

Colorado Open Records Act and Colorado Criminal Justice Records Act

Colo. Rev. Stat. § 24-72-200.1, et seq.

Colo. Rev. Stat. § 24-72-301, et seq.

What is a CORA Request?

- Simply, a CORA Request is a request to inspect and copy “public records.”
- Under the CORA, “all public records shall be open for inspection by any person at reasonable times, except as provided [elsewhere].” Colo. Rev. Stat. § 24-72-203(1)(a).
- “All public records shall be open for inspection by any person at reasonable times” *Id.*

What are “Public Records?”

- Basically: “all writings made, maintained, or kept by the state, any agency, institution, a nonprofit corporation . . . or political subdivision of the state . . . and held by any local-government-financed entity for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.” Colo. Rev. Stat. § 24-72-202(6)(a).

What are not “Public Records”

- Several things do not qualify as “public records,” see Colo. Rev. Stat. § 24-72-202(6)(b), such as:
 - Work Product prepared for elected officials
 - Certain information related to institutions’ receipt and expenditure of funds
 - Certain security information
 - Information provided to the medical marijuana licensing authority
 - Records related to Civil Union (added this year)

- Criminal Justice Records

Requestee's Obligations under CORA

- If the person or entity you make the request to doesn't have the records, they must inform you "forthwith" and tell you who would have the records. Colo. Rev. Stat. § 24-72-203(2)(a).
 - If you want this in writing, you must request it. *Id.*
 - If the records are in active use, storage or otherwise not readily available, they must inform you "forthwith." Colo. Rev. Stat. § 24-72-203(3)(a).
 - If you want this in writing, you must request it. *Id.*

When records are in Active Use, Storage, or Not Readily Available

- If a response states that records are not readily available, you should request that the custodian set a date and time for your inspection. Colo. Rev. Stat. § 24-72-203(3)(a).
 - You must request that they do so.
 - You should probably put this request in the letter.
 - You probably should request that they do so, so you're not put on the back burner forever.
 - The date and time must be within a "reasonable time." *Id.*

What is a Reasonable Time

- A "reasonable time" is "presumed to be three working days or less [but] may be extended if extenuating circumstances exist. However such period of extension shall not exceed seven working days." Colo. Rev. Stat. § 24-72-203(3)(b).
 - Extenuating circumstances are defined in Colo. Rev. Stat. § 24-72-203(3)(b)(I)-(III).
 - Includes things like voluminous requests, broadly stated requests, or other important agency deadlines.
- "In no event can extenuating circumstances apply to a request that relates to a single, specifically identified document." Colo. Rev. Stat. § 24-72-203(3)(c).

After Request is Made

- The custodian can limit or deny you access to certain records and things that are not “public records.” See Colo. Rev. Stat. § 24-72-202(6)(b); 24-72-204(1)-(3.5).
 - If there is a denial, you “may request a written statement of the grounds for the denial, which shall cite the law or regulation under which access is denied.” Colo. Rev. Stat. § 24-72-204(4).
 - Let the custodian make this call. Don’t fail to request something because you think the custodian will deny access. You just might be surprised.

CCJRA Distinguished

- CCJRA applies to “criminal justice records”
 - “all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule, including but not limited to the results of chemical biological substance testing to determine genetic markers conducted pursuant to sections 16-11-102.4 and 16-23-104, C.R.S.”

Discretion

- “all criminal justice records, at the discretion of the official custodian, may be open for inspection by any person at reasonable times ...” Colo. Rev. Stat. § 24-72-304(1).
- Contrast with CORA: “CORA allows access to all public records not specifically exempted by law.” *Denver Publ’g Co. v. Univ. of Colo.*, 812 P.2d 683-84 (Colo. App. 1990).

Reasonable Time?

- CCJRA does not define “reasonable time,” so custodians are not limited to three to seven business days.
- But, it’s not unlimited: “[W]hen the General Assembly uses the same words or phrases in different parts of the statute, then, in the absence of any manifest indication to the contrary, the meaning attributed to the words or phrases in one part of the statute should be ascribed to the same words or phrases found elsewhere in the statute.”

Otherwise, they're very similar

- Both:
 - Are part of the Public Records Act
 - Mandate access at reasonable times
 - Require custodians to “forthwith” notify if records are in active use or storage...if you ask them to
 - Require custodians not in possession of records to “forthwith” notify requestors...if you ask them to
 - Require custodians to cite specific law or regulation...if you ask them to

What to do?

- Not always clear if it's a “public record” or “criminal justice record”
 - *See Land Owners United, LLC v. Waters*, 293 P.3d 86 (Colo. App. 2011); Colo. Rev. Stat. § 30-10-101(1)(a).
- If you're not sure, cite to both!

Now that you know what CORA and CCJRA Request are:

The Next Steps

Is a Request Needed?

- Can the document be obtained from the client? Through the client?
- If it's a public document, it may be available online for free.
 - Just make sure you're using a reliable source, such as the agency's, court's, etc.'s website itself.
 - Wikipedia is NOT a reliable source!
 - But it can link to reliable sources in the endnotes.
 - Web pages change, so print or save to PDF.

“But, they’re so nice!”

Just because you have a friendly relationship with the person you’re requesting from, your obligation is to your client. So, don’t rely on the friendly person saying that they’ll get you what you need if there’s a time issue. It’s better to impose the legal obligation to respond on someone and protect your client than to maintain a friendly relationship to your client’s detriment. Besides, the person’s likely a professional and won’t be hurt that you’re acting in a professional manner too.

“I’m a bulldog!”

Often times, the person responding is simply doing their job to the best of their ability. Even if the person has not complied with 100% of the CORA – for instance, you get a call on the fourth day asking for more information – that’s no reason to be rude or angry.

You catch more flies with honey than you do with vinegar.

Drafting a Request

- Make sure you:
 - Date the Request
 - Address the Request to the **Custodian of Records**
 - Make clear that you’re requesting pursuant to the CORA, CCJRA or both
 - Ask that, if access is denied, the custodian provide you with a written statement of the grounds for the denial, pursuant to Colo. Rev. Stat. § 24-72-204(4); § 24-72-305(6).

Drafting a Request (Cont.)

- Make sure you:
 - Don’t waive the CORA’s legal requirements regarding a “reasonable time”
 - Ask that if the records aren’t readily available, the custodian set a date and time for the inspection
 - Request accommodations you may need to inspect the records
 - Are SPECIFIC about what records you wish to inspect!!!

Being Specific

- If you only need a specific document, only request that specific document.

- Remember, extenuating circumstances don't apply to a specifically identified document, under the CORA.
- If you need a lot of documents, describe each document as much as possible.
- But, if you need most of what's in, for instance, a client's file, it may be more expedient to ask for the whole file.

Client Documents

If the documents you are requesting concern a specific person, you will likely need to send a signed release from that person authorizing you to access those documents.

Costs of Requests

- Try to minimize costs as much as possible by asking for documents in electronic format, unless that is not accessible to you.
- They may charge for looking for the records, even if you don't end up getting copies or inspecting the records.
 - You can ask that they estimate the cost of looking for the records before you incur any costs, but this will delay your receipt of the records.
 - Section 205(1)(b) was added this year to require custodians mail records, but permits withholding until payment is received.

Costs of Requests (Cont.)

- You can always ask that any costs be waived. *See Colo. Rev. Stat. § 24-72-205(4).*
 - “Such fee may be reduced or waived by the custodian if the electronic services and products are to be used for a public purpose, including public agency program support, nonprofit activities, journalism, and academic research.”
 - See also, Colo. Rev. Stat. § 24-72-306(1) (permitting discretionary fee waivers)
 - Make sure you check with your supervisor before indicating that you're requesting on CCDC's behalf!
 - The custodian can charge up to 25 cents per page for copies, or actual cost of providing copies if its not a standard page. *See Colo. Rev. Stat. § 24-72-205(5)(a); 24-72-306(1).*

Requesting Accommodations

- If you need an accommodation to review the records, all the same rules apply:
 - Follow the procedures discussed in this program regarding making requests for accommodations.
 - Put your request for accommodation in the request letter
- The same result can occur if you are denied accommodations, including the possibility of a lawsuit.

Sending the Request

- First things first!
 - Make sure the Request is correctly dated
 - Make sure you have the correct address or fax number
 - Make sure your Request is sent to the proper person
 - Make sure you save a copy of the Request if you are sending the original
 - If you're using e-mail or fax, make sure your device has the accurate date and time.
 - Start the log

Methods of Sending

- Neither the CORA nor the CCJRA prescribe a specific method of sending the request, but you will need proof.
 - E-mail is great because it's free, instantaneous, and you will have a time and date stamped copy.
 - If e-mailing, do not blast your Request to everyone. That will only cause confusion and duplication.
 - It may be helpful to put the text of the request into the body of the e-mail, even if you attach the Request too.

Methods of Sending (Cont.)

- Faxing is good because it's fairly cheap, almost instantaneous, and you will have a confirmation.
 - Beware: fax machines can go down, which may mean that the fax doesn't go through.
- USPS, UPS, FedEx, DHL, etc.
 - Make sure you get delivery confirmation.
 - Significantly more expensive.
 - Greater delay with delivery.
 - We usually do Certified Mail.

What happens next

- Unfortunately, you will frequently not get a response within three days. Although that may technically be a violation of the law, it does not mean you won't get the records.
- The custodian of records must respond.
- Don't forget about your log.

Types of Responses

- You might get:
 - A notice that they require additional time
 - Should be no more than seven days, if CORA, see Colo. Rev. Stat. § 24-72-203(3)(b), but may be more.
 - A notice that they don't have the records
 - You can ask that this be in writing. See Colo. Rev. Stat. § 24-72-203(2)(a); 24-72-304(2).
 - Consider following-up and asking the methods they used to search for the records.
 - A notice that the records are not readily available

- You can also ask that this be in writing. *See* Colo. Rev. Stat. § 24-72-203(3)(a); 24-72-304(2).
- A notice of the date and time set for your inspection, if you asked that one be set. *See* Colo. Rev. Stat. § 24-72-203(3)(b).

Types of Responses (Cont.)

- You might get:
 - A notice of the anticipated costs or required forms
 - A denial
 - You should request a written statement of the grounds for the denial, which cites the law or regulation under which access is being denied. *See* Colo. Rev. Stat. § 24-72-204(4); 24-72-305(6).
 - A mixed response
 - You may get some, but not all records.
 - You may get any mix of the above.
 - Follow-up. They may have denied part of the request without saying so, or simply misunderstood what you asked for. Whatever the case, you need to know.

Violations:

Legal Remedies

Legal Proceedings

- Under CORA, the custodian of records may initiate a proceeding to determine whether disclosure can or should be limited. *See* Colo. Rev. Stat. § 24-72-204(6)(a).
- You can seek a court order requiring the custodian to show cause as to why you were not permitted to inspect the documents. *See* Colo. Rev. Stat. § 24-72-204(5); 24-72-305(7).

... Not so fast!

- “[A]t least three business days prior to filing an application with the district court, the person who has been denied the right to inspect the record shall file a written notice with the custodian who has denied the right to inspect the record informing said custodian that the person intends to file an application with the district court.” Colo. Rev. Stat. § 24-72-204(5).

Enough is enough!

- You “may apply to the district court wherein the record is found for an order directing the custodian . . . to show cause why the custodian should not permit the inspection of such record.” *See* Colo. Rev. Stat. § 24-72-204(5); 24-72-305(7).
 - That means that you may have to travel.
 - “Hearing on such application shall be held at the earliest practical time.” *Id.*
 - And fast!

Orders

- If the custodian brought an action under the CORA, the court may:
 - Permit the custodian to limit or prohibit disclosure
 - You will get notice of the hearing, and a right to appear at that hearing

See generally Colo. Rev. Stat. § 24-72-204(6).

Orders (Cont.)

- If you brought the action, the court may:
 - Determine that access was rightfully restricted or prohibited.
 - If the court also finds that the action was frivolous, vexatious or groundless, you may have to pay their attorneys fees and court costs. *See* Colo. Rev. Stat. § 24-72-204(5).
 - Order the custodian to disclose the records. *Id.*
 - Order the custodian to pay your attorneys fees and court costs. *Id.*

Legal Program Involvement:

Checklist

When you contact us

- In order for us to even think about bringing an open records case on your behalf, we will need:
 - A copy of the request
 - Proof of your sending the request

- Time-stamped e-mail; fax or delivery confirmation
- The log you created, and copies of all voice messages, letters, etc., if any
- If they only respond to part of your request or what they provide is clearly not what you requested, we will also need a description of the problem in clear terms

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