

COMMISSION'S ACCESS TO RECORDS RULES

Rule 1. Access to Information and Records

These rules shall be known and cited as the Commission's Access to Records Rules, "CARR".

The purpose of these rules is to provide the public with reasonable access to the Ethics Commission's documents while protecting the privacy interests of parties and persons. In addition, these rules are intended to provide direction to Ethics Commission personnel in responding to public records requests.

The Ethics Commission has the authority to adopt such reasonable rules as may be necessary for the purpose of administering and enforcing the provisions of Article XXIX. The Ethics Commission finds these rules necessary to help guide the custodian of records in performance of his or her duty to administer the provisions of Article XXIX.

These rules are adopted by the Ethics Commission on an interim basis, pending a final proposal, public comment thereon, and further action by the Commission.

The Commission's custodian of records is not authorized to release any records or material to the public inconsistent with this rule.

This rule is intended to be a rule of the Ethics Commission within the meaning of the Colorado Public Records Act, including §§ 24-72-204(1)(c) and 24-72-305(1)(b), C.R.S. (2017).

Rule 2. Public Access to Administrative Records and Published Decisions of the Independent Ethics Commission

This rule governs public access to all records maintained for the purpose of managing the administrative business of the Ethics Commission of the State of Colorado. The Commission is using the Colorado Open Records Act (CORA), §§ 24-72-200.1 to -206, C.R.S. (2017), and the Judicial Department's Public Access to Information and Records Rules ("PAIRR") as guides. Although CORA and PAIRR served as guides in drafting this rule, they are not identical. Many of the deviations herein reflect the unique nature of the records and operations of the Ethics Commission. These changes are addressed in comments throughout the rule. This rule is intended to be a rule of the Ethics Commission within the meaning of CORA, including § 24-72-204(1)(c), C.R.S. (2017), and PAIRR.

SECTION 1 DEFINITIONS

For purposes of CARR, the following definitions apply:

- (a) "Administrative record" means a record maintained for the purpose of managing the business or performing the duties of the Ethics Commission.
- (b) "Commission", "Ethics Commission" or "IEC" means the Independent Ethics Commission and its staff.

COMMENT: The Independent Ethics Commission was created by Article 29, Section 5 of the Colorado Constitution, and is an independent and autonomous constitutional entity. Since the Ethics Commission does not fall under PAIRR (See PAIRR2, Rule 2, Section 1(e)), it is promulgating these rules to govern requests for the release of any records or material.

(c) “Confidential personal information” means a person’s home address, telephone number, social security number, birth date, bank account or other personal financial information, tax identification number, personal signature, personal email addresses, or similar unique identifying information other than a person’s name.

COMMENT: CORA does not define “confidential personal information” or any similar term. The disclosure provisions in this rule permit the disclosure of many records so long as confidential personal information is redacted or otherwise not disclosed. This definition provides clear guidance to the public and to custodians regarding what information can be disclosed.

(d) “Custodian” means the person designated by the Commission, federal or state statute, court rule, or court order as the keeper of the record, regardless of possession.

(e) “Draft” means any document produced by the Ethics Commission that is not a final product or that is not intended to be published on the Ethics Commission website.

(f) “Financial record” means any documentation maintained to show the receipt, management or disbursement of funds by the Ethics Commission.

(g) “Person” means any natural person acting in any capacity, and any corporation, limited liability company, partnership, firm, or association.

(h) “Person in interest” means the person who is the subject of a record.

(i) “Personnel file” means and includes home addresses, telephone numbers, financial information, and other information maintained because of the employer-employee relationship, and other documents specifically exempt from disclosure under this rule or any other provision of law. “Personnel file” does not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, dates of employment, classification, job title, job description, salary range, performance ratings, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions.

(j) “Protected document” means any document that is accessible to the public only after redaction in accordance with applicable state constitutional provisions, federal or state statute, court rule, or court order, and with these rules.

(k) “Published decision” means any document posted on the Ethics Commission website or other item that is submitted to, filed with, collected by, received by, or issued by the custodian that is related to an Advisory Opinion, Letter Ruling, Position Statement, or non-frivolous complaint; any published agenda; published minutes; or published order, that is related to a non-frivolous complaint.

“Published decision” does not include records maintained for the purpose of managing the administrative business of the Ethics Commission; Commissioner’s notes or Ethics Commission work product related to the deliberative process, draft opinions, draft rulings or draft position statements, draft orders, draft agendas, draft minutes or internal memos; information gathered,

maintained, or stored by another government agency or other entity to which the Ethics Commission has access; and all other records maintained by the Ethics Commission not expressly defined as a published decision.

SECTION 2

ACCESS TO ADMINISTRATIVE RECORDS

(a) All Ethics Commission administrative records shall be available for inspection by any person at reasonable times, except as provided in this rule or as otherwise provided by federal or state statute, court rule, or court order. The custodian shall make policies governing the inspection of administrative records that are reasonably necessary to protect the records and prevent unnecessary interference with the regular discharge of the duties of the custodian or the custodian's office.

(b) The custodian must take reasonable measures to locate any specific administrative record sought and to ensure public access to the administrative record without unreasonable delay or unreasonable cost.

(c) This rule does not preclude the Ethics Commission from obtaining and enforcing trademark or copyright protection for any administrative record. The Ethics Commission is specifically authorized to obtain and enforce such protection in accordance with applicable federal law. This authorization does not restrict public access to, or fair use of, copyrighted materials; and does not apply to writings that are merely lists or other compilations.

SECTION 3

EXCEPTIONS AND LIMITATIONS ON ACCESS TO RECORDS

(a) Exceptions and Limitations on Access to Records. The custodian shall allow any person to inspect an administrative record or any portion thereof except based on the following grounds or as provided in subsection (b) or (c):

- (1) Such inspection would be contrary to any constitutional provision or state statute;
- (2) Such inspection would be contrary to any federal statute or regulation;
- (3) Such inspection is prohibited by court order or court rule; or
- (4) Such inspection could compromise the safety or security of an Ethics Commission employee or commissioner.

COMMENT: Paragraph (4) of this subsection is not in CORA but is found in PAIRR. This provision recognizes that the records of the Ethics Commission contain information that could jeopardize the safety or security of its employee(s) or commissioners, and the Ethics Commission has an obligation to its employee(s) to not release such information.

(b) May Deny Inspection. Unless otherwise provided by state constitutional provision, federal or state statute, court rule, or court order, the custodian may deny inspection of the following records on the ground that disclosure would be contrary to the public interest, including:

- (1) Information related to research projects conducted by or in affiliation with the Judicial Department.

(2) E-mail addresses provided by a person to the Ethics Commission for the purpose of future electronic communications to the person from the Ethics Commission.

(3) E-mail addresses of any person currently or formerly associated with the Ethics Commission by virtue of employment, internship, volunteer position, contracting, or appointment to a board, commission, or committee.

COMMENT: CORA does not have this provision, however PAIRR does have this provision governing e-mail addresses of employees. This provision is intended to protect against improper *ex parte* contacts and to protect personal and Ethics Commission e-mails from being subject to phishing, marketing, or other security risks.

(4) Individual signatures that constitute confidential personal information.

COMMENT: This provision is not in CORA, but does appear in PAIRR. The Ethics Commission protects individual signatures because they can be misappropriated and subject to improper and illegal use.

(5) Financial records of Commissioners, Ethics Commission employees, or payees, unless confidential personal information has been redacted.

COMMENT: The rule is intended to protect the confidential personal information of commissioners, Ethics Commission employees, and payees. Commissioners receive no compensation and are paid only a per diem for their service. Art. XXIX, sec. 5(1), Colorado Constitution.

(6) Written communication from the public, which includes: (a) anonymous complaints or other written communication implying that the author intended the communication to be confidential; (b) written communication from the public for the purpose of requesting assistance with filing a complaint; or (c) any communication from the Ethics Commission in response to such public communication.

COMMENT: The Ethics Commission receives anonymous complaints as well as unsolicited correspondence from the public regarding complaints that may be filed. This provision recognizes that disclosure of this type of communications may be contrary to Article XXIX, Section 5(3)(b) of the Colorado Constitution.

(7) Records related to legislation, including documents related to fiscal notes, proposed or introduced legislation, and the drafting of bills or amendments.

COMMENT: CORA addresses drafts of legislation and documents relating to drafting as part of its “work product” exception to disclosure. § 24-72-202(6.5)(b), C.R.S. (2015). The Judicial Department took a similar approach in PAIRR, and the Ethics Commission’s rule tracks those provisions.

(8) Security records, including records regarding security plans developed or maintained by the Judicial Department or the Ethics Commission, such as:

(A) Details of security plans and arrangements, investigation reports, audit reports, assessments reports, specific incident reports, warnings, investigations, emergency plans, building floor plans and blueprints, building access details, equipment, visitor and vendor logs, surveillance, network and systems topology, and network and systems security design;

(B) Reports of loss that relate to security measures;

(C) Any records of the intelligence information or security procedures of any sheriff, prosecuting attorney, or other law enforcement agency, or investigatory files compiled for any law enforcement purpose related to security measures;

(D) Portions of records of the expenditure of public moneys containing details of security plans and arrangements or investigations. Records of the expenditure of public moneys on security arrangements or investigations, including contracts for security plans and arrangements and records related to the procurement of, budgeting for, or expenditures on security systems, are otherwise available for inspection; and

(E) Any record provided by another public entity that contains details of security arrangements or investigations. The Ethics Commission custodian must refer a request to inspect the record to the public entity that provided the record and shall disclose to the requestor the name of the public entity.

This paragraph (10) does not prohibit the custodian from transferring records containing details of security arrangements or investigations to the Division of Homeland Security and Emergency Management in the Department of Public Safety, the governing body of any city, county, or other political subdivision of the state, or any federal, state, or local law enforcement agency. The custodian shall not transfer any record received from a nongovernmental entity without the prior written consent of the entity unless such information is already publicly available.

Notwithstanding any provision to the contrary in this subsection (b), the custodian shall deny inspection of any record that is confidential by federal or state statute, court rule, or court order.

COMMENT: CORA contains a similar provision. § 24-72-204(2)(a)(VIII), C.R.S. (2015). This rule provides more specific detail on the types of security records maintained by the Judicial Department which may include the Ethics Commission.

(9) Any information that may not be disclosed pursuant to § 24-18.5-101, C.R.S. (2015).

(10) Any information that may not be disclosed under PAIRR.

(c) Must Deny Inspection. Unless otherwise provided by state constitutional provision, federal or state statute, court rule, or court order, the custodian must deny inspection of the following records:

(1) Any complaint, or associated documents, correspondence or preliminary investigation filed with the Ethics Commission that has not been deemed non-frivolous.

(2) Medical, mental health, sociological, and scholastic achievement data on individual persons and groups from which individuals can be identified, unless requested by the person in interest.

(3) Personnel files.

This paragraph (3) does not prevent the person in interest from requesting information from his or her own personnel file or from granting written, signed permission for a third party to access specific components of his or her personnel file that are subject to inspection by the employee.

(4) Any records of sexual harassment complaints and investigations, whether or not such records are maintained as part of a personnel file; except that, an administrative agency investigating the complaint may, upon a showing of necessity to the custodian of records, gain access to information necessary to the investigation of such a complaint. Disclosure of all or a part of any records of sexual harassment complaints and investigations to the person in interest is

permissible to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved. This paragraph shall not preclude disclosure of all or part of the results of an investigation of the general employment policies and procedures of an agency, office, department, or division, to the extent that the disclosure can be made without permitting the identification, as a result of the disclosure, of any individual involved. This paragraph shall not apply to allegations of sexual harassment found to be non-frivolous by the Ethics Commission or to records of sexual harassment complaints and investigations that are included in court files and records of court proceedings.

(5) Letters of reference.

(6) Trade secrets and proprietary information including copyrighted and trademarked materials, and other intellectual property constituting trade secrets and proprietary information; software programs; network and systems architectural designs; source code; source documentation; project management materials developed or maintained by the Ethics Commission; information in tangible or intangible form relating to released and unreleased Ethics Commission software or hardware, user interface specifications, use case documents, images and design screens, database design structures and architecture, security structures and architecture; the Ethics Commission's original design ideas; the Ethics Commission's non-public business policies and practices relating to software development and use; and the terms and conditions of any actual or proposed license agreement or other agreement concerning the Ethics Commission's products and licensing negotiations.

COMMENT: PAIRR contains a similar provision. This provision of the rule is broader than CORA, § 24-72-204(3)(a)(IV), C.R.S. (2017), and contains additional protection of information technology records, including trade secrets and proprietary information. The Judicial Branch relies heavily on its Information Technology infrastructure and has invested in proprietary systems that may not be subject to disclosure. Since the Ethics Commission falls under the Judicial Department umbrella, it is adopting the same exemption from disclosure.

(7) Privileged information; confidential legal, commercial, financial, geological, or geophysical data; and confidential personal information.

(8) Portions of records that reveal a crime victim's confidential personal information.

COMMENT: This provision is not in CORA but is in PAIRR. This rule recognizes the confidentiality concerns of crime victims and is intended to protect their safety, security, and confidential personal information.

(9) Draft reports and related documents prepared by or for the Ethics Commission for internal use in evaluating the performance of the Ethics Commission.

COMMENT: This provision is found in PAIRR and is consistent with the definition of "work product" under CORA. §§ 24-72-202(6), (6.5), C.R.S. (2017).

(10) Purchasing records related to a service or product purchased from a vendor that are determined to be confidential pursuant to applicable procurement rules. Records related to the purchasing process, including criteria and scoring, are not available for inspection until the purchasing process is finalized and any information identifying the scorekeeper on the scoring sheets has been redacted. COMMENT: PAIRR contains the same provisions. Confidential purchasing records are addressed generally in CORA as confidential commercial and financial information. § 24-72-204(3)(a)(IV), C.R.S. (2017). This provision of the rule specifies more

clearly that purchasing records determined to be confidential under the procurement rules applicable to the agency cannot be disclosed.

(11) The following financial records: The Ethics Commission protects the following information that may be found in civil, criminal or domestic relations cases.

(A) Identifying bank account information such as routing numbers, bank account numbers, Public Deposit Protection Act account numbers, and account owner signature cards;

(B) Federal tax identification information including Employer Identification Numbers and Social Security numbers; and

COMMENT: This provision is not in CORA, but is found in PAIRR.

(C) Financial records that reveal a crime victim's or a witness's confidential personal information.

COMMENT: This provision is not in CORA but is found in PAIRR. Like the Judicial Branch, the Ethics Commission has a strong interest in protecting the confidential personal information of witnesses and crime victims.

(12) Records regarding an independent contractor's personal financial information and records maintained for the purpose of evaluating an independent contractor's contract with respect to qualifications and performance under the contract, subject to the disclosures allowed under paragraph (10) of this subsection.

(13) Investigation records, such as:

(A) Any record of civil or administrative investigations authorized by federal or state statute, court rule, or court order unless the record is available for inspection pursuant to federal or state statute, court rule, or court order; and

(B) Any record of an internal personnel investigation, except that records of actions taken based on such investigation must be open to inspection.

(C) Any draft or record of an investigation completed pursuant to Section 5(3)(c) of Article XXIX, that has not been provided to the parties.

COMMENT: CORA does not specifically address internal personnel investigations. This rule strikes a balance between providing a thorough and confidential process for investigating personnel issues and disclosing any action taken as a result of the investigation.

(14) Work product, including all advisory or deliberative materials assembled for the benefit of the Ethics Commission that express an opinion or are deliberative in nature and are communicated for the purpose of assisting the Ethics Commission in performing its duties, such as:

(A) Communications, notes, and memoranda that relate to or serve as background information for such duties; and

(B) Drafts and discussion copies of documents that express a decision, determination, or conclusion by the Ethics Commission.

(15) Records protected under the common law governmental or deliberative process privilege, if the material is so candid or personal that public disclosure is likely to stifle honest and frank discussion within the Ethics Commission. In some circumstances, public disclosure of such

records may cause substantial injury to the public interest. If any administrative record is withheld pursuant to this paragraph, the custodian must provide a sworn statement describing each record withheld, explaining why each such document is privileged and why disclosure would cause substantial injury to the public interest. If the requestor so requests, the custodian must apply to the district court for an order permitting him or her to restrict disclosure. The application shall be subject to the procedures and burden of proof provided for in subsection (d) of this section. All persons entitled to claim the privilege with respect to the records at issue shall be given notice of the proceedings and shall have the right to appear and be heard. In determining whether disclosure of the records would cause substantial injury to the public interest the court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.

(d) Petition for Order Permitting Restriction.

(1) In addition to any of the foregoing, if in the opinion of the custodian access to the contents of a record would do substantial injury to the public interest, notwithstanding the fact that the record might otherwise be available for inspection, or if the custodian is unable, in good faith, after exercising reasonable diligence, and after reasonable inquiry, to determine if this rule restricts access to the record, the custodian may petition the district court of the district in which the record or the custodian is located for an order permitting restriction of access to the record or for the court to determine if access to the record is restricted. A hearing on the petition shall be held at the earliest practical time. The person seeking access to the record must be served with notice of the hearing pursuant to the Colorado Rules of Civil Procedure and has the right to appear and be heard.

(2) In the case of a record otherwise available for inspection pursuant to this Rule, after a hearing the court may, upon a finding that access would cause substantial injury to the public interest, issue an order authorizing the custodian to restrict access. In the case of a record that may be restricted from access pursuant to this rule, after a hearing the court may, upon a finding that access to the record is restricted, issue an order affirming restricting access. In an action brought pursuant to this subsection (d), the custodian has the burden of proof.

(3) The court costs and attorney fees provision of section 5 does not apply to petitions filed pursuant to this subsection (d) if the custodian proves and the court finds that the custodian, in good faith, after exercising reasonable diligence, and after making reasonable inquiry, was unable to determine if this rule restricts access to the record without a ruling by the court.

COMMENT: This provision is found in PAIRR.

**SECTION 4
PROCEDURE TO ACCESS RECORDS**

COMMENT: This rule creates a different process than CORA for accessing records but with similar timeframes. Under this rule, the Ethics Commission responds to a request for inspection within three business days of receipt of the request. Certain extenuating circumstances specified in the rule may require additional time for a response. Any fees charged must be consistent with the fee schedule posted on the Ethics Commission's website and must be consistent with the fees assessed under CORA.

(a) Request for Inspection. The custodian will develop and make information available to the public outlining how to obtain access to administrative records pursuant to this rule. Any request for inspection must be made in accordance with the adopted procedures.

(b) Response. Within three business days of receipt of a request for inspection, the custodian must provide one or more of the following responses:

(1) The record is available for inspection.

(A) When a record is available for inspection, the custodian must provide access to a record or provide written notice of a time and location for inspection of the record within a reasonable time. Production is subject to payment of any fee required under subsection (c) of this section; and

(B) The custodian may determine whether the record will be provided in print or electronic format. If the requestor is unable to use or access records provided in electronic format, the custodian will provide a copy, printout, or photograph of the record.

(2) The record is not available for inspection.

(A) When a record is not available for inspection, the custodian must provide written notice that:

- (i) The record requested is not maintained by the custodian;
- (ii) The request did not provide information sufficient to identify the record sought; or
- (iii) The record is not available for inspection pursuant to section 3 of this rule.

(B) If the custodian denies access to a record, the requestor may request a written statement of the grounds for the denial. Upon receipt of such request, the custodian must, within a reasonable time, provide a written statement setting forth the grounds for denial.

(3) The custodian requires an additional seven business days to respond because extenuating circumstances exist. A finding that extenuating circumstances exist must be made in writing by the custodian and provided to the requestor. Extenuating circumstances exist only when:

(A) A broadly stated request is made that encompasses all or substantially all of a large category of records and the request is without sufficient specificity to allow the custodian reasonably to prepare or gather the records within the three-day period; or

(B) A broadly stated request is made that encompasses all or substantially all of a large category of records and the agency is unable to prepare or gather the records within the three-day period because all or substantially all of the resources necessary to respond to the request are dedicated to meeting an impending deadline, or to a period of peak demand that is either unique or not predicted to recur more frequently than once a month; or

(C) The request involves such a large volume of records that the custodian cannot reasonably prepare or gather the records within the three-day period without substantially interfering with the custodian's obligation to perform other responsibilities; or

(D) The proximity of the request to an Ethics Commission meeting does not allow the custodian, and sole employee of the Ethics Commission, to reasonably prepare for the meeting and gather the records within the three-day period without substantially interfering with the custodian's obligation to perform those other responsibilities.

COMMENT: Provision 3(D) is not in CORA or PAIRR. However, the Ethics Commission has unique practical limitations given its staff of one (1) employee. In order to comply with its constitutional mandate to hear complaints, issue findings, assess penalties, and issue advisory opinions, and to do so in a timely manner, that employee must be prepared and provide certain materials to the Ethics Commission at its monthly meetings. Thus, where preparation for an Ethics Commission meeting would be impaired by the custodian's obligation to respond to a records request, the custodian may require an additional seven business days to respond.

(c) Fees.

(1) A custodian may impose a fee in response to a record request if the custodian has, before the date of receiving the request, either posted on the custodian's website or otherwise made publicly available a written policy that specifies the applicable conditions and fees for research, retrieval, redaction, copying, and transmission of a record.

Assessment of fees shall be consistent with § 24-72-205, C.R.S. (2017). Where the fee for a certified copy or other copy, printout, or photograph of a record is specifically prescribed by federal or state statute, court rule, or court order, the specific fee shall apply.

(2) The custodian may notify the requestor that a copy of the record is available but will only be produced once the custodian either receives payment or makes arrangements for receiving payment for all costs associated with records research, retrieval, redaction, copying, and transmission and for all other fees lawfully imposed.

**SECTION 5
RESOLUTION OF DISPUTES**

(a) Any person denied inspection of a record under this rule may petition the district court of the district in which the record or the custodian is located for an order directing the custodian to show cause why the custodian should not permit inspection of the record. At least three business days before filing a petition with the district court, the person who has been denied inspection of a record must file a written notice with the custodian who denied inspection of the record informing the custodian that the person intends to file a petition with the district court. A hearing on a petition shall be held at the earliest practicable time.

(1) Unless the court finds that the denial of the right of inspection was proper, it shall order the custodian to permit such inspection and shall award court costs and reasonable attorney fees to the prevailing requestor in an amount to be determined by the court. No court costs and attorney fees may be awarded to a person who is a party engaged in litigation with the Ethics Commission and who petitions the court for an order pursuant to this section (5) for access to a record of the Ethics Commission if the court finds that the record sought is related to the pending litigation and is discoverable pursuant to applicable rules of procedure.

(2) If the court finds that the denial of the right of inspection was proper and the court finds that the petition was frivolous, vexatious, or groundless, the court shall award court costs and reasonable attorney fees to the custodian.

(b) In defense against a petition for an order permitting inspection, the custodian may raise any issue that could have been raised and is not limited by any response under sections 3 or 4 of this rule.