Public Access Committee Meeting Minutes

May 17, 2022, at 1:30 pm
1300 Broadway
Denver, CO 80203
Supreme Court Conference Room
Virtual via WebEx

The meeting was called to order at 1:30

Attendees:

Voting Members Present: Judge Jerry Jones, Colorado Court of Appeals, committee chair; Chief Judge Michael Martinez (WebEx), 2nd Judicial District; Marci Hoffman (WebEx), Court Executive, 19th Judicial District; Judge Don Toussaint (WebEx), District Judge, 18th Judicial District; Polly Brock, Clerk of Court and Court Executive, Court of Appeals; Rob McCallum, Public Information Officer, SCAO; Darren Cantor, Office of Alternate Defense Counsel; April McMurrey, Office of Attorney Regulation Counsel; Kent Wagner, Executive Director, Office of Judicial Performance Evaluation; Mellissa Thompson, Executive Director, Office of Respondent Parents' Counsel; James O'Conner, Office of Public Defender; Timothy Lane, Colorado District Attorneys' Council; Peggy Gentles (WebEx), Court Executive, 14th Judicial District; Anne Deyell (WebEx), Clerk of Court, 22nd Judicial District

Non-Voting Members Present: Justice William W. Hood, III, Colorado Supreme Court; Terri Morrison, Legal Counsel, Colorado Judicial Branch; Sherri Hufford, Probation Services, SCAO;

Guests: Kayla Cooley, Court Programs Analyst III, SCAO; Mari Cano, Clerk of Court VIII, 20th Judicial District; Shana Kloek (WebEx), Clerk of Court VIII, 18th Judicial District; Jeff Roberts, representing Colorado Freedom of Information Coalition; Jake Collins, representing LexisNexis CoCourts; Amanda Pampuro, Courthouse News

Approval of Minutes from January 21, 2022, meeting

Chief Judge Martinez moves to approve minutes from January 21. Polly Brock seconds the motion to approve meeting minutes. All in favor. None opposed. Motion to approve minutes passes unanimously.

Old Business

Proposed amendments to PAIRR 2 regarding access to records of investigations.

Judge Jones informed the committee that two organizations within Judicial are concerned with the proposed amendments, Public Defenders office and Office of Attorneys' Regulation Council. **Terri Morrison** summarized the amendments. Right now, PAIRR 2 Section (3)(c)(21) personnel, civil, or administrative investigations are not open to the public. Once the investigation has been concluded the result/action taken then becomes open to inspection. The amendments would allow, upon conclusion of any civil, administrative, or personnel investigation that is closed when no further action is warranted, then those records become open to inspection unless some other statute, order, or rule prevents them from being open. The custodian may remove the name or other personal identifying or financial information of complainants or witnesses prior to inspection. For civil or administrative investigations, the custodian may remove the name or other personal identifying or financial information of complainants, witnesses, or targets of closed

investigations prior to inspection. If the court adopts these amendments all investigations initiated prior to the date of adoption would not be open to inspection. The amendments would only apply to investigations initiated after the adoption date.

James O'Connor is concerned about misuse of the information that becomes open to inspection; the broad scope of these amendments; and the case file records that are not included in the definition of administrative records.

Judge Jones summarized James O'Connor's concerns.

- What are we trying to solve here? Perhaps we are going beyond CORA because personnel investigations are included.
- How would the implementation of these amendments affect the ability to gather information and the willingness of people to come forward?
- The potential impact on targets of investigations where no action is taken for various reasons.

Terri Morrison noted that prior to the legislature passing their own protections, the legislature asked Justice Marquez why should judicial employees be treated differently than other employees? Justice Marquez indicated to Terri that she doesn't know why there is a specific carveout on personnel investigations.

Judge Jones asked if agencies are subject to CORA now? Are their records of closed internal personnel investigations available to the public?

Terri Morrison stated that other than the legislature, according to the AG's office the records are open to the public unless some other exception applies under CORA. She also stated that she has heard some agencies do not close their investigations to avoid having to release them to the public.

Judge Jones asked what are the specific relevant reasons why judicial should be treated differently than other executive branch agencies? Concerns about people coming forward exist throughout all the agencies. Why should we go beyond CORA in terms of carving ourselves out of this disclosure obligation?

James O'Connor stated if you compare his agency (office of public defender) to other agencies across the country you will see the differences, specifically where his agency is placed within the government structure, how it is created, and how the leadership is appointed. Our system here provides us with the amount of independence that is needed because a lot of times we are not dealing with actuality but rather the perception of others.

Judge Jones asked whether he was suggesting that the committee not address this at all? Or was he simply arguing that the public defender's office should be excluded?

James O'Connor clarified that the PDs certainly want to remain within PAIRR. There are good public purposes served by the agency being a part of PAIRR. In terms of access to records of investigations his agency is not in favor of adopting the proposed rule. The reason they are not in favor of the rule, is because of the way it would impact the agency.

Judge Jones suggested that one of the things we must be concerned about is how do we present our relevant differences as judicial to the people across the street. He indicated he was asking because now is not a good time for us to have another bad look. Anything we do is going to be viewed and judged by the general assembly.

April McMurrey indicated she is worried about policy being created because someone is breathing down our neck. It is important to be transparent but what we are going to be giving transparency to is essentially allegations. This will be dangerous for both the subject of the allegation and the person making the allegation. Maybe we need to have some discussions with the folks across the street to see how CORA is playing out. Because if they are in fact not closing out investigations to avoid having to release them to the public, then that is an ineffective policy that they have in place.

That does not accomplish what we are seeking to do with transparency. It may not be as important to present relevant differences but rather let them know that we have questions about CORA and that we are actively discussing if it is a good policy, if it is workable, and if it makes sense for the Judicial Branch to follow it. It may be more important to let them know that we are working on it and trying to be thoughtful about it. She indicated she was not suggesting that they need to change, she was suggesting that the Judicial Branch may not follow and then lay out reasons why we don't.

James O'Connor informed that he has reached out to the AG's office to see if some questions about CORA could be answered, and they did not have anyone who could do that because of staffing changes.

Timothy Lane stated that his experience with investigations is the opposite of what is being said about agencies not closing out their investigations. People want investigations closed out as quickly as possible. There needs to be an administrative policy that if an investigation is open, but no further action is taking place, it needs to be closed and not remain open.

April McMurrey stated that the danger of giving transparency to allegations is that there is a risk of creating a stigma toward the target of the allegations. Cases that come through attorney regulation that have been dismissed, meaning a determination has been made that no action is going to take place. Those cases are not accessible to the public. Criminal defense lawyers and family lawyers' practice in an area that garners more complaints. There is a recognition that making those cases available to the public would create a stigma against those lawyers where no discipline has been imposed. Another concern is that for closed investigations the custodian *may* remove the name or other personal identifying or financial information of complainants or witnesses prior to inspection (this does not include personnel cases, identifying information will not be removed). There is no guarantee that the identities will be protected thus increasing the chance that complainants will not feel comfortable coming forward. Even if that information is redacted it can still be easy to identify the individuals, especially in smaller jurisdictions. Additionally, sometimes when an allegation has been made there is a mutual agreement to part ways instead of proceeding with an investigation. The targeted individual requests to leave the office and that request is then honored before any investigation takes place. In this instance the case is closed, and it then becomes available to the public which may impact our ability to honor a request like this in the future. One more concern is that this can be used in a negative way. An example is if someone makes a false complaint just to create a stigma against the targeted individual. Giving light of day to allegations is our biggest concern and for that reason the office of attorney regulation counsel objects to the adoption of this amendment.

Terri Morrison informed that the Language in (3)(c)(21)(D) that April McMurrey referenced was taken from CORA § 24-72-204(2)(a)(IX)(B) and states that upon conclusion of a civil or administrative investigation that is closed because no further investigation, discipline, or other agency response is warranted, all records not exempt pursuant to any other law are open to inspection; except that the custodian may remove the name or other personal identifying or financial information of witnesses or targets of such closed investigations from investigative records prior to inspection.

Judge Jones asked why is this Language not the same for personnel investigations?

Terri Morrison personnel investigations were carved out because CORA § 24-72-204(2)(a)(IX)(A) states that any records of ongoing civil or administrative investigations conducted by the state or an agency of the state in furtherance of their statutory authority to protect the public health, welfare, or safety unless the investigation focuses on a person or persons inside of the investigative agency.

The meeting was adjourned for five minutes at 2:35

Darren Cantor suggested that if we are concerned about people not coming forward for fear of their identity being made public, we make it a rule that the complaining party's identity be redacted.

Judge Jones read a comment from Chief Judge Martinez. If our goal here is to encourage reporting of improper conduct, are we somehow undermining the objective if once the investigation is completed, we then make it available for public inspection the identity of the party requesting the investigation as well as the target of the investigation? Essentially, does this policy encourage or deter?

Polly Brock is not clear when something is an investigation or just an inquiry. There could be investigations that have no records attached to them because they happen in a face-to-face meeting.

Terri Morrison stated that the term "investigation" is not defined in CORA.

Melissa Thompson questioned if the term "personnel" is used in CORA.

Judge Jones clarified that the term personnel investigation isn't used in CORA, because CORA's default which is everything is public. Those sorts of investigations are deemed to be public because there is not an exemption for them. Our proposed rule makes it explicit. Which is separate from a personnel file.

Mellissa Thompson is concerned because in smaller agencies where an investigation is not handled by HR, the records of the investigation go into their personnel files. This may become an issue as to what should be available to the public.

Judge Jones stated that there is a case that says an agency can't withhold something from disclosure simply by placing it in a personnel file.

Terri Morrison informed that personnel file is defined in both CORA and PAIRR. Additionally, there is case law that states what is included in a personnel file as well as what a personnel file is not.

Judge Jones would like to form a subcommittee to look at the following:

1) Policy question – is it, as a policy matter for the Judicial branch, a good idea to track CORA with respect to personnel investigations?
2) Look at the transparency question from a pragmatic perspective. Are there reasons that judicial or agencies within judicial from the executive branch? Is there a reason for treating judicial or those agencies within judicial differently? What are those reasons specifically?
3) Find some folks over in the executive branch to see how CORA works. Including how this would work for small agencies as well as mental health issues.
4) Proposed Language

Please email J Jones/Kristina if you would like to be on the subcommittee. Judge Jones hopes to get volunteers from all agencies. It is not limited to people on the PAC.

New Business

(3)(c) Exceptions and Limitations on Access to Records Must Deny Inspection

Judge Jones discussed the need for the proposal in (3)(c)(26) Judicial branch professional development materials, records, and information, including, but not limited to (a) evaluation materials and records generated by participants in judicial branch orientation, education, mentoring, or coaching programs, such as program applications, test scores, assessments, practical exercise worksheets, and similar materials, and b) identities of individualized development program applicants and participants.

Darren Cantor agreed with the concept of (3)(c)(26) but is contradictory to the discussion that just took place but is concerned about the perception it may give the public. Why should we exclude employees from the protection that we are providing to judges?

Judge Jones clarified that the discussion that just took place referred to complaints against people that potentially have merit which is different than judges and/or staff voluntarily participating in educational and training programs.
Rob McCallum pointed out that there are mental health aspects that are also involved in some of those professional development courses that include psychological exams that should clearly be protected.
Polly Brock clarified that (3)(c)(26) covers judicial employees and is not limited to judges.
Chief Judge Martinez moved to approve the text in (3)(c) subsection 26.
Rob McCallum seconds that motion
Judge Jones all in favor, no one opposed, text in (3)(c) subsection 26 passed unanimously.
Polly Brock moved to adopt the second comment: This provision is not in CORA. The Judicial Branch has a strong interest in promoting candor with participants of professional development programs.
Kent Wagner seconds that motion
Judge Jones all in favor, no one opposed, the second comment passed unanimously.
Conflicting provisions
Terri Morrison stated that there were a couple of other PAIRR 2 issues that have been brought to her attention. One is that §1(b) defines confidential personal information (CPI) to include personal signatures. CPI MUST be withheld pursuant to §3(c)(7) however, §3(b)(4) says personal signatures MAY be withheld as against public interest. These two provisions conflict which has caused a lot of confusion for those who go through records trying to determine what should be redacted.
Judge Jones suggested that we change may to must for consistency.
Rob McCallum moved to delete §3(b)(4) says personal signatures MAY be withheld as against public interest and re number.
Darren Cantor seconds that motion
Judge Jones all in favor, no one opposed, the deletion of §3(b)(4) says personal signatures MAY be withheld as against public interest and re number passed unanimously.
Grant funded programs
Terri Morrison stated that SCAO runs several grant funded programs and accepts applications which are reviewed and voted upon prior to funding being awarded. Two such programs are Underfunded Facilities and Courthouse Cash Security. It has been requested that the grant applications not be public before they have been reviewed and voted upon.
Justice Hood suggested that this matter could benefit from some proposed Language before voting on.
Judge Jones will prepare a letter for the court about everything that has been voted on today.
Terri Morrison requested that the letter also be sent to the Office of Public Guardianship.

Next Meeting Date

The next meeting will be set via doodle poll this fall.

Meeting was adjourned at 3:32