

First Regular Session
Seventy-first General Assembly
STATE OF COLORADO

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

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.*

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 (3)(a)(I) and (5) as follows:

12 24-72-204. Allowance or denial of inspection - grounds -
13 procedure - appeal - definitions. (3) (a) The custodian shall deny the
14 right of inspection of the following records, unless otherwise provided by
15 law; except that any of the following records, other than letters of
16 reference concerning employment, licensing, or issuance of permits, shall
17 be available to the person in interest under this subsection (3):

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

27 (5) Except as provided in subsection (5.5) of this section, any

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

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

27 **24-72-206. Violation - penalty.** ~~Any person who willfully and~~

1 knowingly violates the provisions of this part 2 is guilty of a misdemeanor
2 and, upon conviction thereof, shall be punished by a fine of not more than
3 one hundred dollars, or by imprisonment in the county jail for not more
4 than ninety days, or by both such fine and imprisonment.

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