

## RULE CHANGE 2018(09)

### CHAPTER 38 PUBLIC ACCESS TO INFORMATION AND RECORDS

#### **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), §§ [sections](#) 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) – (b) [NO CHANGE]

(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 [statute or regulation](#), ~~or~~ state statute, court rule, or court order designates, the custodian is as provided in this subsection:

(1) – (7) [NO CHANGE]

(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) – (11) [NO CHANGE]

(d) [NO CHANGE]

(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, 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~~ [Commission on Judicial Discipline](#), 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~~ [Commission on Judicial Discipline](#) 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~~ [Commission on Judicial Discipline](#). The Supreme Court presumes that the legislature intended section 24-72-401, [C.R.S. \(2015\)](#), and not CORA to control the confidentiality of ~~Judicial Discipline Commission~~ [Commission on Judicial Discipline](#) 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) – (h) [NO CHANGE]

## SECTION 2

### ACCESS TO ADMINISTRATIVE RECORDS

(a) All Judicial Branch 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 [statute or regulation](#), ~~or~~ state statute, court rule, or court order. The custodian of any administrative records 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) – (c) [NO CHANGE]

## SECTION 3

### EXCEPTIONS AND LIMITATIONS ON ACCESS TO RECORDS

(a) [NO CHANGE]

(b) **May Deny Inspection.** Unless otherwise provided by federal [statute or regulation](#), ~~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) – (9) [NO CHANGE]

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

(A) – (E) [NO CHANGE]

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 [statute or regulation](#), ~~or~~ state statute, court rule, or court order.

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

(1) – (2) [NO CHANGE]

(3) ~~(A)~~ 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.

[\(B\) A person in interest under this paragraph \(3\) includes the person making a complaint and the person whose conduct is the subject of such a complaint.](#)

[\(C\) A person in interest may make a record maintained pursuant to this paragraph \(3\) available for public inspection when such record supports the contention that a publicly reported, written, printed, or spoken allegation of sexual harassment against such person is false.](#)

(4) [NO CHANGE]

(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; [network, system, and individual login and logon credentials and passwords](#); 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~~; records of investigations conducted by Judicial Information Security, records of the intelligence information or security procedures relating to security events, incidents, or breach, and security structure, architecture, procedures, policies, and investigations; 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.

This paragraph (5) does not prohibit the custodian from transferring records to the Colorado Chief Information Security Officer or other state or federal agencies as determined to be necessary by the custodian for information security purposes.

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) – (8) [NO CHANGE]

~~(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.~~ With the exception of any records that are accessible pursuant to C.R.C.P. 251, any records related to reports of misconduct made to the Office of Attorney Regulation Counsel.

COMMENT: This provision is not in CORA. ~~Probation supervision files are unique to the Judicial Branch.~~ Records of reports of misconduct made to the Office of Attorney Regulation Counsel are governed by C.R.C.P. 251 and that Rule should not be circumvented by P.A.I.R.R. 2.

(10) – (11) [NO CHANGE]

(12) Juror records, except as provided by federal or state statute, court rule, or court order. This paragraph (12) does not prohibit the publication or disclosure of information in de-identified aggregate or statistical form.

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, with the exception that ~~Such~~ such files shall be available to the person in interest to the extent permitted by federal statute or regulation, or state statute, court rule, or court order. Information regarding restitution collections efforts and payment plans shall be available to the victim(s) of the offender's crime(s) after confidential personal information has been redacted. 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. [This provision strikes a balance between protection of certain offender financial information and information available to a crime victim owed restitution.](#)

(14) – (17) [NO CHANGE]

(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 [applicable](#) procurement rules ~~applicable to the agency~~ cannot be disclosed.

(19) – (20) [NO CHANGE]

(21) Investigation records, such as:

(A) Any record of civil or administrative investigations authorized by federal [statute or regulation](#), ~~or~~ state statute, court rule, or court order conducted by the Judicial Branch unless the record is available for inspection pursuant to federal [statute or regulation](#), ~~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. [For complaints involving sexual harassment, records of the internal personnel investigation, including records of actions taken based upon such investigation, are not open to inspection except as provided in Section \(3\)\(c\)\(3\).](#) Any records of investigations referred to the ~~Judicial Discipline Commission~~ [Commission on Judicial Discipline](#) 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) – (24) [NO CHANGE]

[\(25\) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of a judge or court as part of the judicial decision-making](#)

process utilized in disposing of cases and controversies before Colorado courts unless filed as part of the court record and thus subject to Chief Justice Directive 05-01.

COMMENT: This provision is not in CORA.

(d) [NO CHANGE]

#### SECTION 4

#### PROCEDURE TO ACCESS RECORDS

COMMENT: This rule creates a different process than CORA for accessing records but with similar timeframes. Under the rule, the Judicial Branch 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 Chief Justice Directive 06-01, but the fees are similar to the fees under CORA.

(a) – (b) [NO CHANGE]

(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 Chief Justice Directive 06-01. Where the fee for a certified copy or other copy, printout, or photograph of a record is specifically prescribed by federal statute or regulation,~~or~~ state statute, court rule, or court order, the specific fee shall apply.

(2) [NO CHANGE]

#### SECTION 5 [ 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), sections 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) – (b) [NO CHANGE]

(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 statute or regulation, state statute, court rule, or court order designates, the custodian is as provided in this subsection:

(1) – (7) [NO CHANGE]

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

(9) – (11) [NO CHANGE]

(d) [NO CHANGE]

(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, the Office of

the State Public Defender, and the Office of the Respondent Parents' Counsel. The Judicial Branch does not include the Commission on Judicial Discipline, 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 Commission on Judicial Discipline 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 Commission on Judicial Discipline. The Supreme Court presumes that the legislature intended section 24-72-401, C.R.S. (2015), and not CORA to control the confidentiality of Commission on Judicial Discipline 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) – (h) [NO CHANGE]

## SECTION 2

### ACCESS TO ADMINISTRATIVE RECORDS

(a) All Judicial Branch 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 statute or regulation, state statute, court rule, or court order. The custodian of any administrative record 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) – (c) [NO CHANGE]

## SECTION 3

### EXCEPTIONS AND LIMITATIONS ON ACCESS TO RECORDS

(a) [NO CHANGE]

**(b) May Deny Inspection.** Unless otherwise provided by federal statute or regulation, 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) – (9) [NO CHANGE]

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

(A) – (E) [NO CHANGE]



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 statute or regulation, state statute, court rule, or court order.

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

(1) – (2) [NO CHANGE]

(3) (A) 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.

(B) A person in interest under this paragraph (3) includes the person making a complaint and the person whose conduct is the subject of such a complaint.

(C) A person in interest may make a record maintained pursuant to this paragraph (3) available for public inspection when such record supports the contention that a publicly reported, written, printed, or spoken allegation of sexual harassment against such person is false.

(4) [NO CHANGE]

(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; network, system, and individual login and logon credentials and passwords; 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; records of investigations conducted by Judicial Information Security, records of the intelligence information or security procedures relating to security events, incidents, or breach, and security structure, architecture, procedures, policies, and investigations; 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.

This paragraph (5) does not prohibit the custodian from transferring records to the Colorado Chief Information Security Officer or other state or federal agencies as determined to be necessary by the custodian for information security purposes.

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) – (8) [NO CHANGE]

(9) With the exception of any records that are accessible pursuant to C.R.C.P. 251, any records related to reports of misconduct made to the Office of Attorney Regulation Counsel.

COMMENT: This provision is not in CORA. Records of reports of misconduct made to the Office of Attorney Regulation Counsel are governed by C.R.C.P. 251 and that Rule should not be circumvented by P.A.I.R.R. 2.

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(14) – (17) [NO CHANGE]

(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 applicable procurement rules cannot be disclosed.

(19) – (20) [NO CHANGE]

(21) Investigation records, such as:

(A) Any record of civil or administrative investigations authorized by federal statute or regulation, state statute, court rule, or court order conducted by the Judicial Branch unless the record is available for inspection pursuant to federal statute or regulation, 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. For complaints involving sexual harassment, records of the internal personnel investigation, including records of actions taken based upon such investigation, are not open to inspection except as provided in Section (3)(c)(3). Any records of investigations referred to the Commission on Judicial Discipline 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) – (24) [NO CHANGE]

(25) Trial and appellate court memoranda, drafts of opinions and orders, court conference records, notes, and other written materials of a similar nature prepared by judges or court staff acting on behalf of or at the direction of a judge or court as part of the judicial decision-making process utilized in disposing of cases and controversies before Colorado courts unless filed as part of the court record and thus subject to Chief Justice Directive 05-01.

COMMENT: This provision is not in CORA.

(d) [NO CHANGE]

#### SECTION 4

## PROCEDURE TO ACCESS RECORDS

COMMENT: This rule creates a different process than CORA for accessing records but with similar timeframes. Under the rule, the Judicial Branch 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 Chief Justice Directive 06-01, but the fees are similar to the fees under CORA.

(a) – (b) [NO CHANGE]

(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 Chief Justice Directive 06-01. Where the fee for a certified copy or other copy, printout, or photograph of a record is specifically prescribed by federal statute or regulation, state statute, court rule, or court order, the specific fee shall apply.

(2) [NO CHANGE]

## SECTION 5 [ NO CHANGE]

**Amended and Adopted by the Court, En Banc, May 31, 2018, effective immediately.**

**By the Court:**

**Monica M. Márquez  
Justice, Colorado Supreme Court**