Legislative Policies Related to Public Records and E-Mail

April, 2010

I. Purposes

A. To adopt a public records request policy pursuant to section 24-72-203 (1), C.R.S.,:

1. For providing access to and the protection of public records in the custody of members and staff agencies of the Colorado General Assembly;
2. For the prevention of unnecessary interference with the regular discharge of the duties of the members and staff agencies in compliance with the Colorado Open Records Act, section 24-72-201 to 24-72-309, C.R.S. ("CORA"); and
3. That recognizes the fact that members are uniquely situated as elected officials who are custodians of their own records, must balance their duties as custodians with the fact that each has minimal resources as an elected official for responding to CORA requests, and are therefore dissimilar to custodians of records in state agencies to whom CORA may more readily be applied.
4. This policy should not be construed to apply to other governmental entities or to suggest any legislative intent with respect to CORA.

B. To establish reasonable and standardized fees for producing copies of and information from records maintained by members and staff agencies as authorized by CORA.

C. To adopt a policy for electronic mail communication (hereinafter "e-mail") to ensure that use of e-mail and associated equipment is consistent with the Colorado General Assembly's legal responsibility and business interests.

D To encourage responsible, efficient use of e-mail as a method of business communication.

E. To make users of the legislative computer network aware of their rights and responsibilities with regard to the use of e-mail.

F. To make members of the Colorado General Assembly aware of their rights and responsibilities with regard to their use of e-mail, whether or not they are users of the legislative computer network.

G. To provide recommendations for the retention or disposition of e-mail by members and staff and to promote best practices for the effective management of e-mail with the potential of a CORA request in mind.

H. To adopt a policy for the retention of records in furtherance of article 80 of title 24, C.R.S.

II. Public Records Requests

A. Applicability

The public records request policy under this section II applies to requests submitted to members of the Colorado General Assembly or any of its employees for the inspection of public records pursuant to CORA.

B. Definitions

1. **"Custodian":** Except as otherwise provided in this policy:
   a. The Director or head of each staff agency is the custodian of public records under the custody and control of that staff agency. In the case of the Senate and the House of Representatives, the Chief Clerk of the House of Representatives or the Secretary of the Senate is the custodian for all public records relating to that house except for public records in the custody and control of the members of that house.
   b. Each member of the Senate and the House of Representatives is the custodian of public records under the custody and control of the member.
   c. To the extent that a staff agency has custody of any public records of a member, the staff agency shall, in consultation with the member, meet any requirement of CORA as it may apply to the records in the custody of the staff agency.

2. **"Public Records":** As defined in section 24-72-202 (6)(a) and (6.5), C.R.S.:
   a. "Public records" means and includes all writings made, maintained, or kept by members or staff agencies for use in the exercise of functions required or authorized by law or administrative rule or involving the receipt or expenditure of public funds.
   b. "Public records" includes the correspondence of members or staff agencies, including e-mail, except to the extent that the correspondence or e-mail is:
      i. Work product;
      ii. Without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds;
      iii. A communication from a constituent to the member that clearly implies by its nature or content that the constituent expects that it is confidential or a communication from the member in response to such a communication from a constituent; or
      iv. Not subject to disclosure because such inspection would be contrary to any state statute or federal statute or regulation, is prohibited by rules

promulgated by the Supreme Court or by the order of any court, or would be contrary to the requirements of any joint rule of the Senate and the House of Representatives pertaining to lobbying practices.

c. "Public records", does not include work product prepared for members including but not limited to all documents relating to the drafting of bills or amendments to bills or certain research projects prepared by staff agencies.

d. "Public records" does not include computer hardware, including desktop or laptop computers or storage devices such as computer hard drives or thumb drives.

e. "Work product" does not include those items described in section 24-72-202 (6.5) (c), C.R.S., including, but not limited to, any final version of a document that expresses a final decision by an elected official or any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources.

3. **"Staff Agencies":** "Staff agency" or "staff agencies" means and includes:

a. Joint Budget Committee Staff;

b. Legislative Council Staff;

c. Legislative Information Services;

d. Office of Legislative Legal Services;

e. Office of the State Auditor;

f. Staff of the Colorado House of Representatives; or

g. Staff of the Colorado Senate.

4. **"Writings":** As defined in section 24-72-202 (7), C.R.S.:

a. "Writings" means and includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials, regardless of physical form or characteristics.

b. "Writings" includes digitally stored data including, without limitation, electronic mail messages, but does not include computer software.

c. "Writings" does not include data that is automatically created, stored, or retained on an individual computer or on network equipment or servers, such as e-mail metadata that is not otherwise imprinted or stored as part of the visible content of an e-mail message, logs, web traffic statistics, browser cookies, browser cache, server logs, browser history, or firewall logs.

C. <u>Submission of Requests</u>

1. Requests for inspection of records must be submitted in writing to the custodian and must be sufficiently specific as to enable the custodian to locate the information

requested with reasonable effort. This provision shall not be construed to prohibit the custodian of a staff agency from making public records available pursuant to an oral request for inspection if such records are normally readily available for inspection by the public.

2. To help assure receipt of a request, in the case of requests for inspection of a member's records, such request must be submitted to both the member and to the head of the staff agency for the House of that member: The Chief Clerk of the House if a house member or the Secretary of the Senate if a Senate member. The head of the staff agency who receives a request for records shall immediately notify the member of the request.
3. Requests may be submitted by mail, fax, or hand-delivery and shall include the applicant's name, street address, if any, and telephone number.
4. A request shall be considered made when the request is actually received by the person to whom the request is made:
   a. A letter is received when it is opened in the usual course of business by the recipient or a person authorized to open the recipient's mail.
   b. A fax is received when it is printed during regular business hours, or if received after hours, at 8:00 a.m. on the following business day.
5. Responses to requests of members may be made by the member or by a staff agency designated by the member.
6. Responses to requests of staff agencies may be made by the custodian of the staff agency's records.
7. An employee of a staff agency who receives a request for records shall immediately refer the request to the staff agency's custodian.

D. <u>Inspection</u>

1. The custodian or the custodian's designee shall make the requested public records available for inspection during regular business hours, deemed to be from 8:30 a.m. to 4:30 p.m., Monday through Friday, except for times the custodian's office is closed.
2. If a public record is not immediately or readily available for inspection, the custodian or the custodian's designee shall make an appointment or other arrangements with the applicant concerning the time at which the requested record will be available. The records shall be made available for inspection within a reasonable time, which is presumed to be three (3) business days or less from the date of receipt of the request. Such three (3) day period may be extended by an additional seven (7) business days if extenuating circumstances, as described in section 24-72-203 (3) (b), C.R.S., exist. Responding to applications for inspection of public records need not take priority over the previously scheduled work activities of the custodian or the custodian's designee.
3. Extenuating circumstances may also exist if the request for public records is made to

a member during the legislative interim and the member's office is closed. Under such circumstances, the member may make other arrangements with the applicant concerning the time and location at which the requested record will be available. The arrangements may include extending the period of time in which the member will make the records available to reflect the volume of records requested, whether the member must travel to access the records, and the member's professional and family commitments at the time of the request.

4. All public records to which the request applies shall be preserved from the date of the request regardless of any records maintenance, retention, or deletion policy or practices utilized by the custodian.
5. No one shall remove a public record from the custodian's offices without the permission of the custodian. Records may be removed from file folders or places of storage for photocopying by the custodian or the custodian's designee. The custodian may allow a person to use his or her own portable electronic equipment to make copies of public records.
6. As a general practice, in response to a public records request:
    a. Public records in hard copy, paper, published, or documentary form shall be made available for inspection;
    b. A document will not ordinarily be created in order to respond to such a request;
    c. Public records will not ordinarily be forwarded electronically in response to such a request;
    d. In the case of e-mail that is a public record, copies of such e-mail that is a public record will be made available by the custodian in response to such a request.
    e. The person making the request shall not be allowed to access the custodian's computer or any other computer for purposes of inspecting any public records.
7. A custodian may elect to provide a document in electronic format if it is a record that has been previously released publicly and has been prepared in PDF format or can be so prepared with minimal effort. In addition, a custodian may elect to provide a document in PDF format when the public record consists of twenty pages or less or when the applicant is not readily able to personally inspect the public record in the custodian's office during regular business hours as required in section II. D. 1 of this policy. However, in either such case, the applicant shall be required to:
    a. Waive his or her right to personally inspect public records in the office of the custodian, and waive any objection to the custodian's identification of the document or documents that the custodian determines are responsive to the applicant's request; and,
    b. Prepay any applicable fee for preparation of the documents and for any search and retrieval costs incurred pursuant to section II. E. 2 of this policy.

8. Any portion of a public record containing non-public information that is not subject to inspection may be redacted by the custodian prior to making the record available for inspection. The custodian is not required to redact information from a writing that is not a public record in order to make the writing available for inspection. *Denver Publishing Co. v. Bd. of County Comm'rs of the County of Arapahoe,* 121 P.3d 190 (Colo. 2005); *Colorado Republican Party v. Benefield, et al.*, Court of Appeals No. 07CA1216, Oct. 23, 2008 (Unpublished).
9. For any record that is available at a location that is open and accessible to the public, including, but not limited to, the Colorado General Assembly's web site, the custodian may direct the applicant to that location for purposes of inspecting the record.
10. The custodian or the custodian's designee shall deny the inspection of the records if such inspection would be contrary to federal or state law or regulation or would violate a court order. In special circumstances, a custodian shall deny inspection of the records if such inspection ~~or~~ would cause substantial injury to the public interest. Such a denial shall be made in writing by the custodian to the person making the request and shall set forth with specificity the grounds of the denial. Custodians are encouraged to consult with the Office of Legislative Legal Services prior to denying inspection of any records.

E. Fees for all Record Requests

1. **Fees for standard reproductions:** The custodian or the custodian's designee shall charge a fee not to exceed twenty-five cents per page for any photocopies of records that are required to make a record available. Printouts and other reproductions of records shall be provided at a cost not to exceed the actual cost of the printout or other reproduction. Such fees shall be paid by the applicant prior to the receipt of copies of any public records.
2. **Fees for search and retrieval:**
   a. In the case of any request requiring more than one hour of staff time for search and retrieval or for supervision of inspection or copying, the custodian or the custodian's designee may charge a nominal hourly fee for such staff time based on the estimated average salary and benefits paid by the custodian for the staff involved. See: *Black v. S.W. Water Conserv. Dist.*, 74 P.3d 462 (Colo. App. 2003). Prior to performing any services necessary to respond to a request, the custodian or the custodian's designee may require the applicant to pay a deposit equal to estimated fees that will be charged by the custodian for such staff time.
   b. To the extent possible, the custodian shall utilize administrative or clerical staff for search and retrieval of public records who are ordinarily responsible for such duties to ensure that the fees charged for staff time in connection with

the request represent costs incurred in the ordinary course of business and not extraordinary charges.

c. To assure that fees are kept at a nominal amount, no custodian shall charge more than $30 per hour for the search and retrieval of public records.

d. In the case of any request requiring a member to travel over fifty miles for purposes of searching, retrieving, or making records available, the member may charge an amount equal to his or her reasonable expenses incurred in connection with such travel.

III. Electronic Mail Communications

A. Scope

1. Pursuant to CORA, e-mail that is written in the conduct of public business by members or legislative staff could be considered a public record. This is true, regardless of whether the e-mail was sent or received on a public or privately owned personal computer or whether a member or legislative staff utilize the state or a private service provider paid for at member or staff expense to send or receive the e-mail. Therefore, any e-mail that is written in the conduct of public business by members or legislative staff could be subject to the provisions of CORA and this e-mail policy.
2. Pursuant to section 24-6-402, Colorado Revised Statutes, (the "Open Meetings" law) if members use e-mail to discuss pending legislation or other public business among themselves, that e-mail transaction may be considered a public meeting, and, as such may be subject to the provisions of that section.

B. General Provisions

1. Under no circumstances shall equipment, supplies, or other similar items, including e-mail, which is the property of the Colorado General Assembly, be used for political purposes of a partisan nature, for campaign purposes, or for personal gain of a legislative staff person.
2. The legislative computer network and its accompanying e-mail facilities are intended for official use by members and legislative staff for the purpose of conducting the business of the state of Colorado.
3. The incidental and occasional personal use of e-mail by members and legislative staff is permissible when such use does not:
   a. Generate a direct or incremental cost to the state;
   b. Directly or indirectly interfere with the legislative computer network; or
   c. Contain otherwise unacceptable content more fully described in section III. C

of this policy.

4. Members may use state equipment, and e-mail generated therefrom, to communicate or correspond with constituents, family members, and business and professional associates for purposes not related to campaigns.
5. Members and legislative staff should be aware that when sending any e-mail from a state-owned mail address, or using state-owned equipment, there is an inherent danger of the content being interpreted as an official policy or opinion of the General Assembly or the staff agency.
6. The daily tape backup system is intended for use only in cases of disaster recovery. As provided in the public records request policy contained in section II, this backup system is not a writing or part of any custodian's document management or recordkeeping process and shall not be relied upon or used as a means of compliance with open records requests or the open records law. The entity that manages the system storage of records shall not be considered the custodian of the record by virtue of managing that system.

C. <u>Acceptable Content</u>

1. Users of the General Assembly network will be held to the same standards of professionalism, good taste, and judgment when utilizing e-mail as with any other business communication.
2. This policy does not prohibit users of the General Assembly network from sending e-mail of a social nature directly related to officially sponsored functions of the General Assembly or any staff agency that do not contain otherwise prohibited content. The following are examples of acceptable e-mail:
   a. Social function announcements.
   b. Birth, bereavement, and engagement announcements.
   c. Lost and found.
   d. Blood drive & other charitable event announcements.
3. The following are examples of e-mail that would NOT be considered acceptable:
   a. Garage Sale announcements.
   b. Sporting pools.
   c. Ticket/merchandise sales.
   d. Jokes, audio, or video correspondence that are strictly for entertainment purposes.
4. Avoid the use of language that might be offensive or embarrassing if read by an unintended recipient.

D. <u>Privacy Rights</u>

1. Authorized network administrators and agency management may, from time to time and without prior notice, monitor the use of e-mail by legislative staff or employees. Such monitoring may include tracking addresses of e-mail sent and received, accessing inbox messages, accessing messages in folders, and accessing archived e-mail.
2. All e-mail delivered to the General Assembly network will be scanned automatically to determine if it contains a virus/spy-ware or is considered junk e-mail (spam) and will be automatically handled, as deemed appropriate, to keep such material off the General Assembly network.
3. The results of any monitoring activity are intended to gather usage statistics, troubleshooting information, or other management metrics in order to identify problems or trends and, as such, are not considered a public record.
4. With the approval of the appropriate custodian, authorized network administrators, and agency management may access any e-mail of legislative staff or employees in order to comply with a CORA request.
5. The Colorado General Assembly, its designated representatives, or agency management:
    a. Reserves the right to discipline or terminate employees based on information obtained from monitoring or inspection of e-mail where such information is grounds for such action.
    b. Reserves the right to disclose e-mail of legislative staff or employees to law enforcement officials, without consent and without giving prior notice where such action is deemed appropriate.
    c. Will make every effort to refrain from inspection of e-mail of legislative staff or employees it determines is of a personal and private nature, where such determination can be made without actually inspecting the e-mail.
    d. Will make every attempt, where possible, to respect an objection to disclosure of an e-mail based on a claim that disclosure will result in personal embarrassment.
6. When there are overriding management concerns regarding office policy, compliance with the public records law, compliance with requests from law enforcement officials, or other purposeful disclosure, individual privacy rights of legislative staff or employees may not exist and the provisions of paragraph 5 of this subsection D., may not apply.

E. <u>Confidentiality</u>

No guarantee of any degree of confidentiality of e-mail can be made. If it is necessary or desirable to send confidential information, the use of another medium is strongly recommended.

F. Forwarding Messages

1. Users should be aware that they have no control over what the recipient of an e-mail does with that e-mail once it is in their possession. The intentional or accidental forwarding of an e-mail is always a possibility. When writing an e-mail, this possibility should always be kept in mind. A sender may attempt to limit forwarding by identifying to the recipient on the subject line: "Do Not Forward" or "For Your Eyes Only."
2. If you choose to forward to a third party an e-mail originally addressed to you, either forward the e-mail unchanged or distinctly identify any modifications you have made. It is also recommended that you always retain forwarding information so the original author of a forwarded e-mail can be easily identified. It is a good practice to ask permission from the original sender before forwarding an e-mail.

G. Maintenance

1. The effective use of e-mail and the efficiency of network resources as a whole is dependent upon the good maintenance of the system. Users are responsible for such maintenance with respect to their personal e-mail environment. The following maintenance guidelines should be followed at all times.
   a. Where possible, read your incoming e-mail regularly.
   b. Where a response is appropriate, answer e-mail promptly.
   c. Keep your e-mail environment organized.
      i. Sort your e-mail according to the retention recommendations set forth in subsection H of this section III.
      ii. Develop an orderly filing system for e-mail you need or want to save. Utilizing folders and archives within the e-mail system is a very effective method of organizing your e-mail. If you need assistance setting up and maintaining the archive features of your mail client, you should contact your respective agency's technical support representative or Legislative Information Services staff.
   d. Use the network e-mailing list sparingly. Use of these lists contributes greatly to network traffic and should be avoided unless necessary.
   e. An e-mail file quota of 1GB has been set on all e-mail accounts maintained on the General Assembly in order to control growth of e-mail related data being stored on the General Assembly's resources and to encourage proper management of e-mail as a resource of the General Assembly. Users will receive a warning at 650MB that they are nearing the limit so they can take steps to reduce the e-mail file size. Once the quota is reached, no new e-mail will be delivered. The primary means for reducing e-mail file size is through

regular deletion or archiving of messages. Agency technical support or Legislative Information Services staff will provide assistance setting up e-mail archive functionality upon request.

f. Manage your "sent mail" folders and "trash" folders the same as e-mail in your in-box.

H. Recommended Practices for Classifying E-Mail for Retention or Deletion

1. The easiest way to manage the retention and deletion of e-mail is to determine how long each e-mail will be useful to you so that you can store it accordingly. Some e-mail that you receive or send may be deleted immediately or a very short time after you read or send the message, while other e-mail may need to be kept for an extended period of time. It is likely however, that many of the e-mail messages that you send and receive in the course of your workday will be somewhere between these two extremes. In any event, the best practice is to delete all e-mail within thirty days after you have received or sent it, unless there is an overriding reason to retain it for longer than thirty days. (See section 24-80-101 (1) (f), C.R.S.). Any e-mail that you retain may become the subject of an open records request. For legislative staff, it is suggested that you think of typical e-mail in the following three broad categories:

   a. **Transient E-mail.** E-mail that is personal in nature, of fleeting or no value, or otherwise not created or received in the course of state business may be (and is encouraged to be) deleted immediately after reading, but in no event more than thirty days after receipt. This may include e-mails about lunch plans, arranging a ride home, spam, advertising, or other non-work-related publications or notices.

   b. **Administrative E-Mail.** This is e-mail that serves some state-related purpose, but is also transitory or of time-limited value because it serves a time-defined administrative purpose. This may include e-mail about an upcoming meeting or a reminder of an approaching deadline. Retain this e-mail until it is no longer of administrative value (the meeting has occurred, for example) and delete it. Generally, it will not be necessary to retain e-mail in this category for longer than thirty days.

   c. **Intermediate Retention.** This is e-mail that is neither transient nor permanent and has more significant administrative, legal, or fiscal value than an administrative e-mail as described in paragraph b of this subsection 1. This e-mail may include resource information for legislation, information pertaining to a specific subject area or topic or bill, information pertaining to a procedural aspect of the legislative process, or any other information to which you may want to refer in the future. If you find that it is necessary to retain an e-mail in this category for longer than thirty days, it is a good practice to create

folders to help you categorize this e-mail and to remove it from your e-mail inbox. To enhance the efficiency of the network, you are encouraged to archive the folders. Although there is no statutory requirement that any e-mail be retained as a public record, you should retain this e-mail until you have responded to it or until is no longer useful to you before you delete it.

2. Recognizing that each member of the General Assembly receives large numbers of unsolicited e-mails daily, that each has limited resources to assist with categorizing and deleting or retaining these e-mails, and that each member is required to obtain and pay for his or her own e-mail account, a member may follow the suggested categories for staff described in subsection 1. of this section or establish his or her own categories in writing.
3. Consistent with section II. D. 5. of this policy, any e-mail that is the subject of a public records request shall be preserved from the date of the request regardless of any maintenance, retention, or deletion policy or practices utilized by the custodian for that e-mail.

IV. Records Retention

A. Definitions

1. **"Records"** means "records" as defined in section 24-80-101 (1), C.R.S.

2. **"Staff agency"** means and includes:
   a. The Joint Budget Committee Staff;
   b. The Legislative Council Staff;
   c. Legislative Information Services;
   d. The Office of the State Auditor;
   e. The Office of Legislative Legal Services;
   f. The Colorado House of Representatives; or
   g. The Colorado Senate.

B. Records Management

1. Each staff agency shall comply with the provisions of section 24-80-102.7, C.R.S., in regard to retention and disposition of records of the staff agency.
2. In establishing and maintaining a records management program as required by section 24-80-102.7 (2) (a), C.R.S., each staff agency shall follow the guidelines for the retention and disposition of records as set forth in the Colorado State Archives Records Management Manual as applicable, except when:
   a. The retention or disposition of any records of the staff agency is otherwise

controlled by law;

b. The retention or disposition of any records of the staff agency is controlled by policies adopted by the Executive Committee of Legislative Council pursuant to section 2-3-303 (2) (d), C.R.S.; or

c. The needs of the staff agency with regard to the retention or disposition of any of its records are different for legal, administrative, audit, fiscal, research, historical, or other reasons.

3. The Records Management Manual may be accessed at: http://www.colorado.gov/dpa/doit/archives/rm/rmman/index.htm)