contractual arrangement, our partners at LexisNexis often provide editorial guidance, correcting errors or oversights and accommodating last-minute, staff-initiated changes in the publications.
- LexisNexis has recently assumed responsibility for building the Colorado Court Rules database (at no additional cost) thereby saving legislative staff a significant amount of time and resources in the publications process.
- LexisNexis distributes 3150 additional sets of the statutes and 1200 additional sets of the Session Laws under the contract price for state and local government agencies and it offers government offices a deep discount on purchases of additional sets (just \$36 plus shipping).
- LexisNexis's customer service is outstanding. For example, they provide a dedicated individual to work with our office on deliveries. Their communication and coordination of delivery details is exceptional and their responses to delivery glitches, when they occur, are immediate and professional.
- LexisNexis provides electronic public access to the Colorado Revised Statutes through the General Assembly's website without charge. It also produces DVDs for sale that include embedded caselaw associated with the annotations. At the request of the General Assembly, LexisNexis also developed CRS ebooks which it now sells on the LexisNexis online bookstore and provides at no cost to members of the General Assembly as part of the terms of the contract.
- LexisNexis representatives have worked closely with the OLLS to develop and offer online editorial enhancements including: hyperlinks to bills cited in source notes, and, following the conclusion of a regular legislative session and prior to the availability of the new statutes, up-to-date conspicuous "flag" notifications linking readers to the newest Session Laws amending a particular section of law.

- The cost to purchase a set of the CRS (and the Session Laws) is very reasonable, around \$300 for nongovernment consumers and only \$36 for a government agency seeking more than the number of sets currently allocated to that agency and the cost of the contract to the state is significantly less than it had been before LexisNexis took over the publication of the Session Laws and CRS in 2003.
- A representative of LexisNexis has confirmed that, if the publications contract is extended an additional 5 years, the terms outlined in the 2013 contract will remain the same.
- The OLLS and Legislative Council Staff Information Technology (LCSIT) are in the process of investigating, developing, and ultimately implementing an entirely new method of drafting legislation and publishing the Session Laws and CRS using a web-based XML format. This multi-year undertaking has and will continue to require a significant amount of staff time, attention, and energy with the expectation that, when completed, the effort will result in a more reliable, resilient, and useful product for the General Assembly and the public.

The goal of the project is to eliminate reliance on a dated markup language for coding documents (SGML) and on commercial word-processing products that are subject to fluctuating consumer demands and market conditions, thereby reducing the post-session publications timeline. It is staff's ultimate goal to improve, accelerate, and facilitate the publications process, starting with drafting.

The new drafting and publication design will be built on a web-based XML format. This approach allows for a departure from the historical reliance on a particular commercial word processing application thus circumventing consumer preferences for one product over another (Word over WordPerfect, for example). It will also relieve the concern that the commercial word processing product may completely cease to exist at some indeterminate point in the future as the result of dwindling consumer demand. Furthermore, staff's concern over reliance on aging macros, designed in the 1980s and increasingly uncertain as generations of WordPerfect advance, should also be alleviated.

Staff believes that a web-based XML format will be more resilient and adaptive to change, offering greater flexibility, functionality, and independence. Bill drafts would no longer be drafted in WordPerfect -- eliminating concerns about aging macros and user preferences -- but would be drafted using a platform-agnostic, web-based tool. Enhanced capabilities would likely accelerate the lengthy publications process during and following legislative sessions. For example, staff anticipates that it could design a

tool that would automatically generate the Session Laws as bills are enacted and signed by the Governor -- a process that is currently done manually.

Once in place and operational, the new drafting-to-publications process should pave the way for the in-house publication of the CRS online and, ultimately, achieve the goal of an official digital version of the CRS in a format capable of meeting the authentication, preservation, and permanency requirements of the "Uniform Electronic Legal Material Act".¹⁵ This format would offer the public a more agile and navigable official version of Colorado's primary statutory law on line, a resource that would certainly be in the public's interest.

Extending the current publications contract would benefit this effort. First, maintaining the same publications vendor with which the OLLS has already developed a strong and reliable relationship would allow staff to continue to direct its energy on the XML project. Good communication, excellent customer service, quick response times, and consistent reliability define the partnership with LexisNexis that has developed over the past 14 years. The OLLS is confident that LexisNexis will provide the support, reliability, and consistency that will allow legislative staff to dedicate the time, attention, and effort necessary to continue their work on the XML project and ultimately to facilitate a smooth transition to a new generation of publications. Furthermore, staff is concerned that putting the contract out to bid would divert resources over the next nine months that could otherwise be dedicated to the XML project and would necessarily hamper the project's momentum and delay its progress.

4. Economic, Fiscal, and Tax Impacts of an Extension.

The following considerations address the economic, fiscal, and tax impacts of a contract extension on the state of Colorado, its citizens, and its businesses:

- The public sale price for a set of CRS is moderately priced at \$306 plus delivery charges. This is a very reasonable amount which, in turn, has a direct economic impact on Colorado businesses such as law firms and other Colorado businesses and individuals who purchase the Session Laws or the CRS.
- LexisNexis sells approximately 3200 sets of the Colorado Revised Statutes each year which increases the sales tax revenue base for the state. While other states' book

¹⁵ Article 71.5 of title 24, Colorado Revised Statutes.

orders have declined, Colorado's orders remain sustained, which may be due in part to the affordable pricing of the books.

- The inclusion of 3150 sets of the statutes and 1200 sets of the Session Laws for state and local government offices within the contract amount help state and local governments realize a combined savings of nearly \$1 million each year.
- LexisNexis has a brick-and-mortar legal research division in Colorado Springs, Colorado, that employs 134 Colorado employees on whose behalf the corporation withholds individual state income tax.
- Due to its Colorado operations, LexisNexis (aka Matthew Bender & Company, Inc., a New York corporation) presumably pays Colorado corporate income tax which, in turn, increases the state's revenue base.
- In working with LexisNexis, legislative staff enjoys the responsiveness and relationship of working with a small company through the personal interaction and customer service the company provides, while the state, in turn, enjoys the benefits of the economies of scale realized through working with a large corporation the size of LexisNexis. In fact, the contract price with LexisNexis is significantly less than it had been prior to its initial 2002 contract, and has continued to remain comparatively modest.
- On more than one occasion, the LexisNexis representative, as a courtesy, has waived costs associated with an additional publication.
- LexisNexis has provided many services and has accommodated staff's many requests over the years without adding to the cost of the contract.
- Staff resources will be conserved if allowed to focus exclusively on the XML project without the need to divert time to a bid process for the publications contract.

5. Other Considerations.

There are many advantages to extending the current contract with LexisNexis. LexisNexis provides much more than just books. The following are additional facts for the Committee's consideration:

- ***Exceptional professional relationship.*** Staff at the Office of Legislative Legal Services (Office) has worked with their partners at LexisNexis for approximately 14 years during which time they have developed a strong, mutually respectful, professional relationship. Working together over the years toward a common goal --

producing the best statutes and court rules product possible -- the Office has come to know its counterparts at LexisNexis very well and have developed an excellent relationship with them. Over that time they have developed a trusting, effective, and efficient method of working together made possible only by time and mutual experience.

- ***XML Drafting and Publications Project.*** Staff's XML project has and will continue to require a significant amount of staff time, attention, and energy that would necessarily be suspended if the Committee decided to put the publications contract out to bid. Furthermore, it would seem illogical to contract with a new publisher before staff has completed the project and has a better idea of what the future drafting-to-publications technology and process will be.
- ***Time.*** Finally, the bidding process will take a significant amount of the Committee members' and staff time and effort and will require immediate attention to meet the contract deadlines set out in statute.

Conclusion

The current publications contract with LexisNexis will expire on December 31, 2017, and a new contract must be in place no later than June 30, 2017. The Committee may extend the current contract for an additional 5 more years or it may put the contract out for bid. The committee may extend the contract if an extension would be in the public interest. The Committee must consider the economic, fiscal, and tax impacts of an extension of the current contract on the state, its citizens, and its businesses.

For the reasons stated in this memorandum, staff recommends that the Committee extend the current publications contract with LexisNexis for an additional 5 years.

PROPOSED TIMELINE FOR C.R.S. PUBLICATIONS CONTRACT

for presentation to Committee on Legal Services 2/4/11

Date	Activity	Responsibility
Jan/Feb 2011	Presentation to COLS re publications contract history and RFP timeline	OLLS staff
Feb-July 2011	Draft RFP	OLLS staff
July-Aug/2011	COLS meets: OLLS presents proposed RFP for publications contract to COLS and action plan for approval	OLLS staff/COLS
Aug/2011	Post/publish RFP	OLLS staff
mid-Sept/2011	RFP response deadline	Publishing company applicants
Sept/2011	Prepare summary of proposals for COLS	OLLS staff
Sept/2011	COLS meets: applicants present proposals; committee determines whether follow-up presentations necessary	OLLS staff/COLS/publishing company applicants
Oct/2011	COLS meets: follow-up presentations or select publisher.	OLLS Staff/COLS/publishing company applicants
Nov 2011	COLS meets: selects publisher if not done at Oct meeting	COLS/OLLS Staff/publishing company applicants
Dec/Jan2012	Negotiate contract terms with new publisher	OLLS/Publisher
Jan 2012	Complete draft contract with publisher	OLLS Staff
June/2012	New contract must be awarded pursuant to sec. 2-5-105 (3)(a), C.R.S.	OLL Staff upon direction of COLS
Dec/31/2012	Current contract expires	

TIMELINE FOR PUBLICATIONS CONTRACT
Committee on Legal Services
September 29, 2016

Date	Event	Statutory Reference
January 1, 2013	New 5-year contract with LexisNexis following bid process	§2-5-105, C.R.S.
November 8, 2016	2016 General Election	
January 11, 2017	First Day of Session	
May 10, 2017	Adjournment <i>Sine Die</i>	
June 30, 2017	New publications contract must be awarded (either by bid or extension)	§2-5-105 (3) (a), C.R.S.
December 31, 2017	Current contract expires	
December 31, 2022	Expiration date of new LexisNexis contract if extended 5 years	

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MEMORANDUM

TO: Committee on Legal Services

FROM: Office of Legislative Legal Services

DATE: September 20, 2016

SUBJECT: Update on and Recommendations from Title 12 Recodification Study

Summary

The Office of Legislative Legal Services (OLLS) recommends that the Committee on Legal Services (Committee) consider the following actions with respect to the Title 12 Recodification Study authorized by SB16-163:

- The Committee should authorize the OLLS to draft a committee bill to amend the Administrative Procedure Act and should fast-track the legislation in the 2017 legislative session.
- The Committee should authorize the OLLS to draft legislation for the 2017 legislative session to relocate certain articles out of title 12 for which the feedback on the relocation proposal has been supportive.
- The Committee should provide the OLLS direction on proposals to reorganize and restructure articles that are planned for relocation out of title 12.
- The Committee should defer plans to relocate articles administered by the Secretary of State.

Study Update and Recommendations

1. Steps Taken to Date

Starting in early June 2016, the OLLS engaged in public outreach about the title 12 recodification study and conducted three rounds of meetings with interested parties.

1.1. Public outreach

In early June, the OLLS emailed executive branch agency and local government organization liaisons and representatives to inform them of the title 12 recodification study, invite them to initial organizational meetings in late June, solicit their participation in the meetings and the ongoing study, and request their assistance in reaching out to other interested stakeholders. Several departments provided contact information for additional department staff or other interested individuals to participate in and provide assistance with the study. Additionally, the OLLS received requests from several interested persons to participate in the study and also compiled a list of lobbyists that may be interested in participating. The OLLS added those individuals to an email subscriber group to whom the OLLS sends notices of title 12 recodification study meetings.

The OLLS also created a title 12 recodification study webpage,¹ accessible from the OLLS website, that includes a description of the purpose of the study, information about upcoming meetings, links to live audio-streaming of meetings, summaries of and links to audio archives of prior meetings, and a link to subscribe to our email list. Currently, we have 126 subscribers to our title 12 email list.

The title 12 recodification study and June meetings were also highlighted in the June 21 issue of the OLLS' LegiSource blog and mentioned in tweets on June 15 and 21.

At every meeting and in every email notice, the OLLS continues to solicit assistance in reaching out to other interested individuals in our effort to get the word out about the study and obtain feedback from those interested in or affected by the study and potential legislation. Additionally, the OLLS tweets about all upcoming meetings.

¹ A screenshot of the Title 12 Recodification Study webpage is attached to this memorandum.

1.2. Meetings

The OLLS held organizational meetings on June 29 and June 30 to explain the impetus behind the study: to reorganize and consolidate the professions and occupations articles administered by the Department of Regulatory Agencies (DORA) and to relocate articles or programs that are not administered by DORA to other titles in the Colorado Revised Statutes. Nearly sixty individuals attended these meetings and signed up to participate in various aspects of the study.

On July 21, the OLLS held stakeholder meetings to discuss all articles in title 12 that are not administered by DORA. Meetings were held concurrently in two House committee rooms, and OLLS staff presented specific proposals for relocating specified articles in title 12 to different locations and obtained feedback from those present.

On August 17, the OLLS held a meeting to discuss three articles in title 12 that are not administered by the Division of Professions and Occupations (DPO) in DORA but are administered by other divisions in DORA. With respect to two of the articles, OLLS staff presented proposals to relocate those articles to title 11. As for the third article, administered by the Division of Real Estate, the OLLS obtained feedback on retaining that article within title 12 but considering some minor restructuring of the article.

On August 18, the OLLS held a meeting to discuss the articles in title 12 that are administered by DPO and that regulate a business or health care profession or occupation. The discussion focused on how to divide the professional groups into smaller working groups for future meetings and consideration of restructuring proposals.

2. Summary of Feedback & Recommendations

Generally, the feedback from department and local government representatives on the title 12 recodification proposal has been positive. Industry and professional group representatives have also been receptive to the proposal. As a result of the feedback received to date, the OLLS recommends the following:

2.1. The Committee should pursue a bill for the 2017 legislative session to allow state agencies to more easily update rules if statutory citations change.

At the meetings held on July 21, agency representatives initially expressed concern about the fiscal impact and tremendous workload involved in engaging in the rulemaking process under the Administrative Procedure Act (APA) merely to change statutory citations in rules if a given article is relocated and thus is assigned different statutory citation numbers. Representatives from the Attorney General's office indicated that the impact would not be as great if the agencies were permitted to use the "scrivener's error" process in the APA to correct those changing citations without

proceeding through the normal rulemaking process. In other words, allow the agencies to send a notice to the Secretary of State, indicating the new statutory citation, and allow the Secretary of State to incorporate the correct statutory citation in the applicable rule.

The OLLS agrees that this modification to the APA would minimize the fiscal and workload impacts of any legislation resulting from the recodification proposal that renumbers existing statutes and therefore *recommends*:

- a) *That the Committee authorize the OLLS to draft a committee bill to amend the APA;* and
- b) *That the Committee fast-track this legislation* in order to avoid a significant fiscal impact in legislation proposing to relocate any articles currently in title 12, per the recommendation in section 2.2, below.

2.2. The Committee should authorize the OLLS to draft bills for the 2017 legislative session to relocate certain articles out of title 12.

During the meetings held on July 21 and August 17, much of the feedback received on specific articles supported the proposals to relocate those articles to different, more appropriate titles in the Colorado Revised Statutes. Although the initial recodification proposal was to defer any recodification legislation until the 2018 legislative session, *the OLLS recommends, based on the feedback received on certain articles, that the Committee authorize the OLLS to draft legislation for the 2017 legislative session to relocate articles for which the feedback on the relocation proposal has been supportive and relocation does not appear controversial.* Specifically, the OLLS is seeking permission to draft legislation for the 2017 legislative session to relocate the following articles currently contained in title 12:

Article	Topic	Relocation Proposal
14	Fair debt collection practices act	Title 5 (Consumer Credit Code)
14.1	Child support collection consumer protection act	
14.3	Consumer credit reporting act	
14.5	Debt-management services	
44	Hotel establishments	Title 6 (Consumer & Commercial Affairs), Title 13 (Courts), or Title 38 (Property)
44.5	Indian arts and crafts sales	Title 6 (Consumer & Commercial Transactions) or Title 18 (Criminal Code)
13	Life care institutions	Title 11 (Financial Institutions)
52	Money transmitters	

Article	Topic	Relocation Proposal
5	Attorneys-at-law	Title 13 (Courts)
66	Wholesale sales representatives	
12	Cemeteries	Title 15 (Probate & Trusts)
34, part 1	Uniform anatomical gift act	
34, part 2	Unclaimed human bodies	
59	Private occupational schools	Title 23 (Postsecondary Education)
28	Fireworks	New part in article 33.5 of Title 24 (State Government) or to Title 29 (Local Government)
29.3	Emergency volunteer health practitioners	Title 25 (Public Health & Environment)
30	Cancer cure control	
25.5	Escort services	Title 29 (Local Government)
56	Pawnbrokers	
18	Dance halls	Title 30 (County Government)
16	Farm products and commodities handlers	Title 35 (Agriculture)
15	Commercial driving schools	Title 42 (Vehicles & Traffic)

2.3. The Committee should provide the OLLS direction on proposals to reorganize and restructure articles that are planned for relocation.

During the July 21 meeting, OLLS staff discussed proposals to relocate articles administered by the Department of Revenue, namely:

Article 6	Automobiles
Article 43.3	Medical Marijuana
Article 43.4	Retail Marijuana
Article 46	Fermented Malt Beverages
Article 47	Alcohol Beverages
Article 47.1	Colorado Limited Gaming Act
Article 47.2	Tribal-state Gaming Compact
Article 48	Liquors - Special Events Permits
Article 60	Racing

OLLS staff initially suggested relocating these articles to title 39 or title 24. Based on concerns about relocating these articles to either title 39, pertaining to "Revenue," or title 24, pertaining to "State Government," OLLS staff suggested creating a new title in the Colorado Revised Statutes to which the above-listed articles could be relocated. The feedback to this proposal has been positive.

During the meeting and through follow-up feedback, several stakeholders requested, as part of the title 12 recodification, that a few of the Department of Revenue articles recommended for relocation to a new title also be reorganized and restructured. Specifically, representatives of the marijuana industry proposed a restructuring and reorganization of the medical and retail marijuana codes to eliminate duplication, clarify the differences in the two regulatory schemes, and streamline the statutes. The intent, as explained by the proponents of the proposal, is to effectuate a nonsubstantive reorganization of the marijuana laws to make them more understandable. Representatives of the Attorney General's office also expressed a desire to reorganize these two codes to foster better administration by the Department of Revenue. This specific proposal affects articles 43.3 and 43.4 of title 12.

Additionally, during follow-up discussions with representatives of the automobile dealers, the OLLS received a similar request with regard to article 6 of title 12, regarding automobiles, i.e., to restructure article 6 as part of any legislation to relocate article 6 to a new title 44.

Also at the July meeting, OLLS staff suggested relocating provisions in any of the above-listed articles that impose or enforce a tax (e.g., excise tax on alcohol beverages in sections 12-47-503 and 12-47-504, C.R.S.) to title 39, which is the title pertaining to revenue and taxes. No one at the meeting expressed opposition to this suggestion, although those present indicated a desire to revisit the idea after soliciting feedback from others in the Department of Revenue, as well as the regulated community.

Before proceeding with reorganization efforts or moving tax provisions, *the OLLS requests direction from the Committee on whether the committee wants the OLLS to:*

- a) *Work with interested parties to reorganize the marijuana codes, articles 43.3 and 43.4, and the automobiles law, article 6; and*
- b) *Relocate any tax provisions contained in the Department of Revenue articles to Title 39.*

2.4. The Committee should defer plans to relocate articles administered by the Secretary of State.

After the initial meetings in June, a representative from the Secretary of State's office indicated that the Secretary is planning to propose substantive legislation in the 2017 legislative session to amend portions of article 9, regulating bingos and raffles, and article 55, regulating notaries public. The Secretary's representative indicated a willingness to relocate those articles as part of the substantive legislation. Therefore, at this time, *the OLLS recommends that it defer further efforts on relocating articles 9 and 55, pending further direction from the Committee and potential legislation proposed by the Secretary of State to relocate those articles.*

3. Future plans

The OLLS will continue to meet with department and local government representatives and interested stakeholders to develop specific proposals to recodify and reorganize articles that will remain in title 12 and will continue to seek feedback on articles that are slated for relocation but for which no input has been received. Additionally, the OLLS will be holding another round of meetings in mid-October to discuss:

- a. Reorganizing article 61, pertaining to real estate, which article is administered by the Division of Real Estate in DORA and will remain in title 12; and
- b. Relocating certain articles administered by the Department of Revenue to a new title in the Colorado Revised Statutes.²

The OLLS will continue to update the title 12 recodification study website and will email and tweet notices of meetings.

The OLLS will report progress to the Committee in December and, if the recommendations for legislation are approved, will present, at a minimum, the APA proposed bill at the Committee's December meeting.

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² See the attached list of articles in title 12 that will either remain in title 12 and be restructured or that will be relocated but require further meetings and stakeholder discussions.

REMAINING ARTICLES IN TITLE 12 FOR REORGANIZATION OR RELOCATION

Remain in Title 12 and Reorganize

Article	Topic	Article	Topic
1.5	General provisions	38.1	Nurse aides
2	Accountants	39	Nursing home administrators
5.5	Hearing aid providers	40	Optometrists
8	Barbers and cosmetologists	40.5	Occupational therapy
10	Boxing	41	Physical therapists
15.5	Fantasy contests	41.5	Respiratory therapy
23	Electricians	42	Psychiatric technicians
25	Engineers, surveyors, and architects	42.5	Pharmacy
29.1	Professional review proceedings	43	Mental health
29.5	Acupuncturists	43.2	Surgical assistants and technologists
29.7	Athletic trainers	43.7	Speech-language pathologists
29.9	Audiologists	45	Landscape architects
32	Podiatrists	54	Mortuaries
33	Chiropractors	55.5	Outfitters and guides
35	Dentists and dental hygienists	58	Plumbers
35.5	Massage therapists	58.5	Private investigators
36	Medical practice	61	Real estate
36.5	Health care provider professional review committees	64	Veterinarians
37	Direct-entry midwives	70	Inactive license status
37.3	Naturopathic doctors	71	Regulation of military individuals and spouses
38	Nurses		

Relocate to a New Title 44 and Possibly Reorganize

Article	Topic	Article	Topic
6	Automobiles	47.1	Colorado Limited Gaming Act
43.3	Medical Marijuana	47.2	Tribal-state Gaming Compact
43.4	Retail Marijuana	48	Liquors - Special Events Permits
46	Fermented Malt Beverages	60	Racing
47	Alcohol Beverages		

**Secretary of State-Administered Articles That May Be Relocated
in 2017 Substantive Legislation**

Article	Topic	Article	Topic
9	Bingos & raffles	55	Notaries public

Relocate to a Different Title

Article	Topic	Article	Topic
26	Firearms dealers	37.5	Parental notification act
26.1	Background checks - gun shows		

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY



DIRECTOR
Dan L. Cartin

DEPUTY DIRECTORS
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REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTORS
Duane H. Gall
Deborah F. Haskins
Bart W. Miller

PUBLICATIONS COORDINATOR
Kathy Zambrano

**COLORADO STATE CAPITOL
200 EAST COLFAX AVENUE SUITE 091
DENVER, COLORADO 80203-1716**

**TEL: 303-866-2045 FAX: 303-866-4157
EMAIL: OLLS.GA@STATE.CO.US**

MANAGING SENIOR ATTORNEYS
Jeremiah B. Barry Jason Gelender
Christine B. Chase Robert S. Lackner
Michael J. Dohr Thomas Morris
Gregg W. Fraser

SENIOR ATTORNEYS
Jennifer A. Berman Nicole H. Myers
Brita Darling Jery Payne
Edward A. DeCecco Jane M. Ritter
Kristen J. Forrestal Richard Sweetman
Kate Meyer Esther van Mourik

SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEY
Yelana Love

LEGAL MEMORANDUM

TO: Committee on Legal Services

FROM: Office of Legislative Legal Services

DATE: September 21, 2016

SUBJECT: Recommendations for Updating OLLS Policies on Records Retention and Access to Legislative Member Files¹

Summary

The Office of Legislative Legal Services (OLLS) recommends that the Committee on Legal Services (Committee) consider the following actions with respect to member files:

- The OLLS should work with State Archives to destroy all member files currently stored at State Archives based on a schedule.

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly. The OLLS legal memoranda do not represent an official legal position of the general assembly or the state of Colorado and do not bind the members of the general assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the general assembly, the OLLS legal memoranda generally resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly's plenary power.

- The OLLS should discontinue transferring member files to State Archives and instead only retain files in the Capitol sub-basement for a period of eight years following the creation of the files to give the OLLS staff access to the files for bill drafting and research purposes.
- For the 2017 session and future sessions, the OLLS should discontinue the practice of asking members to waive the work-product exception when they are no longer in office; retain files in the sub-basement for a period of eight years following the creation of the files; and establish a destruction schedule to destroy files for a particular session after the files for that session have been maintained for eight years.
- Recommend that the Executive Committee adopt an updated and modernized records retention policy governing the member files and other files of the OLLS.

Background

Since the 2015 interim, the Committee and the OLLS have been discussing how to handle legislative member files. This memorandum discusses the current OLLS policies regarding legislative member files under records retention policies and current OLLS practices regarding the release of legislative member files under CORA. The memorandum reviews case law on work-product protections and waiver of work-product privileges. Finally, the memorandum presents recommendations for updating the OLLS records retention policy to change how existing member files are treated and future member files are maintained and stored.

Discussion

1. Current OLLS policies regarding retention of member files

Under § 2-3-504 (1)(e), C.R.S., the OLLS has a statutory duty to keep records on each bill prepared for members of the general assembly. The OLLS refers to these files as "member files". Each legislative session the OLLS creates a member file for each legislator. The OLLS places every bill requested by the legislator, whether introduced or not, in the legislator's member file. The OLLS also places every amendment that is drafted for a legislator to *any* bill into the legislator's member file. The member file will include many amendments that are drafted but not actually offered in committee or on

the floor and thus never become a public document in the legislative process. See **Addendum A** for the December 6, 2005, OLLS policies on green sheets² for what the OLLS requires to be attached to a bill request along with the guidelines on what the OLLS staff may attach to bill requests.

The Executive Committee adopted a records retention policy on May 25, 1993, based on a recommendation from the OLLS in a memo dated May 24, 1993. See **Addendum B**. This policy requires the OLLS to retain member files indefinitely.

2. Current OLLS policies regarding the release of documents prepared for members of the General Assembly

Section 2-3-504 (1)(e), C.R.S., states that the records the OLLS maintains are to be made available to the public for reference purposes in the OLLS unless the records are "classified as confidential". Under § 2-3-505 (2)(b), C.R.S., and § 24-72-202 (6.5)(b)(I) and (II), C.R.S, legislative members' files are considered and defined as work product:

2-3-505. Requests for drafting bills and amendments - confidential nature thereof - lobbying for bills. (2) (b) **All documents prepared or assembled in response to a request for a bill or amendment**, other than the introduced version of a bill or amendment that was in fact introduced, shall be **considered work product**, as defined in section 24-72-202 (6.5), C.R.S. **(emphasis added)**

24-72-202. Definitions. As used in this part 2, unless the context otherwise requires:

(6.5) (b) **"Work product" also includes:**

(I) **All documents relating to the drafting of bills or amendments, pursuant to section 2-3-304 (1) or 2-3-505 (2)(b), C.R.S.**, but it does not include the final version of documents prepared or assembled pursuant to section 2-3-505 (2)(c), C.R.S.;

(II) All documents prepared or assembled by a member of the general assembly relating to the drafting of bills or amendments; **(emphasis added)**

After the work-product exception applicable to bill drafts and amendments was added to CORA, the OLLS issued guidelines for public access to member files containing bill drafts, amendments, and attached materials. See **Addendum C**. In relevant part, the policy states:

² The OLLS refers to bill requests by the term "green sheet" due to the green color of the paper on which bill requests are printed.

Member Files Containing Bill Drafts and Amendments and Attached Materials. At all times, the drafts of bills and any amendments contained in the member files and any materials attached to them are work product and shall remain confidential pursuant to section 2-3-505 (2)(b), C.R.S., unless they can be released pursuant to one of the following:

- If the person requesting them **obtains permission of the member or former member**; or
- If a **former member has waived the work product privilege** (see the subsequent paragraph on waiver or release); or
- If a **former member cannot be located or is deceased** and the documents **are reviewed** by a staff attorney or by the office administrator and any personal notes, private communications, or other items that the member would consider confidential are removed.

Waiver or Release.

If a member gives specific permission for release of a document or waives the work product privilege, orally or in writing, or produces or distributes a document in a public meeting, the document can be released. For members serving on or after January 1, 1997, when members end service with the General Assembly they will be given the opportunity to sign a waiver for their documents. The signed waiver forms will be kept in a central file in the front office.

Based on this policy, since 1998, when a legislator's term of service in the general assembly ends or is about to end, the OLLS sends a letter and an e-mail to the legislator explaining how requests to access work-product documents prepared for that legislator will be handled and asking the legislator to fill out a waiver of work-product privilege. See **Addendum D**. On the form, the legislator may indicate that he or she waives or does not waive work-product privilege and may specify which documents the waiver covers. The form also allows the legislator to indicate that he or she does or does not want to be contacted to give permission for access to the documents in the legislator's files. The Committee should note that the process puts the onus of contacting the legislator on the member of the public requesting access, not on the OLLS staff.

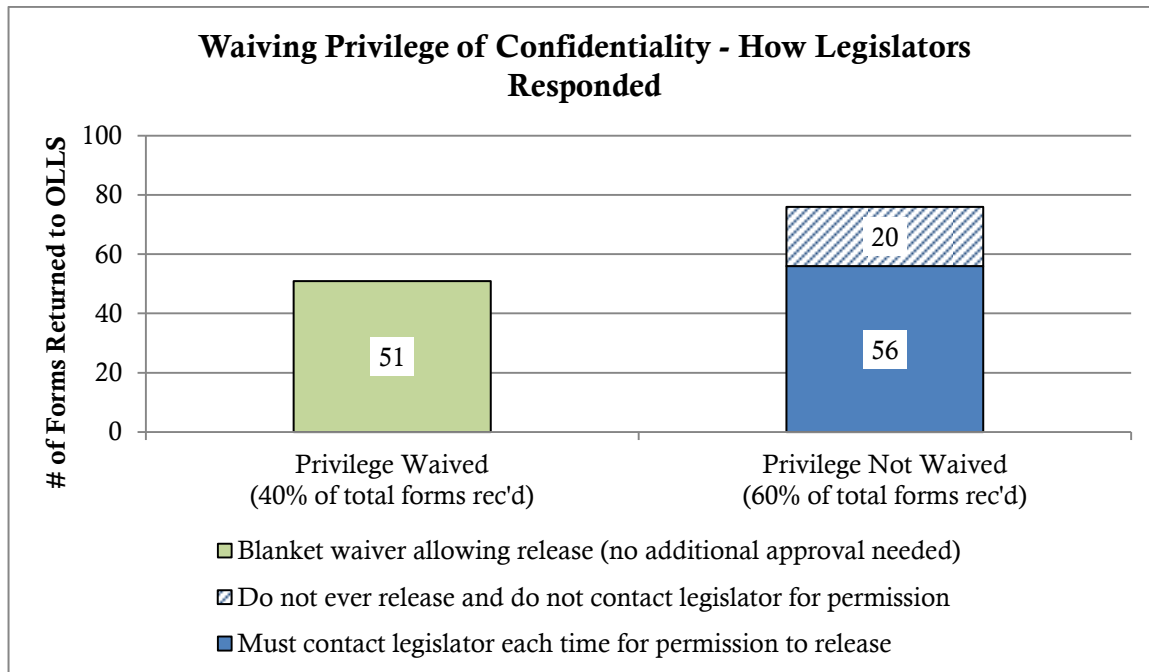
2.1. Response rate of legislators returning a waiver form

The OLLS started asking legislators to fill out the work-product waiver form in 1998. The period since that time covers nine general assemblies. About one-half to two-thirds of the legislators who have left office since the OLLS started using the work-

product waiver form have responded by filling out the form. As of July 1, 2016, the OLLS has received direction from 127 legislators about what to do with their records. Based on an assumption that 20 to 25 legislators leave at the end of each general assembly, the approximate number of legislators who could have filled out a form ranges from 180 to 225 legislators.

2.2. Responses provided by legislators returning a waiver form

Of the 127 responses that the OLLS has received from former legislators, 51 legislators (40%) waived the privilege of confidentiality and 76 legislators (60%) did not waive the privilege of confidentiality. Of those who did not waive the privilege, 56 indicated that the OLLS should require anyone seeking access to the documents to contact the legislator each time for permission to release the file; 20 legislators indicated that none of their files should be released and that they do not want to be contacted for permission.



127 legislators returned OLLS waiver forms over an 18-year period.

1. The work-product privilege of legislators under CORA – the *Ritter v. Jones* decision

The 2009 Colorado Court of Appeals decision in *Ritter v. Jones*³ provides some guidance for the Committee regarding the work-product exception under CORA with respect to legislative bill drafts that have not been introduced. This case arose out of a CORA request to the governor's office to view a bill draft that the OLLS sent at the direction of Representative Rosemary Marshall to a third party who subsequently wrote a memorandum to Governor Bill Ritter. Governor Ritter responded to the CORA request by providing a copy of the memorandum and redacting the appendix containing the excerpts of the draft legislation. Governor Ritter then filed an application in the district court for an order determining whether CORA required disclosure of the appendix. The district court ruled that CORA does not require disclosure of the redacted information.

On appeal, the Colorado Court of Appeals found that the redacted content of the memorandum was legislative work product produced by the OLLS, stating that "[b]ecause the draft legislation was never introduced in the General Assembly, it falls within the definition of work product in § 2-3-505 (2)(b)". The Court of Appeals also found that the draft legislation was work product under § 24-72-202 (6.5)(b), C.R.S., because it was a document relating to the drafting of a bill pursuant to § 2-3-505 (2)(b), C.R.S. The Court of Appeals further held that Representative Marshall did not waive the work-product exemption by providing the memo and draft legislation to a third party because her conduct did not come within any of the statutory waiver exemptions and noted that waiver of a statutory protection must be voluntary.

Ritter v. Jones is important because it gives the following guidance:

- Under CORA, draft legislation of a legislator is work product and is protected from disclosure under an open records request;
- Waiver of a statutory protection under CORA must be voluntary, which supports the OLLS practice of asking each legislator whether he or she waives or does not waive the statutory protection;
- A legislator's direction to the OLLS to release a bill draft to a third party before introduction does not waive the work-product privilege with regard to anyone other than the third party.

³ *Ritter v. Jones*, 207 P.3d 954 (Colo. App. 2009).

2. Does a work-product privilege survive the death of the person who holds the privilege?

Yes, it probably does. This raises questions about the current OLLS practices.

In *Swidler & Berlin v. U.S.*,⁴ the United States Supreme Court explicitly ruled that the attorney-client privilege survives the death of the client. However, in that case, the Supreme Court did not reach the question of whether the work-product privilege also survives the death of the client.⁵ Whether the work-product privilege survives the death of the client is a question that courts have not directly addressed.

Attorney-client privilege protects communications between an attorney and a client, while work-product privilege protects an attorney's work on a case from the client's adversary. The two privileges cover different materials, and different events trigger them. Further, courts have historically placed a far higher value on the attorney-client privilege than the work-product privilege. Attorneys can overcome the work-product privilege by a showing of necessity, but this is not an option with attorney-client privilege.⁶ The high protection afforded to the attorney-client privilege means that the Court's ruling in *Swidler*, that the attorney-client privilege survives a client's death, does not necessarily translate to the work-product privilege also surviving a client's death.

Without directly applicable case law, the best way to determine whether the work-product privilege survives a client's death is to consider the underlying principles of the work-product privilege. Unlike the attorney-client privilege, which the content of a communication triggers, the context of a communication in which materials are created triggers work-product privilege. The work-product privilege protects only materials created in anticipation of litigation.⁷ In *FTC v. Grolier, Inc.*,⁸ the United States Supreme Court stated, in dicta, that "the literal language of [Rule 26(b)(3)] protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation".⁹ If materials were created in anticipation of

⁴ *Swidler & Berlin v. U.S.*, 524 U.S. 399, 405 (1998).

⁵ *Id.* at 416, n. 1.

⁶ See, C.R.C.P. 26(b)(5) for a more extensive list of circumstances that allow for the work-product privilege to be overcome under Colorado law.

⁷ *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁸ *FTC v. Grolier*, 462 U.S. 19 (1983).

⁹ *Id.* at 25.

litigation, those materials are protected in future litigation and perhaps even in unrelated litigation.¹⁰ Therefore, if an attorney created materials in anticipation of litigation and the attorney's client subsequently died, those materials would presumably still be covered by the work-product privilege.

Yet, while work-product privilege may extend to protect materials beyond the litigation for which they were created, the standard for overcoming the work-product privilege might decrease in subsequent litigation. An adverse party can overcome the work-product privilege if the adverse party can show "hardship".¹¹ The court decides what constitutes a sufficient level of "hardship" on a case-by-case basis, and "to the extent that the need for protection of work product does decrease after the end of a suit, that fact might in some cases lower the threshold for overcoming the work product barrier".¹² The more time that passes after the litigation that led to creation of the work product, the lower the barrier the adverse party will have to overcome to gain access to the work product. Courts have found that, as the need for confidentiality decreases over time, the risk that revealing work product will create a "chilling effect" on the relationship between attorneys and their clients also decreases.¹³ With less potential for a "chilling effect", courts are more likely to waive the work-product privilege as time passes after the initial litigation.

The death of a client increases the "hardship" in accessing the materials prepared in anticipation of litigation. While there is no direct case law on this issue, multiple cases have found that the death of a witness creates sufficient hardship to waive the work-product privilege protecting interviews the witness gave while alive.¹⁴ The death of a witness and the subsequent inability of the witness to testify are analogous to the death of a client and his or her inability to testify. The death of a client arguably creates hardship for the adverse party trying to access the information covered by the work-product privilege. But, courts would still decide on a case-by-case basis whether the

¹⁰ See, e.g., *Frontier Refining Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 703 (1998) (holding that Fed. R. Civ. P. 26(b)(3) applies in subsequent litigation). Courts are split on whether work-product privilege applies only in subsequent related cases or also in subsequent unrelated cases.

¹¹ Fed. R. Civ. P. 26(b)(3).

¹² *Grolier*, 462 U.S. at 31 (Brennan, J., concurrence).

¹³ Bruce A. Green & David C. Clifton, *Feeling a Chill*, ABA Journal, Dec. 29, 2005, http://www.abajournal.com/magazine/article/feeling_a_chill

¹⁴ See, e.g., *In re Grand Jury Investigation*, 599 F.2d 1224, 1232 (1979).

hardship created by the death of a client rises to the level of "undue hardship" necessary to overcome the work-product privilege.

Arguably, the work-product privilege continues beyond the death of the client, but the death of the client makes that privilege easier to overcome. The death of the client lowers the standard that the adverse party must meet to gain access to materials protected by the work-product privilege while also increasing the hardship the adverse party faces in trying to access the documents protected by the work-product privilege.

3. Does it make any difference that the person who created the member file or on whose behalf the member file was created is a public figure?

In this particular case, it does appear to make a difference.

Whether the record is created for or by a public figure is important because it triggers CORA. Under CORA, work product includes "all documents relating to the drafting of bills or amendments, pursuant to section 2-3-305 (2)(b), C.R.S."¹⁵ Therefore, the documents contained in a member's file undoubtedly qualify as work product, not because they were prepared in anticipation of litigation but because they are defined as work product under CORA.

CORA defines work product in a way that is very similar to how the attorney-client privilege is defined. CORA defines as work product those materials that "express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority".¹⁶ The attorney-client privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice".¹⁷ The definition of work product in CORA appears to align with the purpose of the attorney-client privilege.

If the purpose of work product under CORA is indeed analogous to the purpose of the attorney-client privilege, then the United States Supreme Court's reasoning in *Swidler* that allowed the attorney-client privilege to continue after the death of the client applies to the work-product privilege under CORA. There is well-established

¹⁵ § 24-72-202 (6.5)(b), C.R.S.

¹⁶ § 24-72-202 (6.5)(a), C.R.S.

¹⁷ *Upjohn Co. v. U.S.*, 499 U.S. 383, 389 (1981).

precedent stating that if the language of a statute is unclear, the court should consider the intent behind the statute.¹⁸ The language of CORA is unclear on whether the work-product privilege continues after the death of the client because the language of CORA is silent on this topic. Therefore, the intent behind CORA should be considered, and it appears that the intent of the definition of work product in CORA is analogous to the intent of the attorney-client privilege. If these intentions are indeed analogous then, just as the attorney-client privilege extends beyond the life of the client, the work-product privilege also extends beyond the life of the client.

Being an elected official makes a difference in the extent of the work-product privilege because work product for an elected official is defined differently than work product for a regular client. Work product for an elected official, as defined by CORA, is broader and more protected than regular work product and is more likely to extend beyond the death of the elected official.

4. What do other states do with legislator bill files?

Research from other states regarding their policies for legislator bill files is summarized in **Addendum E**. Legislative staff from ten states responded to list serve questions posted through the National Conference of State Legislatures. Eight of the ten states treat drafting files as confidential or as work-product exceptions under the public records laws. Virginia passed a law in 1989 that treats files prior to 1989 as confidential and opens up files after 1989. Most states require that records be kept for some time, varying from 1 year to 75 years. Most of these states do not ask legislators what to do with their files after they leave office, and 3 states ask the legislator on a case-by-case basis when a request is made and release is made only if specific permission is granted. Most states have not established a policy about what to do if the legislator is deceased.

5. How does the federal government retain and release records of elected officials or U.S. presidents?

The federal government has separate rules on dealing with records of the House of Representatives and the Senate and with Presidential records.

House Rule VII defines a record as "any official, permanent record of the House (other than a record of an individual Member, Delegate, or Resident Commissioner), including ... with respect to an officer of the House elected under rule II, an official,

¹⁸ See, e.g., *People v. District Court, Second Judicial Dist.*, 713 P.2d 918, 921 (Colo. 1986).

permanent record made or acquired in the course of the duties of such officer."¹⁹

According to a report explaining the origin of the House rules, files of representatives' congressional offices are not considered records of the House and representatives' papers are considered their personal property; how representatives handle them is their prerogative.²⁰ Consequently, drafting records from the Office of Legislative Council appear to be the personal property of those representatives.²¹

The Senate's equivalent to House Rule VII is Senate Resolution 474,²² which prescribes how Senators should handle their papers. However, neither Senate Resolution 474, nor any other statute or standing rule of the Senate, defines what constitutes a Senator's papers.²³ The Secretary of the Senate has defined a Senator's papers as "all records, regardless of physical form and characteristics, that are made or received in connection with an individual's career as a United States Senator."²⁴ These papers, as with the papers of House Representatives, are the private property of the Senators.²⁵ As such, just as with the House, records of Senate interactions with the Office of Legislative Council are the personal property of the Senators.

The "Presidential Records Act" controls the papers and records of a United States President. The "Presidential Records Act" encompasses "documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the

¹⁹ House Rule VII (6).

²⁰ Records of the House, Report 100-1054, page 6, available at: <http://www.pointoforder.com/wp-content/uploads/2016/04/House-Rep-100-1054-proposed-rule-on-House-records-Oct-4-1988.pdf>. "[I]t is relatively clear that Members' papers have been regarded as their personal property." Report 100-1054, pg. 14.

²¹ This is supported by the fact that these records have never been added to Congress's archival holdings. See, *An American Political Archives Reader*, Glenn Gray, Rebecca Johnson Melvin, Karen D. Paul, pg. 68 (2009), available at: https://books.google.com/books?id=5zEM_IE1lpEC&pg=PA84&lpg=PA84&dq=senators+papers+management+and+preservation+guidelines&source=bl&ots=AbOg6h6nxP&sig=wZ0PT3UB5Ao_mWAlf kKL5DOjAJU&hl=en&sa=X&ved=0ahUKEwjLk4SrvY7MAhUptYMKHebqAuwQ6AEIKjAD#v=onepage&q=senators%20papers%20management%20and%20preservation%20guidelines&f=false.

²² Available at: <https://www.archives.gov/legislative/research/senate-resolution-474.html>.

²³ *Closing a Congressional Office: Overview of House and Senate Practices*, Congressional Research Service, pg. 4, available at: <https://www.fas.org/sgp/crs/misc/RL34553.pdf>.

²⁴ U.S. Senate, Secretary of the Senate, Records Management Handbook for United States Senators and Their Archival Repositories, S.Pub. 109-19 (Washington: GPO, 2006), p. 5.

²⁵ *Id.*

President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."²⁶ The broadness of the "Presidential Records Act" means it encompasses those documents that neither House Rule VII nor Senate Resolution 474 catch. The "Presidential Records Act" therefore appears to capture documents equivalent to the interaction of the Office of Legislative Council and elected members of Congress. Under the "Presidential Records Act", the archiver releases the presidential records to the public, unless the President claims executive privilege.²⁷ Unlike with House Rule VII or Senate Resolution 474, the default position of the "Presidential Records Act" is to release presidential records and papers.

6. What issues do the current OLLS practices raise?

The OLLS policies on records retention and access to member files raise the following concerns:

- Are the OLLS' policies on waivers of work-product privilege consistent with case law?
- There are numerous implementation difficulties, including:
 - Legislators do not know what is in the files since they do not create the files;
 - The contact information that legislators provide when they fill out a waiver form often becomes outdated;
 - There is no easy way to know when former legislators move or die; and
 - The policy gives more protection from the revelation of embarrassing comments to deceased former legislators than to former legislators who are still living.
- Since the legal analysis suggests that the work-product privilege extends beyond the life of the client/legislator, should a member file that is defined as work product be released to the public after the death of the legislator for whom the

²⁶ 44 U.S.C. 22 §2201 (2).

²⁷ Executive Order 13489, Section 2(b), available at: https://en.wikisource.org/wiki/Executive_Order_13489.

work product was created if the legislator: a) never gave directions about the release of the member file; or b) specifically refused to waive the work-product privilege on the waiver form?

- Should the OLLS continue to maintain and store old member files either at State Archives or in the State Capitol? Is there a public policy purpose in maintaining these records? If the documents were confidential when created, should they ever be released?
- Should the records retention policy for the OLLS established by the Executive Committee be revised, along with revisions to other outdated aspects that relate to other types of records?

Recommendations for Retaining Member Files

The OLLS recommends that the Committee consider the following changes to OLLS practices with respect to member files.

1. Existing Member Files Currently Housed by State Archives

- a. The OLLS should work with State Archives to destroy all OLLS member files currently housed by State Archives by establishing a reasonable destruction schedule (some files date back to the 1930's and files from 1980 through 2005 and 2007 and 2008 were regularly transferred to State Archives²⁸).

Rationale: For member files from 1998 and earlier, the OLLS does not have direction from each of the applicable legislators about what to do with the respective files. Records created after 1998 fall under the work-product exception in CORA and should not be released to the public without the legislator's permission. The records should be destroyed to save resources and preserve space. Moreover, there is minimal to no value for legislative historical purposes, and these files are infrequently accessed by the public. Since the records are confidential, it is appropriate to shred the files rather than recycling them.

²⁸ The member files for 2006 are currently stored in the sub-basement and were not sent to State Archives due to water damage. In addition, the OLLS is storing member files for 2009 through 2015 in the sub-basement. OLLS will run out of space in the sub-basement in 2017.

2. Existing Member Files Currently Stored by OLLS in Sub-basement

- a. Stop transferring member files to State Archives.
- b. Retain files for a period of eight years from the year of creation to give the OLLS staff access to the files for bill drafting and research purposes and to allow access, upon request of the public, when a legislator specifically waives the work-product exception or gives permission to allow access to the record.
- c. Establish a destruction schedule to destroy the files stored in the sub-basement after the files for a particular session have been maintained for eight years. This is a rolling eight years; one session's files would be destroyed to make room for the latest session's files.

Rationale: Since the files are work product, the files retain work-product status and may be released to the public only with the express direction of the legislator. The files are useful to the OLLS staff on occasion, but the older the files are, the less likely the OLLS staff would find them useful.

3. Member Files Created for the 2017 Session and Future Sessions

- a. Discontinue the practice of asking legislators to waive the work-product exception when they leave the General Assembly.
- b. Do not transfer member files to State Archives.
- c. Retain files in the sub-basement for a period of eight years from the year of creation to give the OLLS staff access to the files for bill drafting and research purposes.
- d. Establish a destruction schedule to destroy the files stored in the sub-basement after the files for a particular session have been maintained for eight years. This is a rolling eight years; one session's files would be destroyed to make room for the latest session's files.

Rationale: Since these files are work product, the files retain work-product status and should never be released to the public.

Conclusion

For the reasons outlined in this memorandum, the OLLS recommends that the current records retention policy and the practices governing member files be revised as

outlined in this memorandum. Under § 2-3-303 (2)(d), C.R.S., the Executive Committee has the power and duty to "establish policies about the retention of records relating to legislative review of rules of the general assembly". The Legislative Council has adopted Rule V (2)(d), which recognizes the authority of the Executive Committee consistent with this statute. Acting under that authority, in 1993, the Executive Committee adopted the policy that the OLLS should retain member files as outlined in a memorandum dated May 24, 1993, contained in **Addendum B**. If the Committee decides that the policy for retaining member files should be altered as outlined in this memorandum, the Committee could recommend to the Executive Committee that the OLLS records retention policy be updated. The OLLS also recommends that the Committee recommend other changes to the records retention policy to reflect current technology and current practices regarding other types of records. See proposed recommended changes to the records retention policy in **Addendum F** and a final version of the proposed recommended changes in **Addendum G**. The Committee's recommendations could be sent to the Executive Committee via a letter signed by the chair of the Committee.

Addendum A

OLLS Policies on Green Sheets

December 6, 2005

Purpose of policies and background: OLLS has a statutory duty to keep records regarding bills. Section 2-3-504 (1) (e), C.R.S., states:

2-3-504. Duties of office. (1) The office shall:

(e) Keep on file records concerning legislative bills and the proceedings of the general assembly with respect to such bills; subject indexes of bills introduced at each session of the general assembly; files on each bill prepared for members of the general assembly and the governor; and such documents, pamphlets, or other literature relating to proposed or pending legislation, without undue duplication of material contained in the office of the legislative council or in the supreme court library. All such records and documents shall be made available in the office at reasonable times to the public for reference purposes, unless said records are classed as confidential under this part 5.

One of the primary means of complying with this requirement is the permanent retention of green sheets. Current practice regarding the types of documents that are attached to green sheets varies widely between teams and from drafter to drafter. One of the purposes of this policy is to promote compliance with OLLS' statutory obligations by establishing uniform requirements and guidelines for attachments to green sheets.

As a preliminary matter, the retention of green sheets is accomplished by filing green sheets in the front office after bills have been introduced. However, often the green sheets are not filed until after the session has ended due to the session work load. Green sheets are historical documents that the office is mandated by statute to save and the office takes the custodianship of these records seriously. Thus, the other purpose of this policy is to specify the procedures to be followed for the filing of green sheets.

Green Sheet Attachments - Required. The following documents shall be attached to each green sheet:

1. The bill draft workflow sheet and bill request yellow sheet;
2. Legislative audit committee partial draft request workflow sheets and pre-CLICS workflow sheets, if applicable;
3. All written drafting instructions from the sponsor and contacts; and
4. All of the different versions of the bill draft, including LAC partial drafts. In order to conserve space, at the legislative editors' discretion, only those pages of a revised bill draft that contain new language in double underlined text or hand-written changes may be attached rather than every page of the full redrafted bill.

Green Sheet Attachments - Guidelines. Any document, whether created pre- or post-introduction, should be attached to a green sheet, if, giving due consideration to limitations on storage space and compliance with the office's record keeping responsibilities, doing so would aid in the office's later reconstruction of the bill's drafting history, including specifically the following:

1. Summaries of legal research conducted with regard to the bill, including case citations instead of hard copies of cases and the file and pathname of legal opinions

- or memos that originate inside the office; and
2. Hard copies of legal opinions or memos that originate outside the office.

Filing of Green Sheets. Legislative editors shall file a bill's green sheet in the front office as soon as possible after the bill has been introduced.

Addendum B

State of Colorado

Attachment F

Committee on
Legal Services

Senator Dottie Wham,
Chairman

Representative Jeanne M. Adkins,
Vice-Chairman

Representative Vickie Agler
Representative Diana DeGette
Representative William G. Kaufman
Senator Donald J. Maroe
Senator Steve Ruddick
Representative Carol Snyder
Senator Dave Wattenberg
Senator Jeffrey M. Wells



COLORADO GENERAL ASSEMBLY
OFFICE OF LEGISLATIVE LEGAL SERVICES
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157

Director
Douglas G. Brown

Revisor of Statutes
Charles W. Pike

Deputy Director
Rebecca C. Lennahan

Assistant Directors
William A. Hobbs
Alice Soler Ackerman

Administrative
Senior Attorneys
Deborah F. Haskins
Sharon L. Eubanks

Administrative Assistants
Linda R. Bell
Cheryl L. Branson

Senior Attorneys
David A. Bergin
Dan L. Cartin
Bart W. Miller
Pat Rosales-Kroll
Mark C. Van Ness

Staff Attorneys
Helen M. Baldwin
Jane L. Brown
Michele D. Brown
Dorothy M. Dodick
Duane H. Gell
Jennifer G. Gilroy
Mark T. Hamby
Deena Jones
Julie A. Pelegnin
John Taylor

TO: Executive Committee

FROM: Office of Legislative Legal Services

RE: Retention of records by the Office of Legislative Legal Services

DATE: May 24, 1993

HB 93-1246, concerning the Legislative Council, authorizes the Executive Committee to establish policies on the retention of records by legislative service agencies. There are several reasons why the issue of records retention needs to be addressed at this time: 1) The temporary relocation of a significant portion of our records stored in the subbasement due to the asbestos abatement project and the installation of a sprinkler system under the life safety project for the capitol building and 2) the fact that the office is running out of space for all of the records that we currently store and will need to store in the future.¹ The agencies involved in storing records in the subbasement have been encouraged by the department of administration, which is in charge of the life safety project, to use this project as an opportunity to go through their records and determine what records could be discarded. Decisions about disposal of records need to be made by the end of May because records will be need to be moved by June 4.

We would recommend that the Executive Committee consider the adoption of the following policies with respect to the retention of records maintained by the Office of Legislative Legal Services:

- 1) "Members Files" comprised of bill requests and amendment requests made by members of the general assembly should be retained.
- 2) Copies of different versions of bills should be retained. However, once those records have been microfilmed, they may be discarded.
- 3) Extra hardbound volumes and supplements to the Colorado Revised Statutes which are over fifteen years old may be discarded.

¹ Under section 2-3-504, C.R.S., the Office of Legislative Legal Services is required to keep on file records concerning legislative bills and proceedings of the general assembly with respect to such bills, subject indexes of bills introduced each session, and files on each bill prepared for members of the general assembly and the governor.

4) The second copy of rules and regulations that are submitted by executive branch agencies for purposes of the review of rules and regulations by the OLLS may be disposed of after two years.

5) Rules and regulations which have been reviewed by the OLLS may be disposed of after five years. The docket books of submissions of rules shall be retained in order to have a record upon which to certify the submission of rules pursuant to section 24-4-103 (8) (d), C.R.S.

6) The replacement pages for the Colorado Code of Regulations (CCR) may be disposed of after two years.

7) Files of records of former staff attorneys of the OLLS may be disposed of at the direction of the director of the Office of Legislative Legal Services. The director shall take into consideration whether those files may be useful to the office in determining legislative intent or may involve subject matter that may be useful to the office in carrying out its duties.

8) General correspondence of the Office of Legislative Legal Services may be disposed of at the direction of the director of the Office of Legislative Legal Services after two years.

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Addendum C

GUIDELINES FOR RELEASING DOCUMENTS PREPARED FOR MEMBERS OF THE GENERAL ASSEMBLY

Introduced Versions of Bills and Amendments.

The introduced version of bills and amendments that have been introduced in committee or on the House or Senate floor are public records and can be released at any time pursuant to section 2-3-505 (2)(b), C.R.S. If a determination cannot readily be made that an amendment was introduced, the person requesting the document can be asked to provide additional information or, as time permits, the Office can conduct appropriate research necessary to make a determination¹. "Engrossed", "reengrossed", "revised", "rerevised", and the "act" versions of bills are also public records and can be released at any time pursuant to section 2-3-505 (2)(b), C.R.S.

Member Files Containing Bill Drafts and Amendments and Attached Materials. At all times, the drafts of bills and any amendments contained in the member files and any materials attached to them are work product and shall remain confidential pursuant to section 2-3-505 (2)(b), C.R.S., unless they can be released pursuant to one of the following:

- If the person requesting them **obtains permission of the member or former member**; or
- If a **former member has waived the work product privilege** (see the subsequent paragraph on waiver or release); or
- If a **former member cannot be located or is deceased** and the documents are **reviewed** by a staff attorney or by the office administrator and any personal notes, private communications, or other items that the member would consider confidential are removed.

Legal Opinions.

A legal opinion can be released if the person requesting it obtains permission of the member or former member or the member or former member has waived the work product privilege (see the subsequent paragraph on waiver or release).

Factual data² - Not part of Member Files or Legal Opinions.

The final version of documents containing factual data that are not prepared as a part of a bill or amendment request or a part of a legal opinion are public records pursuant to section 2-3-505 (2)(c), C.R.S.

- The final version of these documents can be released.
- On and after August 6, 1997, a member may request that these documents remain work product pursuant to section 2-3-505 (2)(e), C.R.S.

¹ For example, if a person requests all amendments prepared for a particular member on a bill, you can't automatically release the copies in the member file. You would have to determine which of the amendments were actually introduced. Alternatively, you could release all of the amendments if the person obtains permission of the member or if the member has waived confidentiality.

² Examples are: Side-by-side comparisons of laws or versions of bills; compilations of existing public information, statistics, or data; or compilations or explanations of general areas or bodies of law, legislative history, or legislative policy.

The Office should generally assume that these documents are prepared for public release. However, if a member makes a request that a document remain work product, the person preparing the document should include the following notice on the first page: THIS DOCUMENT IS WORK PRODUCT PREPARED FOR A MEMBER OF THE GENERAL ASSEMBLY AND IS NOT AVAILABLE FOR PUBLIC RELEASE. If such a statement is not on the face of the document, you may release it.

Any documents containing factual data that are in draft form and not finalized cannot be released without the consent of the member or former member.

Waiver or Release.

If a member gives specific permission for release of a document or waives the work product privilege, orally or in writing, or produces or distributes a document in a public meeting, the document can be released. For members serving on or after January 1, 1997, when members end service with the General Assembly they will be given the opportunity to sign a waiver for their documents. The signed waiver forms will be kept in a central file in the front office.

Assisting Members of the General Assembly.

In situations where the person making the request for release of a document is a member of the General Assembly or someone acting on behalf of a member, the Office should conduct any necessary research or obtain any necessary permission from other members.

Addendum D

OFFICE OF LEGISLATIVE LEGAL SERVICES COLORADO GENERAL ASSEMBLY

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045 FACSIMILE: 303-866-4157
E-MAIL: OLLS.GA@STATE.CO.US

January 12, 2015
MEMORANDUM

To: Members of the Sixty-ninth General Assembly
From: Office of Legislative Legal Services
Re: Access to Your Work Product Documents

The Colorado Revised Statutes define many documents prepared for you as a member of the General Assembly as "work product". These documents can't be released to a member of the public who requests them unless you have previously released them or you waive the work product privilege. Work product does not include the introduced and subsequent versions of a bill or an amendment that is introduced as these are considered public documents. Examples of work product that the Office of Legislative Legal Services ("OLLS") may have in its records are: (1) Requests for bills or amendments that you made but were never introduced; (2) Materials attached to your bill or amendment requests such as preliminary drafts or written suggestions from legislative staff or lobbyists or other contact people who worked on the issue; and (3) Legal memorandums and documents attached to them.

Since you are no longer a member of the General Assembly, the OLLS must have direction from you as to how we should treat your work product when someone seeks access to our records. Please indicate your preference on the attached form and return it to the OLLS, or fax it to 303-866-4157. You may also send an electronic copy of the completed form to olls.ga@state.co.us.

If you check the first box on the attached waiver form, you are indicating that you waive the work product privilege. The OLLS will release documents without anyone contacting you. However, in the space provided in the form you may elect to designate specific documents that you want us to continue to treat as work product and not release unless your permission is obtained.

If you check the second box on the attached waiver form, you are indicating that you do not want to waive the work product privilege. *If you check this box, you must also check one of the two boxes under it.* The first box indicates that anyone seeking access to your documents must obtain your permission. Each time a member of the public asks for a document that is work product, you will receive a request for permission to release it to that specific person. The second box indicates that you do not want to release any of these documents and do not want to be contacted for permission.

If you do not return this form, by default the OLLS will assume you must be contacted for permission prior to the release of any work product documents. We will provide to the person seeking access to your records the contact information listed for you in the Legislative Directory (a.k.a. the "Pink Book") from the last term in which you served in the General Assembly.

Thank you for your assistance.

4

WORK PRODUCT - WAIVER

☐ **I hereby waive my privilege** to maintain the confidentiality of documents considered to be work product contained in any records kept by the Office of Legislative Legal Services. I authorize the Office to release these documents to anyone making a request for access to them.

This waiver shall not apply to the following:

(list any specific document or documents).

☐ **I do not waive my privilege** to maintain the confidentiality of documents considered to be work product contained in any records kept by the Office of Legislative Legal Services.

☐ The Office shall require anyone seeking access to these documents to obtain my permission for their release. The person seeking access should contact me at the following address, phone number, or e-mail address:

☐ I do not want to release any of these documents and do not want to be contacted for permission.

APPROVED ON _____
(Date)

(Name - printed)

(Signature)

Addendum E

Summary of Responses: How Other States Handle Legislator Bill Files

(States responding: Connecticut, Kentucky, Montana, New Mexico, Ohio, Pennsylvania, Vermont, Virginia, Wisconsin, Wyoming)

1. Are bill drafting files protected as work product or as confidential?
 - 7 states (Connecticut, Kentucky, New Mexico, Ohio, Pennsylvania, Wisconsin, and Wyoming) treat them as confidential;
 - Vermont treats them as partially confidential;
 - Virginia enacted a law designating 1989 and earlier files as confidential and files from 1990 and later as public records;
 - Montana does not treat drafting files as confidential.
2. Are bill drafting files public records?
 - Most states do not consider bill drafting files to be public records;
 - Most states have reasons (e.g., confidentiality, work product privilege) not to allow access.
3. Are bill drafting files required to be maintained and stored?
 - 8 states (Kentucky, Montana, New Mexico, Ohio, Pennsylvania, Vermont, Virginia, and Wyoming) maintain records;
 - Wisconsin does not maintain legislative drafting files;
 - 3 states (Kentucky, Montana, and Ohio) have retention of records policies;
 - Ohio destroys records based on retention of records policy;
 - Pennsylvania keeps files for 1 year;
 - Wyoming sends drafting files to State Archives after 2 years. Files are retained for 75 years.
4. Are legislators asked what they want done with bill drafting files after they leave office?
 - 6 states (Connecticut, Kentucky, Montana, New Mexico, Pennsylvania, and Virginia) do not specifically ask the legislator when he or she leaves office;
 - Vermont responded that the legislator has no right to ask for the file;
 - 3 states (Connecticut, Ohio, and Virginia) ask on a case-by-case basis when a request is made and release is made only if specific permission is granted;
 - Wyoming has a specific waiver of privilege that is presented to the legislator at the time the legislator files the bill request.
5. Is there a different policy if a legislator is deceased?
 - 5 states (Connecticut, Montana, New Mexico, Vermont, and Virginia) do not have a different policy;
 - Ohio allows release if a legislator is deceased or unreachable;

- In Wyoming, if a legislator dies without signing the waiver form, the records are not accessible because of the privilege viewed as being attached to the bill drafting folder.

Addendum F

Proposed Recommended Changes to Retention of Records Policy for Records of the Office of Legislative Legal Services

RECORDS CREATED AND MAINTAINED BY THE OFFICE OF LEGISLATIVE LEGAL SERVICES ("OLLS") ARE SUBJECT TO THE FOLLOWING RETENTION OF RECORDS POLICY ADOPTED BY THE EXECUTIVE COMMITTEE ON ____ (FILL IN DATE):

- 1) ~~"Members Files" comprised of bill requests and amendment requests made by members of the general assembly should be retained.~~ IN COMPLIANCE WITH THE REQUIREMENT TO KEEP LEGISLATIVE BILL FILES SET FORTH IN SECTION 2-3-504 (1) (e), C.R.S., THE OLLS SHALL RETAIN FOR A PERIOD OF EIGHT YEARS THE MEMBER FILES OF EACH MEMBER OF THE GENERAL ASSEMBLY FOR A PARTICULAR SESSION. MEMBER FILES ARE FILES CREATED BY THE OLLS THAT CONTAIN BILL REQUESTS AND AMENDMENT REQUESTS MADE BY MEMBERS OF THE GENERAL ASSEMBLY. ONCE THE MEMBER FILES FOR A LEGISLATIVE SESSION HAVE BEEN HELD FOR EIGHT YEARS, THE OLLS SHALL DESTROY THE FILES FOR THAT SESSION BY SHREDDING.
- 2) PURSUANT TO SECTIONS 2-3-504 (1) (e) AND 24-72-202 (6.5) (b) (I) AND (II), C.R.S., THE MEMBER FILES RETAINED BY THE OLLS IN ACCORDANCE WITH SUBSECTION 1) OF THIS POLICY ARE SUBJECT TO A WORK-PRODUCT EXCEPTION UNDER THE COLORADO OPEN RECORDS ACT ("CORA"). THE FOLLOWING PROCEDURES APPLY TO THOSE FILES IF THERE IS A REQUEST MADE TO THE OLLS FOR ACCESS TO THE FILE OR TO A SPECIFIC RECORD IN THE FILE:
 - a. MEMBER FILES ARE WORK PRODUCT AND REMAIN CONFIDENTIAL PURSUANT TO SECTION 2-3-505 (2) (b) (I) AND (II), C.R.S., AND WILL NOT BE RELEASED, UNLESS THE PERSON REQUESTING THE FILE OR A SPECIFIC RECORD IN THE FILE OBTAINS THE WRITTEN PERMISSION OF THE APPLICABLE MEMBER OR FORMER MEMBER OF THE GENERAL ASSEMBLY TO RELEASE THE REQUESTED MEMBER FILE OR RECORD IN THE FILE. THE OLLS WILL PROVIDE THE LAST KNOWN CONTACT INFORMATION ON FILE WITH OLLS TO THE REQUESTER IF THE MEMBER IS NO LONGER SERVING IN THE GENERAL ASSEMBLY.
 - b. IF THE FORMER MEMBER IS DECEASED, THE OLLS WILL NOT RELEASE THE APPLICABLE MEMBER FILES BECAUSE THE WORK-PRODUCT PRIVILEGE SURVIVES THE

DEATH OF THE DECEASED MEMBER AND NO OTHER PERSON CAN WAIVE THAT PRIVILEGE.

~~2) Copies of different versions of bills should be retained. However, once those records have been microfilmed, they may be discarded.~~

[Bills are now stored on CLICS and on the Internet - OLLS and the joint library no longer retain copies of versions of the bills so this duty should be eliminated.]

3) THE OLLS MAY DISCARD extra hardbound volumes and supplements to the Colorado Revised Statutes AND SESSION LAWS ~~which~~ THAT are over fifteen years old ~~may be discarded~~.

4) THE OLLS MAY DISCARD EXTRA SOFTBOUND VOLUMES OF THE COLORADO REVISED STATUTES AND THE SESSION LAWS THAT ARE OVER ONE YEAR OLD.

[The OLLS only prints softbound volumes.]

5) TWO YEARS AFTER AN ADMINISTRATIVE RULE IS SUBMITTED TO THE OLLS BY AN EXECUTIVE BRANCH AGENCY FOR PURPOSES OF OLLS REVIEW, THE OLLS MAY DISPOSE OF ~~the second copy of~~ OLLS RULE REVIEW FORM, THE ADMINISTRATIVE RULE FILING INFORMATION FORM, AND ANY MATERIALS ATTACHED TO THE FORMS, INCLUDING THE RULE IF PRINTED BY THE OLLS STAFF, ~~rules and regulations that are submitted by executive branch agencies for purposes of the review of rules and regulations by the OLLS may be disposed of after two years.~~

[Rules are no longer submitted in paper copy to SOS or OLLS, so OLLS no longer requires 2nd copies. Since rules are filed electronically, the staff reviews rules electronically and staff has discretion to not print out the rules. The OLLS rule review form, the filing information form, and any attachments are kept for 2 years.]

6) ~~Rules and regulations which have been reviewed by the OLLS may be disposed of after five years.~~ The OLLS SHALL RETAIN ELECTRONIC docket books of submissions of rules ~~shall be retained in order to have~~ PRESERVE a record upon which to certify the submission of rules pursuant to section 24-4-103 (8) (d), C.R.S., AND TO COMPILE INFORMATION ON THE REVIEW OF RULES BY THE OLLS.

[The online CCR publication on the Secretary of State's website contains past versions of the rules back to 2007, thus there is no reason for OLLS to maintain paper versions of previously adopted and previously reviewed rules. Rule Review Memos and the COLS minutes of any rule issues are also retrievable through OLLS computer systems.]

7) ~~The replacement pages for the Colorado Code of Regulations (CCR) may be disposed of after two years.~~

[This portion can be eliminated. Since the CCR is now accessible online on the Secretary of States' website and to save money, the OLLS no longer buys a hard copy of the CCR.]

- 7) THE OLLS MAY DISPOSE OF THE WORK files of ~~records of~~ former staff attorneys of the OLLS ~~may be disposed of~~ at the direction of the director of the ~~Office of Legislative Legal Services~~ OLLS. The director shall take into consideration whether those files may be useful to the office in determining legislative intent or may involve subject matter that may be useful to the office in carrying out its duties.

~~9) The general correspondence of the Office of Legislative Legal Services may be disposed of at the direction of the director of the Office of Legislative Legal Services after two years.~~

[The OLLS does not currently keep or maintain correspondence in central files. Each staff member retains paper or electronic copies of correspondence necessary to complete his or her own assignments.]

- 8) THE OLLS SHALL RETAIN AN ELECTRONIC COPY OF ANY LEGAL OPINION OR LEGAL MEMORANDUM PREPARED FOR A MEMBER. LEGAL OPINIONS OR LEGAL MEMORANDUMS PREPARED BY THE OLLS ARE CONSIDERED WORK PRODUCT AND WILL NOT BE RELEASED UNLESS THE LEGISLATOR HAS WAIVED WORK-PRODUCT PRIVILEGE OR DIRECTS THE OLLS TO RELEASE THE LEGAL OPINION OR LEGAL MEMORANDUM.

[The retention of records policy should address the retention of legal opinions and legal memorandums. These are stored electronically in a separate database maintained by the OLLS.]

Addendum G

Final Version of Proposed Recommended Changes to Retention of Records Policy for Records of the Office of Legislative Legal Services

Records created and maintained by the Office of Legislative Legal Services (“OLLS”) are subject to the following retention of records policy adopted by the Executive Committee on ____ (fill in date):

- 1) In compliance with the requirement to keep legislative bill files set forth in section 2-3-504 (1) (e), C.R.S., the OLLS shall retain for a period of eight years the member files of each member of the general assembly for a particular session. Member files are files created by the OLLS that contain bill requests and amendment requests made by members of the general assembly. Once the member files for a legislative session have been held for eight years, the OLLS shall destroy the files for that session by shredding.
- 2) Pursuant to sections 2-3-504 (1) (e) and 24-72-202 (6.5) (b) (I) and (II), C.R.S., the member files retained by the OLLS in accordance with subsection 1) of this policy are subject to a work-product exception under the Colorado Open Records Act (“CORA”). The following procedures apply to those files if there is a request made to the OLLS for access to the file or to a specific record in the file:
 - a. Member files are work product and remain confidential pursuant to section 2-3-505 (2) (b) (I) and (II), C.R.S., and will not be released, unless the person requesting the file or a specific record in the file obtains the written permission of the applicable member or former member of the general assembly to release the requested member file or record in the file. The OLLS will provide the last known contact information on file with OLLS to the requester if the member is no longer serving in the general assembly.
 - b. If the former member is deceased, the OLLS will not release the applicable member files because the work-product privilege survives the death of the deceased member and no other person can waive that privilege.

- 3) The OLLS may discard extra hardbound volumes and supplements to the Colorado Revised Statutes and session laws that are over fifteen years old.
- 4) The OLLS may discard extra softbound volumes of the Colorado Revised Statutes and the session laws that are over one year old.
- 5) Two years after an administrative rule is submitted to the OLLS by an executive branch agency for purposes of OLLS review, the OLLS may dispose of the OLLS rule review form, the administrative rule filing information form, and any materials attached to the forms, including the rule if printed by the OLLS staff.
- 6) The OLLS shall retain electronic docket books of submissions of rules to preserve a record upon which to certify the submission of rules pursuant to section 24-4-103 (8) (d), C.R.S., and to compile information on the review of rules by the OLLS.
- 7) The OLLS may dispose of the work files of former staff attorneys of the OLLS at the direction of the director of the OLLS. The director shall take into consideration whether those files may be useful to the office in determining legislative intent or may involve subject matter that may be useful to the office in carrying out its duties.
- 8) The OLLS shall retain an electronic copy of any legal opinion or legal memorandum prepared for a member. Legal opinions or legal memorandums prepared by the OLLS are considered work product and will not be released unless the legislator has waived work-product privilege or directs the OLLS to release the legal opinion or legal memorandum.