

# LAW SCHOOL FOR JOURNALISTS

## Topics in FOIA & Sunshine Law

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LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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# The “First” Amendment

*Article the Third:*

*Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof; or abridging the freedom of Speech, or of the Press; or the right of the People peaceably to assemble, and to petition the Government for a redress of grievances.*

# History of adoption of the 1<sup>st</sup> A.

- Nov. 15, 1777 – Continental Congress adopts the Articles of Confederation.
- Mar. 1, 1781 – Confederation comes into force with ratification by 13<sup>th</sup> state, Maryland.
- Sept. 17, 1787 – “Constitution of the United States” signed by 39 delegates at the Philadelphia Convention.

# History of adoption of the 1<sup>st</sup> A.

- June 21, 1788 – New Hampshire, as the ninth state, approves the U.S. Constitution, which then becomes the law of the land.
- Sept. 25, 1789 – Under the “Massachusetts Compromise,” the Bill of Rights (drafted primarily by James Madison) is approved by the first session of Congress.
- Dec. 15, 1791 – Virginia, as the eleventh state, approves the Bill of Rights, which then goes into effect as the law of the land.

# **COLORADO OPEN MEETINGS LAW**

("COML")

§§ 24-6-401, et seq., C.R.S. (2009)

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# Statutory Purpose

“It is declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.”

Colorado Sunshine Act of 1972,  
Enacted by initiative, Nov. 7, 1972  
(codified as later amended at § 24-6-401, C.R.S. )

# Statutory Purpose

“The purpose of the [statute] is to afford the public access to a broad range of meetings at which public business is considered; to give citizens an expanded opportunity to become fully informed on issues of public importance, and to allow citizens to participate in the legislative decision-making process that affects their personal interests .”

*Walsenburg Sand & Gravel Co. v. City Council,*  
160 P.3d 297, 299 (Colo. App. 2007)

# Statutory Scope – “Meetings”

## The COML applies to:

- **Any** kind of gathering, convened **to discuss public business**,
- In person, by telephone, electronically, or by other means of communication, including e-mail of elected officials\*,
- Of a quorum or three or more members of a “local public body,” or
- Of a quorum or two or more members of a “state public body.”

§ 24-6-402(1)(b),(2)(a), \*(2)(d) (III), C.R.S. (2009)

# Statutory Scope – Which Bodies?

## A “public body” under the COML is:

- Any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of
  - A political subdivision of the State, or
  - A state agency, state authority, governing board of a state institution of higher education, or the General Assembly; and,
- A public or private entity to which the government or an official thereof has delegated a governmental decision-making function.

§ 24-6-402(1)(a) and (1)(d), C.R.S. (2009)

# Statutory Scope – Which Meetings?

The COML applies to “those meetings that concern matters related to the policy-making function of that body.”

*Hanover Sch. Dist. No 28 v. Barbour,*  
171 P.3d 223, 227 (Colo., 2007)

An open meeting must be held for any discussion having “a meaningful connection . . . [to] the policy-making powers of the public body.”

*Bd. of Cnty. Commrs., Costilla Cnty. v. Costilla Cnty. Conservancy Dist.,*  
88 P.3d 1181, 1194 (Colo. 2004)

# Statutory Requirements

All “public meetings” must be:

- Preceded by “full and timely **notice** to the public,” with “specific agenda information where possible”;
- “**Open to the public** at all times,” unless closed for a proper executive session; and
- Conducted with **minutes** that are “taken and promptly recorded.”

§ 24-6-402(2)(a), (2)(b) and (2)(d)(II), C.R.S. (2009)

# Executive Session Requirements

An “executive session” may be held *only after*:

- **Public announcement** of the *topic* and *statutory citation* authorizing closure;
- **Public announcement** of the “*particular matter* to be discussed in as much detail as possible”; and,
- Two-thirds majority **vote** to discuss the specifically identified matter behind closed doors.

§ 24-6-402(4), C.R.S. (2009)

# Executive Session Requirements

During an “executive session,” a public body must:

- Electronically record the closed session, unless the public body’s attorney certifies an attorney-client communication; and,
- Maintain the electronic recording for at least 90 days.

§ 24-6-402(2)(d.5)(II)(A), C.R.S. (2009)

# Executive Session Topics

An “executive session” by a local public body may be held only for the following topics:

- Property acquisition, lease, or sale;
- Conferences with the public body’s attorney;
- Matters required to be kept confidential by some other statute;
- Specialized details of security arrangements or investigations;
- Determining positions relative to matters in negotiation;
- Personnel matters;
- Consideration of public records whose disclosure is prohibited;  
and,
- Discussion of individual students.

§ 24-6-402(4), C.R.S. (2009)

# Limits on Executive Session Topics

## Attorney conferences for local public bodies:

- Must be with the board's own attorney;
- Must be confined to “receiving legal advice on specific legal questions”; and
- Do not apply to discussions where the board's attorney is merely present, without a discussion of legal advice on specific legal questions.

§ 24-6-402(4)(b), C.R.S. (2009)

# Limits on Executive Session Topics

## Personnel matter discussions for local public bodies:

- Must pertain to an “employee” or “employees”;
- Must give employee(s) advance notice, and an option to request the discussion be held in public;
- May not pertain to a member of the public body, or the filling of a vacancy on the public body;
- May not pertain to any elected official;
- May not pertain to any personnel policies that do not require the discussion of matters personal to particular employees.

§ 24-6-402(4)(f), C.R.S. (2009)

# Executive Session Prohibitions

During an “executive session,” a public body may not:

- “Adopt” any “proposed policy, position, resolution, rule, regulation, or formal action”;
- Engage in “informal” decision-making; or,
- Engage in “substantial discussion” of any topic that was not announced and voted upon in advance.

§ 24-6-402(4), C.R.S. (2009)

# Executive Session Prohibitions

COML prohibits public bodies from conducting a public vote that merely “rubber stamps” a decision made during an earlier executive session:

Such a process “deprive[s] citizens of the discussions, the motivations, the policy arguments and other considerations which led to the discretion exercised by the Board and influenced the vote announced without discussion at the later public meeting. **One has not participated in a public meeting if one witnesses only the final recorded vote.**”

*Cole v. State*, 673 P.2d 345, 349 (Colo. 1983);

See also *Van Alstyne v. Housing Auth.*, 985 P.2d 97, 101 (Colo. App. 1999);

*Bagby v. School Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (1974).

# Penalties/Remedies

A violation of the COML may be remedied with:

- **Disclosure of the recording** of an illegally closed meeting;
- **Invalidation** of any action taken at an illegal meeting;
- An **injunction** to conduct a new meeting to reconsider any illegal action; and,
- Mandatory award of **attorney's fees** to person bringing a successful complaint.

§ 24-6-402(2)(d.5)(II)(c), (8) and (9), C.R.S. (2009); and  
*Gumina v. City of Sterling*, 119 P.3d 527, 532 (Colo. App. 2004)

# Colorado Open Records Act (CORA)

§§ 24-72-201 et seq.,  
Colo. Rev. Stat.

# Legislative Declaration

“It is declared to be the public policy of this state that all public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise specifically provided by law.”

§ 24-72-201, C.R.S.

# Legislative Declaration

“The general policy of the Act is that all public records are open to inspection unless specifically excepted by law.”

*Carpenter v. Civil Serv. Comm'n,*  
813 P.2d 773, 777 (Colo. App. 1990)

# Legislative Declaration

Countervailing policy:

“[P]ublic disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials.”

*City of Colorado Springs v. White,*  
967 P.2d 1042, 1046 (Colo. 1998)

# CORA:

CORA's statutory elements:

- (1) Definition of what constitutes a “public record.”
- (2) Procedures for access to “public records.”
- (3) Exemptions from presumption of public access.

# CORA:

CORA's establishes a presumption of public availability for all "public records":

"All public records shall be open for inspection by any person at reasonable times, except as provided in this part 2 or as otherwise provided by law. . . ."

§ 24-72-203(1)(a), C.R.S.

# Definition of “Any Person”

CORA’s provides a right of public access to “any person”:

“Person” means and includes any natural person, corporation, limited liability company, partnership, firm, or association.

§ 24-72-202(3), C.R.S.

# Definition of “Public Record”

## Elements of a “public record”:

- (1) Any paper, data or other documentary material, regardless of hard-copy or electronic format, that is
- (2) “made, maintained, or kept” by
- (3) an entity that falls within the scope of the “state,” or a state “agency,” a state “institution,” a “political subdivision” of the state.

# Definition of “Public Record”

What constitutes a “public record”:

“Public records” means and includes all writings made, maintained, or kept by the state, any agency, institution . . . or political subdivision of the state. . . .

§ 24-72-202(6)(a)(I), C.R.S.

# Definition of “Public Record”

What constitutes a “writing”:

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

“Writings” includes digitally stored data, includes without limitation electronic mail messages, but does not include computer software.

§ 24-72-202(7), C.R.S.

# Definition of “Public Record”

What constitutes a “political subdivision”:

“Political subdivision” means and includes every county, city and county, city, town, school district, special district, and housing authority within this state.

§ 24-72-202(5), C.R.S.

# Definition of “Public Record”

## What constitutes an “institution”:

“Institution” includes but is not limited to every state institution of higher education, whether established by the state constitution or by law, and every governing board thereof. In particular, the term includes the University of Colorado, the regents thereof, and any other state institution of higher education or governing board referred to by the provisions of section 5 of article VIII of the state constitution.

§ 24-72-202(1.5), C.R.S.

# Definition of “Public Record”

The scope of which agencies or entities fall under the requirements of the CORA is to be given broad and generous interpretation:

an “agency”

*Dawson v. State Compensation Ins. Auth.*,  
811 P.2d 408 (Colo. App. 1990)

an “instrumentality”

*Zubeck v. El Paso County Retirement Plan*,  
961 P.2d 597 (Colo. App. 1998)

an entity performing a “public function”

*Denver Post Corp. v. Stapleton Dev. Corp.*,  
19 P.3d 36, 39 (Colo. App.)

# Definition of “Public Record”

“[T]he failure specifically to include a particular type of agency within the definitional sections of the CORA has not precluded such an agency from being subject to its provisions if exclusion of the agency would be contrary to the General Assembly’s intent in enacting the CORA.”

*Denver Post Corp. v. Stapleton Dev. Corp.*,  
19 P.3d 36, 39 (Colo. App.) (Erickson, J., by designation)

# Definition of “Public Record”

Writings excluded from definition of public records:

- Criminal justice records
- Work product prepared for elected officials
- Colorado student obligation bond authority materials
- Crime victim compensation records
- Notification of possible arson loss
- Correspondence with constituents, with expectation of privacy
- Computer software programs

# Definition of “Public Record”

“Work product” exclusion :

- Applies to inter-agency or intra-agency advisory or deliberative materials that express an opinion or are deliberative,
- Which are conveyed to an elected official for the purpose of assisting the elected official to reach a decision within the scope of the official’s authority.

§ 24-72-202(6.5)(a), C.R.S.

# Exemptions from Public Availability

All exemptions from the presumption of public availability are to be construed narrowly.

*Freedom Newspapers, Inc. v. Tollefson*,  
961 P.2d 1150, 1154 (Colo. App. 1998)

# Exemptions from Public Availability

## Permissive exemptions:

- Police investigations, intelligence information, security procedures;
- Test questions or scoring keys;
- Specific details of research projects by state agencies;
- Real estate appraisals, until such time as the property has pass to a governmental agency;
- Market analyses for Colorado Department of Transportation;
- Individually identifying records held by Colorado Department of Revenue.

§ 24-72-204(2)(a), C.R.S.

# Exemptions from Public Availability

## Mandatory exemptions:

- Medical, mental health, sociological, and scholastic achievement information;
- Personnel files;
- Letters of reference;
- Trade secrets, privileged information, and confidential commercial information;
- Library and museum materials;
- Public school student information;
- Library records;
- Information on users of public utilities or public facilities;

§ 24-72-204(3)(a), C.R.S.

# Exemptions from Public Availability

## Mandatory exemptions (con't):

- Records of sexual harassment complaints or investigations;
- Applications of non-finalists for executive positions;
- Records of vanity or disability license plates;
- Deliberative process privilege materials;
- Veterinary medical information; and,
- Security arrangements or investigations.

§ 24-72-204(3)(a), C.R.S.

# Mandatory Exemptions: Personnel Files

“Personnel file” exemption:

“Personnel files” 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 part 2 or any other provision of law.

§ 24-72-202(4.5), C.R.S.

# Mandatory Exemptions: Personnel Files

“Personnel file” exemption:

“Personnel files” does not include applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required under section 23-5-123, C.R.S., or any compensation, include expense allowances and benefits, paid to employees by the state, its agencies, institutions or political subdivisions.

§ 24-72-202(4.5), C.R.S.

# Mandatory Exemptions: Personnel Files

“Personnel file” exemption:

“[W]e construe the phrase at issue to mean that the information must be of the same general nature as an employee’s home address and telephone number or personal financial information.”

*Daniels v. City of Commerce City*,  
988 P.2d 648, 651 (Colo. App. 1999)

# Mandatory Exemptions: Trade Secrets & Commercial Information

Trade secret/commercial information exemption:

Public access shall be denied for -

“[T]rade secrets, privileged information, and confidential commercial, financial geological or geophysical data furnished by or obtained from any person.”

§ 24-72-204(3)(a)(IV), C.R.S.

# Mandatory Exemptions: Trade Secrets & Commercial Information

Trade secret/commercial information exemption:

Disclosure of confidential commercial information may be denied only if disclosure is likely to –

“(1) to impair the government’s future ability to gain necessary information; or

“(2) to cause substantial harm to the competitive position of the person providing the information.”

*International Brhd. of Elec. Workers Local 68 v. Denver Metropolitan Major League Baseball Stadium Dist.,*  
880 P.2d 160, 163 (Colo. App. 1994)

# Mandatory Exemptions: Trade Secrets & Commercial Information

Trade secret/commercial information exemption:

Mere classification of a document as confidential by the third party business is not a sufficient basis for withholding access.

The party seeking to prevent disclosure of commercial information has the burden of affirmatively establishing the likelihood of harm that would flow from public disclosure.

*IBEW,*  
880 P.2d at 167

# Mandatory Exemptions: Sexual harassment cases

Sexual harassment complaints or investigations:

Disclosure is prohibited for –

“Any records of sexual harassment complaints and investigations, whether or not such records are maintained as part of a personnel file.”

§ 24-72-204(3)(a)(X)(A), C.R.S.

## Mandatory Exemptions: Sexual harassment cases

Sexual harassment complaints or investigations:

Disclosure to a “person in interest” is permitted so long as –

No information is provided that permits the identification of “any individual involved” in the case.

§ 24-72-204(3)(a)(X)(A), C.R.S.

# Mandatory Exemptions:

## Applications for executive positions

### Exemption for applications of non-finalists:

All application materials for persons seeking a chief executive position who do not constitute a “finalist” are exempt from disclosure.

§ 24-72-204(3)(a)(XI)(A), C.R.S.

# Mandatory Exemptions:

Applications for executive positions

Exemption for applications of non-finalists:

A finalist for a chief executive position is -

- Person who is a member of a group of three or fewer applicants, or
- Person who is identified as a “finalist.”

§ 24-72-204(3)(a)(XI)(A), C.R.S.

# Mandatory Exemptions: Deliberative process privilege

Statutory deliberative process privilege:

Disclosure must be denied for –

“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 government, unless the privilege has been waived.”

§ 24-72-204(3)(a)(XIII), C.R.S.

# Mandatory Exemptions: Deliberative process privilege

Procedures for statutory deliberative process privilege:

Custodian must supply affidavit that -

- Specifically describes each document being withheld;
- Explains why each such document is privileged, *i.e.*, how the material in the document is “so candid or personal that public disclosure is likely to stifle honest and frank discussion within the government”; and,
- Explains why disclosure would cause substantial injury to the public interest.

§ 24-72-204(3)(a)(XIII), C.R.S.

# Mandatory Exemptions: Deliberative process privilege

Judicial evaluation of claim of deliberative process privilege:

A claim under the deliberative process privilege will be enforced only if the trial court concludes that the government interest in confidentiality outweighs the public interest in disclosure.

§ 24-72-204(3)(a)(XIII), C.R.S.

# The “Columbine” Exception:

The CORA permits denial of access under a catch-all provision protecting against “substantial injury to the public interest”

§ 24-72-204(6)(a), C.R.S.

# The “Columbine” Exception:

“Substantial injury” exception:

Court must balance three factors -

- (1) Whether in connection with the requested record, an individual has a legitimate expectation of nondisclosure or some other constitutionally significant liberty interest counseling against disclosure;
- (2) Whether there is a compelling public interest in public access to the requested record; and,
- (3) How, if the public interest in the document compels disclosure, disclosure may be achieved in a manner that is the least intrusive to a person’s individual expectation of privacy or other liberty interest.

*Freedom Newspapers, Inc. v. Tollefson*,  
961 P.2d 1150, 1156-57 (Colo. App. 1998)

# The “Columbine” Exception:

## “Substantial injury” exception:

- Applies only if the record is otherwise disclosable.
- Applies only if the circumstances that would harm the public interest could not have been foreseen by the General Assembly.

*Freedom Newspapers, Inc. v. Tollefson*,  
961 P.2d 1150, 1156-57 (Colo. App. 1998)

# Remedies

“Any person” who has been denied access to a public record may:

- Apply to the district court (after giving three-days notice of an intent to sue) for a “show cause” order directing the custodian to defend the denial;
- Receive a hearing on the show cause order “at the earliest practical time,” and,
- Obtain an award of reasonable attorney’s fees and costs upon a finding that the denial was improper.

§ 24-72-204(5), C.R.S.

# Colorado Criminal Justice Records Act (CCJRA)

§§ 24-72-301 et seq.,  
Colo. Rev. Stat.

# CCJRA:

CCJRA's statutory elements:

Distinction between “records of official actions”  
and “criminal justice records”:

- (1) “Records of official actions” are subject to *mandatory* release.
- (2) “Criminal justice records” are subject only to *discretionary* release, if disclosure will not “harm the public interest.”

# CCJRA:

“Records of official actions” :

- (1) Arrest report,
  - a. Mug shot?
- (2) Indictment or information.
- (3) Judgment (or other disposition),
- (4) Sentence, and
- (5) Log of incarceration.

# CCJRA:

“Criminal justice records”:

All other law enforcement records:

- (1) Investigatory reports,
- (2) Crime scene photographs,
- (3) 911 recordings and dispatch communications,
- (4) Internal affairs files,
- (5) Search warrant or arrest warrant affidavit prior to execution and filing with the court.

# Court Records

Documents filed in court are presumptively open to public inspection absent an order to seal the document (or the case file).

A sealing order over a court record may be set aside under the First Amendment if it is not “narrowly tailored” to “directly advance” the compelling interest in a fair trial.

# Shield Law Protections

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**Two sources of protection for  
*unpublished* information:**

- **State Shield Law (§ 13-90-119, C.R.S.)**
- **First Amendment**

**Both require essentially same showing to  
overcome:**

- **directly relevant (“heart of the matter”)**
- **not available through reasonable  
alternative means**
- **need overrides First Amendment interests**

## **Waiver (loss of privilege):**

- **Do NOT discuss anything unpublished with anyone outside of the editorial process**

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