

First Regular Session  
Seventy-first General Assembly  
STATE OF COLORADO

INTRODUCED

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

**House Committees**

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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.*

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, 24-72-202, **amend**  
3 (7); and **add** (2.3), (6.3), and (6.4) as follows:

4 **24-72-202. Definitions.** As used in this part 2, unless the context  
5 otherwise requires:

6 (2.3) "NATIVE FORMAT" MEANS THE FORMAT IN WHICH A FILE OR  
7 DATABASE CONFIGURATION OR SCHEMA WAS ORIGINALLY CREATED OR IS  
8 STORED ON THE CUSTODIAN'S COMPUTER OR SERVER.

9 (6.3) "SEARCHABLE" MEANS CAPABLE OF BEING SEARCHED BY A  
10 COMPUTER.

11 (6.4) "STRUCTURED DATA" MEANS DIGITAL DATA THAT IS STORED  
12 IN A FIXED FIELD WITHIN A RECORD OR FILE THAT IS CAPABLE OF BEING  
13 AUTOMATICALLY READ, PROCESSED, OR MANIPULATED BY A COMPUTER.

14 "STRUCTURED DATA" INCLUDES DATA CONTAINED IN RELATIONAL  
15 DATABASES AND SPREADSHEETS.

16 (7) "Writings" means and includes all books, papers, maps,

1 photographs, cards, tapes, recordings, or other documentary materials,  
2 regardless of physical form or characteristics. "Writings" includes  
3 digitally stored data, including without limitation electronic mail  
4 messages. ~~but does not include computer software.~~ "WRITINGS" DOES NOT  
5 INCLUDE A COMPUTER PROGRAM OR SOFTWARE, BUT DOES INCLUDE THE  
6 INFORMATION USED AS INPUT FOR THE COMPUTER PROGRAM AND THE  
7 INFORMATION PRODUCED AS A PRODUCT OF THE COMPUTER PROGRAM,  
8 EXCEPT AS OTHERWISE PROVIDED BY LAW.

9 **SECTION 2.** In Colorado Revised Statutes, **add 24-72-203.5** as  
10 follows:

11 **24-72-203.5. Storage of records as structured data - request**  
12 **for copies - definition.** (1) (a) EXCEPT AS OTHERWISE REQUIRED BY  
13 SUBSECTION (1)(b) OF THIS SECTION:

14 (I) IF PUBLIC RECORDS ARE STORED AS STRUCTURED DATA, THE  
15 CUSTODIAN SHALL PROVIDE AN ACCURATE COPY OF THE PUBLIC RECORDS  
16 IN A STRUCTURED DATA FORMAT WHEN REQUESTED; AND

17 (II) IF PUBLIC RECORDS ARE NOT STORED AS STRUCTURED DATA  
18 BUT ARE STORED IN AN ELECTRONIC OR DIGITAL FORM AND ARE  
19 SEARCHABLE IN THEIR NATIVE FORMAT, THE CUSTODIAN SHALL PROVIDE  
20 A COPY OF THE PUBLIC RECORDS IN A FORMAT THAT IS SEARCHABLE WHEN  
21 REQUESTED.

22 (b) A CUSTODIAN IS NOT REQUIRED TO PRODUCE RECORDS IN A  
23 SEARCHABLE OR STRUCTURED DATA FORMAT IN ACCORDANCE WITH  
24 SUBSECTION (1)(a) OF THIS SECTION IF:

25 (I) AFTER MAKING REASONABLE INQUIRIES WITHIN THE ENTITY,  
26 THE CUSTODIAN CONCLUDES THAT IT IS NOT TECHNOLOGICALLY OR  
27 PRACTICALLY FEASIBLE TO PRODUCE A COPY OF THE REQUESTED

1 INFORMATION IN A SEARCHABLE OR STRUCTURED FORMAT;

2 (II) THE CUSTODIAN WOULD BE REQUIRED TO PURCHASE  
3 SOFTWARE OR HARDWARE, OR TO CREATE ADDITIONAL PROGRAMMING OR  
4 FUNCTIONALITY IN ITS EXISTING SOFTWARE OR HARDWARE, TO  
5 ACCOMMODATE THE REQUEST;

6 (III) PRODUCING THE DATA IN THE REQUESTED FORMAT WOULD  
7 VIOLATE THE TERMS OF ANY COPYRIGHT AGREEMENT BETWEEN THE  
8 CUSTODIAN AND A THIRD PARTY OR RESULT IN THE RELEASE OF A THIRD  
9 PARTY'S PROPRIETARY INFORMATION; OR

10 (IV) IT IS NOT TECHNOLOGICALLY FEASIBLE TO PERMANENTLY  
11 REMOVE INFORMATION THAT THE CUSTODIAN IS REQUIRED OR ALLOWED  
12 TO WITHHOLD WITHIN THE REQUESTED FORMAT, OR THE CUSTODIAN  
13 WOULD BE REQUIRED TO PURCHASE SOFTWARE OR CREATE ADDITIONAL  
14 PROGRAMMING OR FUNCTIONALITY IN ITS EXISTING SOFTWARE TO REMOVE  
15 THE INFORMATION.

16 (2) IF A CUSTODIAN IS NOT ABLE TO COMPLY WITH A REQUEST TO  
17 PRODUCE PUBLIC RECORDS IN A REQUESTED FORMAT SPECIFIED IN  
18 SUBSECTION (1)(a) OF THIS SECTION, THE CUSTODIAN MUST PRODUCE THE  
19 RECORDS IN AN ALTERNATE FORMAT AND SHALL PROVIDE A WRITTEN  
20 DECLARATION ATTESTING TO THE REASONS THE CUSTODIAN IS NOT ABLE  
21 TO PRODUCE THE RECORDS IN THE REQUESTED FORMAT. IF A COURT  
22 SUBSEQUENTLY RULES THE CUSTODIAN SHOULD HAVE PROVIDED THE  
23 DATA IN THE REQUESTED FORMAT BUT THAT THE CUSTODIAN REASONABLY  
24 BELIEVED, BASED UPON THE REASONS STATED IN THE WRITTEN  
25 DECLARATION, THAT THE DATA COULD NOT BE PRODUCED IN THE  
26 REQUESTED FORMAT, ATTORNEY FEES MAY BE AWARDED ONLY IF THE  
27 CUSTODIAN'S ACTION WAS ARBITRARY OR CAPRICIOUS.

1 (3) NOTHING IN THIS SECTION REQUIRES A CUSTODIAN TO PRODUCE  
2 RECORDS IN THEIR NATIVE FORMAT.

3 (4) FOR PURPOSES OF THIS SECTION, "ACCURATE COPY" MEANS AN  
4 ACCURATE REPRESENTATION OF A RECORD PROVIDED TO A REQUESTER AT  
5 THE TIME THE RECORD IS PRODUCED.

6 **SECTION 3.** In Colorado Revised Statutes, 24-72-204, **amend**  
7 (5); and **add** (9) as follows:

8 **24-72-204. Allowance or denial of inspection - grounds -**  
9 **procedure - appeal - definitions.** (5) Except as provided in subsection  
10 (5.5) of this section, any person denied the right to inspect any record  
11 covered by this part 2, OR WHO ALLEGES A VIOLATION OF DIGITAL FORMAT  
12 PROVISIONS UNDER SECTION 24-72-203.5 OR A VIOLATION OF RECORD  
13 TRANSMISSION PROVISIONS SPECIFIED IN SECTION 24-72-205, may apply  
14 to the district court of the district wherein the record is found for an order  
15 directing the custodian of such record to show cause why the custodian  
16 should not permit the inspection of such record; except that, at least three  
17 business days prior to filing an application with the district court, the  
18 person who has been denied the right to inspect the record shall file a  
19 written notice with the custodian who has denied the right to inspect the  
20 record informing said custodian that the person intends to file an  
21 application with the district court. Hearing on such application shall be  
22 held at the earliest practical time. Unless the court finds that the denial of  
23 the right of inspection was proper, it shall order the custodian to permit  
24 such inspection and shall award court costs and reasonable attorney fees  
25 to the prevailing applicant in an amount to be determined by the court;  
26 except that no court costs and attorney fees shall be awarded to a person  
27 who has filed a lawsuit against a state public body or local public body

1 and who applies to the court for an order pursuant to this subsection (5)  
2 for access to records of the state public body or local public body being  
3 sued if the court finds that the records being sought are related to the  
4 pending litigation and are discoverable pursuant to chapter 4 of the  
5 Colorado rules of civil procedure. In the event the court finds that the  
6 denial of the right of inspection was proper, the court shall award court  
7 costs and reasonable attorney fees to the custodian if the court finds that  
8 the action was frivolous, vexatious, or groundless. IN ANY CASE ALLEGING  
9 A VIOLATION OF DIGITAL FORMAT PROVISIONS, THE ATTORNEY FEE  
10 PROVISIONS SPECIFIED IN SECTION 24-72-203.5 (2) MUST APPLY.

11 (9) ALTERING AN EXISTING RECORD, OR EXCISING FIELDS OF  
12 INFORMATION, TO REMOVE INFORMATION THAT THE CUSTODIAN IS  
13 REQUIRED OR ALLOWED TO WITHHOLD DOES NOT CONSTITUTE THE  
14 CREATION OF A NEW PUBLIC RECORD. SUCH ALTERATION OR EXCISION MAY  
15 BE SUBJECT TO A RESEARCH AND RETRIEVAL FEE OR A FEE FOR THE  
16 PROGRAMMING OF DATA AS ALLOWED UNDER SECTION 24-72-205.

17 **SECTION 4.** In Colorado Revised Statutes, **amend** 24-72-205 as  
18 follows:

19 **24-72-205. Copy, printout, or photograph of a public record**  
20 **- imposition of research and retrieval fee.** (1) (a) In all cases in which  
21 a person has the right to inspect a public record, the person may request  
22 a copy, printout, or photograph of the record. The custodian shall furnish  
23 a copy, printout, or photograph and may charge a fee determined in  
24 accordance with ~~subsection (5)~~ of this section; except that, when the  
25 custodian is the secretary of state, fees shall be determined and collected  
26 pursuant to section 24-21-104 (3), and when the custodian is the  
27 executive director of the department of personnel, fees shall be

1 determined and collected pursuant to section 24-80-102 (10). Where the  
2 fee for a certified copy or other copy, printout, or photograph of a record  
3 is specifically prescribed by law, the specific fee shall apply.

4 (b) Upon request for records transmission by a person seeking a  
5 copy of any public record, the custodian shall transmit a copy of the  
6 record by United States mail, other delivery service, facsimile, or  
7 electronic mail. No transmission fees may be charged to the record  
8 requester for transmitting public records via electronic mail. Within the  
9 period specified in section 24-72-203 (3)(a), the custodian shall notify the  
10 record requester that a copy of the record is available but will only be sent  
11 to the requester once the custodian either receives payment or makes  
12 arrangements for receiving payment for all costs associated with records  
13 transmission and for all other fees lawfully allowed, unless recovery of  
14 all or any portion of such costs or fees has been waived by the custodian.  
15 Upon either receiving such payment or making arrangements to receive  
16 such payment at a later date, the custodian shall send the record to the  
17 requester as soon as practicable but no more than three business days after  
18 receipt of, or making arrangements to receive, such payment.

19 (2) If the custodian does not have facilities for making a copy,  
20 printout, or photograph of a record that a person has the right to inspect,  
21 the person shall be granted access to the record for the purpose of making  
22 a copy, printout, or photograph. The copy, printout, or photograph shall  
23 be made while the record is in the possession, custody, and control of the  
24 custodian thereof and shall be subject to the supervision of the custodian.  
25 When practical, the copy, printout, or photograph shall be made in the  
26 place where the record is kept, but if it is impractical to do so, the  
27 custodian may allow arrangements to be made for the copy, printout, or



1 photograph to be made at other facilities. If other facilities are necessary,  
2 the cost of providing them shall be paid by the person desiring a copy,  
3 printout, or photograph of the record. The custodian may establish a  
4 reasonable schedule of times for making a copy, printout, or photograph.  
5 ~~and may charge the same fee for the services rendered in supervising the~~  
6 ~~copying, printing out, or photographing as the custodian may charge for~~  
7 ~~furnishing a copy, printout, or photograph under subsection (5) of this~~  
8 ~~section.~~

9 (3) If, in response to a specific request, the state or any of its  
10 agencies, institutions, or political subdivisions has performed a  
11 ~~manipulation of data~~ PROGRAMMING, CODING, OR CUSTOM SEARCH  
12 QUERIES SO AS TO CONVERT A RECORD INTO A STRUCTURED DATA OR  
13 SEARCHABLE FORMAT so as to generate a record in a form not used by the  
14 state or by said agency, institution, or political subdivision, a reasonable  
15 fee may be charged to the person making the request. Such fee shall not  
16 exceed the actual cost of ~~manipulating the said data~~ PROGRAMMING,  
17 CODING, OR CUSTOM SEARCH QUERIES and generating the said record in  
18 accordance with the request. Persons making subsequent requests for the  
19 same or similar records may be charged a fee not in excess of the original  
20 fee.

21 (4) ~~If the public record is a result of computer output other than~~  
22 ~~word processing, the fee for a copy, printout, or photograph thereof may~~  
23 ~~be based on recovery of the actual incremental costs of providing the~~  
24 ~~electronic services and products together with a reasonable portion of the~~  
25 ~~costs associated with building and maintaining the information system.~~  
26 ~~Such fee may be reduced or waived by the custodian if the electronic~~  
27 ~~services and products are to be used for a public purpose, including public~~

1 ~~agency program support, nonprofit activities, journalism, and academic~~  
2 ~~research. Fee reductions and waivers shall be uniformly applied among~~  
3 ~~persons who are similarly situated~~ IF A CUSTODIAN PERFORMS  
4 PROGRAMMING, CODING, OR CUSTOM SEARCH QUERIES TO CREATE A PUBLIC  
5 RECORD, THE FEE FOR A PAPER OR ELECTRONIC COPY OF THAT RECORD MAY  
6 BE BASED ON RECOVERY OF THE ACTUAL OR INCREMENTAL COSTS OF  
7 PERFORMING THE PROGRAMMING, CODING, OR CUSTOM SEARCH QUERIES,  
8 TOGETHER WITH A REASONABLE PORTION OF THE COSTS ASSOCIATED WITH  
9 BUILDING AND MAINTAINING THE INFORMATION SYSTEMS.

10 (5) (a) A custodian may charge a fee not to exceed twenty-five  
11 cents per standard page for a PAPER copy of a public record or a fee not to  
12 exceed the actual cost of providing a copy, printout, or photograph of a  
13 public record in a format other than a standard page.

14 (b) Notwithstanding ~~paragraph (a) of this subsection (5)~~  
15 SUBSECTIONS (4) AND (5)(a) OF THIS SECTION, an institution, as defined in  
16 section 24-72-202 (1.5), that is the custodian of scholastic achievement  
17 data on an individual person may charge a reasonable fee for a certified  
18 transcript of the data.

19 (6) (a) A custodian may impose a fee in response to a request for  
20 the research and retrieval of public records only if the custodian has, prior  
21 to the date of receiving the request, either posted on the custodian's  
22 website or otherwise published a written policy that specifies the  
23 applicable conditions concerning the research and retrieval of public  
24 records by the custodian, including the amount of any current fee. Under  
25 any such policy, the custodian shall not impose a charge for the first hour  
26 of time expended in connection with the research and retrieval of public  
27 records. After the first hour of time has been expended, the custodian may

1 charge a fee for the research and retrieval of public records that shall not  
2 exceed thirty dollars per hour.

3 (b) WHEN A PERSON HAS MADE A REQUEST TO INSPECT OR MAKE  
4 COPIES OR IMAGES OF ORIGINAL PUBLIC RECORDS, THE CUSTODIAN MAY  
5 CHARGE A FEE IN ACCORDANCE WITH SUBSECTION (6)(a) OF THIS SECTION  
6 FOR THE TIME REQUIRED FOR THE CUSTODIAN TO SUPERVISE THE HANDLING  
7 OF THE RECORDS, WHEN SUCH SUPERVISION IS NECESSARY TO PROTECT THE  
8 INTEGRITY OR SECURITY OF THE ORIGINAL RECORDS.

9 ~~(b)~~ (c) On July 1, 2019, and by July 1 of every five-year period  
10 thereafter, the director of research of the legislative council appointed  
11 pursuant to section 2-3-304 (1) C.R.S., shall adjust the maximum hourly  
12 fee specified in ~~paragraph (a) of this subsection (6)~~ SUBSECTION (6)(a) OF  
13 THIS SECTION in accordance with the percentage change over the period  
14 in the United States department of labor, bureau of labor statistics,  
15 consumer price index for Denver-Boulder-Greeley, all items, all urban  
16 consumers, or its successor index. The director of research shall post the  
17 adjusted maximum hourly fee on the website of the general assembly.

18 **SECTION 5.** In Colorado Revised Statutes, **repeal** 24-72-206 as  
19 follows:

20 **24-72-206. Violation - penalty.** ~~Any person who willfully and~~  
21 ~~knowingly violates the provisions of this part 2 is guilty of a misdemeanor~~  
22 ~~and, upon conviction thereof, shall be punished by a fine of not more than~~  
23 ~~one hundred dollars, or by imprisonment in the county jail for not more~~  
24 ~~than ninety days, or by both such fine and imprisonment.~~

25 **SECTION 6. Act subject to petition - effective date.** This act  
26 takes effect at 12:01 a.m. on the day following the expiration of the  
27 ninety-day period after final adjournment of the general assembly (August

1 9, 2017, if adjournment sine die is on May 10, 2017); except that, if a  
2 referendum petition is filed pursuant to section 1 (3) of article V of the  
3 state constitution against this act or an item, section, or part of this act  
4 within such period, then the act, item, section, or part will not take effect  
5 unless approved by the people at the general election to be held in  
6 November 2018 and, in such case, will take effect on the date of the  
7 official declaration of the vote thereon by the governor.