Colorado Open Records Act

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SUMMARY

I would like to take this opportunity to summarize for you the current requirements of the Colorado Open Records Act, § 24-72-201, *et seq.,* C.R.S., in light of changes to the legislation and the prevalence of electronic mail.

"Public records" are declared open for inspection "at all reasonable times" pursuant to the Colorado Open Records Act, C.R.S. § 24-72-203(1). The Act defines "public records" at C.R.S. § 24-72-202(6)(a)(I) as "... all writings made, maintained, or kept by the state, any agency, institution, or political subdivision of the state" that are "for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds." "Writings" is defined to include facsimile transmissions and e-mail correspondence.

Accordingly, should an individual request copies of all public records relating to a particular subject matter, there is a substantial likelihood that some public records would need to be disclosed *unless one of the exceptions to the Act applies*. **Because the decision as to whether a public record is subject to disclosure requires analysis of the intricate and interrelated statutory provisions, and of the various qualifications and exceptions to those provisions, it is imperative to discuss the request and the nature of the information sought with your attorney before responding to the request.** The Open Records Act balances the competing public policy interests of complete disclosure of all governmental records against personal privacy and other governmental interests in maintaining secrecy as to some records. It can, therefore, be a trap for the unwary and it is difficult, if not impossible to make broad generalizations as to the provisions of the Act.

EXCEPTIONS TO THE MANDATORY DISCLOSURE REQUIREMENTS

The Open Records Act may generally be broken into three parts. The first part describes public records that *must* be disclosed upon request (see C.R.S. §§ 24-72-203(1)(a) and 24-72-

204(1)); the second part describes documents that *may or may not* be disclosed, depending on public interest considerations (see C.R.S. § 24-72-204(2)(a)); and the third part describes public records for which the records custodian *must deny* the right of inspection (see C.R.S. § 24-72-204(3)(a)).

Public records subject to mandatory disclosure requirements generally *do not include* criminal justice records (which records are dealt with under C.R.S. § 24-72-301 *et seq.* and are outside the scope of this presentation), some correspondence of elected officials, certain "work product" information and some documents prepared for use in the "deliberative process" by a governing body, among others. The categories of documents protected from disclosure and most relevant to the municipalities and counties are further defined below:

1. Criminal justice records. If there is a determination that disclosure, would be contrary to the public interest, the custodian of records *may* deny access to certain criminal justice records. Criminal justice records include the records of investigations conducted by the prosecuting attorney or police department, the records of the intelligence information or security procedures of the prosecuting attorney or police department or any investigatory files compiled for any other law enforcement purpose. Only those documents which remain internal investigative matters of the police department are subject to this exception. Once such records are turned over to the prosecutor's office, defense attorneys are entitled to obtain such information. Losavio v. Mayber, 178 Colo. 184, 496 P.2d 1032 (1972). There are additional provisions in the state statute concerning criminal justice records, such as a provision prohibiting disclosure of the names of sexual assault victims. Police records custodians need in depth familiarization with these requirements.

2. Privileged information. C.R.S. § 24-72-204(3)(a)(IV), Inspection of records that contain privileged communications, such as those between an attorney and its client, shall be denied.

3. Documents prepared under the common law governmental or "deliberative processes" privilege. C.R.S. § 24-72-204(3)(a)(XIII).This privilege is based on the ground that "public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect .the government's decision making process, its consultative functions, and the quality of its decisions." Colorado Springs v. White, 967 P.2d 1042 (Colo. 1998). In order to withhold disclosure of any document pursuant to this exception, the records custodian must first determine that the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government.

If a request is made for records which could be classified as records prepared for use in the deliberative process, the records custodian must provide the applicant with a sworn statement listing each document withheld, explaining the privilege under which the document is being withheld and stating the reasons that disclosure would cause substantial injury to the public interest. Only documents which reflect predecisional (generated before the adoption of the decision) and deliberative ("reflective of the give-and-take of the consultative process") processes are subject to the privilege and to non-disclosure. *Id* at 1051.

4. Certain correspondence of elected officials. C.R.S. § 24-72-202. Public records generally include the correspondence, including e-mails, of elected officials except to the extent that such correspondence is either (a) work product; (b) "without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and [which] does not involve the receipt or expenditure of public funds"; or (c) from a constituent to an elected official and clearly implies by its nature or content that the constituent expects that it is confidential or a communication from an elected official in response to such communication by a constituent.

   (a) Work product; Elected officials *may* release or authorize the release of all or any part of work product prepared for them. Without such authorization, however, work product documents do not qualify as public records subject to disclosure. Before a records custodian releases correspondence from or to an elected official, the custodian must consult with the elected official to determine whether the document qualifies as a public record. C.R.S. § 24-72-203(2)(b).

   Work product includes advisory or deliberative materials prepared for elected officials which express an opinion or are deliberative in nature and communicated to assist elected officials in reaching a decision within the scope of their elected position. Such items as notes and memoranda relating to or serving as background information for such decisions or preliminary drafts and discussion copies of documents that express a decision of an elected official are not required to be disclosed as public records. However, a final version of a document expressing a final decision of an elected official would need to be disclosed, as would a final version of a document that consists solely of factual information compiled from public

sources or a final fiscal or performance audit or a final accounting or final financial report.

Because the decision as to whether a public record is subject to disclosure requires analysis of the intricate and interrelated statutory provisions, and of the various qualifications and exceptions to those provisions, it is imperative to discuss the request and the nature of the information sought with your attorney before responding to the request.

MANDATORY NON-DISCLOSURE REQUIREMENTS

Public records subject to mandatory non-disclosure requirements are described in C.R.S. § 24-72-204(3)(a). The categories of documents that must not be disclosed (unless otherwise provided by law) and that are most relevant to the municipalities and counties are further defined below:

1. Medical, mental health, sociological and scholastic achievement data on individual persons;

2. Personnel files;

3. Letters of reference;

4. Trade secrets, privileged information, and confidential commercial, financial, geological, or geophysical data furnished by or obtained from any person;

5. Addresses and telephone numbers of students in any public elementary or secondary school;

6. Names, addresses, telephone numbers, and personal financial information of past or present users of public utilities, public facilities, or recreational or cultural services that are owned and operated by the state, its agencies, institutions, or political subdivisions;

7. Records of sexual harassment complaints and investigations; and

8. Records submitted by or on behalf of an applicant or candidate for an executive position as defined in section 24-72-202(1.3) who is not a finalist.

Again, because the decision as to whether a public record is subject to disclosure or mandatory non-disclosure requires analysis of the intricate and interrelated statutory provisions, and of the various qualifications and exceptions to those provisions, it is

imperative to discuss the request and the nature of the information sought with your attorney before responding to the request.

ELECTRONIC MAIL

Because the Open Records Act defines public records to include correspondence in the form of electronic mail, electronic mail must be disclosed unless it meets the criteria for an exception to the disclosure requirements. Thus, electronic mail between, from, or to employees or elected officials of the City potentially must be disclosed in response to an open records request unless such communications do not otherwise meet the definition of a public record or do meet the criteria for a particular exception.

City employees and elected officials should be conscious that all writings, including documents, communications, notes, and e-mails which memorialize meetings are available for public inspection as public records unless specifically excluded from the definition of public record or from the disclosure requirements. The Public Records Act does not, however, require retention of such notes. Thus, it may be appropriate to dispose of notes made while in attendance at meetings which are of a sensitive nature and which may be subject to public inspection if retained.

E-mail notes or communications are retrievable even if "deleted" unless the recipient undertakes steps beyond simple deletion such as emptying a trash bin. Even then, the messages may remain available on back-up system tapes, etc. Governmental employees and elected officials have a responsibility to the public to comply with the open records laws and the intent of those laws -- ensuring that public business is decided in open forums. Nonetheless, in using electronic mail, employees and elected officials need to be aware of the openness and accessibility of such communications.

In order to protect governmental entities from liability for invading the privacy rights of its employees or elected officials, Colorado enacted legislation requiring governmental entities which operate and maintain an electronic mail communications system to adopt a written policy on any monitoring of electronic mail communications and the circumstances under which it will be conducted. In addition, the policy must state that e-mail correspondence of the employee may be a public record subject to public inspection pursuant to state statute. C.R.S. §24-72-204.5. A simple example of such policy would be:

> *No employee should have any expectation of privacy as to his or her Internet usage or electronic mail messages. The **[name of governmental entity here]** has software and systems in place that can monitor and record all electronic mail and Internet usage, The **[name of governmental entity here]** reserves the right to do so at any time. The communication systems and Internet utilized by **[name of governmental entity here]** are intended solely for business use. Although employees are able to use personal access codes, employees shaft not assume that e-mail messages are personal or confidential.*

*The **[name of governmental entity here]**, as employer, maintains the ability to access any messages left or transmitted over the system. Electronic mail transmitted over the **[name of governmental entity here]** 's internet system is public information and is subject to the laws guaranteeing citizen access to public information.*

Correspondence 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 24-72-204.5 of the Colorado Revised Statutes. Employees' or elected officials' electronic mail may be obtainable by a reporter and published in a newspaper. Electronic mail deleted from the mailbox of an employee or elected official will still exist in system backups for months after being deleted from the employee's mailbox and could be recovered from those backups.

A case study in the disclosure of e-mails under the Open Records Act may be had by examining the decisions of the Colorado Court of Appeals and the Colorado Supreme Court in the "Tracy Baker Cases." Those cases are *Petition of Board of County Commissioners of the County of Arapahoe*, 95 P.3d 593 (Colo. App. 2003) and *Denver Publishing Company v. Board of County Commissioners of the County of Arapahoe*, 121 P.3d 190 (Colo. 2005).

COLORADO COURT OF APPEALS SAYS TRACEY BAKER E-MAILS ARE ONLY PARTIALLY PROTECTED FROM DISCLOSURE

The media requested inspection of a private investigator's report compiled for the Arapahoe County Commissioners concerning County Clerk Tracey Baker and his assistant Leesa Sale. The report included a sexual harassment/hostile work environment investigation and contents of 570 sexually explicit and romantic e-mails between Baker and Sale. The trial court required release of the entire report, including the emails, to the media.

The trial court's order was put on hold while Baker and Sale appealed. The Colorado Court of Appeals ruled that the trial court went too far and that some of the e-mails may be protected from disclosure.

Baker and Sale argued that the e-mails were not "public records" within the meaning of CORA, but were private, personal and confidential communications whose disclosure is prohibited by the statute. Although they acknowledged that CORA's definition of "writings" includes e-mails, they argued that certain exceptions to disclosure applied to keep them private.

The Court of Appeals, however, disagreed with Baker and Sale that the emails should not be disclosed because they fall within the official correspondence exception. To fall within this exception, the Court of Appeals reasoned, the correspondence of elected officials cannot involve the receipt or expenditure of public funds. The Court of Appeals found that this exception did not apply to protect the e-mails. The e-mails were sent on an e-mail system purchased by the County for use by County employees and the e-mails were sent over county-owned computers. The county's e-mail and Internet policies contemplated some occasional use of e-mails for personal

purposes, but not the volume at issue here. The Court found out that the use of this system to send sexually explicit e-mails or mail unrelated to county business was relevant to allegations that Baker misspent public funds, including improperly promoting and compensating Sale.

Baker and Sale next argued that the e-mails were protected under the "records of sexual harassment" exception. Under CORA, disclosure of sexual harassment complaints, investigations, and the results are prohibited unless disclosure can be made without disclosing the identity of the individuals involved. The Court found that the sexual harassment/hostile work environment report and e-mails that referred to the employee filing the hostile work environment complaint were protected from disclosure. However, the disclosure of e-mails not related to the county's investigation of employee complaints could be made without revealing the identity of other employees.

Lastly, Baker and Sale argued that their constitutional right to privacy should protect the e-mails that were not related to county business. The Court determined that CORA is subject to a constitutional right of privacy known as the right to confidentiality. To be protected by a right to confidentiality, the following must be answered: (1) is there a legitimate expectation of privacy? (2) is disclosure nonetheless necessary to serve a compelling state interest? (3) if so, will disclosure occur in the manner least intrusive to the right of confidentiality?

The Court of Appeals agreed with the trial court's conclusion that Baker and Sale were on notice from the County's e-mail and Internet policies that their e-mails might have to be disclosed. However, the Court disagreed that Baker and Sale were on notice that any person at any time could request and receive copies of their e-mails. Specifically, the trial court did not consider whether the e-mails concerned highly personal and sensitive information whose disclosure would be offensive and objectionable to a person of ordinary sensibilities. Moreover, the County's policies did anticipate some occasional use of e-mail for personal reasons, and did state that messages not deleted by users would be automatically purged after 90 days with no possibility of retrieval. Therefore, the Court found that Baker and Sale had a reasonable expectation under . CORA that personal, sexually explicit e-mails would be subject to more limited disclosure.

Baker and Sale next contended that disclosure of their e-mails does not serve any compelling state interest. But the Court found that disclosure could help explain why Baker promoted Sale, why she received substantial pay raises, and why she was not terminated despite allegations of embezzlement. So e-mails related to these three government interests would not be protected.

The Court of Appeals concluded that Baker and Sale had a limited expectation of privacy, that many of the e-mails are personal and sensitive, and that there is a compelling state interest in only those e-mails relevant to Sale's promotion, salary and potential grounds for termination. As for the private e-mails that are not completely protected, the Court said that these must be disclosed in the least intrusive manner. So the Court sent the case back down to the trial court to determine whether some limited disclosure of these e-mails is appropriate, e.g., redacted or summary disclosure of the private e-mails.

COLORADO SUPREME SAYS TRACEY BAKER E-MAILS ARE, FOR THE MOST PART, NOT "PUBLIC RECORDS" AS DEFINED BY THE OPEN RECORDS ACT

The Colorado Supreme Court granted certiorari (the right to bring an appeal to them) to determine the issue of whether the mandated disclosure of the e-mails pursuant to the Open Records Act was barred by Baker's and Sale's constitutional privacy rights. In fact, however, the Supreme Court never analyzed the constitutional issue because, in its words "the privacy interests raised by Baker and Sale under the circumstances of this case should have been protected through the correct application of the "public records" definition.

The Supreme Court held that it was apparent that e-mail must meet the same requirement as any other record to be deemed a "public record." To be a "public record" an e-mail message must be for use in the performance of public functions or involve the receipt and expenditure of public funds. According to the Supreme Court, "[t]he simple possession, creation, or receipt of an e-mail record by a public official or employee is not dispositive as to whether the record is a 'public record' [and] [t]he fact that a public employee or public official sent or received a message while compensated by public funds or using publicly-owned computer equipment is insufficient to make the message a 'public record.'"

In its conclusion as to the issues raised by the Baker and Sale e-mails, the Supreme Court said:

> After considering the content of the e-mail messages, as required by the statute, we conclude that not all of the e-mail messages at issue here have a demonstrable connection to the performance of public functions or involve the receipt or expenditure of public funds. It is apparent that a large portion of the e-mail messages instead contain only sexually explicit exchanges between Baker and Sale. Based upon the content of the e-mails, it is clear they were sent in furtherance of their personal relationship and were not for use in the performance of the public functions of the Clerk and Recorder's Office. These messages demonstrate very private exchanges that convey the 'every thought and feeling' of a public official that we sought to guard from disclosure in *Wick. See id.* At 365. The only discernable purpose of disclosing the content of these messages is to shed light on the extent of Baker and Sales' fluency with sexually-explicit terminology and to satisfy the prurient interests of the press and the public.

The Supreme Court's decision in this case emphasizes the importance determining, in the first instance, whether any given record is in fact a "public record." It also makes clear that in making that determination, one must focus on the content of the record, because it is that

content that either makes the record one that addresses public business, which the public has a right to know of under the Open Records Act, or private business, of which the public has no right to know and for which an individual may have a legally protected privacy interest. It is also important to remember that the *Baker* case concerns only the disclosure requirements of the Open Records Act and does *not* affect a public employer's right to discipline its employees for misuse or abuse of e-mail systems.

INSPECTION **AND DISCLOSURE** ***REQUIREMENTS***

Any letter or other written communication received by a governmental entity, including an electronic mail message, that requests access to or copies of documents should be considered an "open records request" made pursuant to the Colorado Open Records Act. This is true whether or not the communication expressly refers to the Colorado Revised Statutes, the Colorado Open Records Act, or cites a statutory provision such as C.R.S, § 24-72-201 through 206. Responding to any open records request should be considered a high priority for the governmental entity. Immediately after receiving any open records act request, the entity's attorney should be notified by telecopying/faxing a copy of the request and following up with a telephone call. It should be the entity's policy to respond within three (3) working days of the receipt of the request. Upon receipt of a copy of the open records act request, your attorney should be able to advise you on the appropriate procedure and content of the response to the request.

C.R.S. § 24-72-203(2) provides that where the department does not have possession of the records, the records custodian "shall forthwith" notify the applicant of this fact in writing if requested by the applicant and shall state in detail the knowledge of the custodian regarding the location and person in custody.

C.R.S. § 24-72-203(3) provides that where the governmental entity possesses or has control of the records, but the records are being used by the entity or one of its department or are held in storage:

1. The custodian "shall forthwith" notify the applicant of the fact in writing if requested by the applicant. C.R.S. § 24-72-203(5)(a); and

2. If requested by the applicant, the custodian shall set a "date and hour within three (3) working days at which time the records will be available for inspection." C.R.S. § 24-72-203(3)(b).

Each open records request may require coordination with the requesting party in order to determine the reasonableness of the response and the appropriate timing of the response. In many cases, the documents requested may require significant time to locate and to produce, thereby requiring a prompt response of this fact to the requesting party.

The Act generally requires that the governmental entity respond to a request in some fashion within three (3) days and it is imperative that this deadline be met. It is not necessary in some cases that the documents themselves be produced within three (3) days, depending on volume, whereabouts and copying considerations, but it is required that a response to the request be made. Because there are exceptions to the type of information which must be released, because the governmental entity may be subjected to liability for releasing information which should not be disclosed, because there are penalties associated with failing to timely respond, and because disclosure may affect current or future litigation involving the governmental entity, it is important that you involve the entity's attorney in determining:

whether the request is in fact an Open Records Act request subject to statutory disclosure requirements;

whether the documents sought are within your "custody and control' or are privileged or excepted from disclosure under the Act or other applicable law; and

how the governmental entity should coordinate or respond to the request and the delivery of copies of documents.

CHARGES FOR COMPLYING WITH OPEN RECORDS REQUESTS

The Act permits a governmental entity to charge a fee not to exceed twenty-five cents per page for standard page copies or, alternatively, the actual cost for providing a copy in a format other than a standard page.

Where the request requires the manipulation of data to generate a record in a form not usually kept by the governmental entity, the entity may impose a reasonable fee not to exceed the actual cost of manipulating the data. C.R.S. § 24-72-205(3). Staff time in manipulating and generating data may be charged. If the request is for computer output other than word processing, state law allows for recovery of the incremental costs of providing the electronic services and products together with a reasonable portion of the costs associated with building and maintaining the information system. Therefore, charges for providing database records may include a reasonable fee for the cost of building and maintaining the database. A sample request form and invoice is attached.

ENFORCEMENT OF THE OPEN RECORDS ACT

Pursuant to C.R.S. § 24-72-204(5), any person who is denied the right to inspect a any record covered by the Open Records Act may apply to the district court for an order directing the custodian of such record to show cause why the custodian should not permit the inspection of such record. Any person seeking such an order must first, however, provide written notice to the custodian (at least three (3) business days in advance of seeking the order) that the person intends to seek the order. The district court is to hold a hearing on such an application at the

“earliest practical time.” Unless the court finds that the denial of inspection was proper, it shall order the custodian to permit the inspection and award court costs and reasonable attorney fees to the prevailing applicant. In contrast, in the event that the court finds that the denial of the right of inspection was proper, the court is to award the custodian his or her court costs and reasonable attorney fees only if the court finds that the application for a show cause order was frivolous, vexatious, or groundless.