

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**To:** Jon Caldara and Beth Hendrix

**From:** Legislative Council Staff and Office of Legislative Legal Services

**Date:** March 13, 2026

**Subject:** Proposed Initiative Measure 2025-2026 #261, Concerning the Right to Access Public Proceedings and Records

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Legislative Council Staff and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments and questions to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council Staff and the Office of Legislative Legal Services is to provide comments and questions intended to aid designated representatives, and the proponents they represent, in determining the language of their proposal and to avail the public of the contents of the proposal. Our first objective is to be sure we understand your intended purposes of the proposal. We hope that the comments and questions in this memorandum provide a basis for discussion and understanding of the proposal. Discussion between designated representatives or their legal representatives and employees of the Legislative Council Staff and the Office of Legislative Legal Services is encouraged during review and comment meetings, but comments or discussion from anyone else is not permitted.

## Purposes

The major purposes of the proposed amendment to the Colorado Constitution appear to be to:

1. Establish a fundamental constitutional right for all persons to know the affairs of all levels of state and local government, which guarantees access to public proceedings and public records;
2. Specify that this fundamental right applies to all public affairs of government and does not apply only when the demand of individual privacy or another highly compelling state interest clearly outweighs this fundamental right;
3. Require any government office, official, officer, employee, or public body asserting an exemption to the public access requirements of the proposed initiative to demonstrate by clear and convincing evidence that the government affairs at issue are exempt;
4. Impose a civil penalty of at least \$1,000 on any public official, officer, employee, or agent for each instance in which they knowingly violate the provisions of the proposed initiative, except for ministerial acts;
5. Prohibit any state or local government from enacting legislation to limit or restrict the provisions of the proposed initiative; and
6. Preempt any ordinance, rule, regulation, charter, or statute that conflicts or is inconsistent with the provisions of the proposed initiative.

## Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado Constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The amending clause of the proposed initiative places this language as a new section 33 in article II of the Colorado Constitution. Because article II outlines the state's Bill of Rights, is it the proponents' intent that this new fundamental right be weighed equally against other fundamental constitutional rights, for instance, the right to privacy?
3. In the declaration of the proposed initiative, in subsections (1)(d) and (1)(e), there is a finding that Colorado state and local governments have infringed on the fundamental right created in the initiative. Do the proponents intend this finding to create any legal liability on the part of any government for the declared infringement?
4. There are no definitions included for any term used in the proposed initiative. To ensure that the initiative accomplishes the proponents' intent, consider defining some of the key terms used, such as "affairs of government," "state and local governmental entities," "ministerial acts," "public body," "public record," and "public proceeding." What is meant by these key terms?
5. Subsection (2) of the proposed initiative establishes the fundamental constitutional right to "know the affairs of all levels of state and local government." Throughout the proposed initiative, it is stated that this fundamental right guarantees other rights, including the right to access and examine public records, the right to access public proceedings, and the right to observe the meetings, deliberations, discussions, and presentations of all public bodies.
  - a. Are all of these subsidiary rights their own fundamental constitutional rights?
  - b. Alternatively, are these examples of ways that the fundamental right to know the affairs of all levels of state and local government can be

protected or infringed but are not fundamental rights in and of themselves?

- c. Subsection (1)(b) of the proposed initiative specifies that the fundamental right to know the affairs of all levels of state and local government guarantees the right to observe the meetings, deliberations, discussions and presentations of all public bodies of state and local governments. How is this different from the right to access public proceedings? Section (1)(b) is a declaration of the people and may not be considered binding law. Is this the proponents' intent? Why did the proponents choose not to include this language in section (2) of the proposed initiative?
6. Subsection (3) of the proposed initiative establishes certain standards and exceptions for violations of the fundamental right to know the affairs of all levels of state and local government. The following questions relate to those exceptions and standards:
- a. The proposed initiative states that no person shall be "deprived or unreasonably burdened" in the exercise of this fundamental right. Because unreasonably burdened is a subjective standard, how would government entities or courts determine what constitutes an unreasonable burden in practice?
  - b. The proposed initiative states that the right to know the affairs of government applies unless a matter is private "such that the demand of individual privacy or other highly compelling state interest clearly exceeds the merits of the public's fundamental right to know the affairs of government." Who decides whether a state interest is highly compelling or whether individual privacy clearly exceeds the merits of this fundamental right?
  - c. The proposed initiative requires any governmental entity or public body that asserts that any governmental affairs should be exempt from disclosure or access to the public to demonstrate this exemption "by clear and convincing evidence."
    - i. Is it the proponents' intent that this specific evidentiary standard applies to the public body holding a meeting or initial records

custodian making a denial at the administrative level, or solely to a judicial officer reviewing a denial in a legal proceeding?

- ii. If this is intended to apply to the administrative level, how does a governmental entity, public body, or records custodian practically demonstrate "clear and convincing evidence" at the moment a records request is denied or a meeting is closed?

7. The following questions relate to how the proposed initiative will interact with existing statute or other legal frameworks:

- a. How will the proposed initiative interact with existing statutory frameworks like the Colorado Open Records Act, the Colorado Open Meetings Law, or those governing criminal justice records?
- b. Is it the proponents' intent to invalidate all existing exemptions to public records access—such as those protecting ongoing criminal investigations, the addresses of survivors of domestic violence, trade secrets, or attorney-client-privileged communications—unless they meet the new standard for individual privacy or another highly compelling state interest?
- c. Statute currently allows public bodies to enter into executive session for specific, limited reasons. Is it the proponents' intent that executive sessions would be entirely abolished unless the topic meets the new standard for individual privacy or another highly compelling state interest?
- d. Subsection (4) of the proposed initiative declares that any provisions in local ordinances, state or local rules or regulations, local charters, or state statutes that are in conflict or inconsistent with the proposed initiative are preempted and inapplicable.
  - i. Who determines whether an ordinance, rule, regulation, charter, or statute is in conflict or inconsistent with the proposed initiative and is therefore inapplicable?
  - ii. Is it your intent that ordinances, rules, regulations, or charters that are determined to be in conflict or inconsistent with the proposed initiative be repealed?

- iii. Does this create ambiguity or liability for records custodians who must decide whether to follow existing statutory mandates or to independently determine if those statutes are preempted and inapplicable by operation of the proposed initiative?
  - e. How does the proposed initiative interact with the Colorado Governmental Immunity Act, which typically protects public employees from personal liability when acting within the scope of their employment?
- 8. Subsection (5) of the proposed initiative allows state and local governmental entities to enact legislation to "facilitate the operation" of the proposed initiative and to enact measures "reducing the costs of obtaining access" to examine or inspect government affairs but prevents state and local governmental entities from limiting or restricting the provisions of the initiative. The following questions relate to subsection (5):
  - a. Who determines whether legislation facilitates the operation of the initiative or restricts its provisions?
  - b. Does this provision mean that the General Assembly or a local government is prohibited from passing laws that allow governmental entities to charge reasonable fees to recover the time, labor, and resources required to fulfill public records requests? What about laws that set a timeframe for completing public records requests and include an ability to extend that timeframe?
  - c. Would existing laws that allow governmental entities to charge reasonable fees to recover the time, labor, and resources required to fulfill public records requests or that set a timeframe for completing public records requests restrict the provisions of the proposed initiative and therefore be considered conflicting provisions of law?
  - d. Would the following types of laws facilitate the operation or the proposed initiative or restrict its provisions:
    - i. A law that defines the terms used in the proposed initiative?
    - ii. A law that establishes a process by which a person could request access to a public record?

- iii. A law that specifies what notice is required for a public meeting?
9. Subsection (8) of the proposed initiative provides that any public official, officer, employee, or agent who knowingly violates the provisions of the proposed initiative is subject to a civil penalty of at least \$1,000 for each violation, except for ministerial acts.
- a. Ministerial acts are typically those acts that are a routine part of an individual's employment and that are non-discretionary. What is meant by a "ministerial act" in the proposed initiative?
  - b. What is the proponents' intent in exempting ministerial acts from the provisions of subsection (8) of the proposed initiative?
  - c. Is it the proponents' intent that front-line governmental employees (such as administrative assistants or clerks) be held personally liable if they deny a record in good faith based on their agency's directives or their understanding of existing law?
  - d. Is it the proponents' intent that individual governmental employees be held personally liable if they deny access to a meeting of their governmental agency based on a policy adopted by that agency?
  - e. Who enforces the sanctions provision and by what mechanism?
  - f. What entity, agency, or judicial body is authorized to assess and collect this minimum civil penalty? To whom or to what fund would the assessed penalty be paid?
  - g. This provision includes a minimum \$1,000 civil penalty. Is there an intended maximum limit to the civil penalty that can be assessed per violation? If so, who determines the maximum penalty?
  - h. The \$1,000 minimum penalty is "for each violation." What constitutes a single violation? For instance, in the case of a public meeting, is the closure of any part of one public meeting only a single violation, or is the closure of each item during one public meeting its own violation?

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the designated representatives so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as follows:

1. It is standard drafting practice for only the second-to-last item in a list to end in a conjunction that connects the items, either "; and" or "; or." Consider adding an "and" after the semi-colon in subsection (1)(e) of the proposed initiative.
2. Article V, section 1 (4)(a) of the Colorado Constitution requires that, when the majority of voters approve an initiative, the initiative is effective on and after the date of the official declaration of the vote and proclamation of the governor. This would be the default effective date for a proposed initiative that does not specify an effective date. Because the effective date as established in subsection (9) of the proposed initiative aligns with this default effective date, you could consider removing the effective date. Alternatively, you could consider making this a new SECTION 2. of the proposed initiative and including the effective date language in lowercase type, so that the effective date clause would not be printed in the Colorado Constitution.
3. It is standard drafting practice to use commas to connect two independent clauses connected by a conjunction. Consider adding a comma after "self-executing" in subsection (7) of the proposed initiative.
4. In subsection (6) of the proposed initiative, the second reference to "section 33" uses "the section 33," when all other section references in the proposed initiative used "this" to refer to the section. Consider changing the second reference in subsection (6) of the initiative to "this section 33."