



Technical Update

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Aurora Shooting Case Highlights Duty of Local Government to Carefully Consider Release of Records

In a recent case concerning the City of Aurora, the Colorado Open Records Act was pulled into play in considering a request to release a report written by the City of Aurora. The report was commissioned by the City to review the response of agencies to the Aurora theatre shootings. The decision laid out the following legal framework for us to follow:

1. Determine if the report is a “criminal justice record”. If the answer is yes, then the custodial agency has discretion as to whether or not to release it.
2. To determine this, one must consult the definition at 24-72-301 which is “Criminal justice records means all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, that are made, maintained, or kept by any criminal justice agency in the state for use in the exercise of functions required or authorized by law or administrative rule, including but not limited to the results of chemical biological substance testing to determine genetic markers.”
3. All criminal justice records, at the discretion of the official custodian, may be open for inspection by any person at reasonable times, except as otherwise provided by law, and the official custodian of any such records may make such rules and regulations with reference to the inspection of such records as are reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office. This definition has had some criticism as it sets criminal justice records outside the purview of the CORA. See, for example: <http://cocommonlaw.com/2014/09/the-arbitrariness-of-the-colorado-criminal-justice-records-act/>. See Colo. Rev. Stat. § 24-72-304 (1).
4. The custodian’s decision to release or not will only be overturned if “it is manifestly arbitrary, unreasonable

or unfair; it reflects a misapplication of the law; or it is not reasonably supported by competent evidence in the record.”

5. If it is NOT a criminal justice record, the CORA applies and the record can only be withheld under certain specific exceptions.

Since it was NOT a criminal justice record, the decision turned on Aurora’s analysis of the following question:

Would release of the records do substantial injury to the public interest? (exceptions are to be narrowly construed). The court determined that the disclosure could substantially impair Holmes’ ability to have a fair trial.

The court then determined that the report could be disclosed only to the extent that “disclosure will not substantially prejudice the court’s ability to conduct a fair trial in the criminal case”. In order to effect that result, the court redacted all references in the report relating to the crime’s commission, including the shooter’s possible motivations, items found at Holmes’ apartment, and the circumstances of Holmes’ arrest.

What This Means for Counties

The most recent definition of Criminal Justice Records, and the revisions to the Colorado Open Records Act, result in a much limited access to criminal justice records for counties. It is recommended that BOCCs consult with their Sheriffs in recommending a written policy on which records under the custodial control of the Sheriff will be released and those which will be withheld, and those which may need additional review. This will avoid contention and costly disputes in the event of lawsuit defenses.

For more information, contact CTSI at 303-861-0507.