



**Colorado
Legislative
Council
Staff**

SB17-040

**REVISED
FISCAL NOTE**

(replaces fiscal note dated March 9, 2017)

FISCAL IMPACT: State Local Statutory Public Entity Conditional No Fiscal Impact

Drafting Number: LLS 17-0153
Prime Sponsor(s): Sen. Kefalas
Rep. Pabon

Date: April 14, 2017
Bill Status: House Finance
Fiscal Analyst: Amanda Hayden (303-866-4918)

BILL TOPIC: PUBLIC ACCESS TO GOVERNMENT FILES

| Fiscal Impact Summary | FY 2017-2018 | FY 2018-2019 |
|---|---|--------------------------|
| State Revenue Cash Funds | Net Increase. See State Revenue section. | |
| State Expenditures | at least \$226,584 | at least \$86,879 |
| General Fund | at least 50,810 | at least 55,735 |
| Cash Funds | at least 152,892 | at least 5,490 |
| Centrally Appropriated Costs | 22,882 | 25,654 |
| TABOR Impact | Net Increase. See TABOR Impact section. | |
| FTE Impact | 0.9 FTE | 1.1 FTE |
| Appropriation Required: \$203,702 - Multiple agencies (FY 2017-18). | | |
| Future Year Impacts: Ongoing increase in state revenue and expenditures. | | |

Summary of Legislation

This *reengrossed* bill modifies the Colorado Open Records Act (CORA) with respect to digital or electronic records. It requires custodians of public records to provide records in a structured data format, when requested. Structured data means digital data capable of being automatically read, processed, or manipulated by a computer, and it includes data in relational databases and spreadsheets. If digital records are searchable, custodians must provide them in that format, when requested. If the custodian has made the requested records publicly available in a structured data format, the custodian may satisfy the request by redirecting the requester to the location of the records. Nothing in the bill requires custodians to provide digital records in their native format, meaning the format in which they were created or are stored on the custodian's computer or server, or to release metadata. The choice of format is entirely up to the custodian.

Exceptions. The bill provides additional grounds upon which a custodian may deny a records request, specifically with regard to infrastructure security data, software programs, network and systems architectural designs, source code, and certain other technology or licensing records, as well as any record that might jeopardize an individual's safety. A custodian does not have to provide records in a searchable or structured data format if:

- it is not technologically or practically feasible to do so;

- the custodian would be required to purchase software or hardware or to create additional programming or functionality in the existing software or hardware;
- producing the data in the requested format would violate a copyright agreement or result in the release of a third party's proprietary information; or
- it is not technologically feasible to permanently remove information that the custodian is required or allowed to withhold.

Any current or former public employee who provides a written declaration attesting that the release of his or her personal identifying information would pose a credible threat to his or her safety may request that such information be withheld from the production of any public records released in searchable or structured data format.

Civil remedies. If the custodian cannot provide records in the requested format, he or she must provide them in an alternate format and document in writing the reasons for not being able to comply with the request. Any person who alleges a violation of the provisions of the bill may seek a court order requiring the custodian to show cause for why the request was denied. If a court rules that the custodian should have provided the records in the requested format but that the custodian reasonably believed that he or she could not comply, attorneys fees may be awarded to the plaintiff only if the custodian's action was found to be arbitrary or capricious.

Fees. Altering an existing public record to remove information that the custodian is allowed or required to withhold does not constitute the creation of a new public record. Altering or excising a record in response to a request may be subject to a research and retrieval fee. The bill adds that programming, coding, or custom search queries required to convert a record into a structured data or searchable format may be subject to a reasonable fee, not to exceed the actual cost of generating the record as requested. If a governmental entity has to perform programming, coding, or custom search queries to create a 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. When a person has made a request to inspect or make copies or images of original public records, the custodian may charge a fee for the time required to supervise the handling of the records, when necessary, in accordance with other current provisions of CORA.

Repeal of violation. The bill repeals the class 2 misdemeanor for knowingly and willfully violating the section of CORA on inspection, copying, or photographing a record.

Judicial Department. The bill applies CORA to the Judicial Department.

Background

CORA creates a presumption in favor of public access to government documents. Statute defines public records to include all writings made, maintained, or kept by the state, any agency, institution, political subdivision of the state, local government-financed entity, or nonprofit corporation incorporated by a state supported higher education institution's governing board. Colorado case law has determined that CORA does not apply to the Judicial Branch. The Colorado Supreme Court promulgated the Public Access to Information and Records Rule (PAIRR) to provide public access to administrative records within the Judicial Branch.

In the last three years, there have been no criminal charges filed or convictions entered for a violation of the class 2 misdemeanor repealed by the bill.

State Revenue

Beginning in FY 2017-18, this bill may increase or decrease state cash fund revenue from fees. The fiscal note assumes a net increase in state revenue. The bill allows state agencies, including those in the Judicial Department, to charge additional fees to fulfill CORA requests for records in structured data or searchable formats if programming, coding, or custom search queries are necessary to fulfill the request. To the extent that Executive Branch agencies fulfill requests by sending electronic files rather than charging for printed copies, revenue may also decrease. The amount of revenue generated or lost will depend on the number of CORA requests, the complexity of those requests, the services rendered, and the specific fee charged by the agency.

TABOR Impact

This bill may increase state cash fund revenue from fees, which may increase the amount of money required to be refunded under TABOR for FY 2017-18 and FY 2018-19. TABOR refunds are paid out of the General Fund. If the bill increases the TABOR refund obligation without a corresponding change in General Fund revenue, the amount of money available in the General Fund for the budget will decrease by an identical amount.

State Expenditures

The bill increases state General Fund expenditures in the Office of the State Public Defender by \$72,462 and 0.8 FTE in FY 2017-18 and by \$80,077 and 1.0 FTE in FY 2018-19. It increases expenditures in the Department of State Cash Fund by \$154,122 and 0.1 FTE in FY 2017-18 and by \$6,803 and 0.1 FTE in FY 2018-19. The bill also increases expenditures and workload in other state agencies and the Department of Law. These impacts are shown in Table 1 and explained below.

| Table 1. Expenditures Under SB17-040 | | |
|---|-------------------|-------------------|
| Cost Components | FY 2017-18 | FY 2018-19 |
| Office of the State Public Defender | \$72,462 | \$80,077 |
| Personal Services | \$44,492 | \$53,931 |
| FTE | 0.8 FTE | 1.0 FTE |
| Operating Expenses and Capital Outlay Costs | 5,463 | 950 |
| Legal Services | 855 | 855 |
| Centrally Appropriated Costs* | 21,652 | 24,341 |
| Secretary of State's Office | \$154,122 | \$6,803 |
| Personal Services | 4,477 | 5,395 |
| FTE | 0.1 FTE | 0.1 FTE |
| Operating Expenses | 95 | 95 |
| Computer Programming | 148,320 | |
| Centrally Appropriated Costs* | 1,230 | 1,313 |
| TOTAL | \$226,584 | \$86,879 |

*Centrally appropriated costs are not included in the bill's appropriation.

Office of the State Public Defender (OSPD). Under current law, Judicial Department agencies do not respond to CORA requests. OSPD will require a legal assistant to receive, analyze, process, and track an estimated 60 CORA requests per year. First year costs are prorated to reflect a September 1, 2017, start date and the General Fund pay date shift. Standard operating and capital outlay costs are included. OSPD will also require approximately nine hours of legal services provided by the Department of Law at an hourly rate of \$95.05. Should OSPD require the legal services of private counsel, the fiscal note assumes that it will request additional appropriations through the annual budget process.

Secretary of State's Office (SOS). The SOS maintains several different information systems, including the online voter registration system; the online campaign finance system; and databases of business filings, notaries public, lobbyist filings, and charitable solicitors registrations. Many of these systems contain names, telephone numbers, and home addresses. Because of the provision of the bill allowing current or former public employees to request that personal identifying information be withheld from structured data or searchable records, the SOS must build a new database that can search all of its other information systems, flag the employee's personal information, and selectively withhold it, at a cost of approximately \$148,320. The department also requires an additional 0.1 FTE to oversee the creation of the database and to process requests.

Department of Law (DOL). In addition to the legal services required by OSPD, the bill will increase workload and expenditures in the DOL to provide assistance and review for legal matters related to CORA requests for state agencies. The bill may lead to an increase in lawsuits filed against state agencies that deny requests for records in data formats. The fiscal note assumes that state agencies will follow the law and the requirements of the bill when denying requests. If a client agency of the DOL requires additional legal support on an annual basis, the DOL will coordinate with the client agency through the annual budget process.

Other state agencies. Beginning in FY 2017-18, the bill will increase workload for state agencies that respond to CORA requests that require the agency to program, code, or perform custom search queries, and it will increase workload for all Judicial Branch agencies to begin responding to CORA requests. The bill allows agencies to deny requests for records in certain formats if they are deemed too onerous to fulfill, provided the agency fulfills the request in an alternative format. If the bill increases workload significantly, some state agencies may require increased and permanent FTE to accommodate CORA requests that cannot be paid for with fee revenue and will require state appropriations to backfill insufficient resources. Agencies may also be ordered to pay attorneys fees in any court proceeding where their actions are deemed arbitrary or capricious. The fiscal note assumes that if this occurs at all, it will be rare. Since new costs and workload cannot be predicted in advance, this analysis assumes that agencies will address the need for additional appropriations through the annual budget process.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. The centrally appropriated costs subject to this policy are estimated in the fiscal note for informational purposes and summarized in Table 2.

| Table 2. Centrally Appropriated Costs under SB17-040 | | |
|--|-------------------|-------------------|
| Cost Components | FY 2017-18 | FY 2018-19 |
| Employee Insurance (Health, Life, Dental, and Short-term Disability) | \$7,247 | \$8,849 |
| Supplemental Employee Retirement Payments | 4,388 | 5,315 |
| Indirect Costs | 2,505 | 2,748 |
| Leased Space | 8,742 | 8,742 |
| TOTAL | \$22,882 | \$25,654 |

Local Government and Statutory Public Entity Impact

The bill increases revenue and workload for any local government or statutory public entity that responds to CORA requests that require them to program, code, or perform custom search queries. Entities may also be ordered to pay attorneys fees in any court proceeding where their actions are deemed arbitrary or capricious. The fiscal note assumes that if this occurs at all, it will be rare. The amount of additional revenue that the bill will generate or workload required to fulfill its requirements for local governments or statutory public entities will vary depending on the number of CORA requests received, the complexity of those requests, and the fee charged. The exact impact to local governments and statutory public entities has not been estimated.

Effective Date

The bill takes effect August 9, 2017, if the General Assembly adjourns on May 10, 2017, as scheduled, and no referendum petition is filed.

Departmental Difference

Higher Education. The Department of Higher Education (DHE) estimates that the bill requires a one-time expenditure of \$80,000 to enhance, modify, and strengthen its current database and database security. The DHE received 32 CORA requests and about 250 data requests last year. The department also estimates that CORA requests will increase as a result of the bill and that it will require \$79,962 and one additional FTE to accommodate the increase. Several institutions of higher education have made similar estimates. The fiscal note acknowledges that workload and expenditures will increase as a result of the bill; however, the increase will depend on the number of structured data requests, the exact nature of those requests, and the technology issues associated with fulfilling the requests, none of which can be predicted in advance accurately enough to calculate an appropriation.

Colorado Department of Public Health and Environment (CDPHE). CDPHE estimates that the bill may result in an increase in CORA requests, specifically for structured data. Currently the department receives about 5,000 CORA requests per year. CDPHE estimates that the average structured data request will require 29 hours and will cost approximately \$1,500 to fulfill. The department also estimates that it will face increased litigation, increasing costs by at least \$200,000 for instances when CDPHE is ordered to pay attorney's fees for not meeting statutory timelines, as well as \$12,067 for staff time and legal services to provide written declarations for the denials. The fiscal note acknowledges that the bill will increase workload for the department; however, any associated increase in expenditures will depend upon the number of structured data

requests, the exact nature of those requests, the technology issues associated with fulfilling the requests, and the behavior of the requesters, none of which can be predicted in advance accurately enough to calculate an appropriation.

State Appropriations

For FY 2017-18, the bill requires and includes an allocation of 0.8 FTE and a General Fund appropriation of \$50,810 to the Office of the State Public Defender, \$855 of which must be reappropriated to the Department of Law. The bill also requires an appropriation to the Secretary of State's Office of \$152,892 and an allocation of 0.1 FTE from the Department of State Cash Fund.

State and Local Government Contacts

| | | |
|----------------------------------|-------------------|---------------------------|
| All State Agencies | Counties | District Attorneys |
| Joint Budget Committee | Judicial | Legislative Council Staff |
| Legislative Legal Services | Municipalities | PERA |
| Regional Transportation District | Special Districts | State Auditor |