

**First Regular Session  
Seventy-first General Assembly  
STATE OF COLORADO**

**REVISED**

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

LLS NO. 17-0153.01 Bob Lackner x4350

**SENATE BILL 17-040**

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**SENATE SPONSORSHIP**

**Kefalas, Gardner**

**HOUSE SPONSORSHIP**

**Pabon,**

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**Senate Committees**

State, Veterans, & Military Affairs  
Appropriations

**House Committees**

Finance  
Appropriations

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**A BILL FOR AN ACT**

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

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**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 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.

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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.