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How the Colorado Criminal Justice Records Act Stacks Up: A Comparative Analysis of the Act's Scope, Waiting Period, and Fee Provisions

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Executive Summary

Colorado has two open records laws. Most government bodies are subject to the Colorado Open Records Act (CORA). Criminal justice agencies are subject to a different law, the Colorado Criminal Justice Records Act (CCJRA). This paper compares the CCJRA to the CORA and open records laws in other states in four key areas: internal affairs files, other police records, response-time provisions, and fee provisions. The goal was to determine how the CCJRA performs in these areas and identify other approaches that might work better. To perform this analysis, open records laws from all 50 states were analyzed.

The Colorado General Assembly recently amended the CCJRA to make law enforcement internal affairs files available when there is an incident of alleged misconduct that involves a member of the public. This makes internal affairs files more available in Colorado than in many states that totally exempt the records from disclosure. However, the law makes only a subset of internal affairs files public and does not require that the records be produced in a timely manner.

With respect to other police records, the CCJRA enumerates a limited set of “records of official action” that are available to the public, but many routine law enforcement records are not public by default. These records are released or withheld by law enforcement agencies based on a judicially created balancing test that seeks to determine whether release of the records furthers the public interest. Some records that are widely available in other states, such as police blotter and incident reports, can be difficult to obtain in Colorado because law enforcement agencies have significant discretion to decide whether to release or withhold them under the balancing test.

A big problem with the CCJRA is that it fails to specify a response time for most records subject to the act. Only the small subset of “records of official action” are subject to a statutory time requirement. For everything else, criminal justice agencies have a lot of leeway in when they respond. Further, a response may not mean the actual production of records because of law enforcement agencies’ discretion to withhold records. A majority of states mandate a response time for compliance with records requests in their public record statutes. For records

that don't carry a response-time requirement, requesters in Colorado can wait 12 weeks or longer to receive records.

Another issue with the CCRJA is that it allows criminal justice agencies to charge high fees without explaining those charges to records requesters. The Act permits agencies to charge for staff time involved in complying with a record request but does not specify the hourly rate or delineate the types of activities that can or cannot be charged for. Other states take measures to limit costs associated with records requests, like providing the first hour of staff time free and prohibiting agencies from charging for redaction of records or legal review. Because the CCRJA does not include those limitations, fees to search, retrieve and redact records can be comparatively large.

Contents

Introduction	4
I. Internal Affairs Files	5
A. Traditional Approaches	5
B. Recent Reforms	7
C. The CCJRA Approach	9
II. Other Law Enforcement Records	10
A. Investigatory Records	11
B. Police Body-Worn Camera Footage	12
C. Other Records: Police Blotter, 911 Tapes, and Incident Reports	14
III. Waiting Periods	16
A. States That Require a Fast Response	16
B. States That Don't Specify a Response Time	18
C. The CCJRA Approach	20
IV. Fee Provisions	20
A. Staff Time	21
B. Per-Page Cost for Copies	23
Conclusion	23

Introduction

Colorado has two open records laws. Most government bodies are subject to the Colorado Open Records Act (CORA). Criminal justice agencies are subject to a different law, the Colorado Criminal Justice Records Act (CCJRA). This paper compares the CCJRA to the CORA and open records laws in other states in four areas: internal affairs files, other police records, response-time provisions, and fee provisions. The CCJRA does not provide the same broad level of access to government files as the CORA and open records laws in most states, but recent amendments to the CCJRA making internal affairs files and police body-worn camera footage

more available are steps in the right direction. The CCJRA lags behind other states' laws with respect to response-time requirements and fees associated with records requests.

I. Internal Affairs Files

Historically, many states have exempted internal affairs files from open records laws to protect the privacy of law enforcement officers. A 2015 report by WNYC found that police misconduct records were confidential in 23 states, available on a limited basis in 15 states, and public in only 12 states.¹ However, police misconduct has become subject to increasing scrutiny and public attention over the past decade. This scrutiny is primarily the product of a number of high-profile police killings—of Eric Garner, Tamir Rice, Freddie Gray, Philando Castile, Jordan Edwards, and Breonna Taylor to name just a few.² The public demand for transparency into incidents of police misconduct reached a climax in 2020 after the murder of George Floyd. Some states have responded to this pressure by opening up internal affairs files. Others continue to keep those files under lock and key. This section looks at states' approaches and rationales for making internal affairs files available or unavailable, some recent reforms, and how the CCJRA fits into the mix.

A. Traditional Approaches

The 2015 report by WNYC identified 23 states that keep internal affairs files confidential. While that number is lower today because of recent reforms, a substantial number of states still exempt those records from disclosure. In states that keep police misconduct records confidential, the pervasive rationale is that the privacy interests of police officers outweigh the public interest in having access to officers' disciplinary files. Some 15 states have a Law Enforcement Officer's Bill of Rights (LEOBOR) that protects those privacy interests.³ One such

¹ WNYC, <https://project.wnyc.org/disciplinary-records/> (last visited April 15, 2022).

² *A Look at High-Profile Cases over Killings by U.S. Police*, ABC NEWS (April 20, 2021, 4:21 PM), <https://abcnews.go.com/US/wireStory/high-profile-cases-killings-us-police-77196885> (last visited April 15, 2022).

³ Kallie Cox & William H. Freivogel, *Analysis of Police Misconduct Record Laws in All 50 States*, AP NEWS (May 12, 2021), <https://apnews.com/article/business-laws-police-reform-police-government-and-politics-d1301b789461adc582ac659c3f36c03c>

state is Delaware.⁴ Under Delaware’s version of LEOBOR, internal affairs files are completely confidential forever.⁵ It is an absolutist approach.

Delawareans are not happy with the system. A 2021 poll showed that 68% of Delawareans support making Delaware police officers’ disciplinary records available to the public.⁶ Despite the public sentiment, change has been difficult for the First State to accomplish. The state’s legislature was unable to pass a reform bill in 2021 but has another on the table for 2022. The 2022 bill’s sponsor, State Senator Elizabeth Lockman, calls the bill a response to the “erosion” of public trust in the state’s law enforcement officers.⁷ Through its absolutist approach, Delaware gives no weight to the public interest in transparency. The erosion of public trust in law enforcement is a natural result of the entirely opaque system.

Other states take a polar-opposite approach. The WNYC report identified 12 states that make internal affairs files public. A 2022 estimate by the Pulitzer Center estimates that the number has increased to 19 states⁸—Ohio and Florida are good examples from this group. In Ohio, law enforcement officer misconduct records are available to the public under the state’s open records law. The statute contains no exception for internal affairs files, and judicial interpretation has held that disciplinary records, including use-of-force reports and citizen complaints, are public records.⁹ Florida does things slightly differently by directly addressing police misconduct records in its statute. The Sunshine State makes internal affairs files public, but not until the investigation into the misconduct is complete. At that point, the records become public regardless of whether the investigating agency decides to proceed with disciplinary action.¹⁰ Both states provide broad public access to law enforcement disciplinary

⁴ Del. Code Ann. § 9200.

⁵ Del. Code Ann. § 9200(12).

⁶ Morgan R. Kelley, *New Data Shows: Delawareans Overwhelmingly Support LEOBOR Reform*, ACLU DELAWARE (June 22, 2021, 5:15 PM), <https://www.aclu-de.org/en/news/new-data-shows-delawareans-overwhelmingly-support-leobor-reform>

⁷ Hannah Cechini, *LEOBOR Changes Back on the Table in Delaware General Assembly*, ABC 47 (March 22, 2022), <https://www.wmdt.com/2022/03/leobor-changes-back-on-the-table-in-delaware-general-assembly/>

⁸ Kallie Cox & William Freivogel, *Police Misconduct Records Secret, Difficult to Access*, PULITZER CENTER (January 24, 2022), <https://pulitzercenter.org/stories/police-misconduct-records-secret-difficult-access>

⁹ Ohio Rev. Code Ann. § 149.43; *Dispatch Printing Co. v. Columbus*, 90 Ohio St.3d 39, 734 N.E.2d 797 (Ohio 2000).

¹⁰ Fla. Stat. 112.533(2)(a).

records, and the people of those states are able to monitor misconduct. Trust between the public and law enforcement officers is fostered through transparency and accountability.

B. Recent Reforms

In the wake of the murder of George Floyd, a number of states have undertaken to make law enforcement disciplinary records more available to the public. New York completely overhauled its laws governing the disclosure of internal affairs files in June of 2021.¹¹ Prior to this reform, internal affairs files were exempt from disclosure under the now repealed Civil Rights Law § 50-a.¹² The New York State Legislature passed Bill S8496 which repealed § 50-a and amended its open records statute to make certain, enumerated categories of internal affairs files public records subject to disclosure. These records include complaints levied against officers, transcripts of disciplinary hearings including any exhibits introduced, the disposition of disciplinary proceedings, and the final written opinion supporting the disposition or discipline.¹³ Since the law was passed, news organizations in New York have obtained a large number of disciplinary records and have used those records to create a searchable database of police misconduct within the state.¹⁴ The New York law is broad in that it encompasses most records associated with an internal affairs investigation of officer misconduct. Records that were once hidden from the public eye are now neatly collected and organized in a database, and readily available for inspection.

California also recently amended its laws to make information about incidents of police conduct more available to the public. In 2018 the state passed its Right to Know Act, which makes certain records public: any incident involving the discharge of a police firearm; any incident in which use of force by an officer results in death or serious injury; any incident in which a finding is made and sustained that a police officer engaged in sexual assault involving a member of the public; and any incident of a police officer committing perjury, filing false

¹¹ *Law Enforcement Disciplinary Records*, NEW YORK STATE DEFENDERS ASSOCIATION, <https://www.nysda.org/page/LawEnforcementDisciplinaryRecord> (last accessed April 15, 2022).

¹² Michael J. Grygiel, *New York Open Government Guide*, REPORTER'S COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/new-york/> (last visited April 15, 2022); *Matter of Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 150 A.D.3d 13, 51 (N.Y. App. 2017).

¹³ New York State Defenders Ass'n, *Supra* note 11.

¹⁴ NYDatabases.com, *New York Police Disciplinary Records*, <https://data.democratandchronicle.com/new-york-police-disciplinary-records/?searchtext=> (last visited April 15, 2022).

reports, or destroying, falsifying, or concealing evidence.¹⁵ Law enforcement agencies are permitted to redact certain information from the records including an officer's home address, phone number, and other information which would "cause an unwarranted invasion of personal privacy personal privacy that clearly outweighs the strong public interest" in the misconduct records.¹⁶ California previously exempted police misconduct records from disclosure. While the Right to Know Act represents a substantial step toward transparency, the law is narrower than New York's because it enumerates only a few limited categories of police misconduct records that are public and affords agencies some discretion in determining what kind of personal information to redact from the record.

Maryland is another state that has recently reformed its open records policies for internal affairs files. In 2021, the state passed the Maryland Police Accountability Act, known as Anton's Law in honor of Anton Black who died in custody after a violent arrest by Greensboro Police. Prior to the passage of Anton's Law, internal affairs files were completely exempt from disclosure in Maryland.¹⁷ Anton's Law erased that exemption and made internal affairs files public. An early report suggests that the law is having some success in providing access to internal affairs files, but that progress is being hampered by recalcitrant police departments.¹⁸ These departments are constructively denying requests by imposing prohibitive fees. For example, a group in Montgomery County, Md., was quoted \$95,000 for copies of the county's internal affairs files.¹⁹ Maryland's experience shows that laws making internal affairs files public are likely to receive pushback from police departments, and legislatures should ensure that the law has sufficient guardrails to prevent blatant obstruction. The laws should, at a minimum, provide mandatory response times, fee limits, and appeal and enforcement mechanisms.

¹⁵ *SB 1421: The Right to Know Act*, ACLU CALIFORNIA, https://www.aclusocal.org/sites/default/files/aclu_socal_sb1421_right_to_know_act.pdf (last visited April 25, 2022).

¹⁶ Ca. Penal Code § 832.7(b)(5)–(6).

¹⁷ Md. Code Ann. § 4-351(a).

¹⁸ Miranda S. Spivack, *Law Aimed at More Access to Police Discipline Records Has Not Yet Lived Up to its Promise*, BALTIMORE BREW (April 15, 2022), <https://baltimorebrew.com/2022/03/20/law-aimed-at-more-access-to-police-discipline-records-has-not-yet-lived-up-to-its-promise/>.

¹⁹ *Id.*

C. The CCJRA Approach

The CCJRA was amended in 2019 to make certain records of police misconduct available to the public. The law affords access to records of an in-uniform or on-duty police officer “related to an incident of alleged misconduct involving a member of the public.”²⁰ Colorado law requires that certain information *must* be redacted from these records and provides that other information *may* be redacted. Among the mandatory redactions are: personally identifying information such as SSNs and driver’s license numbers, information that identifies confidential informants or witnesses, and a law enforcement officer’s home address, phone number, and personal email address.²¹ Records custodians are allowed to withhold: compelled statements by officers subject to a criminal investigation, videos or photographs that raise “substantial privacy concerns,” the identity of officers who volunteered information but are not subject to the internal investigation, compelled statements by officers subject to a criminal investigation, information that would reveal confidential intelligence information, and internal investigation files if there is an ongoing criminal case against the officer who is the subject of the investigation.²²

The law is a good one in that it provides access to records of a lot of incidents of police misconduct—those involving members of the public. It compares favorably to the many states that completely exempt internal affairs files from disclosure. However, the law could be improved if it was not constrained to situations involving a member of the public. There are plenty of instances of police misconduct that don’t directly intersect with a private individual but are still of public concern. For example, in March 2019, Aurora police officer Nathan Meier was found passed out drunk in his squad car, which was parked in the middle of an Aurora city street.²³ The internal affairs file related to the incident could be withheld in response to a records request because Officer Meier’s misconduct did not “involve a member of the public”

²⁰ Colo. Rev. Stat. § 24-72-303(4)(a).

²¹ Colo. Rev. Stat. § 24-72-303(4)(b).

²² Colo. Rev. Stat. § 24-72-303(4)(c).

²³ Clayton Sandell & Jeffrey Cook, *Colorado District Attorney ‘Incredibly Frustrated’ He’s Unable to Prosecute Cop Found Drunk in Patrol Car*, ABC NEWS (Feb. 6, 2020, 3:59 PM), <https://abcnews.go.com/US/colorado-district-attorney-incredibly-frustrated-unable-prosecute-cop/story?id=68808524#:~:text=Aurora%20officer%20Nathan%20Meier%20was,and%20in%20his%20patrol%20car.&text=Bodycam%20footage%20showed%20Aurora%20officer,five%20times%20the%20legal%20limit>.

as required by the CCJRA for disclosure. Moreover, even if the record was produced, the Aurora Police Department could withhold information like the blood draw which revealed Officer Meier was five times over the legal limit,²⁴ because the blood draw would constitute a compelled statement by an officer subject to a criminal investigation, one of the permissible redactions. The law also wouldn't make public internal affairs files related to a police chief's professional misconduct in the office, like Florence Chief Shane Prickett's alleged sexual harassment of staff members.²⁵

The 2019 CCJRA amendment related to internal affairs files was a positive step forward for transparency in Colorado's criminal justice system. However, officer misconduct like driving under the influence and sexual harassment should not escape public scrutiny merely because it did not involve a member of the public. Such behavior is still of high public concern because it evidences deep character flaws in officers entrusted with our safety. An officer who drives under the influence may well involve the public in a violent manner the next time he gets behind the wheel.

II. Other Law Enforcement Records

One of the biggest problems with the CCJRA is that it does not provide a broad level of public access to records held by criminal justice agencies. Under the CCJRA, most records held by criminal justice agencies are not public and may be withheld if the custodian determines that disclosure would be "contrary to the public interest."²⁶ A law enforcement agency is supposed to apply a judicially created five-part balancing test to determine whether the release of records is contrary to the public interest: 1) the public interest to be served, 2) the agency's interest in protecting confidential information, 3) privacy interests, 4) the agency's interest in pursuing ongoing investigations, and 5) any other pertinent consideration.²⁷ A small subset of criminal justice records that are designated as "records of official action"²⁸ are deemed to be

²⁴ *Id.*

²⁵ Chelsea Brentzel, *13 Investigates: Florence Police Chief Previously Accused of Sexual Harassment*, KRDO (Mar. 25, 2022, 3:51 PM), <https://krdo.com/news/2022/03/25/13-investigates-florence-police-chief-previously-accused-of-sexual-harassment/>

²⁶ Colo. Rev. Stat. § 24-72-305(5).

²⁷ *Harris v. Denver Post Corp.*, 123 P.3d 1166, 1228 (Colo. 2005).

²⁸ Colo. Rev. Stat. § 24-72-302(7).

public records and are not subject to the balancing test, as are the internal affairs files discussed above and certain police body-worn cam footage. The result is that only a limited portion of law enforcement agency records are public, and the rest can be withheld at an agency's discretion, subject to the balancing test.

This section looks at three different categories of records that are subject to the CCJRA. First, it examines how the CCJRA treats investigatory records. Next it turns to police body-worn camera footage and recent law changes that make some of that footage available. Finally, the section turns to other police records. Of particular interest are police blotter records, incident reports, and 911 tapes because these routine records are not considered "records of official action" under the Act.

A. Investigatory Records

Investigatory records are not "records of official action" and may be withheld by criminal justice agencies. Because one of the factors considered in the balancing test is an agency's interest in pursuing an ongoing investigation, it is very easy and common for criminal justice agencies in Colorado to find that the release of investigatory records is "contrary to the public interest." For as long as an investigation goes unsolved and remains open, a law enforcement agency can withhold the associated records. The exemption also applies to records of investigations that aren't actively being pursued for whatever reason, like lack of priority or insufficient agency resources. That is to say that an exemption for all investigatory records is too broad and sweeps in records that would not actually prejudice the agency if released.

Many states exempt investigatory records from disclosure. It makes sense to the extent that releasing some investigatory records might interfere with active investigations. However, a blanket exemption is too broad a remedy. Arizona takes a more tailored approach. In the Grand Canyon State, reports of ongoing investigations are not generally exempt from public records laws. Rather, they must be disclosed unless a law enforcement agency can specifically demonstrate how the production of the documents would violate a privacy interest or would prejudice the state's interest in the investigation.²⁹ Massachusetts has a similar policy with no blanket exemption for investigative records. Instead, an exemption must be determined on a

²⁹ *Cox Arz. Publications v. Collins*, 852 P.2d at 1198 (Ariz. 1993).

case-by-case basis, and where the exemption for investigatory records is applied, it must be construed narrowly, allowing redaction only of information that would so prejudice law enforcement as to run counter to the public interest.³⁰ These are smart approaches because they directly target the potential problems associated with releasing investigatory records without imposing an overbroad exemption.

On the other end of the spectrum is Virginia. In the Old Dominion, investigatory files are defined broadly and exempt from mandatory disclosure forever. The Virginia Freedom of Information Act defines criminal investigatory files as “any documents and information, including complaints, court orders, memoranda, notes, diagrams, maps, photographs, correspondence, reports, witness statements, and evidence, relating to a criminal investigation”³¹ The law makes no distinction between active and closed investigations, and any of those records that were associated with a criminal investigation don’t have to be released, even after the investigation is closed and no prejudice to the investigation is possible.³² There is no legitimate state interest that supports such a broad and total exemption of investigatory records from the public domain. Such a law only serves to make government less transparent and to make law enforcement agencies less accountable for their investigations.

B. Police Body-Worn Camera Footage

Body-worn camera footage is another type of police record that is of public concern. The Colorado General Assembly passed a law in 2020,³³ and amended it in 2021,³⁴ that takes some body cam footage (as well as dashboard camera footage) out of the general provisions of the CCJRA and makes it more available to the public. Prior to the enactment of this law, body cam footage was treated like any other criminal justice record and could be withheld by a law enforcement agency if it determined that its release would be “contrary to the public interest.” The new law makes body cam footage public available in instances of complaints of police officer misconduct. When there is such a complaint, the police department must release the body cam footage to the public within 21 days of a request being made. An agency can delay

³⁰ *Worcester Telegram & Gazette Corp. v. Chief of Police of Worcester*, 436 Mass. 378, 383–84 (Mass. 2002).

³¹ Va. Code Ann. § 2.2-3706.B.1.

³² *Fitzgerald v. Loudon Cty. Sheriff's Office*, 771 S.E.2d 858, 861 (Va. 2015).

³³ Senate Bill 20-217 (codified at Colo. Rev. Stat. § 24-31-902).

³⁴ House Bill 21-1250 (codified at Colo. Rev. Stat. § 24-31-902).

the release of the video until 45 days from the date of the incident if its release would substantially interfere with or jeopardize an ongoing investigation.³⁵

The law is responsive to public pressure demanding more transparency into police misconduct, but it does not go far enough in making all body-worn camera footage available to the public. For example, the Boulder County Sheriff's Office has released some body cam footage of the 2021 Marshall Fire in Boulder County but is withholding some as "contrary to the public interest." Because the law only makes body cam footage related to incidents of police misconduct categorically available, other body cam footage is still under the general CCJRA provisions and law enforcement agencies have significant discretion under the balancing test to release and withhold footage as they choose. The public receives a curated collection of body cam footage rather than a complete catalogue.

Some states make body cam footage more available by treating it as a public record by default, subject only to the general exemptions that apply to all records requests in that state. In Florida, body cam footage is considered a public record unless it is recorded within a private residence, a healthcare facility, or another location in which a reasonable person would have an expectation of privacy.³⁶ Oklahoma has a similar law. In the Sooner State, body cam footage is considered a public record under the state's public records law, subject to a few exceptions. Law enforcement agencies may redact or obscure some certain things, such as death, nudity, and severe violence.³⁷ In these states, body cam footage does not have special standing compared to other records and is more available to the public as a result.

Other states make body cam footage more difficult for the public to access. In these states, special provisions in public records laws partially or fully exempt body cam footage from disclosure. Usually this is done under the rationale of protecting the privacy interests of police officers, but in practice it serves to shield them from accountability. Kansas, for example makes body cam footage unavailable by categorically defining every piece of audio or video recording made by a police body-worn camera as a "criminal investigation record," which are generally

³⁵ Colo. Rev. Stat. § 24-31-902(2)(a).

³⁶ Fla. Stat. 119.071(2)(l).

³⁷ Okla. Stat. Ann. tit. 51, § 24A.8(9).

exempt from disclosure under state law.³⁸ In California, body cam records are only available if they are connected to a “critical event,” which is defined as a an incident in which a peace officer discharges a firearm at a person or a use-of-force incident that results in death or great bodily injury.³⁹ In all other situations, body cam footage is exempt from disclosure.

Colorado’s approach to body cam footage under the CCJRA is more like the California model than full transparency. While the new law is a significant step in the right direction, it fails to go far enough. The public has an interest in police activities outside of the police misconduct context.

C. Other Records: Police Blotter, 911 Tapes, and Incident Reports

The “records of official action” that are public by default under the CCJRA are: arrest reports; indictments; charging information; disposition; pre-trial or post-trial release from custody; judicial determination of mental or physical condition; decisions to grant, order, or to terminate probation, parole, or participation in a correctional or rehabilitative program; and decisions to formally discipline, reclassify, or relocate any person under criminal sentence.⁴⁰ Some important and routine police records are conspicuously absent from that list: police blotter, incident reports, and 911 tapes. Because these are not considered “records of official action,” they are subject to the balancing test and law enforcement agencies have a lot of discretion over what is released.

A police blotter is the book of events—such as arrests, time and place of an incident, and the names of officers who respond to incidents—kept by police stations as logs of daily activity. These records are routine and don’t contain the type of sensitive information that might prejudice a police investigation. As such, no state exempts them from disclosure. Indeed, many states specifically recognize that a police blotter is a matter of public concern and should be available to the public as a way of ensuring that police officers are complying with their duties.⁴¹ States have expressly considered, and rejected, arguments that a blotter should be exempt from disclosure as an investigatory record⁴² or because the of the privacy interests of

³⁸ Kan. Stat. Ann. § 45-254(a).

³⁹ Cal. Gov’t Code § 6254(f)(4).

⁴⁰ Colo. Rev. Stat. § 24-72-302(7).

⁴¹ See, e.g., *Cape Publications v. City of Louisville*, 147 S.W. 3d 731, 733 (Ky. Ct. App. 2004).

⁴² 63 Op. Att’y Gen. 543 (1978) (Maryland).

arrestees.⁴³ Because the CCJRA subjects a police blotter to the balancing test, Colorado is one of least transparent states in the country when it comes to these records.

Incident reports are closely related to a police blotter, and many states treat them interchangeably with respect to records requests. The definition of an “incident report” varies from jurisdiction to jurisdiction, but generally these are routine reports created for record-keeping purposes when an officer wants to document an incident, whether it is criminal or merely a situation of concern. No state expressly exempts incident reports from its open records laws. Some even specifically address incident reports as being open and outside of an investigatory record exemption. For example, Georgia’s statutory provision creating an exemption for investigatory records specifies that incident reports are public records and must be disclosed.⁴⁴ Despite the overwhelming consensus that a police blotter and incident reports should be public records, the CCJRA can hide them behind the balancing test. In Colorado, these records aren’t truly public because law enforcement agencies have wide latitude to withhold them as “contrary to the public interest.”

Tapes of 911 calls are also less than freely available under the CCJRA. Like police blotter and incident reports, 911 tapes are not “records of official action” and are therefore subject to the balancing test. In most states, 911 tapes are presumptively open records but sometimes are exempt from disclosure under other exemptions, like the exemption for investigatory records or if the privacy interests of the caller outweigh the public interest in the recording.⁴⁵ Under the CCJRA, however, there is not a presumption that 911 calls are available. Instead, the records are subject to a balancing test. The Denver Police Department even requires permission from the caller before it will find that the release of a 911 tape isn’t contrary to the public interest.⁴⁶

⁴³ Op. Att’y Gen 95-294 (Louisiana).

⁴⁴ Ga. Code Ann. § 50-18-72(a)(4).

⁴⁵ See, e.g., Ga. Code Ann. § 50-18-72(a)(26) (911 tapes are presumed open, except information that would reveal personally identifying information of the caller and information that would disclose the existence of a confidential information, among other exceptions).

⁴⁶ POLICE RECORDS, City of Denver, <https://denvergov.org/Government/Agencies-Departments-Offices/Agencies-Departments-Offices-Directory/Police-Department/Police-Records> (last visited April 15, 2022).

III. Waiting Periods

A key component of any open records law is the waiting period, or the time allotted to an agency to comply with, or deny, a records request. Most states spell out response-time requirements in their public records statutes. In Colorado, however, most criminal justice records subject to the CCJRA do not carry a mandatory response time. Imposing a mandatory response time on agencies has several key benefits. Primarily, it puts requesters and agencies on notice and sets expectations on both sides. But it also prevents agencies from sitting on records requests for inordinate amounts of time as a method of denial. Where a response time is set by statute, an agency's failure to respond to a request within the permitted time can serve as a constructive denial of the request. This provides the requester a basis for appeal. It also holds agencies accountable, especially in states where monetary penalties are imposed on a per-day basis against agencies that wrongfully deny records requests. Where a response time isn't set by statute, it is difficult to draw the line where a delay turns into a denial that can be appealed.

This section examines the approaches taken by different states. Some require a quick response, in as little as three to five days. Others specify a more lenient response time, up to 15 or even 30 days at the long end of the spectrum. Still others leave response time up to the discretion of the agency. The section concludes by examining how the approach employed by the CCJRA compares to other states.

A. States That Require a Fast Response

At the most expedient end of the spectrum, some states require requested records to be produced in as little as three or five days. Georgia, for example, requires agencies to respond to a records request within a "reasonable amount of time not to exceed three business days" with records that can be located and produced within that period.⁴⁷ If some, but not all, of the records requested in a particular request can be produced within three days, the agency must produce the records that it can within that window. For records that take longer than three

⁴⁷ Ga. Code Ann. § 50-18-71(b)(1)(A)

days to locate and produce, the agency subject to the request must provide the requester with a written description of the records and an estimated timeline for their production.⁴⁸

Missouri and Idaho also follow the three-day model. In the Show-Me State, government bodies have three business days to produce records pursuant to a request unless there is “reasonable cause” for a delay.⁴⁹ In that case, the records custodian is required to give a detailed explanation for the cause of delay and must specify the earliest time and place at which the records could be made available for inspection in the interim.⁵⁰ Idaho employs a similar approach. Agencies have three working days to produce records or deny a request but may get an extension of up to 10 business days if additional time is needed to locate or retrieve the records.⁵¹

Other states require that records be produced within five days. Illinois fits into this group, requiring agencies to either furnish records or deny a request within five business days.⁵² The state allows a five-day extension under certain, enumerated circumstances. Among other things, an agency qualifies for the five-day extension if the records are stored at a location other than the office which received the request, the request is for a “substantial number” of records, or the agency needs a consultation before responding to the request.⁵³ An agency seeking such an extension must notify the requester in writing of the reason for the extension and the date on which the records can be produced.⁵⁴ Illinois introduces an interesting enforcement mechanic in the response-time section of its statute; if an agency produces a record, but fails to do so in a timely manner, it may not charge a fee for the production of that record.⁵⁵

Michigan also falls into the five-day camp. A records requester in the Wolverine State can expect a public agency to respond to a records request within five business days by furnishing the records, furnishing the records in part, providing a written denial, or providing a notice that

⁴⁸ *Id.*

⁴⁹ Mo. Rev. Stat. § 610.023.3.

⁵⁰ Mo. Rev. Stat. § 610.023.3.

⁵¹ Idaho Code § 74-103

⁵² 5 Ill. Comp. Stat. Ann. 140/3(d)

⁵³ 5 Ill. Comp. Stat. Ann. 140/3(e)

⁵⁴ *Id.*

⁵⁵ *Id.*

an additional 10 days is needed to comply with the request.⁵⁶ An extension is available only in “unusual circumstances,” defined by statute to mean a situation where the search requires review a voluminous amount of records or the records need to be collected from numerous different locations or offices.⁵⁷

These are just a few examples of states that require records to be produced in an expedient manner—five days or less—by statute. But they are not the only examples, and these states do not represent some small minority. At least six states⁵⁸ require an agency to respond to a request within three business days and at least another 10⁵⁹ give agencies only five business days. These states—comprising nearly a third of the country—embody the spirit of open records laws by making records available to the public not only in legal theory, but in practice.

B. States That Don’t Specify a Response Time

Apart from the states mentioned above, most states impose some kind of response-time requirement. These requirements are typically no longer than 15 days. A minority of states, however, choose not to impose a statutory response-time requirement, meaning that agencies have discretion over when to respond to a records request. In these states, requests can linger.

One such state is Minnesota. Under its Government Data Practices Act, governmental bodies must respond to records requests in an “appropriate and prompt manner,” but the statute provides no specific timeframe.⁶⁰ Additionally, the statute does not recognize delay as a cognizable basis of appeal. Citizens and members of the press who submit records requests and receive only silence in response can only seek enforcement against an agency by bringing an

⁵⁶ Mich. Comp. Laws Ann. § 15.235(2)

⁵⁷ Mich. Comp. Laws Ann. § 15.232(k)

⁵⁸ Arkansas (Ark. Code Ann. § 25-19-105(e)); Georgia (Ga. Code Ann. § 50-18-71(b)(1)(A)); Idaho (Idaho Code § 74-103); Kansas (Kan. Stat. Ann. § 45-218(d)); Louisiana (La. Stat. Ann. § 44:32(D)); Missouri (Mo. Rev. Stat. § 610.023.3); and Vermont (Vt. Stat. Ann. tit. 1, §318(a)(1)).

⁵⁹ Illinois (5 Ill. Comp. Stat. Ann. 140/3(d)); Kentucky (Ky. Rev. Stat. Ann. § 61.880(1)); Michigan (Mich. Comp. Laws Ann. § 15.235(2)); Nebraska (Neb. Rev. Stat. § 84-712(4)); Nevada (Nev. Rev. Stat. Ann. § 239.0107(1)); New Hampshire (N.H. Rev. Stat. Ann. § 91-A:4, IV(b)); New York (NY CLS Pub Off. § 89(3)); Oregon (Or. Rev. Stat. § 192.324(2)); Virginia (Va. Code Ann. § 2.2-3704.B.2); and Washington (Wash. Rev. Code § 42.56.520(1)).

⁶⁰ Minn. Stat. § 13.03, subd. 2(a).

action in state civil court.⁶¹ Because of the time and costs involved in a lawsuit, that remedy is unobtainable to many and presents a substantial obstacle to the few who have sufficient resources to pursue it. Effectively, the open records law is toothless.

In December of 2020—seven months after the murder of George Floyd—the *Minnesota Reformer* ran a story entitled *The Bad Cops: How Minneapolis Protects its Worst Police Officers Until it's Too Late*.⁶² The authors of the article obtained 195 disciplinary records from the Minneapolis Police Department and discovered a pattern of minimizing and underreporting police misconduct within the department.⁶³ The article won an award in 2021 for “Best Use of Public Records” from New York University’s Arthur L. Carter Journalism Institute, as part of its American Journalism Online Awards.⁶⁴ But the story almost never happened because the City of Minneapolis didn’t respond to the records request, because it didn’t really have to. The records that formed the basis of the report were first requested in October of 2019. Minneapolis failed to produce a single record for seven months before the reporters, Max Neterak and Tony Webster, filed a lawsuit. It took another year of litigation and mediation to actually obtain the records.⁶⁵

The result of using indefinite language like “appropriate and prompt manner” instead of specifying a response time in days is that the statute is far less enforceable. Agencies are empowered to withhold records, especially ones which cause the agency embarrassment. Such records also tend to carry great public importance. Minnesota is not alone in this approach, but only a small minority of states employ it. In preparing this report, I was only able to identify four other states that don’t impose a specific response-time requirement.⁶⁶

⁶¹ Leita Walker, Shannon Jankowski & John Borger, *Minnesota Open Government Guide*, REPORTER’S COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/minnesota/> (last visited April 15, 2022); Minn. Stat. § 13.08, subd. 4.

⁶² Max Nesterak & Tony Webster, *The Bad Cops: How Minneapolis Protects its Worst Police Officer Until It’s Too Late*, MINNESOTA REFORMER (Dec. 15, 2020, 5:30AM), <https://minnesotareformer.com/2020/12/15/the-bad-cops-how-minneapolis-protects-its-worst-police-officers-until-its-too-late/>

⁶³ *Id.*

⁶⁴ *American Journalism Online Awards – 2021 Winners*, ARTHUR L. CARTER JOURNALISM INSTITUTE, <https://journalism.nyu.edu/graduate/programs/american-journalism-online-masters/awards/2021-winners/> (last visited April 15, 2022).

⁶⁵ J. Patrick Coolican, *Minnesota’s Open Records Law Needs an Enforcer*, MINNESOTA REFORMER (May 21, 2021, 7:00 AM), <https://minnesotareformer.com/2021/05/21/13385/>.

⁶⁶ Florida, Indiana, Montana, and Oklahoma.

C. The CCJRA Approach

Except for the small subset of records of “official action,” which must be made available for inspection within three days, the CCJRA does not impose a response-time requirement.⁶⁷ Additionally, body camera footage subject to disclosure must be provided within 21 days of a request unless it would prejudice an active investigation, in which case an agency can wait up to 45 days.⁶⁸ For the remainder of criminal justice records subject to the Act, agencies are not required to produce records within a certain number of days, or even to issue some kind of response to a request.

Like in Minnesota, this system is ripe for abuse and neglect. A recent example was highlighted by a Colorado Freedom of Information Coalition blog post.⁶⁹ As of March 2022, the Aurora Police Department had a backlog of over 12 weeks in responding to records requests submitted under the CCJRA. The blog post includes a tweet from 9News reporter Jeremy Jojola, who notes the delay is three months—a time period that would not be tolerable to any of the 46 states that specify a response-time requirement in their open records laws.

IV. Fee Provisions

States take a varied approach in how they assess fees against people who request records. It is widespread practice to charge a requester a sufficient fee to cover a state’s actual cost involved in complying with a records request, including the search and retrieval of the records. States take different approaches with respect to how to charge for staff time involved in complying with records requests. The main issues involved are the hourly rate that an agency can charge, whether the first hour or two are free, and whether the agency can charge for time associated with redaction and legal consultation. The other component to fees are per-page costs that can be assessed for furnished records.

⁶⁷ Colo. Rev. Stat. § 24-72-303(3)

⁶⁸ Colo. Rev. Stat. § 24-31-902(2)(a); Colo. Rev. Stat. § 24-31-902(2)(b)(III).

⁶⁹ Jeffrey A. Roberts, *Sunshine Madness Nominations Highlight Government Transparency Barriers, Failures*, COLORADO FREEDOM OF INFORMATION COALITION (March 21, 2022), <https://coloradofaic.org/sunshine-madness-nominations-highlight-government-transparency-barriers-failures/>.

A. Staff Time

The CCJRA permits criminal justice agencies to charge reasonable fees, not to exceed actual costs, for the personnel and equipment required to comply with a records request. The scope of permissible fees includes time associated with the search, retrieval, and redaction of records. The statute does not make the first hour of staff time free or specify a maximum hourly rate an agency may charge for its staff time.⁷⁰ In contrast, the CORA sets a maximum rate of \$33.58 per hour for staff time required to complete a records request.⁷¹ Additionally, the CORA prohibits agencies from charging for the first hour of time expended, an approach more in line with other states.⁷² Other states also limit staff fees by carefully delineating the kinds of staff work that can, or cannot, be charged.

Some states don't charge for staff time at all, or only charge for staff time connected to requests that are unusual in some way. For example, Washington makes staff time free except for certain, customized records requests.⁷³ Indiana takes a similar approach; agencies can only charge search fees under limited, enumerated circumstances, like if the records request is ordered by a court.⁷⁴ Pennsylvania and North Carolina make staff time free unless a request actually affects an agency's bottom line. In Pennsylvania, an agency can't charge for staff time unless it is "necessarily incurred" as a result of the request.⁷⁵ In North Carolina, public bodies can only charge for "actual cost," which does not include costs that would have been incurred by the body if a request had not been made.⁷⁶ While many states only permit actual staff costs to be charged, these two states recognize that utilizing an otherwise idle resource does not represent an actual, hard cost to an agency.

Some states limit staff fees by fixing an hourly rate—like Colorado does with CORA—or providing the first increment of time for free. It is common for states to provide the first hour of staff time expended on complying with a records request for free. For example, North Dakota⁷⁷

⁷⁰ Colo. Rev. Stat. § 24-31-306(1).

⁷¹ Colo. Rev. Stat. § 24-72-205(6)(b).

⁷² Colo. Rev. Stat. § 24-72-205(6)(a).

⁷³ Wash. Rev. Code § 42.56.120.

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⁷⁵ 65 Pa. Stat. Ann. § 67.1307.

⁷⁶ N.C. Gen Stat. § 132-6.2(b).

⁷⁷ N.D. Cent. Code § 44-04-18(2).

and Rhode Island⁷⁸ are two of the many states that don't charge for the first hour of staff time. Some states, like Maryland⁷⁹ and Idaho,⁸⁰ even provide the first two hours for free. Other states limit staff costs by setting an hourly rate. Georgia⁸¹ and South Carolina⁸² stipulate that a records custodian cannot charge an hourly staff fee that exceeds the hourly salary of the lowest paid full-time employee who has the necessary skill and training to perform the request. In Rhode Island, a governmental body can charge only \$15 per hour of staff time for the search and retrieval of records, after the free first hour.⁸³

Another approach to limiting staff time is to delineate the scope of hours subject to charges. Wisconsin prohibits agencies from charging for redacting records.⁸⁴ Delaware doesn't allow government bodies to charge for legal review of a records request.⁸⁵ And in Massachusetts, records custodians can only charge for segregating and redacting records if the segregation and redaction is required by law or approved by the state's Supervisor of Records.⁸⁶

While the CCJRA prohibits charging fees in excess of an agency's actual costs, the statute does not do enough to constrain how much an agency charges for a request. For example, a criminal justice agency is free to have the highest paid employee in the office perform the search, retrieval, and redaction. The statute is silent as to whether an agency can charge for a lawyer's time in reviewing a request. This problem is compounded by the fact that the CCJRA does not require records custodians to provide a detailed explanation of the efforts involved in producing records. The result is an opaque process where criminal justice agencies can charge prohibitively expensive fees—like \$4,400 to find out how often police discharge their taser guns in Colorado Springs⁸⁷—with little accountability.

⁷⁸ R.I. Gen. Laws Ann. § 38-2-4(b).

⁷⁹ Md. Code Ann. § 4-206(b).

⁸⁰ Idaho Code § 74-102(10)(f)(I)-(iii).

⁸¹ Ga. Code Ann. § 50-18-71(c)(1).

⁸² S.C. Code Ann. § 3-4-30(B).

⁸³ R.I. Gen. Laws § 38-2-4(b).

⁸⁴ *Milwaukee Journal Sentinel v. City of Milwaukee*, 815 N.W.2d 367 (Wis. 2012).

⁸⁵ Del. Code Ann. § 10005(d)

⁸⁶ Mass. Gen. Laws ch. 66, § 10(d); 950 Mass. Code Regs. 32.07(2)(d).

⁸⁷ Eric Ross, *Public Records Kept Hidden From the Public; Legislators Want More Transparency*, KOAA NEWS (Mar. 11, 2019, 8:57 PM), <https://www.koaa.com/news/news5-investigates/2019/03/11/public-records-kept-hidden-from-the-public-legislators-want-more-transparency/>

B. Per-Page Cost for Copies

Per-page fees for copies can be another main cost component associated with a records request. While this is often less of a cost driver than staff time, there is substantial variation among the states. For lengthy records requests, the paper costs can add up. The CCJRA permits criminal justice agencies to charge the lesser of actual cost and 25 cents per page.⁸⁸ That number is fairly typical, although it is on the somewhat higher end of the range. Vermont charges only five cents for a single-sided copy.⁸⁹ Georgia⁹⁰ and Missouri⁹¹ charge 10 cents. New Mexico apparently buys the most expensive paper, as a single page of copy can run a records requester up to a dollar in the Land of Enchantment.⁹²

Conclusion

Recent amendments to the CCJRA with respect to internal affairs files and police body-worn camera footage have improved the law and advanced the public interest of transparency into law enforcement operations. Still, in many respects, the law lags behind its peers in other states. Its scope is limited with respect to other police records, sometimes making it difficult for Coloradans to obtain routine records, like police blotters and incident reports, that are widely available in other states. It specifies no response time for most records, leaving some records requesters waiting 12 weeks or more on requests. And it is insufficiently detailed in its fee provisions, allowing law enforcement agencies to charge unreasonable fees to comply with records requests. The law could be significantly improved by amendments to these key areas.

⁸⁸ Colo. Rev. Stat. § 24-72-306(1).

⁸⁹ Vt. Stat. Ann. tit. 1, § 316(d).

⁹⁰ Ga. Code Ann. § 50-18-71(c)(2).

⁹¹ Mo. Rev. Stat. § 610.026.1(1).

⁹² N.M. Stat. Ann § 14-2-9(C)(1)-(2).