

RULE CHANGE 2016(10)

CHAPTER 38

PUBLIC ACCESS TO INFORMATION AND RECORDS

Rule 1. [NO CHANGE]

Rule 2. Public Access to Administrative Records of the Judicial Branch

This rule governs public access to all records maintained for the purpose of managing the administrative business of the Judicial Branch of the State of Colorado. Using the Colorado Open Records Act (CORA), §§ 24-72-200.1 to -206, C.R.S. (2015), as a guide, the Supreme Court published a proposed Rule governing access to administrative records of the Judicial Branch, and the Chief Justice signed Chief Justice Directive 15-01 to govern interim access to administrative records. The Colorado Supreme Court received comments and held a public hearing on the proposed rule. The Supreme Court revised the rule in response to the comments received. Although CORA served as a guide in drafting this rule, the rule and CORA are not identical. Many of the rule's deviations from CORA reflect simple changes to language and streamlined organization of the rule for clarity and to better serve the public. Other, substantive deviations from CORA reflect the unique nature of the records and operations of the Judicial Branch. These changes are addressed in comments throughout the rule. This rule pertains only to administrative records and does not contemplate or control access to court records, which is governed by P.A.I.R.R. 1 and Chief Justice Directive 05-01. This rule is intended to be a rule of the Supreme Court within the meaning of CORA, including section 24-72-204(1)(c), C.R.S. (2015).

SECTION 1

DEFINITIONS

For purposes of Chapter 38, Rule 2, the following definitions apply:

(a) "Administrative record" means a record maintained for the purpose of managing the business or performing the duties of the Judicial Branch that is not defined as a court record in P.A.I.R.R. 1 and Chief Justice Directive 05-01.

(b) "Confidential personal information" means a person's home address, telephone number, social security number, birth date, bank account 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.

(c) “Custodian” means the person designated by federal or state statute, court rule, or court order as the keeper of the record, regardless of possession. Where no federal or state statute, court rule, or court order designates, the custodian is as provided in this subsection:

(1) For Colorado State Courts and Probation, the custodian is the Chief Justice. The Chief Justice has delegated custodial authority to the following: the chief judge in each judicial district; the chief judge of the court of appeals; and the presiding judge of the Denver Probate and Denver Juvenile courts in their respective courts. Each chief judge or presiding judge may delegate authority to the district administrator, clerk of court, chief probation officer, or other designee.

(2) For the Office of the State Court Administrator, the custodian is the State Court Administrator or his or her designee.

(3) For the Office of the Presiding Disciplinary Judge, the custodian is the Presiding Disciplinary Judge or his or her designee.

(4) For the Office of Judicial Performance Evaluation, the custodian is the Executive Director of the Office of Judicial Performance Evaluation or his or her designee.

(5) For the Office of Attorney Regulation Counsel and the Office of Attorney Registration, the custodian is the Attorney Regulation Counsel or his or her designee.

(6) For the Colorado Lawyer Assistance Program, the custodian is the Executive Director of the Colorado Lawyer Assistance Program or his or her designee.

(7) For the Colorado Attorney Mentor Program, the custodian is the Executive Director of the Colorado Attorney Mentor Program or his or her designee.

(8) For the Office of Alternate Defense Counsel, the custodian is the Executive Director of the Office of Alternate Defense Counsel or his or her designee.

(9) For the Office of the Child’s Representative, the custodian is the Executive Director of the Office of the Child’s Representative or his or her designee.

(10) For the Office of the State Public Defender, the custodian is the State Public Defender or his or her designee.

(11) For the Office of the Respondent Parents’ Counsel, the custodian is the Executive Director of the Office of the Respondent Parents’ Counsel or his or her designee.

(d) “Financial record” means any documentation maintained to show the receipt, management or disbursement of funds by the Judicial Branch.

(e) The “Judicial Branch” includes Colorado State Courts and Probation, the Office of the State Court Administrator, the Office of the Presiding Disciplinary Judge, the Office of Judicial Performance Evaluation, the Office of Attorney Regulation Counsel, the Office of Attorney Registration, the Colorado Lawyer Assistance Program, the Colorado Attorney Mentor Program, the Office of Alternate Defense Counsel, the Office of the Child’s Representative, ~~and~~ the Office of the State Public Defender, and the Office of the Respondent Parents’ Counsel. The Judicial Branch does not include the Judicial Discipline Commission, Independent Ethics Commission, or the Independent Office of the Child Protection Ombudsman.

COMMENT: The Independent Ethics Commission was created by article 29, section 5 of the Colorado Constitution, and is an independent and autonomous constitutional entity. The Supreme Court does not believe it is appropriate to promulgate a rule governing access to records of a separate constitutional entity. The Judicial Discipline Commission is also a separate constitutional entity, created by article 6, section 23 of the Colorado Constitution. Section 24-72-401, C.R.S. (2015) governs the confidentiality of information and records of the Judicial Discipline Commission. The Supreme Court presumes that the legislature intended section 24-72-401 and not CORA to control the confidentiality of Judicial Discipline Commission records. The legislation creating the Independent Office of the Child Protection Ombudsman specifies that it is subject to CORA. § 19-3.3-102(5), C.R.S. (2015).

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

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

(h) “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.

SECTION 2 [NO CHANGE]

SECTION 3

EXCEPTIONS AND LIMITATIONS ON ACCESS TO RECORDS

(a) Exceptions and Limitations on Access to Records. The custodian of any administrative record shall allow any person to inspect a 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 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 a Judicial Branch employee.

COMMENT: Paragraph (4) of this subsection is not in CORA. This provision recognizes that the records of the Judicial Branch contain information that could jeopardize the safety or security of its employees, and the Judicial Branch has an obligation to its employees to not release such information.

(b) May Deny Inspection. Unless otherwise provided by 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:

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

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

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

COMMENT: CORA does not have a similar provision governing e-mail addresses of employees. This provision is intended to protect against improper ex parte contacts and to protect personal and Judicial Branch 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. The Judicial Branch protects individual signatures because they can be misappropriated and subject to improper and illegal use.

(5) Contracts and assignment letters related to the Senior Judge Program unless confidential personal information has been redacted.

COMMENT: The Senior Judge Program is unique to the Judicial Branch, and the Judicial Branch has an interest in protecting the confidential personal information of judges in the Senior Judge Program.

(6) Financial records of judges and justices, Judicial Branch employees, or payees, unless confidential personal information has been redacted.

COMMENT: The rule is intended to protect the confidential personal information of judges and justices, Judicial Branch employees, and payees. Judges and justices are required to provide periodic financial disclosures to the Secretary of State. §§ 24-6-202, 203, C.R.S. (2015).

(7) Written communication from the public implying that the author intended the communication to be confidential and written communication from the public for the purpose of requesting assistance with personal matters affecting the author that are not publicly known, as well as any communication from the Judicial Branch in response.

COMMENT: The Judicial Branch regularly receives unsolicited correspondence from the public with highly personal information. This provision recognizes that disclosure of these personal communications may be contrary to the public interest. CORA contains a similar provision regarding correspondence between a constituent and an elected official on a personal and private matter. § 24-72-202(6)(a)(II)(C), C.R.S. (2015).

(8) 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 Branch takes a similar approach here.

(9) All data and records pertaining to administration of a licensing or certification examination, including application materials, test questions, applicant answers, scoring keys, all grading information and materials, and graded answers.

COMMENT: This provision is not in CORA. The Judicial Branch administers certain licensing and certification examinations, including the bar examination for attorneys. This provision recognizes that disclosure of exam materials or individual application materials may be contrary to the public interest.

(10) Security records, including records regarding security plans developed or maintained by the Judicial Branch, 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 Judicial Branch 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.

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 Branch.

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.

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

(1) 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.

(2) Personnel files.

This paragraph (2) 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.

(3) 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. This paragraph shall not apply to records of sexual harassment complaints and investigations that are included in court files and records of court proceedings. 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.

(4) Letters of reference.

(5) 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 Judicial Branch; information in tangible or intangible form relating to released and unreleased Judicial Branch software or hardware, user interface specifications, use case documents, images and design screens, database design structures and architecture, security structures and architecture; the Judicial Branch's original design ideas; the Judicial Branch'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 Judicial Branch's products and licensing negotiations.

COMMENT: CORA contains a similar provision. § 24-72-204(3)(a)(IV), C.R.S. (2015). This provision of the rule is broader than CORA 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.

(6) Library and museum records contributed by private persons, to the extent of any limitations placed thereon as conditions of such contributions.

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

(8) Names, addresses, e-mail addresses, telephone numbers, and personal financial information of users of public facilities or cultural services that are owned and operated by the Judicial Branch. This paragraph does not prohibit the publication of such information in an aggregate or statistical form if the identity, location, or habits of individuals are not revealed. This paragraph does not prohibit the custodian from transmitting data to any agent of an investigative branch of a federal agency or any criminal justice agency as defined in section 24-72-302(3), C.R.S. (2015), who makes a request to the custodian to inspect such records and who asserts that the request for information is reasonably related to an investigation within the scope of the agency's authority and duties.

(9) Any probation supervision files not included in Chief Justice Directive 05-01 or subject to the provisions of part 3 of article 71 of title 24 of the Colorado Revised Statutes.

COMMENT: This provision is not in CORA. Probation supervision files are unique to the Judicial Branch.

(10) Useful Public Service supervision files. This paragraph does not prevent the disclosure of records related to nonprofit agencies partnering with the Judicial Branch in the Useful Public Service program once signature verification pages have been redacted.

COMMENT: This provision is not in CORA. Useful Public Service supervision files are unique to the Judicial Branch.

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

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

(12) Juror records, except as provided by federal or state statute, court rule, or court order.

COMMENT: This provision is not in CORA. Juror records are unique to the Judicial Branch and must remain confidential to protect juror safety and security. Certain juror records are addressed by statute. § 13-71-101 to -145, C.R.S. (2015).

(13) Collection files pertaining to a person, including collections investigator files. Such files shall be available to the person in interest to the extent permitted by federal or state statute, court rule, or court order. Aggregate or statistical information related to collection files is available for inspection.

COMMENT: This provision is not in CORA. The Judicial Branch is responsible in many cases for collections and collections investigations related to court costs, fines, fees, and restitution. These files contain confidential personal and financial information.

(14) Search warrants that do not have a return of service, except when requested by the law enforcement agency that sought the warrant.

COMMENT: This provision is not in CORA. Search warrant records are unique to the Judicial Branch, and search warrant records without a return of service may contain confidential case or investigation information.

(15) Individual-level responses to surveys conducted by or for the Judicial Branch to collect Judicial Branch performance evaluation information. The aggregate results of such surveys are available for inspection.

COMMENT: This provision is not in CORA. The Judicial Department relies upon honest and frank feedback regarding the performance of the branch. If individual-level responses are not expected to be confidential, individuals may be dissuaded from providing reliable evaluations.

(16) Draft reports and related documents prepared by or for the Judicial Branch for internal use in evaluating the performance of the Judicial Branch.

COMMENT: This provision is consistent with the definition of “work product” under CORA. §§ 24-72-202(6), (6.5), C.R.S. (2015).

(17) Reports and related documents prepared by the Judicial Branch to monitor protected party proceedings unless ordered by a judge in a specific court action. Aggregate or statistical information related to protected party proceedings is available for inspection.

COMMENT: This provision is not in CORA. Protected party proceedings are unique to the Judicial Branch, and confidentiality in these cases must be maintained to protect minors and those who do not have the capacity to proceed in court on their own.

(18) 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: Confidential purchasing records are addressed generally in CORA as confidential commercial and financial information. § 24-72-204(3)(a)(IV), C.R.S. (2015). 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.

(19) The following financial records:

(A) Identifying bank account information such as bank account number, Public Deposit Protection Act account number, and account owner signature card;

(B) Federal tax identification information including Employer Identification Number; and

COMMENT: This provision is not in CORA. The Judicial Branch does not disclose federal tax information.

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

COMMENT: This provision is not in CORA. The Judicial Branch has a strong interest in protecting the confidential personal information of witnesses and crime victims.

(20) 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 (18) of this subsection.

(21) Investigation records, such as:

(A) Any record of civil or administrative investigations authorized by federal or state statute, court rule, or court order conducted by the Judicial Branch 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. Any records of investigations referred to the Judicial Discipline Commission are governed by the Colorado Rules of Judicial Discipline.

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.

(22~~3~~) Judicial application records submitted by or on behalf of an applicant for any judicial office in any court of record who is not listed on the nominee list certified to the governor as described in article VI, section 20 of the Colorado Constitution, unless local

commission rules permit disclosure of such information. Portions of the Judicial Nominating Commission Application for Colorado State Court Judgeship designated as confidential, including letters of reference, are not available for inspection. The public portions of the applications of the nominees on the list certified to the governor are available for inspection until a judicial appointment is made. After a judicial appointment is made, the public portions of the application only of the person appointed are available for inspection.

COMMENT: Judicial application records are unique to the Judicial Branch. However, these applications are similar to applications for an executive position, which are protected from disclosure under CORA. § 24-72-204(3)(a)(XI)(A), C.R.S. (2015). The rule recognizes that some local commission rules may permit disclosure of certain information regarding all applicants, and the rule permits such disclosure.

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

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

(B) Preliminary drafts and discussion copies of documents that express a decision, determination, or conclusion by the Judicial Branch.

(245) 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 Judicial Branch, unless the privilege has been waived. 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 in 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 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.

SECTION 4 & SECTION 5 [NO CHANGE]

Rule 3. [NO CHANGE]

Amended and Adopted by the Court, En Banc, September 22, 2016, effective immediately.

By the Court:

Monica M. Márquez
Justice, Colorado Supreme Court