

## CHAPTER 271

**GOVERNMENT - STATE****SENATE BILL 96-212**

BY SENATORS Wells, Johnson, Matsunaka, Mutzebaugh, Pascoe, and Perlmutter;  
also REPRESENTATIVES Adkins, George, Kerns, Leyba, Lyle, Reeser, Saliman, and Tupa.

**AN ACT**

**CONCERNING PUBLIC ACCESS TO GOVERNMENTAL PROCESSES, AND, IN CONNECTION THEREWITH,  
AMENDING THE PUBLIC RECORDS AND OPEN MEETINGS LAWS TO ADDRESS ISSUES RAISED BY THE  
USE OF ELECTRONIC MAIL BY GOVERNMENTAL AGENCIES.**

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

**SECTION 1. Legislative declaration - use of e-mail.** The general assembly hereby finds and declares that the use of electronic mail by agencies, officials, and employees of state government creates unique circumstances. Electronic mail shares some features with telephonic communication, which generally is not stored in any form and is generally regarded as private. However, electronic mail differs in that it creates an electronic record that may be used or retrieved in electronic or paper format. The use of electronic mail is becoming more common and more important in facilitating the ability of government officials to gather information and communicate with their staff, other officials and agencies, and the public. However, individual officials are not equipped to act as official custodians of such communications and to determine whether or not the communications might be public records. For these reasons, this act is intended to balance the privacy interests and practical limitations of public officials and employees with the public policy interests in access to government information.

**SECTION 2.** 2-3-505, Colorado Revised Statutes, 1980 Repl. Vol., as amended, is amended to read:

**2-3-505. Requests for drafting bills and amendments - confidential nature thereof - lobbying for bills.** (1) All requests made to the office for the drafting of bills OR AMENDMENTS THERETO shall be submitted, either in writing or orally, by the legislator or BY the governor or ~~his~~ THE GOVERNOR'S representative making the request, with a general statement respecting the policies and purposes which the

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

person making the request desires the bill OR AMENDMENT to accomplish. The office shall draft each bill OR AMENDMENT to conform to the purposes so stated or to supplementary instructions of the person making the original request.

(2) (a) Prior to the introduction of a bill OR AMENDMENT in the general assembly, no employee of the office shall reveal to any person outside the office the contents or nature of such bill OR AMENDMENT, except with the consent of the person making the request. Nothing in this section shall prohibit the disclosure to the staff of any legislative service agency of such information concerning bills OR AMENDMENTS prior to introduction as is necessary to expedite the preparation of fiscal notes, as provided by the rules of the general assembly, but such staff shall not reveal the contents or nature of such bills OR AMENDMENTS to any other person without the consent of the person making the request.

(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.

(3) No employee of the office shall lobby, personally or in any other manner, directly or indirectly, for or against any pending legislation before the general assembly.

**SECTION 3.** 24-6-402 (2) (d), Colorado Revised Statutes, 1988 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SUBPARAGRAPH to read:

**24-6-402. Meetings - open to public.** (2) (d) (III) IF ELECTED OFFICIALS USE ELECTRONIC MAIL TO DISCUSS PENDING LEGISLATION OR OTHER PUBLIC BUSINESS AMONG THEMSELVES, THE ELECTRONIC MAIL SHALL BE SUBJECT TO THE REQUIREMENTS OF THIS SECTION. ELECTRONIC MAIL COMMUNICATION AMONG ELECTED OFFICIALS THAT DOES NOT RELATE TO PENDING LEGISLATION OR OTHER PUBLIC BUSINESS SHALL NOT BE CONSIDERED A "MEETING" WITHIN THE MEANING OF THIS SECTION.

**SECTION 4.** 24-72-202 (1), (6), and (7), Colorado Revised Statutes, 1988 Repl. Vol., as amended, are amended, and the said 24-72-202 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

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

(1) ~~"Custodian" means and includes the official custodian or any authorized person having personal custody and control of the public records in question.~~ "CORRESPONDENCE" MEANS A COMMUNICATION THAT IS SENT TO OR RECEIVED BY ONE OR MORE SPECIFICALLY IDENTIFIED INDIVIDUALS AND THAT IS OR CAN BE PRODUCED IN WRITTEN FORM, INCLUDING, WITHOUT LIMITATION:

(a) COMMUNICATIONS SENT VIA U.S. MAIL;

(b) COMMUNICATIONS SENT VIA PRIVATE COURIER;

## (c) COMMUNICATIONS SENT VIA ELECTRONIC MAIL.

(1.1) "CUSTODIAN" MEANS AND INCLUDES THE OFFICIAL CUSTODIAN OR ANY AUTHORIZED PERSON HAVING PERSONAL CUSTODY AND CONTROL OF THE PUBLIC RECORDS IN QUESTION.

(1.2) "ELECTRONIC MAIL" MEANS AN ELECTRONIC MESSAGE THAT IS TRANSMITTED BETWEEN TWO OR MORE COMPUTERS OR ELECTRONIC TERMINALS, WHETHER OR NOT THE MESSAGE IS CONVERTED TO HARD COPY FORMAT AFTER RECEIPT AND WHETHER OR NOT THE MESSAGE IS VIEWED UPON TRANSMISSION OR STORED FOR LATER RETRIEVAL. "ELECTRONIC MAIL" INCLUDES ELECTRONIC MESSAGES THAT ARE TRANSMITTED THROUGH A LOCAL, REGIONAL, OR GLOBAL COMPUTER NETWORK.

(6) (a) (I) "Public records" means and includes all writings made, maintained, or kept by the state or any agency, institution, or political subdivision thereof for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.

(II) "PUBLIC RECORDS" INCLUDES THE CORRESPONDENCE OF ELECTED OFFICIALS, EXCEPT TO THE EXTENT THAT SUCH CORRESPONDENCE IS:

(A) WORK PRODUCT;

(B) WITHOUT A DEMONSTRABLE CONNECTION TO THE EXERCISE OF FUNCTIONS REQUIRED OR AUTHORIZED BY LAW OR ADMINISTRATIVE RULE AND DOES NOT INVOLVE THE RECEIPT OR EXPENDITURE OF PUBLIC FUNDS;

(C) A COMMUNICATION FROM A CONSTITUENT TO AN ELECTED OFFICIAL THAT CLEARLY IMPLIES BY ITS NATURE OR CONTENT THAT THE CONSTITUENT EXPECTS THAT IT IS CONFIDENTIAL OR A COMMUNICATION FROM THE ELECTED OFFICIAL IN RESPONSE TO SUCH A COMMUNICATION FROM A CONSTITUENT; OR

(D) SUBJECT TO NONDISCLOSURE AS REQUIRED IN SECTION 24-72-204 (1).

(III) THE ACCEPTANCE BY A PUBLIC OFFICIAL OR EMPLOYEE OF COMPENSATION FOR SERVICES RENDERED, OR THE USE BY SUCH OFFICIAL OR EMPLOYEE OF PUBLICLY OWNED EQUIPMENT OR SUPPLIES, SHALL NOT BE CONSTRUED TO CONVERT A WRITING THAT IS NOT OTHERWISE A "PUBLIC RECORD" INTO A "PUBLIC RECORD".

(b) ~~It~~ "PUBLIC RECORDS" does not include:

(I) Criminal justice records which are subject to the provisions of part 3 of this article;

(II) WORK PRODUCT PREPARED FOR ELECTED OFFICIALS.

(6.5) (a) "WORK PRODUCT" MEANS AND INCLUDES ALL INTRA- OR INTER-AGENCY ADVISORY OR DELIBERATIVE MATERIALS ASSEMBLED FOR THE BENEFIT OF ELECTED OFFICIALS, WHICH MATERIALS 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. SUCH MATERIALS

INCLUDE, BUT ARE NOT LIMITED TO:

(I) NOTES AND MEMORANDA THAT RELATE TO OR SERVE AS BACKGROUND INFORMATION FOR SUCH DECISIONS;

(II) PRELIMINARY DRAFTS AND DISCUSSION COPIES OF DOCUMENTS THAT EXPRESS A DECISION BY AN ELECTED OFFICIAL.

(b) "WORK PRODUCT" ALSO INCLUDES ALL DOCUMENTS RELATING TO THE DRAFTING OF BILLS OR AMENDMENTS, PURSUANT TO SECTION 2-3-505 (2) (b), C.R.S., AND ALL RESEARCH PROJECTS CONDUCTED BY STAFF OF LEGISLATIVE COUNCIL PURSUANT TO SECTION 2-3-304 (1), C.R.S., IF THE RESEARCH IS REQUESTED BY A MEMBER OF THE GENERAL ASSEMBLY AND IDENTIFIED BY THE MEMBER AS BEING IN CONNECTION WITH PENDING OR PROPOSED LEGISLATION OR AMENDMENTS THERETO. HOWEVER, THE FINAL PRODUCT OF ANY SUCH RESEARCH PROJECT SHALL BECOME A PUBLIC RECORD UNLESS THE MEMBER SPECIFICALLY REQUESTS THAT IT REMAIN WORK PRODUCT. IN ADDITION, IF SUCH A RESEARCH PROJECT IS REQUESTED BY A MEMBER OF THE GENERAL ASSEMBLY AND THE PROJECT IS NOT IDENTIFIED AS BEING IN CONNECTION WITH PENDING OR PROPOSED LEGISLATION OR AMENDMENTS THERETO, THE FINAL PRODUCT SHALL BECOME A PUBLIC RECORD.

(c) "WORK PRODUCT" DOES NOT INCLUDE:

(I) ANY FINAL VERSION OF A DOCUMENT THAT EXPRESSES A FINAL DECISION BY AN ELECTED OFFICIAL;

(II) ANY FINAL VERSION OF A FISCAL OR PERFORMANCE AUDIT REPORT OR SIMILAR DOCUMENT THE PURPOSE OF WHICH IS TO INVESTIGATE, TRACK, OR ACCOUNT FOR THE OPERATION OR MANAGEMENT OF A PUBLIC ENTITY OR THE EXPENDITURE OF PUBLIC MONEY, TOGETHER WITH THE FINAL VERSION OF ANY SUPPORTING MATERIAL ATTACHED TO SUCH FINAL REPORT OR DOCUMENT;

(III) ANY FINAL ACCOUNTING OR FINAL FINANCIAL RECORD OR REPORT;

(IV) ANY MATERIALS THAT WOULD OTHERWISE CONSTITUTE WORK PRODUCT IF SUCH MATERIALS ARE PRODUCED AND DISTRIBUTED IN A PUBLIC MEETING OR CITED AND IDENTIFIED IN THE TEXT OF THE FINAL VERSION OF A DOCUMENT THAT EXPRESSES A DECISION BY AN ELECTED OFFICIAL.

(7) "Writings" means and includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics. "WRITINGS" INCLUDES DIGITALLY STORED DATA, INCLUDING WITHOUT LIMITATION ELECTRONIC MAIL MESSAGES, but does not include computer software.

**SECTION 5.** 24-72-203 (1), (2), and (3), Colorado Revised Statutes, 1988 Repl. Vol., are amended to read:

**24-72-203. Public records open to inspection.** (1)(a) All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law, but the official custodian of any public

records may make such rules ~~and regulations~~ with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or ~~his~~ THE CUSTODIAN'S office.

(b) WHERE PUBLIC RECORDS ARE KEPT ONLY IN MINIATURIZED OR DIGITAL FORM, WHETHER ON MAGNETIC OR OPTICAL DISKS, TAPES, MICROFILM, MICROFICHE, OR OTHERWISE, THE OFFICIAL CUSTODIAN SHALL:

(I) ADOPT A POLICY REGARDING THE RETENTION, ARCHIVING, AND DESTRUCTION OF SUCH RECORDS; AND

(II) TAKE SUCH MEASURES AS ARE NECESSARY TO ASSIST THE PUBLIC IN LOCATING ANY SPECIFIC PUBLIC RECORDS SOUGHT AND TO ENSURE PUBLIC ACCESS TO THE PUBLIC RECORDS WITHOUT UNREASONABLE DELAY OR UNREASONABLE COST. SUCH MEASURES MAY INCLUDE, WITHOUT LIMITATION, THE AVAILABILITY OF VIEWING STATIONS FOR PUBLIC RECORDS KEPT ON MICROFICHE; THE PROVISION OF PORTABLE DISK COPIES OF COMPUTER FILES; OR DIRECT ELECTRONIC ACCESS VIA ON-LINE BULLETIN BOARDS OR OTHER MEANS.

(2) (a) If the public records requested are not in the custody or control of the person to whom application is made, such person shall forthwith notify the applicant of this fact, in writing if requested by the applicant. In such notification, ~~he~~ THE PERSON shall state in detail to the best of ~~his~~ THE PERSON'S knowledge and belief the reason for the absence of the records from ~~his~~ THE PERSON'S custody or control, ~~their~~ THE LOCATION OF THE RECORDS, and what person then has custody or control of the records.

(b) IF AN OFFICIAL CUSTODIAN HAS CUSTODY OF CORRESPONDENCE SENT BY OR RECEIVED BY AN ELECTED OFFICIAL, THE OFFICIAL CUSTODIAN SHALL CONSULT WITH THE ELECTED OFFICIAL PRIOR TO ALLOWING INSPECTION OF THE CORRESPONDENCE FOR THE PURPOSE OF DETERMINING WHETHER THE CORRESPONDENCE IS A PUBLIC RECORD.

(3) (a) If the public records requested are in the custody and control of the person to whom application is made but are in active use, ~~or~~ in storage, ~~and therefore~~ OR OTHERWISE not READILY available at the time an applicant asks to examine them, the custodian shall forthwith notify the applicant of this fact, in writing if requested by the applicant. If requested by the applicant, the custodian shall set a date and hour ~~within three working days~~ at which time the records will be available for inspection.

(b) THE DATE AND HOUR SET FOR THE INSPECTION OF RECORDS NOT READILY AVAILABLE AT THE TIME OF THE REQUEST SHALL BE WITHIN A REASONABLE TIME AFTER THE REQUEST. AS USED IN THIS SUBSECTION (3), A "REASONABLE TIME" SHALL BE PRESUMED TO BE THREE WORKING DAYS OR LESS. SUCH PERIOD MAY BE EXTENDED IF EXTENUATING CIRCUMSTANCES EXIST. HOWEVER, SUCH PERIOD OF EXTENSION SHALL NOT EXCEED SEVEN DAYS. A FINDING THAT EXTENUATING CIRCUMSTANCES EXIST SHALL BE MADE IN WRITING BY THE CUSTODIAN AND SHALL BE PROVIDED TO THE PERSON MAKING THE REQUEST WITHIN THE THREE-DAY PERIOD. EXTENUATING CIRCUMSTANCES SHALL APPLY ONLY WHEN:

(I) A BROADLY STATED REQUEST IS MADE THAT ENCOMPASSES ALL OR SUBSTANTIALLY ALL OF A LARGE CATEGORY OF RECORDS AND THE REQUEST IS WITHOUT SUFFICIENT SPECIFICITY TO ALLOW THE CUSTODIAN REASONABLY TO PREPARE OR GATHER THE RECORDS WITHIN THE THREE-DAY PERIOD; OR

(II) A BROADLY STATED REQUEST IS MADE THAT ENCOMPASSES ALL OR SUBSTANTIALLY ALL OF A LARGE CATEGORY OF RECORDS AND THE AGENCY IS UNABLE TO PREPARE OR GATHER THE RECORDS WITHIN THE THREE-DAY PERIOD BECAUSE:

(A) THE AGENCY NEEDS TO DEVOTE ALL OR SUBSTANTIALLY ALL OF ITS RESOURCES TO MEETING AN IMPENDING DEADLINE OR PERIOD OF PEAK DEMAND THAT IS EITHER UNIQUE OR NOT PREDICTED TO RECUR MORE FREQUENTLY THAN ONCE A MONTH; OR

(B) IN THE CASE OF THE GENERAL ASSEMBLY OR ITS STAFF OR SERVICE AGENCIES, THE GENERAL ASSEMBLY IS IN SESSION.

(c) IN NO EVENT CAN EXTENUATING CIRCUMSTANCES APPLY TO A REQUEST THAT RELATES TO A SINGLE, SPECIFICALLY IDENTIFIED DOCUMENT.

**SECTION 6.** 24-72-204 (2) (a) (III) and (6), Colorado Revised Statutes, 1988 Repl. Vol., as amended, are amended to read:

**24-72-204. Allowance or denial of inspection - grounds - procedure - appeal.**

(2) (a) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest:

(III) The specific details of bona fide research projects being conducted by a state institution, INCLUDING, WITHOUT LIMITATION, RESEARCH PROJECTS UNDERTAKEN BY STAFF OR SERVICE AGENCIES OF THE GENERAL ASSEMBLY OR THE OFFICE OF THE GOVERNOR IN CONNECTION WITH PENDING OR ANTICIPATED LEGISLATION;

(6) (a) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection, ~~he~~ THE OFFICIAL CUSTODIAN may apply to the district court of the district in which such record is located for an order permitting him OR HER to restrict such disclosure. Hearing on such application shall be held at the earliest practical time. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. In such action the burden of proof shall be upon the custodian. The person seeking permission to examine the record shall have notice of said hearing served upon him OR HER in the manner provided for service of process by the Colorado rules of civil procedure and shall have the right to appear and be heard.

(b) IN DEFENSE AGAINST AN APPLICATION FOR AN ORDER UNDER SUBSECTION (5) OF THIS SECTION, THE CUSTODIAN MAY RAISE ANY ISSUE THAT COULD HAVE BEEN RAISED BY THE CUSTODIAN IN AN APPLICATION UNDER PARAGRAPH (a) OF THIS SUBSECTION (6).

**SECTION 7.** Part 2 of article 72 of title 24, Colorado Revised Statutes, 1988

Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

**24-72-204.5. Adoption of electronic mail policy.** (1) ON OR BEFORE JULY 1, 1997, THE STATE OR ANY AGENCY, INSTITUTION, OR POLITICAL SUBDIVISION THEREOF THAT OPERATES OR MAINTAINS AN ELECTRONIC MAIL COMMUNICATIONS SYSTEM SHALL ADOPT A WRITTEN POLICY ON ANY MONITORING OF ELECTRONIC MAIL COMMUNICATIONS AND THE CIRCUMSTANCES UNDER WHICH IT WILL BE CONDUCTED.

(2) THE POLICY SHALL INCLUDE A STATEMENT THAT CORRESPONDENCE OF THE EMPLOYEE IN THE FORM OF ELECTRONIC MAIL MAY BE A PUBLIC RECORD UNDER THE PUBLIC RECORDS LAW AND MAY BE SUBJECT TO PUBLIC INSPECTION UNDER SECTION 24-72-203.

**SECTION 8.** 24-80-101 (1), Colorado Revised Statutes, 1988 Repl. Vol., is amended BY THE ADDITION OF A NEW PARAGRAPH to read:

**24-80-101. Definitions.** As used in this part 1, unless the context otherwise requires:

(1) "Records" means all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the value of the official governmental data contained therein. As used in this part 1, the following are excluded from the definition of records:

(f) ELECTRONIC MAIL MESSAGES, REGARDLESS OF WHETHER SUCH MESSAGES ARE PRODUCED OR STORED USING STATE-OWNED EQUIPMENT OR SOFTWARE, UNLESS THE RECIPIENT HAS PREVIOUSLY SEGREGATED AND STORED SUCH MESSAGES AS EVIDENCE OF THE ORGANIZATION, FUNCTIONS, POLICIES, DECISIONS, PROCEDURES, OPERATIONS, OR OTHER ACTIVITIES OF THE GOVERNMENT OR BECAUSE OF THE VALUE OF THE OFFICIAL GOVERNMENTAL DATA CONTAINED THEREIN.

**SECTION 9. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 1, 1996