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Privileges Under the Colorado Open Records Act

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Privileges under the CORA

- Work Product
- Attorney-Client
- Deliberative Process
- Trade Secrets, Confidential Commercial and Financial Data

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What is work Work Product under the CORA?

Let's start with the definition:

"Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. . . .

C.R.S. § 24-72-202(6.5)(a).

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Work Product - inclusions


The CORA then provides two express inclusions:

Such materials include, but are not limited to:

- (I) Notes and memoranda that relate to or serve as background information;*
- (II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.*

C.R.S. § 24-72-202(6.5)(a).

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Work Product - exclusions

The CORA also provides an exhaustive list of exclusions:

"Work product" does not include:

- (I) Any final version of a document that expresses a final decision by an elected official;*
- (II) Any final version of a fiscal or performance audit report or similar document . . . ;*
- (III) Any final accounting or final financial report;*

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Work Product - exclusions

(IV) Any materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official.

C.R.S. § 24-72-202(6.5)(c).

But wait, there is much more . . .



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Work Product - exclusions

More express exclusions:

(d)(1) In addition, "work product" does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record. These documents include, but are not limited to:



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Work Product - exclusions

(A) Comparisons of . . . laws, ordinances, rules, or regulations with [other existing or proposed laws, ordinances, rules or regulations].

(B) Compilations of existing public information, statistics or data;

(C) Compilations or explanations of general areas or bodies of law, ordinances, rules or regulations, legislative history, or legislative policy.

C.R.S. § 24-72-202(6.5)(d).



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Work Product - what is it?

So what does all this really mean?

• Five (?) part test:

- 1) Is it intra- or inter-agency?
- 2) Is it advisory or deliberative?
- 3) Is it prepared for the benefit of elected officials to make a decision within their authority?
- 4) If so, is it expressly included?
- 5) Even if 1-4 are satisfied, is it excluded?



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Work Product - case law

Despite the ridiculously lengthy definition, there is only one published case expressly addressing the CORA definition of "work product" as it relates to municipalities: *City of Fort Morgan v. Eastern Colo. Publishing Co.*, 240 P.3d 481 (Colo. App. 2010).



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Work Product - case law

In the *Fort Morgan* case, the Colorado Court of Appeals held that certain documents related to a performance evaluation for the city administrator were work product. The records at issue were individual review forms prepared by Councilmembers and an associated spreadsheet.



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Work Product - case law

First, the court noted that exemptions from the CORA must be construed narrowly and in favor of public access. Then the court discussed the meaning of “advisory” and “deliberative.” After a lengthy analysis, the court ultimately concluded that the documents were advisory, and therefore, it was immaterial whether they were deliberative.



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Work Product - case law

Then the court discussed whether one Councilmember’s individual evaluation, which was then compiled into the overall evaluation, was a “final decision” of that Councilmember. The court found that the individual evaluations were not final decisions, or even “votes,” because the only final decision was the entire Council’s decision.



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Work Product - case law

In the *Fort Morgan* case, the plaintiff argued that the court’s decision “gutted” the CORA as it relates to work product, because no elected official can ever make a final decision. The court disagreed, noting that the Council must act by voting, in a public meeting.



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Work Product - examples

- A draft Town Council ordinance.
 - It is inter-agency (prepared by staff), deliberative (a draft), and assembled for elected officials.
 - It fits within the second inclusion (preliminary drafts and discussion copies of documents that express a decision by an elected official).
 - *Sidebar - one elected official, by definition, cannot make a final decision. However, the ordinance is the governing body’s final decision. Stay tuned on this.*
 - It does not fit within any of the listed exclusions.
 - So . . . it is work product.



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Work Product - examples

- A staff memo to City Council regarding a land use application.
 - It is inter-agency, advisory, and prepared for the benefit of elected officials, enabling a decision.
 - It fits under the first inclusion, as a memo that serves as background information.
 - However, because it is distributed to the City Council for use during a public meeting, it is expressly excluded from the definition of work product.
 - So . . . it is not work product.



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Work Product - examples

- An outside consultant’s memo to the Board of Trustees regarding a construction project.
 - Is it inter- or intra-agency? Likely not. Consultants are typically independent contractors, and thus not part of any “agency.”
 - So . . . it is not work product.
 - Perhaps a cure is to have the Town Manager send the memo, attaching the findings of the consultant? Or is this too cute?



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Work Product - wrap up

Work product is an exclusion to the CORA, and is therefore construed narrowly by courts. However, many documents prepared by staff and submitted to elected officials will constitute work product. A careful analysis is recommend, because the ultimate answer will be quite-fact specific.



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Attorney-Client Privilege

- Custodian shall deny the right of inspection of privileged information, unless otherwise provided by law. C.R.S. 24-72-204(3)(a)(IV).
- No discretion on the part of the custodian.



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What is the attorney-client privilege?

- Common law privilege codified at C.R.S. 13-90-107(1)(b).
 - Attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment.
- Protects communications between attorney and client relating to legal advice.



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What is the attorney-client privilege?

- Exists for the personal benefit of the client who holds the privilege.
 - must be asserted by the client
 - only the client can waive
- Privilege is available to corporations. *A. v. Dist. Court*, 550 P.2d 315 (Colo. 1976).
- And to governmental entities. *Alliance Construction Solutions v. Dept. of Corrections*, 54 P.3d 861 (Colo. 2002).



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What is the attorney-client privilege?

- Policy underlying the privilege is to ensure candid and open discussion by the client without fear of disclosure.



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What types of records does it protect?

- Only confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations.
- Applies to legal advice, not general business decisions.



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What types of records does it protect?

- Statements made in circumstances giving rise to a reasonable expectation that the statements will be treated as confidential.
- Protects not only information and advice communicated from the attorney to the client, but also communications to the attorney that facilitate sound and informed legal advice.



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What types of records does it protect?

- Not every document produced by an attorney is privileged.
 - Attorney as scrivener
 - Transmittal letters
 - Invoices from outside counsel?
 - Records to or from lawyer/lobbyist? *Black v. Southwestern Water Conserv. Dist.*, 74 P.3d 462 (Colo. App. 2003)
 - Attorney as investigator?



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What types of records does it protect?

- Only protects against disclosure of communications, not the underlying facts on which the communication is based.
 - Client cannot refuse to disclose relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. *Nat'l Farmers Union Prop. & Cas. Co. v. Dist. Court*, 718 P.2d 1044 (Colo. 1986).



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What type of records does it protect?

- Burden of establishing a document is attorney-client privileged is on the claimant of the privilege.
- Burden of establishing waiver is on the party seeking to overcome the claim of privilege.



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What type of records does it protect?

- Communications between governmental entity's legal counsel and independent contractor may be attorney-client privileged. *Alliance Construction Solutions*, 54 P.3d at 862.
- Four-part test:
 - (1) Information-giver must be employee, agent or independent contractor of entity.



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What types of records does it protect?

- (2) Communication made for the purpose of seeking or providing legal assistance.
- (3) The subject matter of the communication was within the scope of the duties provided to the entity by its employee, agent, or independent contractor.
- (4) The communication was treated as confidential and only disseminated to those persons with a specific need to know its contents.



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How can the attorney best protect privileged records?

- Should every written communication have a notification of the privilege?
 - Standard email footer in signature?
 - Header for memoranda?
- Documents prepared for executive session.
 - Distribute in executive session
 - Collect them before executive session ends.



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How can the City or Town best protect privileged records?

- Council or Board resolution in certain circumstances, like pending litigation.
 - Can help demonstrate a disclosure was not authorized.
- Address in code of ethics.
- Recordkeeping approaches.
 - Segregate privileged documents.



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Who can waive the privilege?

- Only the governing body.
 - Governing body must act by motion, resolution or ordinance at a public meeting.
 - Individual elected official cannot act on behalf of municipality.
 - Asserting a claim or defense that focuses on attorney advice can operate as a waiver.
 - Reliance on legal advice as a defense.
 - Attorney may defend his ethics and conduct.



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Who can waive the privilege?

- Sharing document with a third party may sometimes constitute a waiver.
 - Including privileged document in public meeting packet.
 - But mere disclosure at a public meeting of a document's existence, without public discussion of its contents or dissemination, not likely to constitute a waiver. *Black, 74 P.3d at 470.*



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Who can waive the privilege?

- Common interest doctrine. *Black, 74 P.3d at 469.*
 - Not an independent basis for privilege, but an exception to the general rule of waiver when disclosed to third parties.
 - Does not require existing or impending litigation.
 - Includes pre-existing confidential communications during common enterprise.



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Can City or Town staff waive the privilege?

- Unauthorized or inadvertent disclosure.
 - Disclosure must be knowingly made.
 - Colorado law does not recognize inadvertent disclosure.
 - Privilege intact, even though document may no longer be confidential.
 - So may be protected from a legal standpoint, but from political standpoint damage is done.



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What is the effect of waiver?

- The document is a public record, so subject to disclosure unless some other CORA exception applies.
- (Review whether work product applies.)



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Crime/Fraud Exception

- Attorney-client privilege does not apply when the communication relates to an ongoing or future criminal or fraudulent act. *Caldwell v. District Court*, 644 P.2d 26 (Colo. 1982).
 - Party seeking privileged material must prove factual basis adequate to support good-faith belief by a reasonable person that wrongful conduct has occurred.
 - Factual basis must be derived independently.



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Crime/Fraud Exception

- Must be proven as to each document before the document is stripped of the privilege.
- Court may order production of documents for *in camera* review.



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How to respond to CORA request?

- *Mountain-Plains Invest. Corp. v. Parker Jordan Metro. Dist.*, 312 P.3d 260 (Colo. App. 2013).
 - Can charge fee for review of records to identify those protected by the privilege and for creating privilege log, if one requested.
 - \$25 per hour determined reasonable, so long as does not exceed actual cost.
 - Can require advance deposit of fees.
 - Policy need not be in place before request.



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Deliberative Process Privilege

- “Common law” privilege codified at C.R.S. § 24-72-204(3)(a)(XIII)
- Privilege first described in *City of Colo. Springs v. White*, 967 P.2d 1042 (Colo. 1998) (citing *Martinelli v. Dist. Court*, 612 P.2d 1083 (Colo. 1980))
- *White* remains instructive as to scope of privilege, as well as process for assertion
- Similar privilege in FOIA: 5 USC 552(b)(5) (1994); considerable case law



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Purpose of the Privilege

- To “protect the frank exchange of ideas and opinions critical to the government’s decision making process where disclosure would discourage such discussion in the future.” *White*, 967 P.2d at 1051



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Purpose of the Privilege

- “The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government’s decision-making process, its consultative functions, and the quality of its decisions.” White, 967 P.2d at 1047



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Scope of the Privilege

The privilege protects records that are:

(1) Pre-decisional

- Public has little interest on discussion of plans not adopted, options not chosen
- Post-decisional documents not protected – quality of decision not affected by release – public has interest in rationale for course chosen



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Scope of the Privilege

(2) Deliberative

- Not all pre-decisional documents are privileged; the record should reflect the “give and take” of the consultative process
- Factual material less likely to qualify; advisory material more likely
- Role of document in process is considered



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Scope of the Privilege

(3) Likely to stifle future communication if revealed

- “[I]n order to determine if disclosure of the material is likely to adversely affect the purposes of the privilege, courts inquire whether “the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.” White, 967 P.2d at 1052



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Scope of the Privilege

(3) Likely to stifle future communication if revealed

- “As a consequence, the deliberative process privilege typically covers recommendations, advisory opinions, draft documents, proposals, suggestions, and other subjective documents that reflect the personal opinions of the writer rather than the policy of the agency.” White, 967 P.2d at 1053



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Asserting the Privilege

- White court: The “requirements for assertion of the privilege are rather technical.” No kidding!
- If document withheld, custodian shall provide a sworn statement to applicant:
 1. Specifically describing each document withheld,
 2. Explaining why each document is privileged, and
 3. Explaining how disclosure would do substantial injury to public interest



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Asserting the Privilege

- As noted, White helpful as to (2)
- As to (3) statute says, “[T]he court shall weigh, based on the circumstances presented in the particular case, the public interest in honest and frank discussion within government and the beneficial effects of public scrutiny upon the quality of governmental decision-making and public confidence therein.” C.R.S. § 24-72-204(3)(a)(XIII).



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Asserting the Privilege

If applicant requests, custodian shall apply to district court for an order restricting disclosure

- Custodian has burden of proof
- Goes beyond White
- A CORA action initiated by custodian if unsure whether release prohibited by privilege does not appear foreclosed



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Protection for Trade Secrets, Confidential Commercial and Financial Data under CORA

- CORA: custodian shall deny access to “trade secrets...and confidential commercial [or] financial data.” C.R.S. § 24-72-204(3)(a)(IV)
- FOIA contains similar provision: 5 USC 552(b)(4)



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Trade Secrets, Confidential Commercial and Financial Data

- Colorado cases cite “Morton Test” (derived from Nat’l. Parks & Conservation Assoc. v. Morton, 498 F2d 765 (DC Cir.1974), under which records are shielded from release if their release is “likely to”):
 1. “Impair the government’s future ability to gain necessary information”, or
 2. “Cause substantial harm to the competitive position of the person providing the information.” Freedom Newspapers, Inc. v. Denver & Rio Grande Western R. Co., 731 P.2d 740, 743 (Colo. App. 1986).



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Trade Secrets, Confidential Commercial and Financial Data

- The “purpose of the exception is to protect information received from private individuals or businesses, not the government itself.” Zubeck v. El Paso Co. Retirement Plan, 961 P.2d 567,601 (Colo. App. 1998).



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Trade Secrets, Confidential Commercial and Financial Data

- Neither conclusory declarations on the face of a document, nor “custom in industry” sufficient to shield data: IBEW Local 68 v. Denver Metro. Major League Baseball Stadium Dist., 880 P.2d 160 (Colo. App. 1994).



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Questions?

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