

First Regular Session
Seventy-first General Assembly
STATE OF COLORADO

REREVISED

*This Version Includes All Amendments
Adopted in the Second House*

LLS NO. 17-0153.01 Bob Lackner x4350

SENATE BILL 17-040

SENATE SPONSORSHIP

Kefalas, Gardner

HOUSE SPONSORSHIP

Pabon,

Senate Committees

State, Veterans, & Military Affairs
Appropriations

House Committees

Finance
Appropriations

A BILL FOR AN ACT

101 CONCERNING PUBLIC ACCESS TO FILES MAINTAINED BY
102 GOVERNMENTAL BODIES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov/>.)

Section 2 of the bill modifies the "Colorado Open Records Act" (CORA) by creating new procedures governing the inspection of public records that are stored as structured data. **Section 1** defines key terms including "structured data", which the bill defines as digital data that is stored in a fixed field within a record or file that is capable of being automatically read, processed, or manipulated by a computer.

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
*Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.*

HOUSE
Amended 3rd Reading
May 10, 2017

HOUSE
Amended 2nd Reading
May 9, 2017

SENATE
3rd Reading Unamended
March 22, 2017

SENATE
Amended 2nd Reading
March 21, 2017

If public records are stored as structured data, section 2 requires the custodian of the public records to provide an accurate copy of the public records in a structured data format when requested. If public records are not stored as structured data but are stored in an electronic or digital form and are searchable in their native format, the custodian is required to provide a copy of the public records in a format that is searchable when requested.

Section 2 specifies the circumstances that exempt the custodian from having to produce records in a searchable or structured data format.

If a custodian is not able to comply with a request to produce public records in a requested format, the custodian is required to produce the records in an alternate format and to provide a written declaration attesting to the reasons the custodian is not able to produce the records in the requested format. If a court subsequently rules the custodian should have provided the data in the requested format but that the custodian reasonably believed, based upon the reasons stated in the written declaration, that the data could not be produced in the requested format, attorney fees may be awarded only if the custodian's action was arbitrary or capricious.

Nothing in the bill requires a custodian to produce records in their native format.

Section 3 expands the grounds permitting the filing of a civil action seeking inspection of a public record to include an allegation of a violation of the digital format provisions in the bill or a violation of record transmission provisions specified in CORA. This section also specifies that altering an existing record, or excising fields of information, to remove information that the custodian is required or allowed to withhold does not constitute the creation of a new public record. Such alteration or excision may be subject to a research and retrieval fee or a fee for the programming of data as allowed under existing provisions of CORA.

Section 4 modifies CORA provisions governing the copy, printout, or photograph of a public record and the imposition of a research and retrieval fee. Among these modifications:

- ! The bill deletes existing statutory language permitting the custodian to charge the same fee for services rendered in supervising the copying, printing out, or photographing of a public record as the custodian may charge for furnishing a copy, printout, or photograph;
- ! The bill replaces a reference in the statute to the phrase "manipulation of data" with the phrase "programming, coding, or custom search queries so as to convert a record into a structured data or searchable format";
- ! In connection with determining the amount of the fee for a paper or electronic copy of a public record, the bill

specifies that, if a custodian performs programming, coding, or custom search queries to create a public record, the fee for a paper or electronic copy of that record may be based on recovery of the actual or incremental costs of performing the programming, coding, or custom search queries, together with a reasonable portion of the costs associated with building and maintaining the information systems; and

! When a person makes a request to inspect or make copies or images of original public records, the bill permits the custodian to charge a fee for the time required for the custodian to supervise the handling of the records, when such supervision is necessary to protect the integrity or security of the original records.

Section 5 repeals the existing criminal misdemeanor offense and penalty for a willful and knowing violation of CORA.

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

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

4 **24-72-203. Public records open to inspection.** (3.5) (a) EXCEPT
5 AS OTHERWISE REQUIRED BY SUBSECTION (3.5)(b) OF THIS SECTION:

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

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

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

15 (b) A CUSTODIAN IS NOT REQUIRED TO PRODUCE A PUBLIC RECORD
16 IN A SEARCHABLE OR SORTABLE FORMAT IN ACCORDANCE WITH

1 SUBSECTION (1)(a) OF THIS SECTION IF:

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

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

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

26 (d) ALTERING AN EXISTING PUBLIC RECORD, OR EXCISING FIELDS
27 OF INFORMATION PURSUANT TO THIS SUBSECTION (3.5) TO REMOVE

1 INFORMATION THAT THE CUSTODIAN IS EITHER REQUIRED OR PERMITTED
2 TO WITHHOLD, DOES NOT CONSTITUTE THE CREATION OF A NEW PUBLIC
3 RECORD.

4 (e) NOTHING IN THIS SUBSECTION (3.5) RELIEVES OR MITIGATES
5 THE OBLIGATIONS OF A CUSTODIAN TO PRODUCE A PUBLIC RECORD IN A
6 FORMAT ACCESSIBLE TO INDIVIDUALS WITH DISABILITIES IN ACCORDANCE
7 WITH TITLE II OF THE FEDERAL "AMERICANS WITH DISABILITIES ACT OF
8 1990", 42 U.S.C. SEC. 12131 ET. SEQ., AND OTHER FEDERAL OR STATE
9 LAWS.

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

12 24-72-204. Allowance or denial of inspection - grounds -
13 procedure - appeal - definitions. (2) (a) The custodian may deny the
14 right of inspection of the following records, unless otherwise provided by
15 law, on the ground that disclosure to the applicant would be contrary to
16 the public interest:

17 (VIII) (A) Specialized details of EITHER security arrangements or
18 investigations OR THE PHYSICAL AND CYBER ASSETS OF CRITICAL
19 INFRASTRUCTURE, INCLUDING THE SPECIFIC ENGINEERING,
20 VULNERABILITY, DETAILED DESIGN INFORMATION, PROTECTIVE MEASURES,
21 EMERGENCY RESPONSE PLANS, OR SYSTEM OPERATIONAL DATA OF SUCH
22 ASSETS THAT WOULD BE USEFUL TO A PERSON IN PLANNING AN ATTACK ON
23 CRITICAL INFRASTRUCTURE BUT THAT DOES NOT SIMPLY PROVIDE THE
24 GENERAL LOCATION OF SUCH INFRASTRUCTURE. Nothing in this
25 subparagraph (VIII) SUBSECTION (2)(a)(VIII) prohibits the custodian from
26 transferring records containing specialized details of EITHER security
27 arrangements or investigations OR THE PHYSICAL AND CYBER ASSETS OF

1 CRITICAL INFRASTRUCTURE to the division of homeland security and
2 emergency management in the department of public safety, the governing
3 body of any city, county, city and county, or other political subdivision of
4 the state, or any federal, state, or local law enforcement agency; except
5 that the custodian shall not transfer any record received from a
6 nongovernmental entity without the prior written consent of the entity
7 unless such information is already publicly available.

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

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

22 (5) Except as provided in subsection (5.5) of this section, any
23 person denied the right to inspect any record covered by this part 2 OR
24 WHO ALLEGES A VIOLATION OF SECTION 24-72-203 (3.5) may apply to the
25 district court of the district wherein the record is found for an order
26 directing the custodian of such record to show cause why the custodian
27 should not permit the inspection of such record; except that, at least three

1 business days prior to filing an application with the district court, the
2 person who has been denied the right to inspect the record shall file a
3 written notice with the custodian who has denied the right to inspect the
4 record informing said custodian that the person intends to file an
5 application with the district court. Hearing on such application shall be
6 held at the earliest practical time. Unless the court finds that the denial of
7 the right of inspection was proper, it shall order the custodian to permit
8 such inspection and shall award court costs and reasonable attorney fees
9 to the prevailing applicant in an amount to be determined by the court;
10 except that no court costs and attorney fees shall be awarded to a person
11 who has filed a lawsuit against a state public body or local public body
12 and who applies to the court for an order pursuant to this subsection (5)
13 for access to records of the state public body or local public body being
14 sued if the court finds that the records being sought are related to the
15 pending litigation and are discoverable pursuant to chapter 4 of the
16 Colorado rules of civil procedure. In the event the court finds that the
17 denial of the right of inspection was proper, the court shall award court
18 costs and reasonable attorney fees to the custodian if the court finds that
19 the action was frivolous, vexatious, or groundless.

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

22 **24-72-206. Violation - penalty.** ~~Any person who willfully and~~
23 ~~knowingly violates the provisions of this part 2 is guilty of a misdemeanor~~
24 ~~and, upon conviction thereof, shall be punished by a fine of not more than~~
25 ~~one hundred dollars, or by imprisonment in the county jail for not more~~
26 ~~than ninety days, or by both such fine and imprisonment.~~

1 **SECTION 4. Act subject to petition - effective date.** This act
2 takes effect at 12:01 a.m. on the day following the expiration of the
3 ninety-day period after final adjournment of the general assembly (August
4 9, 2017, if adjournment sine die is on May 10, 2017); except that, if a
5 referendum petition is filed pursuant to section 1 (3) of article V of the
6 state constitution against this act or an item, section, or part of this act
7 within such period, then the act, item, section, or part will not take effect
8 unless approved by the people at the general election to be held in
9 November 2018 and, in such case, will take effect on the date of the
10 official declaration of the vote thereon by the governor.