

21st Century Sunshine



Modernizing CORA



coloradoforethics.org

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Executive Summary

Sunshine laws requiring open access to public records are little more than hollow promises if those public records are difficult to find or expensive to obtain. As an organization, Ethics Watch uses the Colorado Open Records Act (CORA) to review thousands of pages of public documents every year – such as government spending records, lobbying reports, and official calendars. Access to this information is essential for keeping government officials and agencies accountable.

However, CORA has not kept pace with the times and suffers from pre-digital age thinking to the detriment of citizens and government officials alike. Many commonly sought public records could easily be presented online by government agencies, drastically increasing accessibility for average citizens who have a right to know what their government is doing. Placing such public records online once would also save the time spent by government employees handling numerous CORA requests for that uncontroversial information. Responding to CORA requests in digital form not only saves paper, but also the time spent by government employees printing out documents kept in digital form and the requestor's time photocopying these same records. Digital production through email also ensures access to records for citizens across the county (or the state) from the physical location of the government agency.

CORA has also been used by government agencies across Colorado as a means to supplement shrinking budgets. "Research and retrieval" fees charged to requestors have skyrocketed in some state agencies and localities based on an aggressive reading of Colorado state court precedent. A requestor can seek the same documents from two different state agencies and face drastically different fees charged, not necessarily bearing any relation to the actual "cost" incurred by the agency in responding to the request. Indeed, since taxpayer money already funds the employee salaries and equipment used to create and maintain these public records, there is arguably no additional cost created by a CORA request that needs to be "recouped." Fees for public documents should be uniform and minimal since providing public access to these documents is part of the government's responsibility. Increased fees cut off access to public records by the average citizen and attempt to shift the cost of government to a financially-strapped traditional press.

Public records belong to all citizens of Colorado, and access should not be *de facto* limited to wealthy individuals, organizations or press entities that spend the time and money required by agencies. This report identifies these weaknesses in our Colorado sunshine laws and recommends reforms that will modernize CORA and provide cost savings both to citizens accessing public records and the government entities that maintain them.

The Colorado Open Records Act (CORA)

Colorado's statutory provisions protecting access to public records date back to 1969 – only a few years after the federal Freedom of Information Act of 1966.¹ Current law includes both the Colorado Open Records Act (CORA) and the Colorado Criminal Justice Records Act (CCJRA). The latter provisions govern only records held by law enforcement agencies; CORA applies to all other government documents. This report focuses on the process for citizens to obtain records under CORA.

“The Colorado Open Records Act gives broad and fundamental rights to every person to learn what is happening in Colorado's government.”² However, the law as it exists on the books is not always as effective and accessible in practice where resistance to technology and aggressive fee demands hinder Colorado citizens who seek to exercise these rights.

Statutory Overview

CORA states that “all public records shall be open for inspection by any person at reasonable times” unless limited exceptions apply.³ “Public records” includes written documents created, maintained, or held by a government entity for use in official functions or involving expenditure of public funds.⁴ CORA also lists various categories of documents that are not required to be produced by a government entity, and a government response to a CORA request might refuse to produce such documents under such an exception.⁵ The law broadly applies to all levels of government in Colorado.⁶

The basic process for requesting and receiving documents under CORA is as follows:



If a government entity refuses to respond to a CORA request, or a requester believes documents are being improperly withheld, the requestor may serve a three-day notice of intent to sue under CORA, and then file a complaint in district court if the issue was not resolved.⁷ If a court finds that documents were “wrongfully withheld”, then attorneys’ fees are awarded to the requestor in addition to a judgment that they are entitled to the

documents.⁸ Private-party enforcement through the courts is the only means to enforce CORA and this process can take months, or even years.

This report focuses on two parts of the CORA statutory scheme: (1) the method of production of documents in response to a CORA request; and (2) fees charged by government agencies for providing documents under a CORA request.

CORA's provisions regarding the method for producing documents are largely holdovers from pre-digital age. The overall requirement is merely that governments must make documents available for inspection by a person, which was historically interpreted by most Colorado jurisdictions as meaning requestors must travel to view documents in person.⁹ Recent legislation has taken a step in modernizing CORA by requiring government entities to comply with a requestor who asks for records to be transmitted by mail, delivery service, fax or electronic mail.¹⁰ However, the older provision in CORA that deals with public records kept in "digital form" is so outdated that it defines such form as "magnetic or optical disks, tapes, microfilm, [or] microfiche."¹¹ For records kept in such form, CORA requires the government agency to assist the requestor in accessing documents through public viewing stations for microfiche, computer files on disks, or more direct access through "on-line bulletin boards."¹²

The statute also specifically addresses the types of fees that a government agency may charge to a CORA requestor:

1. If the requestor wants a "copy, printout or photograph" of a record the agency may charge a copying fee that does not exceed 25 cents per page for standard copies (or the actual cost of specialized format copies);¹³
2. Agencies may charge a "reasonable fee" if a CORA request seeks information that requires the agency to perform a "manipulation of data" to create the record in a form that is not usually maintained by the agency;¹⁴ and
3. Requestors that seek public information from computer programs that are specialized may be charged the "actual incremental costs of providing electronic services" as well as a "reasonable portion" of the maintenance costs for the information systems involved.¹⁵

As explained in this report's discussion of fees charged under CORA, a 2003 Colorado Court of Appeals opinion also opened the door to allow government agencies to create additional fees through regulation – usually for "research and retrieval" time spent responding to CORA requests¹⁶

Low Grades for Transparency in Colorado

Despite CORA's protections and broad coverage in statute, recent national reviews of government transparency in Colorado have given low marks from the citizen's perspective. The 2012 *State Integrity Investigation* graded Colorado with an "F" in the "public access to information category."¹⁷ The lowest part of the composite score was based on Colorado's lack of a central information office that handles CORA requests or provides a way to challenge a government agency's refusal to provide documents without going to court.¹⁸ However, the report also gave low marks based on fees charged by agencies to CORA requestors. Colorado received only "50%" of possible total points for citizens being able to access information, in practice, at a reasonable cost.¹⁹ Based on the study's interviews with certain press sources, the study cites a \$1 million fee requested by a government official in response to a *Rocky Mountain News* CORA seeking emails about the Columbine shooting as one high profile example.²⁰ States that received full marks for the "reasonable cost" factor in this report include Washington, whose statute does not allow any fees charged to requestors except actual costs for copying pages, and New Jersey, whose statute was amended to only authorize 5 cents per page copying charges after the courts ruled prior fees were too high.

Another recent report looked at the online availability of public spending information in Colorado. U.S. PIRG conducts an annual review rating all 50 states in how they provide free online access to government spending data.²¹ Colorado's rating actually dropped from a dubious "C-" in 2012 to a disappointing "D+" in the *Following the Money 2013* report. This report looks at Colorado's Transparency Online Project (TOP) run by the Office of the State Controller to provide free online access to state revenue and expenditure information.²² "A" level states in this report "have created user-friendly websites that provide users with information on an array of checkbook-level expenditures" where "users can monitor the payments made to vendors through contacts, grants, tax credits and other discretionary spending" in a searchable database.²³ In contrast, Colorado was categorized as a "lagging" state – there is a transparency website, but it misses important parts of the checkbook and other information.²⁴ For example, according to U.S. PIRG, TOP does not include information on economic development tax credits distributed by the state. Colorado's portal also does not provide information regarding any city or county spending – something it considers "commonplace" on other state's websites.²⁵

The reforms suggested in this report address some of these deficiencies and other roadblocks faced by Colorado citizens in using CORA in the 21st century.

Modernizing CORA for the Digital Age

While Coloradans should be proud that we were one of the first states with open records laws, this accomplishment now means we are struggling to make a framework from the late 1960s fit our modern digital age. Based on the technology and information available to citizens and governments alike, the baseline responsibility for government should no longer be that public records are simply available within a government office filing cabinet should any citizen ask for them. Instead, public records should be increasingly available online for citizens to access on their own terms. Not only is this the level of transparency we expect in the 21st century, but the more information that is available online, the fewer formal CORA requests will be filed with government entities for routine information. Not all citizens have equal access to technology, so government entities should be prepared to provide open records in paper format when needed. However, this should become the exception, not the rule for modern government.

Increase Digital Production of Requested Materials

CORA has recently taken a step into the digital age, albeit a timid one, regarding production of open records in digital format when requested. Until the 2013 General Assembly Session, a government entity had no obligation to transmit documents to a CORA requestor in any fashion – even U.S. Mail. The statute merely required those records be made available for in-person inspection.²⁶ Thus, an agency in Ft. Collins could require a requestor to travel from Grand Junction to come in-person to retrieve a single page in response to a CORA request. While some state and local governments chose to provide documents via mail or e-mail when requested, many did not because the law did not require it.²⁷

In 2013, an amendment to the CORA provision governing production of a “copy, printout or photograph of a public record” gave citizens the right to request government entities to actually send records to the requestor instead of requiring in-person inspection.²⁸ The new provision requires a government entity to transmit copies of the records requested in the method chosen by the CORA requestor, including “mail, other delivery service, facsimile, or electronic mail.”²⁹ Government records custodians may require the CORA requestor to pay “costs associated with records transmission” such as postage, but the provision specifically prohibits charging any such transmission fees for records requested to be sent via e-mail. The records must be sent to the requestor no more than three days after the receipt of such costs (if any), or making arrangements to receive such payment from the requestor.³⁰

However, this slight modernization was not without controversy and opponents, based mostly on the larger issue of fees charged to CORA requestors. In addition to the “transmission costs” discussed above, the new provision states that records custodians may require payment (or make arrangements for payments) of “all other fees lawfully allowed.”³¹ As discussed in more detail below, there is currently a large range of fees that many government entities charge in response to CORA requests that extend beyond the specific fees listed in the statute. Those testifying against House Bill 1041 were concerned that this language legitimized those fees.³² At least one county clerk testified in support of the measure and defended fees charged as needed to cover large requests that take county resources to compile and then are never retrieved by the requestor.³³ Despite this heated argument about CORA fees, the 2013 amendment was focused on accessibility and delivering open records upon request. As discussed below, a separate bill dealing specifically with CORA fees was withdrawn in the 2013 session. This new law was successful in providing CORA requestors the right to receive public records digitally from any state, county or local government entity.

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"How records are transmitted and giving people who live in great distances the option to receive those records without having to show up in person. That's the issue that we're trying to address with House Bill 1041,"

–Senator John Kefalas

There have been two other amendments to CORA in the last 20 years that directly affect the digital production of records. Both of which were perhaps cutting-edge at the time of introduction, but are now in need of modernization to reflect 21st century realities.

The “digital form” provision governing any public record that is kept digitally by a government entity was adopted in 1996 as part of a larger bill dealing with “issues raised by the use of electronic mail by governmental agencies.”³⁵ The legislative declaration of this bill recognized that open records and open meetings laws needed to be modernized to deal with the increased use of e-mail by governmental officials.³⁶ The amendments added electronic mail to the definitions of “correspondence” under CORA and defined some exceptions intended to protect private and personal communications from CORA requests.³⁷ The “digital form” provision also adopted at this time had two parts:

1. Requiring government entities that keep public records in digital form to adopt some sort of retention, archiving, and destruction policy for those digital records; and

2. Requiring government to take necessary measures to enable public access to such digital records “without unreasonable delay or unreasonable cost” including a number of digital access formats.³⁸

Prior to these 1996 amendments, the Colorado Court of Appeals had held that CORA did not require government custodians of records to provide digitally-kept information in the digital records format.³⁹ In that case, the CORA requestor sought property tax information held only in digital form by the Denver Treasury department; in 1990, this meant magnetic computer tapes accessible only through specific computer terminals used by department employees.⁴⁰ While individual employees initially allowed the requestor to access these computer terminals, the Treasurer discontinued this practice and instead offered to provide specific information requested orally or in printout form instead.⁴¹ The requestor brought suit under CORA to regain access to the digital information through the computer terminals. However, the Court decided that CORA provided a right to access the public *information*, but did not create a right to see that information in any particular *format*.⁴² Therefore, government custodians of records could make regulations limiting the way that information was produced in response to CORA requests, so long as the content of the information was not altered – such as a print-out of a computer screen instead of viewing the screen directly.⁴³

Although no cases have applied the new “digital form” provision adopted after *Tax Data Corporation* case, the language of the statute focuses on a governmental responsibility to provide digital access to digital records. More than 15 years later, this section could now be further modernized to support the 2013 amendment regarding electronic transmission of requested documents by incorporating email and government website access as suggested means of production of public records in digital form.

Another well-meaning provision regarding emails added to CORA has now become an outdated road-block to efficient digital production of requested public records. CORA lists certain public records of which a government custodian “may” deny inspection as contrary to public interest.⁴⁴ This is not an absolute prohibition, but leaves production of the requested records up to the discretion of the government entity holding them. In 2004, the following provision was added to this list:

Electronic mail addresses provided by a person to an agency, institution, or political subdivision of the state for the purposes of future electronic communications to the person from the agency, institution or political subdivision⁴⁵

This CORA amendment was included in a much larger piece of legislation “Concerning Identity Theft” that focused on government use of individual personal identifying information, such as social security numbers.⁴⁶ At this time, legislators were

concerned that lists of email addresses on file with government entities for newsletters, updates or notifications would be requested under CORA and used for commercial spamming or other nefarious purposes. However, many custodians have misinterpreted this provision in a way that takes digital email records back in time.

Some government entities interpret this *permissive* provision allowing a custodian to refuse to provide *lists* of email addresses to impose a duty to redact any individual email address that might be included in a public record subject to CORA disclosure. Ethics Watch has experienced first-hand where both state and county agencies do not respond digitally to a CORA request seeking emails between government officials about official business, but instead print out emails onto paper for us to review in person. Some non-governmental person's email address is redacted from the paper copy, presumably based on this section. Yet, this needlessly wastes time and money for the government entity to print out emails onto paper and for the requestor to then have to scan the paper versions of the emails in order to have the information digitally.

This subsection of CORA should be further modernized to clarify that it does not in any way ban production of individual email addresses included in correspondence that otherwise meets the definition of "public record." It might actually be cleaner to just delete this provision entirely as the technology used by spammers and hackers in the modern internet age unfortunately has moved far beyond using open records laws to request email lists from government agencies.

CORA Amendments regarding digital records



Online Publication of Public Records

Another way to modernize CORA for the digital age is by reducing the need for citizens to use the formal CORA process to access indisputably public information of great interest through proactive disclosure on government websites. CORA is based on a records-on-request paradigm that was appropriate 50 years ago when most documents existed in paper format but is artificially limiting in the 21st century. Virtually all state, county and municipal governments in Colorado operate at least a sparse website today. But in most cases, it is up to the discretion of the government entity to decide what information to provide to citizens on that website. Government custodians could reduce the need for citizens to file (and government employees to respond to) CORA requests by using this tool to proactively disclose information and records that are commonly requested.

The Sunlight Foundation refers to this type of proactive government disclosure of documents before they are asked for as “setting the default to open.”⁴⁷ While this report is not suggesting CORA be amended to mandate government entities proactively post ALL public records subject to CORA online, there are categories of documents that are routinely kept and the subject of public interest that should be placed online. Understanding that not all citizens rely upon internet research, any web publication should not preclude the ability for an individual to request a document through CORA.

Most likely, a large portion of public documents generated by government employees are created in digital form on a computer instead of paper-only form. If that is the case, CORA’s “digital form” provision supports making these public records kept in digital form available to citizens through government websites – the modern version of “on-line bulletin boards” in C.R.S. 24-72-203(1)(b)(II). Yet, the reality is that many government websites in Colorado do not provide much substantive information online. It is actually remarkable how difficult it was for Ethics Watch staff to even locate CORA policies or instructions on how to submit a CORA report on websites for state, county and municipal governments. Of the 17 state cabinet-level agencies reviewed, only 11 had any information about how to make a CORA request on their agency website.⁴⁸ Of that group, three agencies merely listed the contact information of who to ask about CORA requests but did not include the form or a list of possible fees charged online. This information is even harder to find at the county and municipal level. One can imagine the frustration of a citizen who is used to shopping, banking, and reading news online, when a government website not only does not post the public record that she is interested in, but does not include information as to how to request that record through CORA.

While it is not an excuse at the state government level, some county and municipal governments are small and do not have enough technology staffing to perhaps maintain as

many records and information on government websites as citizens would prefer. Luckily, some nonprofit open government help does exist. Open Colorado is a nonprofit organization working in partnership with local governments in Colorado to use digital resources to “lead to a simple, beautiful, and easy-to-use government.”⁴⁹ In addition to consulting with government officials to help them design websites that provide user-friendly citizen access to information and data, Open Colorado actually provides a platform to host such information online for smaller communities at: <http://data.opencolorado.org/>. Open Colorado allows government entities to upload data and documents to the website and its servers and then they can just post a link to that information on the government

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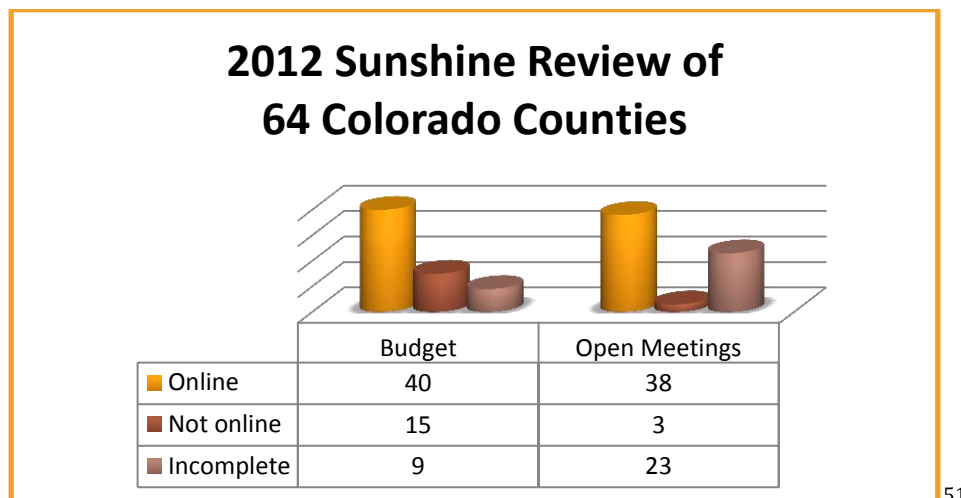
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website. It also has an option for government entities that want to host data on their government servers to just link that information on the Open Colorado site. The goal is to create a central depository of government documents and data that promotes accountability, citizen engagement and economic development.⁵⁰ In addition to providing citizen access to public records and information in a modern way, Open Colorado explains to government officials how such proactive disclosure is an economic driver – allowing private sector businesses access to information needed to conduct their business in a locality.

Colorado law should be modernized to encourage – and sometimes require – proactive disclosure on government websites where public interest in the information is high and any risk of privacy intrusions is minimal. Specifically, we suggest requiring proactive disclosure of two categories of public records that currently are subject to CORA requests: (1) government budget and spending information and (2) agendas and minutes for open meetings. Requiring proactive disclosure of these types of public records – either through the government entity website or a link to a host like Open Colorado – should not be burdensome to state and local government entities. These documents are required to be created and maintained and available for public inspection. Proactive disclosure will reduce the time citizens and government employees have to spend on requesting and retrieving these records in the CORA process.

Ethics Watch receives numerous calls and emails every year from citizens who are concerned that a state or local government body is violating open meetings or budget laws. The basis of this suspicion: the citizen looked on the government entities website and did

not find the budget and expenditure information posted; or did not see agendas and minutes for sessions subject to open meetings laws. In the 21st century, many citizens assume that if something exists, it must be online. Therefore, if no agendas or minutes are online, some citizens conclude the government body must be violating open meetings laws that require them. Ethics Watch informs these observant citizens that these pre-internet-era laws actually do not require any of these items be made public online, but just made public in other ways. In most cases, we have found that the government body is in full compliance of the law once a directed request is made for the records.



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Citizen confidence and government accountability would increase if these records were proactively disclosed online. A 2012 evaluation of Colorado county government websites by *Sunshine Review* rated the availability of this information online with mixed results. While the five largest counties (Adams, Arapahoe, Denver, El Paso and Jefferson) received an average grade of “A-” for transparency, the rest of the counties averaged only a “C-.”⁵² Below are the results for how many counties specifically provided budget and open meetings records online.

Government Budget & Expenditures Information

There is little debate that citizens have a right to know how the government is spending public funds. However, it is not as easy as one might think to access the budget and expenditure information of many government entities in Colorado. At least a basic level of financial information – a budget and top line expenditure report – should be proactively disclosed on government websites to promote accountability. Best practices would be a checkbook-level detail of government expenditures, but that might be more difficult for some local governments to keep updated online. In the past few years the Colorado state government has made progress in this type of disclosure. However, there are improvements that can be made to the state-level disclosure. More transparency of this

financial information is also needed at the local government level where availability varies drastically.

Since 2009, the State of Colorado government has worked to put more of its budget and expenditures online for citizens through the “Transparency Online Project” or TOP (<http://tops.state.co.us>). This project is the result of an executive order by then-Governor Ritter and subsequent legislation from the General Assembly. Information on this website is proactively disclosed, but does not preclude citizens from requesting additional information through CORA:

The TOP system is not intended to replace Colorado citizen's access to public information allowed by the Colorado Open Records Act. Rather it is intended to reduce the time and cost associated with open records requests and to maximize convenience for state citizens in accessing state financial information. Any information that is not available in the TOP system remains available to the public in accordance with the Colorado Open Records Act.⁵³

In user-friendly terms, this website focuses on “what the citizens purchase” and “where the money comes from.”⁵⁴ As discussed in the annual U.S. PIRG evaluations above, this website does a good job of listing goods and services purchased by state agencies, including vendor names. It also includes budget vs. expenditure comparisons for citizens’ use.⁵⁵

There is room for improvement in the State disclosure of fiscal information. For example, the information is still fairly top-level by department, using accounting codes that citizens might not recognize. Perhaps the website could include a guide or citizen “translation” for these codes. Plus, some financial information is missing from the website. In 2011, the General Assembly actually amended the statute to recognize that due to using a different technical and accounting system, the Colorado Department of Transportation (CDOT) financial information could not be integrated into the TOP system.⁵⁶ The solution: the legislation requires CDOT to create its own online system that is linked on the TOP website.⁵⁷ More troubling is the financial information that is still only available on paper in the basement of the Colorado Capitol building. For example, overall expenses for the Legislature are available on TOP but actual *per diem* requests and expenses paid for individual legislators are not. Citizens must request this information through CORA (and, until recent legislation, personally travel to Denver to view in person). As the U.S. PIRG survey shows, many other states have been able to provide greater detail to citizens through state transparency websites.

In addition to strengthening the state TOP website, this model should be implemented at the city and county level in Colorado. As seen above, only 40 of Colorado's 64 counties even placed the budget online in 2012, much less expenditure information. An Ethics Watch review of some county and city websites found a wide range in the amount of budget and expenditure information available online. At one end of the spectrum, Denver City and County has launched full budget and checkbook-level detail on its new website: <http://www.denvergov.org/transparency>. However, other cities and counties do not appear to have any information about expenditures beyond a posting of the final budget. Mesa County is a good example of proactive disclosure of a fair amount of information to citizens without the checkbook-level accounting of Denver. Mesa County's website includes both the budget⁵⁸ and monthly spending by each county department.⁵⁹

This type of proactive disclosure should not be too onerous – most cities and counties in Colorado do have a website and all must maintain budget documents for their government's use. Mostly likely, this budget information is a digital document on a government computer, not just in paper form. It is therefore, just a matter of posting that information online.

While it would not be practical for state law to mandate checkbook-level proactive disclosure for all localities in Colorado, some modernization of laws could encourage, facilitate, and at times, mandate, online disclosure of government budget and expenditure information. For example, the Local Government Budget Law requires a government body to provide notice to citizens regarding proposed budgets and proposed changes to that budget.⁶⁰ However, these budget documents and notices must merely be "available for inspection by the public at a designated public office."⁶¹ For larger government entities, notice is also required to be published in the local newspaper while smaller governments must physically post three copies of the budget notices in "public places."⁶² This statute should be modernized to require online posting of the notice and accompanying budget documents if the government entity hosts an official website. Similarly, state law that requires records of expenditures could also be amended to require disclosure of that information on a government entity website on at least a yearly basis.⁶³ This type of legislation was passed in Arizona in 2010 and gave local governments a couple years to phase-in online reporting of government expenditures.⁶⁴

While there would be some transition needed, city and county governments that move budget and expenditure information online will experience long-term savings in time and money responding to citizen CORA requests for this information.

Agendas and Meeting Minutes for Open Meetings

Another area where modernizing how government presents information to citizens can increase confidence in government decision-making is in “sunshine notices” and minutes of public body meetings. Colorado’s open meetings law was the first state-level sunshine law in the nation, and it is showing its age. State and local public bodies subject to the open meetings requirement must provide notice of public meetings, including specific agenda information if possible, not later than 24-hours prior to the meeting.⁶⁵ Such bodies are also required to record and keep minutes of public meetings.⁶⁶ However, dissemination through modern technology is not required by either provision. If the agenda and/or meeting minutes are not posted on the government body’s website, some citizens will assume the worst and conclude that proper notice was not given and minutes are not being kept, when in fact the government is complying with the Open Meetings Law’s notice requirements.

The sunshine law requires notice and agenda materials must be “posted in a designated public place” that is designated annually by the government body.⁶⁷ Meeting minutes must be recorded, but then merely “open to public inspection” upon request.⁶⁸ Again, citizens are left with a patchwork of access to information online. Some state and local government bodies provide sunshine notices and minutes online, but most don’t. At the state level, there are some good examples of boards and commissions which do include this information proactively online. For example, the State Board of Education has a website with all agendas for public meetings with content searching features.⁶⁹ The Board also has a webpage including meeting minutes and/or audio files for each of the public meetings dating back to at least 2005.⁷⁰ A more common approach for state agencies is the Colorado Independent Ethics Commission, which uploads pdf versions of the agendas and meeting minutes after they are approved, but does not include a searchable database or audio files.⁷¹

Many citizens have trouble finding open meetings information for their local city or county government boards and elected officials. According to the *2012 Sunshine Review*, only 38 of 64 counties provided complete open meetings information online for County Commissioner meetings– at least basic agendas and meeting minutes. Of the 23 additional counties that the *Sunshine Review* deemed to have only provided incomplete open meetings information, usually basic notice of meetings or agendas were posted, but not meeting minutes. Other local public bodies in each county (such as various boards and commissions) do not necessarily provide the same level of online information as the elected County Commissioners.

As the requirement to provide sunshine notices and keep meeting minutes originates in state law, this statute should be modernized to require state and local public

bodies to also post notices and minutes on the government entity's website in addition to the physical posting. Again, the burden should not be too high – even on small entities – as they are required to create and make available these public records already. Long-term, this will again save the government employees' time and money as citizens will no longer have to use CORA requests to get this information. In the 21st century, sunshine means online disclosure to most citizens.

Agency-Specific “Routine Requests”

In addition to these general categories of public records that should be proactively disclosed online, each government entity has certain “routine requests” for information within its expertise that could probably be moved online. For example, the Colorado Oil and Gas Conservation Commission is currently engaged in a project to digitize and post online records of violations and fines assessed dating back to the 1950s. This is public information of high interest that is routinely requested through CORA. The agency will save time and money by proactively disclosing this information, thereby eliminating the need to respond to individual, often duplicative open records requests..

Each government entity should be encouraged to review its records requests and proactively disclose on the government website that information which appears to be of high public interest. For a local government, this could be zoning maps or other geographic information system (GIS) data, like Pueblo provides at <http://county.pueblo.org/government/online-services>. Organizations like Open Colorado help governments identify the information as well as host the records online. As long as privacy interests are not compromised, state and local agencies should “set the default to open” and provide this information to citizens online.

“It’s a trend that’s good for everyone: citizens don’t have to make time consuming FOIA requests and state workers don’t have to spend time processing said requests and looking for information.”
- Rapid City Journal (Sept. 4, 2013).

One poor example of an agency that has migrated commonly sought documents online is the “Public Records Center” for the Colorado Department of Labor and Employment’s Division of Oil and Gas Safety.⁷² The good news: many of these public records are online. The bad news: citizens have to fill out a “file request review form,” which once approved, will provide only 24-hours of access to these online documents.

Documents not available online must be viewed in person. It is unclear what purpose is served by placing all these documents online, but limiting access so drastically.

Another disappointing approach to online transparency is government entities that put public records online, but then require citizens to pay to download or print those documents on the citizen's own computer equipment. For example, the Weld County Clerk & Recorder has a free online index of public land documents but requires individuals who wish to view and print actual documents to register online.⁷³ As a registered user, citizens can purchase documents at the cost of 50 cents for the first page of the PDF document and 25 cents each additional page.⁷⁴ Or, citizens or businesses may purchase a "subscription" for \$300 per month for unlimited documents.⁷⁵ Yet, Weld County also has a separate document online portal where County Commissioner agendas, minutes and other county documents appear to be accessible without a fee.⁷⁶ Other county governments take a similar approach: recognizing the desire of citizens to access public documents online, but then charging when there is no incremental cost to recoup, such as ink and paper with a paper photocopy.⁷⁷ About a dozen Colorado county clerks use a service called "The County Recorder" which provides online searching and access to scanned land documents, mostly without charge.⁷⁸

By proactively disclosing commonly requested documents, state and local entities should be able to reduce the amount of time and money spent responding to CORA requests from citizens seeking basic information on government finances, open meetings and/or agency specialty public records. Modernizing how government entities provide public records to the public will increase citizen confidence in the efficiency and transparency of their government. But, modernizing CORA also requires looking at the fees charged to requestors by government entities to respond to and produce public records.

Runaway Fees Charged under CORA

Earlier this year at a public meeting, the Executive Director of a Colorado statewide commission suggested that the Commissioners review their CORA policy which only charged requestors a per-page fee if records were photocopied and produced in paper form. The Director noted how much time staff spent responding to CORA requests, advised that many state and local agencies actually charge for time spent responding to CORA requests, and urged the Commission to consider charging CORA requestors. This cash-strapped agency is now considering the matter.

Over the last decade, "research and retrieval" fees charged to requestors have increased across state agencies and localities. While initially seen as a way to recoup costs for unusually large and burdensome CORA requests, a number of government entities now charge time-based research fees for nearly every CORA request. As discussed below, these

fees are not specifically authorized in the CORA statute. Predictability, uniformity and limitations on the rising fees charged to CORA requestors can be achieved through legislative reforms.

When budget-conscious government entities use CORA fees to increase revenue and recoup costs, traditional media – who largely use open records requests for research and government accountability – feel the pain. This is a time of financial crises for the press as well, and journalists are faced with deciding not to follow a story when presented with a large research bill for public records. Recently, a *Colorado Springs Independent* story noted that the city government responded to a CORA request for emails among city councilmembers for a 2 week period with a \$370 estimated charge.⁷⁹ The *Independent* was “unwilling to pay” the charge and withdrew its request, rather than continuing to investigate whether councilmembers were improperly conducting public business through private emails. On a national level, a 2011 survey of media outlets showed that lack of financial resources was the top reason why media entities did not challenge open records denials by government entities.⁸⁰

When CORA fees price out not only most citizens seeking access to public records, but also the media, ordinary citizens suffer. Transparency in government is too important to be limited to a handful of groups or individuals who can afford to pay charges for time spent disclosing documents about public business.

A Brief History of Research and Retrieval Fees

So where did these extra fees charged to CORA requestors originate? As noted above, the CORA statute only specifies photocopying fees, “data manipulation” fees, and some proprietary computer software fees.⁸¹ This is different statutory language than in the Criminal Justice Records Act which authorizes agencies to “assess reasonable fees, not to exceed actual costs, including but not limited to personnel and equipment, for the search, retrieval, and redaction” of records under that act.⁸² However, case law in Colorado has interpreted CORA to generally permit government agencies to promulgate their own fee schedules that include research, retrieval (and sometimes review/redaction) time in addition to the specific fees listed in the statute.

In 2003, the Colorado Court of Appeals held in *Black v. Southwestern Water Conservation District*⁸³ that the general provision in CORA authorizing government custodians to “make such rules with reference to the inspection of such records as are reasonably necessary” allowed an agency to set

Journalists are faced with deciding not to follow a story when presented with a large research bill for public records

a fee schedule for CORA requests. In that case, the special water district charged a \$15 per hour fee for research and retrieval of requested records (\$20 for “exceptionally voluminous requests.”)⁸⁴ The Court looked at the statutory language and legislative history of CORA to determine whether an agency rule setting up such fees contravened the purposes of CORA. The Court noted that the words “without charge” were deleted from the original bill because the legislature wanted to allow agencies to establish “nominal fees” in connection with CORA requests.⁸⁵ Therefore, the agency was permitted to use its rulemaking authority to set research and retrieval fees that were “nominal in comparison to the time spent responding to the volume of requests and court orders and did not constitute a burden contrary to the spirit of the Open Records Act.”⁸⁶ The \$15/\$20 hourly fees charged in this case were within that range of acceptable and nominal fees.



After *Black*, a growing number of state, local and county agencies issued fee schedules for responding to CORA requests. In 2007, the General Assembly decided to amend the fee provisions of CORA, which (at that time) capped photocopying fees at \$1.25 per page – the amount enacted as part of the original CORA. At first, the bill reduced the photocopying fee to 10 cents per page and added a provision allowing custodians to charge a \$15 per hour for research and retrieval time if the CORA request exceeded 50 pages or required retrieving documents from remote facilities.⁸⁷ During the committee hearings on the legislation, the Colorado Clerk’s Association and the Colorado Municipal League were opposed to that version of the bill because per page fee would be too low compared to actual costs.⁸⁸ The Colorado Press Association supported the legislation as drafted arguing that the costs to make copies had dramatically decreased over the years and fees create barriers to citizen access to public documents.⁸⁹ The bill was amended in those hearings to raise the photocopying fee to 25 cents per page (the current limit) and to delete the proposed new provision regarding research and retrieval fees.⁹⁰

However, removal of the provision that would have explicitly authorized research fees with a \$15 per hour cap and 2-hour limit was not a legislative move to ban these fees. Instead, as Senator McElhany (the sponsor of the amendment removing this provision) explained, the existing case law on research fees established by *Black* was working “well” and there was “no abuse” or reason to change the system based on that case law with a statutory amendment.⁹¹ By reducing the per page photocopying fee to 25 cents, it would no longer build in the research costs that the higher per page fee subsidized. Instead, agencies could charge research fees separately.⁹² Both the clerks and the municipal associations agreed that 25 cents would be acceptable if separate research fees could be charged under the *Black* standard.⁹³ Thus, the 2007 amendments to CORA left in place state and local agency discretion whether to charge a research fee and the amount of that fee without any state-level standards.

The last five years has seen increased use of research and retrieval fees by state and local agencies under the authority of *Black*. The Colorado Municipal League advises its government custodian members that localities should feel comfortable setting such fees at \$15 or \$20 per hour and can adjust up for inflation based on the 10 years since *Black* was decided.⁹⁴ On the other hand, organizations that usually request public documents or advise citizen requestors highlight the ruling’s holding that only “nominal” fees can be charged and those fees should be set at a level that is “trifling” compared to actual costs instead of an attempt to recoup costs.⁹⁵ The “Sunshine Laws Guide” issued jointly by the Governor’s office, Attorney General, Colorado Press Association and the Colorado Freedom of Information Coalition uses this language as its guidance rather than focusing on any particular dollar figure.⁹⁶ There is a philosophical difference between these two approaches: many government custodians view CORA requests as bothersome distractions that take resources away from the “real” work of the agencies, while requestors and government watchdogs generally contend that public records created and maintained using public funds have already been paid for and it is part of government’s job to respond to document requests from members of the public.

A recent case has reaffirmed and expanded *Black*. The Colorado Court of Appeals upheld higher fees charged for responding to a CORA request in *Mountain-Plains Investment Corp. v. Parker Jordan Metropolitan District*.⁹⁷ The requestors were given a cost estimate by the special district government of more than \$16,000 for retrieval of emails requested and attorney time spent reviewing for privilege issues.⁹⁸ The Court upheld the special district’s \$25 per hour research fee as reasonable under *Black*.⁹⁹ The *Mountain-Plains* decision also held that CORA does not require fee schedules to be set before a request is received and that the custodian can require a deposit be paid.¹⁰⁰ The Court also stated that the hourly fee could even be charged for time spent identifying and separating privileged documents.¹⁰¹

Because CORA does not mention research, retrieval and review fees, courts have enjoyed wide latitude to approve a variety of fees charged to requestors. *Black* and *Mountain-Plains* have approved fees of \$15, \$20 and \$25, but with cautioning language that fees cannot “constitute a burden contrary to the spirit of CORA.”¹⁰² What the “spirit of CORA” might dictate in a particular case is hard to predict, so governmental entities may feel free to aggressively seek new fees in the hope that a court might approve them.

It is disturbing to think that agencies might use CORA fees to deter citizens who seek public records, but that does appear sometimes to be true. A Colorado Department of Transportation memo commenting upon proposed legislation in 2013 that might have addressed CORA research fees candidly stated:

This year alone, CDOT has received 680 open record requests requiring 120,000 copies. Without the \$20 fee, it was expected that the size of CORA requests would increase significantly, possibly requiring additional CDOT resources to handle the new workload.¹⁰³

The “spirit of CORA” would be best served by some predictability and uniformity in research and retrieval fees faced by records requestors; especially since *Mountain Plains* allows government entities with no fee policy to create one after a request has been received.

Fees Vary Greatly Between State and County Agencies

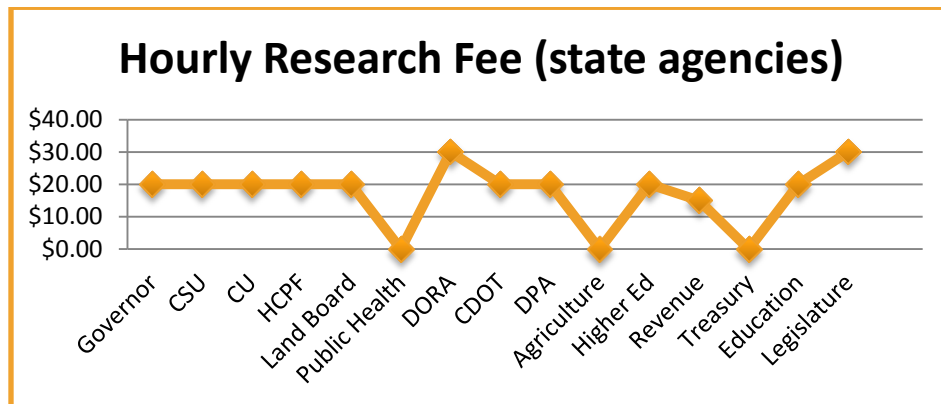
A look at current fees charged shows the disparate treatment CORA requests receive across Colorado under the current system with no legislative provision regarding such fees.

Colorado State Agencies

CORA research and retrieval fees are not consistent even among Colorado state agencies. The Governor’s office takes the lead in these matters but has not issued an executive order setting uniform fees across these departments. The Office of the Governor CORA policy effective August 2008 provided that copies of public records would be subject to a 25 cents per page fee but did not charge any research or retrieval fees.¹⁰⁴ Then Governor Ritter’s staff expressed the belief that the copying fee subsidized the research time. In late 2011, Governor Hickenlooper replaced this policy with a policy that charges \$20 per hour for staff time spent locating and producing records for requests that take more than two hours.¹⁰⁵ However, this policy only applies to those offices and departments under the Office of the Governor.

Most Colorado state agencies have separate CORA policies and fee schedules. While some follow the lead of the Governor, many do not. Ethics Watch conducted a search to determine the fees charged by the largest state departments. Unfortunately, this search itself showed how government agencies need to modernize the way they provide information to citizens. For many agencies, CORA fee information was not available online; requiring calls or emails to agency officials to obtain this information. In some cases, such as the Department of Treasury, we were told there was no written policy, but there was not a history of charging CORA fees.

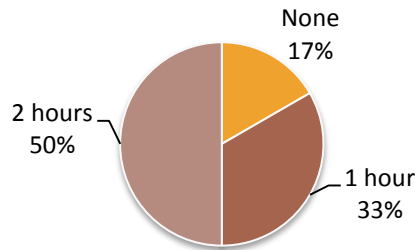
Some agencies, such as the Departments of Agriculture and Public Health do not charge any research or retrieval fees for CORA requests in addition to copying or mailing fees. Other state agencies charge as high as \$30 per hour for production of documents. In comparison, the General Assembly has adopted a legislative branch CORA policy which charges a \$30 per hour research and retrieval fee for any CORA requests that take more than one hour of staff time to complete.¹⁰⁶ Requestors can, and should, request an itemized statement or time log showing how much time was spent responding to the CORA before paying any charges.



As varied as these CORA fee policies are, this is just a sampling of the state agencies subject to CORA. Without legislation or an executive order from the Governor, disparate policies are in effect with each agency, department, board and commission in the state government.

In addition to the difference in the amount of fees charged, state agency CORA policies vary as to when those fees will be charged. For example, the Governor's office only charges the research and retrieval fee for CORA requests that require more than 2 hours of staff time. Not all state agencies use the same period of time – or any time period – before charging research fees.

Time for response before fee charged (state agencies)



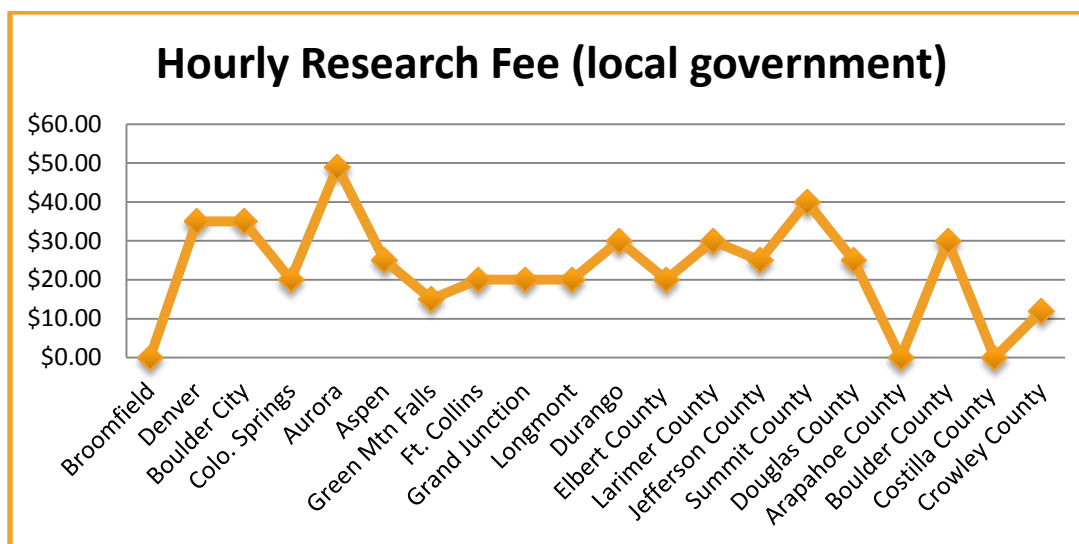
Of the state departments we reviewed, 50% of those which charged a research fee waited 2 hours before charging the CORA requestor. The rest of the departments reviewed charged CORA fees for research requests that used only one hour of staff time or less. Indeed, 17% charged research and retrieval fees for all CORA requests, regardless of how quickly the government employees could produce the records. The amount of time a government entity will spend on a CORA request before charging a research fee arguably reveals whether or not the agency is actually complying with the rule in *Black* and staying within the “spirit of CORA.” *Black* rested its holding on the government entity’s ability to create a regulation setting fees to be charged for “exceptionally voluminous requests.”¹⁰⁷ *Black* does not necessarily authorize government entities to charge for every minute spent responding to every CORA request – even routine and simple requests. Yet, some state agencies and many counties and municipalities have CORA fee policies that do just that.

Colorado Counties and Municipalities

If the Colorado state government cannot set standard CORA request research and retrieval fees across executive agencies, certainly the 64 counties and hundreds of municipalities could not be expected to adopt uniform CORA policies. Media reports cite not only growing fees charged by county and municipal governments in Colorado, but allegations of favoritism and disparate treatment in the way these local officials charge some requestors, but waive fees for others. For example, *The Boulder Weekly* complained in February 2013 that its CORA requests to the city of Boulder almost always required payment of a fee before production of records.¹⁰⁸ The paper also accused the city of using this “pay to play” system to punish critics while providing records free of charge to media requestors deemed friendly.¹⁰⁹ Without any state law to guide or cap the fee schedules adopted by local governments, public officials enjoy practically unfettered discretion..

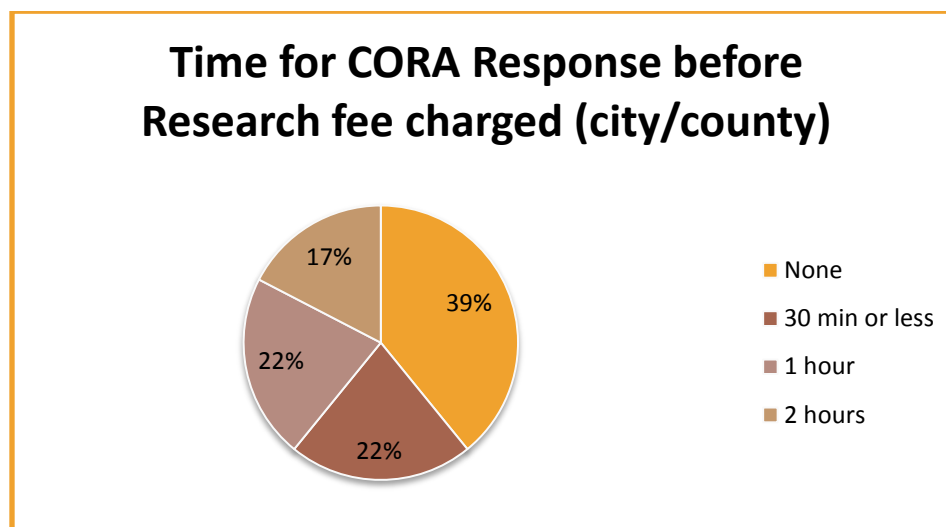
Although unable to find CORA fee charges for all counties and municipalities in Colorado, Ethics Watch did compile information from a number of localities – big and small.

Once again, it was difficult in many cases to find information about CORA request processes and fees on local government websites, even for some large counties with an extensive online presence. When available, information was gathered from email and phone calls with government employees as well. Unlike the state agencies who at least have the \$20 benchmark of the Governor’s CORA policy, local governments are all over the map with regard to the amount of fees charged to CORA requestors.



Perhaps more disturbing than hourly fees that can reach almost \$50 per hour are the local governments who charge fees but do not have a set amount to provide notice to requestors. The City of Boulder CORA policy states that “reasonable fees” for research and retrieval may be charged and that “large requests” may be charged \$35 per hour.¹¹⁰ Lakewood, Salida, Pueblo, El Paso County, Weld County, Mesa County, Adams County, Rio Blanco County and Crowley County each state that fees for responding to CORAs are based on the “actual cost” of the employee fulfilling the CORA request. Requestors are subject to vastly different fees depending upon which government employee ends up reviewing their request. For example, the Lakewood CORA form states that the hourly fee for research is based upon “hourly rate, including benefits, of the least technically trained person capable of performing the search/retrieval.”¹¹¹ The City of Pueblo form has an empty spot for hourly rate for its research fee with no range or explanation; a phone call to the city clerk told Ethics Watch that the hourly rate depends upon the hourly wage of the employee who ends up completing the CORA response.¹¹² The approach of these localities seems in direct contradiction of *Black* which permitted fees based on the assumption that such fees were “trifling” as compared to actual costs. Instead these governments are attempting to recoup actual cost (including benefits for the employees) of any minute spent on CORA requests from the requestors.

Similar to the state government agencies, some local governments provide a certain amount of time spent responding to a CORA request before research fees are charged. Again, *Black* would seem to limit governments to only charging such fees for large and “voluminous” requests instead of every routine request. Yet, many local governments have an unforgiving view of what is routine and charge for nearly every request.



Overall, county and city governments provide less research time free of charge than state government agencies that use the 2 hour policy of the Governor’s office as a model. Of the local governments reviewed who charged research and retrieval fees, 41% started charging fees for the first minute of employee time considering a CORA request. Another 23% charged research fees after the first 15 or 30 minutes spent responding to a CORA request. It would seem that such a short time period would cover even fairly narrow and routine requests.

Additionally, whether requestors even get the benefit of these time guidelines is uncertain. For example, Boulder County’s CORA policy is discretionary on this point – a custodian “may” provide records without a research fee if it takes less than two hours to complete.¹¹³ But no guidance is provided as to how to exercise that discretion. Other governments allow charges based on a determination that “significant staff time” (Lakewood)¹¹⁴ or “extensive staff time” (Adams County)¹¹⁵ is used to respond to the request as determined by the employee or supervisor. It is unclear how that decision is made and whether that determination is consistent between different CORA requestors.

Local governments usually institute CORA fees (or raise them) based on complaints about the time spent responding to CORA requests and the amount of money the local government is “losing.” For example, Colorado Springs officials stated that the city spent more than \$200,000 in staff time to respond to “voluminous and frivolous” CORA requests

in 2012 to support the imposition of a new fee schedule charging \$20 hour for research.¹¹⁶ Those figures were questioned in a recent media report that 2013 “costs” have only been \$6,000, with \$1,400 charged to requestors under the new fees.¹¹⁷

Other local governments have openly viewed CORA fees as a source of revenue. Durango City Council adopted a new \$30 per hour research fee and a ban on requestors using smartphones to photocopy records because the city argued they were “burned” by people who used their own equipment to photograph records instead of paying 25 cents per page for paper copies.¹¹⁸ The policy adopted by City Council was listed as having no fiscal impact because fees would cover all actual costs under the new fee schedule.¹¹⁹

Local governments large and small alike have sought to shift the cost of transparency onto members of the public who want to know what their government is doing. For example, Denver charges \$20 an hour after only 15 minutes of staff research and even charges more (\$35 per hour) if the search involves emails – which seems odd since those records could be searched electronically.¹²⁰ A number of other localities have had recent media coverage of growing CORA fees:

- Elbert County started charging \$20 per hour research fees because “the cost of providing information was just too high in tough economic times.”¹²¹
- Salida City Council responded to a citizen CORA requesting electronic messages sent between councilmembers during council meetings. The citizen was told a \$1,900 deposit was required before research could begin.¹²²
- The same CORA request to different school districts received estimates of costs to respond ranging from \$5,000 (Adams County School District 50) to \$76,000 (Lewis-Palmer District 38).¹²³
- Jefferson County officials referred to CORA requests as “fishing expeditions” that are costly and time consuming when considering increased CORA research fees.¹²⁴

In addition to the large range of possible fees that could be charged by localities, CORA requestors are sometimes actually required to agree to any and all charges by signing the CORA request form.¹²⁵ Perhaps the most egregious of these is Colorado Springs, which has an online CORA request form.¹²⁶ The online form includes the following statement:

Request Information:

I have read the CORA Request Fee Schedule and understand that there is a charge associated with CORA requests. I understand that an estimate will be provided and I agree to pay a 50% deposit upon receipt of the estimate. I also agree to pay for the FINAL costs before receipt of records

*I Agree

Select Choice



If the requestor selects “No” to the statement agreeing to pay all fees, the system refuses to process the CORA request at all and sends an email stating:

-----Original Message-----

From: CORA [<mailto:CORA@springsgov.com>]

Sent: Friday, July 12, 2013 1:40 PM

To: 

Subject: Your issue/problem email submission to 'CORA' was not accepted

'No' is not a valid choice for Fieldname 'I Agree'

Valid choices are:

Yes

Please resubmit your issue/problem with the correct information.

“No” is literally not an option if you want the City of Colorado Springs CORA system to process your CORA request. With regard to the CORA request that generated this email response, Ethics Watch worked around the online system by submitting a separate CORA request via email to the city custodian.

Some small local governments have bucked the trend. Costilla County does not charge any CORA research fees,¹²⁷ while Crowley County only charges for requests that take more than 2 hours.¹²⁸

In the decade since *Black*, government entities at the state, county and local level have instituted a confusing patchwork of research fees which deter media requestors and citizens from accessing public records. Runaway research and retrieval fees do undermine the “spirit of CORA.” If these fees under CORA are here to stay, they should not be

regulated only by courts operating without statutory guidance. Legislation and/or an executive order at the state level are needed to institute uniformity and predictability for both government custodians and CORA requestors.

Recent Attempts to Reform Fee Charges in Colorado and other States

Representative Joe Salazar introduced a CORA fees bill in the 2013 General Assembly session that would have limited research fees charged by state and local governments in a couple ways:

1. Fees charged could not exceed the actual cost incurred by the custodian in complying with the request (including copying costs);
2. Government entities must use the “least expensive means” to comply with a request;
3. No fees could be charged for the time spent determining whether a requested record is subject to inspection; and
4. No fee could be charged for time spent by an employee who is already compensated for responding to CORA requests.¹²⁹

While this legislation would have set some state-wide standards for CORA research fees, it would not actually cap the amounts that could be charged. Nor would it provide any predictability or uniformity for CORA requestors as it would adopt an “actual costs” model that would vary based on which employee handled a CORA request. Faced with opposition from both government custodians and CORA requestors, Rep. Salazar withdrew this bill before its first committee hearing. He plans to introduce a bill on the subject next session.

In reforming Colorado’s state legislation on CORA fees, there is not a uniform approach in federal or other state law that would be easy to adopt. Under the federal Freedom of Information Act (FOIA), agencies may charge “reasonable standard charges” when responding to a request takes more than two hours to fulfill.¹³⁰ This is similar to the approach taken in some states where law sets a standard such as “reasonable” (usually requiring the fee not to exceed the actual cost) while including some sort of minimum time before fees can be charged. For example, Texas does not allow labor charges for requests under 50 pages, New York mandates two hours of research free of charge, and Rhode Island mandates one free hour.¹³¹ Some states do not have a time limit, but do include a cap for research and retrieval fees such as Rhode Island (\$15 per hour) and Hawaii (\$10 per hour).¹³² California prohibits charging any fees except for duplication costs and some costs related to creating a record not already in existence.¹³³ Finally, some states operate on an “actual costs” model that has not been used in Colorado, such as Missouri, Kansas, New Jersey, and Georgia.¹³⁴

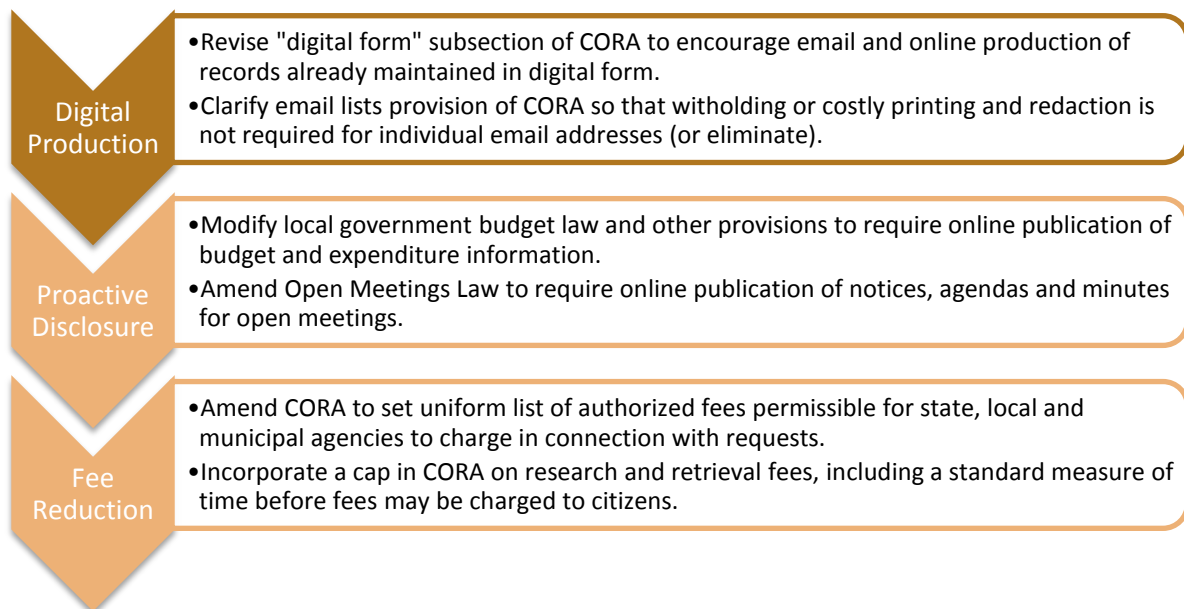
Some states have been reviewing fees charged under their state open records laws to modernize those provisions to reflect our digital world. Here are a few proposed legislative packages considered in 2013:

State	Proposed Open Records Reform
Washington	Current law does not allow fees to be charged for the time spent locating records. Current legislation under consideration would allow agencies to limit the amount of hours they spend on public records requests to one percent of the annual operations budget, but no fewer than five hours per month. ¹³⁵
South Carolina	Current law allows a “reasonable hourly rate” charge to be charged for time spent gathering records. Legislation that was considered but tabled for next session would explicitly prohibit charging fees for staff time associated with gathering record and charging of copying fees for documents stored electronically. ¹³⁶
Indiana	Current Law prohibits charging for time spent searching for a record requested. Legislation failed this year that would have allowed custodians to charge a fee for searches that take more than 2 hours at a rate of the <u>lesser</u> of \$20 per hour or the hourly pay of the employee. ¹³⁷
Michigan	Current law limits fees charged for production of records to the lowest hourly wage employee capable of performing the search. Legislation is currently under consideration that would continue this research fee, but prohibit charging a fee for a requestor who makes their own scanned or paper copies. ¹³⁸
Nebraska	New law passed in 2013 limits any costs charged to “actual added charge” of making copies available, prohibits charging costs for requestors who use their own equipment to scan or photograph documents and prohibits charging any fees for time spent searching or retrieval documents unless more than four hours of staff time are used. ¹³⁹

Predictability and uniformity would be best served in Colorado by state-wide legislation that set a cap on the hourly rate of research and retrieval fees to be charged and a floor for a minimum amount of time spent responding before charging such fees. Keeping within the spirit of *Black* and the history of CORA, this cap should not be based on “actual costs” of employees handling the request. There would be less confusion and uncertainty if CORA explicitly listed all permissible fees in connection with a request.

Summary of Recommendations

Modernizing CORA and open records policies across Colorado should not be a contentious issue. Citizens expect access to public records in digital, low-cost forms. One county agency probably has more computers now than the entire government of Colorado used when CORA was enacted. Understanding that government custodians are always under budget pressures, many of these proposed reforms are either no cost or provide long-term savings with a small short-term investment in digitizing and online portals. The combination of increased digital production of records and proactive online disclosure of commonly-requested public records will drastically increase transparency and accountability. At the same time, a predictable, uniform, and low-cost fee structure is needed when certain records not available online are requested through CORA and take significant time and resources to generate a response. Citizens should not be required to agree to pay before receiving an estimate of fees charged in connection with the request. Predictable and limited fees serves the underlying purposes of CORA of providing open access to public records in most cases because for many citizens, requiring payment of fee is effectively a denial of access.



Our government is not truly transparent and accountable to the people of Colorado so long as our access to public records remains governed by 1960s technology and a public-if-requested mindset. 21st century sunshine means digital production of requested materials without undue burden, proactive disclosure of government spending and policy documents online, and predictable and minimal fees for unusual requests. Only with these modernizing reforms can we bring “the spirit of CORA” into the new millennium.

About Colorado Ethics Watch

Founded in 2006 as the first state-level project of Citizens for Responsibility and Ethics in Washington (CREW), Colorado Ethics Watch uses high impact legal actions to hold public officials and organizations accountable for unethical activities that undermine the integrity of state and local government in Colorado, while also educating the public to mobilize support for reforms to keep Colorado government honest and transparent.

We accomplish our goals using the following methods:

- Litigation and ethics complaints
- Colorado Open Records Act requests (CORAs)
- Requests for government audits and criminal investigations
- Research and policy reports
- Educating the public

In tandem with legal actions, Ethics Watch executes a comprehensive communications strategy to bring attention to the misbehavior of public officials while also educating the public about ethics, transparency and election administration issues, thereby deterring misbehavior and mobilizing support for reform.

Ethics Watch also issues extensively researched reports to promote fresh, nonpartisan solutions to recurring challenges in state and local government in Colorado. Based on our experience using existing legal tools to promote clean government, Ethics Watch is uniquely positioned to hold public officials accountable and to encourage reform.

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Endnotes

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- ¹ Colo. Rev. Stat. § 24-72-201 *et seq.*
- ² Colorado Attorney General Opinion No 01-1, *Colorado Open Records Act Nineteen Frequently Asked Questions* (issued July 5, 2001).
- ³ Colo. Rev. Stat. § 24-72-203(1)(a).
- ⁴ Colo. Rev. Stat. § 24-72-202 (6)(a)(i).
- ⁵ Colo. Rev. Stat. § 24-72-202 (6)(a)(ii) and (6)(b); Colo. Rev. Stat. § 24-71-204(1)-(3).
- ⁶ *Id.*
- ⁷ Colo. Rev. Stat. § 24-72-204(5).
- ⁸ *Id.*
- ⁹ Colo. Rev. Stat. § 24-72-203(1)(a).
- ¹⁰ H.B. 13-1041, 69th Gen. Assem., 1st Reg. Sess. (Colo. 2013) (amending Colo. Rev. Stat. § 24-72-205(1)).
- ¹¹ Colo. Rev. Stat. § 24-72-203(1)(b).
- ¹² *Id.* at (1)(b)(ii).
- ¹³ Colo. Rev. Stat. § 24-72-205(1) & (5).
- ¹⁴ *Id.* at (3).
- ¹⁵ *Id.* at (4).
- ¹⁶ See *Black v. S.W. Water Conserv. Dist.*, 74 P.3d 462 (Colo. App. 2003).
- ¹⁷ Colorado – Public Access to Information, STATE INTEGRITY INVESTIGATION, http://www.stateintegrity.org/colorado_survey_public_access_to_information (last visited Sept. 24, 2013).
- ¹⁸ *Id.* (follow “Question 1.1” hyperlink).
- ¹⁹ *Id.* (follow “Question 1.2” hyperlink; follow note “7” hyperlink).
- ²⁰ *Id.*
- ²¹ FOLLOWING THE MONEY 2013, US PIRG, <http://www.uspirg.org/reports/usp/following-money-2013> (last visited Sept. 24, 2013).
- ²² Transparency Online Project, STATE OF COLORADO, <http://tops.state.co.us> (last visited Sept. 24, 2013) [hereinafter TOP].
- ²³ FOLLOWING THE MONEY 2013 at 29.
- ²⁴ *Id.* at 32.
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