

LEGISLATIVE STAFF COORDINATING COMMITTEE

State Legislatures and Litigation: A Toolkit



State Legislatures and Litigation: A Toolkit

The National Conference of State Legislatures is the bipartisan organization dedicated to serving the lawmakers and staffs of the nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues, and is an effective and respected advocate for the interests of the states in the American federal system. Its objectives are:

- Improve the quality and effectiveness of state legislatures.
- Promote policy innovation and communication among state legislatures.
- Ensure state legislatures a strong, cohesive voice in the federal system.

The conference operates from offices in Denver, Colo. and Washington, D.C.

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Project Description

Over the past decade, two legal privileges that are integral to the operation of state legislatures have been litigated in the courts numerous times: the attorney-client privilege as applied to legislative attorneys and the legislative privilege. Moreover, state and federal courts have treated these core privileges that protect legislative independence, free speech and debate and counsel inconsistently. The National Conference of State Legislatures (NCSL) and the Legislative Staff Coordinating Committee (LSCC) are working to assist state legislatures in defending these privileges; part of this assistance is to help legislative staff better understand the law and its interpretation by the courts.

In 2018, Jon Heining, NCSL Staff Chair and General Counsel for the Texas Legislative Council, created the LSCC Legislative Litigation Work Group to study these issues. The mission of this work group was to produce a high-quality set of documents that can be used to strengthen the position of state legislatures, legislators and legislative staff when they are forced to interact with state and federal disclosure requirements.

The work group's product—this report—includes a primer on legislative privilege, court decisions and statutes that address legislative privilege and constitutional and statutory citations regarding speech or debate protections and confidentiality. An important feature of this report is a set of sample forms designed to address privilege and guide decision-making on proper maintenance of legislative documents to allow legislative members to waive legislative privilege, if they so choose.

During the 2018–19 conference year, members of the Legislative Litigation Work Group met in person on three occasions and met via conference call collectively or in topical subgroups over 15 times. Early in the process, the work group enlisted legislative attorneys to help craft the product to address the important legal issues and to draft the sample forms for legislative use. Without this team of advisory attorneys, it would have been impossible to complete this report in such a short time frame.

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Understanding the Scope of State Legislative Privilege

What is legislative privilege, and why does it matter?

A privilege is an evidentiary rule that, when invoked in a judicial proceeding, successfully limits a person's ability to demand information about communications and to interrogate certain witnesses.¹ Privileges serve recognized societal values that often outweigh the importance of the court's truth-finding function in particular cases. In some ways, government privileges—those exercised by state agencies or elected officials, for example—can also create a tension with modern ideals of transparency, particularly open records or freedom of information laws. But public access to information, similar to a court's access, must be balanced against the need for the government to engage in frank and honest discussions on matters of public policy without fear of reprisal.

Legislative privilege protects members of Congress and state legislatures from being compelled to provide testimony or records regarding statements made or actions taken in furtherance of legislative conduct.² At its core, legislative privilege is meant to shield legislators from interference with carrying out official duties, whether from other government officials, the media or public opinion.³ Legislative privilege establishes a bulwark to separate legislative power from executive and judicial scrutiny, but it also insulates legislators as they grapple with modern government's toughest questions and consider creative solutions and potential compromise.⁴

The concept of legislative privilege first appeared in the English Bill of Rights of 1689 to protect Parliament from suits by the monarchy.⁵ Drafters of the U.S. Constitution later enshrined the privilege for members of Congress in the speech or debate clause of Article 1, which states:

[Members of Congress] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House, they shall not be questioned in any other Place.*⁶

Although this may seem expansive, legislative privilege developed not from a desire to protect legislators themselves, but instead to protect the interests of the public in a well-functioning democratic process.⁷ As a result, application of the privilege must balance the necessity for legislative independence against other, more individualized social values at stake in particular cases. Judicial recognition of legislative privilege can also vary depending on forum (for example, state or federal court), the

¹ Roger Park, et al., *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* § 12.01, 437 (3rd ed., 2004).

² *Gravel v. U.S.*, 408 U.S. 606, 616 (1972).

³ *U.S. v. Johnson*, 383 U.S. 169, 180-182 (1966).

⁴ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975).

⁵ *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1123-1136 (1973).

⁶ U.S. Const. art. I, §6, cl. 1 (emphasis added).

⁷ *Tenney*, 341 U.S. at 373-374.

defendants and the claims at issue.⁸ In recent decades, efforts to expand government transparency and public access to information, particularly when coupled with modern litigiousness, mean state legislatures face growing demands for intrusion into the legislative sphere, highlighting the need for understanding and safeguarding legislative privilege.

Does legislative privilege apply to state legislatures?

Yes. While the protections of the speech or debate clause of the U.S. Constitution expressly apply only to members of Congress, legislative privilege has been extended to state legislators.⁹ In 1951, the Supreme Court extended federal legislative privilege to state legislators through common law, albeit in a more limited fashion than applied to Congress.¹⁰ In addition, most states have adopted language into their state constitutions to establish some form of legislative privilege. Twenty-three states have provisions largely identical to the speech or debate clause, while others have adopted variations that may provide less or more protection to their legislators.¹¹

Unlike for members of Congress, however, courts have typically found legislative privilege to be “qualified” (or limited) when applied to state legislators, rather than absolute, meaning that state legislators may not always be privileged from giving testimony or disclosing documents that would otherwise be protected in a legal action.¹² Most federal and state courts today rely on a balancing test to determine if a member’s legislative privilege should bar the production of evidence or testimony in a case, as discussed below in further detail. Some state courts, however, have held that legislative privilege is absolute even for state legislators, resulting in more disparate outcomes across the country when applying the privilege.¹³ Whether qualified or absolute, courts weighing the legislative privilege recognize the importance for legislatures to function without looming interference from other branches of government, except in extreme cases.

What does legislative privilege protect?

Legislative privilege protects lawmakers from being compelled to provide testimony or produce documents related to their official legislative actions. The Supreme Court has found that the privilege applies to both “things generally said or done in the [legislature] in the performance of official duties and into the motivation for those acts.”¹⁴ The Court has also recognized the privilege must extend beyond speeches and debate on the floor of a chamber to other acts that relate to “an integral part of

⁸ Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221 (Oct. 2003).

⁹ *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (“The Federal Constitution, the constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities.”); see also Huefner, *supra* note 8 at 224.

¹⁰ See *Tenney*, 341 U.S. at 375.

¹¹ See Huefner, *supra* note 8 at 236.

¹² *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (“In some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.”).

¹³ *Holmes v. Farmer*, 475 A. 2d 976 (R.I. 1984); *ARIZONA IRC v. Fields*, 75 P. 3d 1088, 206 Ariz. 130 (Ariz. App. 2003).

¹⁴ *U.S. v. Brewster*, 408 U.S. 501, 512 (1972); *Gravel*, 408 U.S. at 617.

the deliberative and communicative processes” of legislating.¹⁵ As a result, courts have extended legislative privilege to other activities involving legislative duties such as gathering information, conducting investigations and publishing reports.¹⁶

Example: A group of state senators debate legislation being heard at a committee hearing.

To whom does legislative privilege extend?

In recognition of the growing complexities of the work that state legislatures perform, the protections of legislative privilege have extended from legislators to their staff, committees and legislative agencies.¹⁷ The privilege generally extends both to staff that individual legislators directly employ and to professional staff at legislative committees or agencies that the legislature employs as a whole, when acting on behalf of their employer and performing legislative duties.¹⁸ Legislative privilege can even extend to persons outside the legislative branch, including executive or judicial officials and members of the public, when they perform legislative functions.¹⁹ Ultimately, the privilege attaches to activities, not offices.²⁰ Because the ability of staff and others to claim a privilege extends from the member’s own ability, the relationship between an individual and member is critical in the court’s analysis.

*Example: The Texas Supreme Court extended legislative privilege to the state attorney general, comptroller and land commissioner as to their work on a legislative redistricting board.*²¹

What does legislative privilege not protect?

Whether legislative privilege protects an act “turns on the nature of the act,” not the person conducting the act or his or her motive.²² Courts have declined to extend the protections of legislative privilege to speech or conduct that occurs outside the legislative arena or is not required as part of legislative duties. Particularly, courts have noted that legislators may choose to undertake a wide range of activity to inform or interact with their constituents, such as making appointments with government agencies, preparing newsletters for constituents and giving media briefings, but concluded these actions are not core legislative functions.²³ Similarly, members of legislatures may regularly interact with members of

¹⁵ *Gravel*, 408 U.S. at 625.

¹⁶ *Gravel*, 408 U.S. at 617; *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws . . .”); *Doe v. McMillan*, 412 U.S. 306, 312 (1973) (“Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries.”).

¹⁷ *Gravel*, 408 U.S. at 616-617.

¹⁸ *Chapman v. Space Qualified Sys. Corp.*, 647 F. Supp. 551, 553-54 (N.D. Fla. 1986).

¹⁹ *Bogan*, 523 U.S. at 55; *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731 (1980); *Filarsky v. Delia*, 566 U.S. 377, 387 (2012).

²⁰ *Bryan v. City of Madison*, 213 F.3d 267, 272 (5th Cir. 2000).

²¹ *In re Perry*, 60 S.W.3d 857 (Tex. 2001).

²² *Bogan*, 523 U.S. at 54.

²³ *Brewster*, 408 U.S. at 512.

the executive or judicial branches by sharing information or requesting assistance, but such interactions will not be privileged if not performed for a legislative purpose.²⁴

Courts have also declined to extend legislative privilege to conduct considered purely “ministerial,” when legislators had no discretion in performing a specific act, and in cases involving a legislator’s potentially criminal conduct.²⁵ Finally, while courts have precluded disclosure of documents and communications created in preparation for legislation, the same privilege was found not to apply to factual reports or documents created *after* legislation had been enacted.²⁶

*Example: Courts have found a legislative committee’s efforts to publish a report are privileged, but a legislator publishing a newsletter to constituents is not.*²⁷

How is legislative privilege distinct from confidentiality?

Many states have statutes that make documents or records confidential and that protect reports, work papers or other specific and often narrowly defined categories of information from public disclosure. In contrast, privileges usually protect some larger societal value like legislative independence, the relationship between attorney and client or marital communications, so as one court noted, “[a] legal privilege is a broader concept than confidentiality.”²⁸ While confidential information is meant to be kept secret, courts are often more comfortable allowing discovery of confidential information in a formal legal proceeding when compared to privileged information. In fact, by definition, a privilege typically “includes the legal right not to provide certain data when faced with a valid subpoena.”²⁹ Legislative privilege, in particular, carries implications for the separation of powers and democratic processes that judges must consider before ordering the production of evidence.

How can legislative privilege be waived?

Legislative privilege is personal and may be expressly waived only by the legislator.³⁰ A number of courts have also held that the privilege may be impliedly waived by sharing documents or communications with third parties who are not necessary to the legislative process.³¹ Some courts, however, have reached a different conclusion, reasoning that, unlike other privileges such as attorney-client privilege, “the maintenance of confidentiality is not the fundamental concern of the legislative privilege.”³² These courts have found that legislative privilege is primarily intended to protect the freedom of legislators

²⁴ *Doe*, 412 U.S. at 313-314; *Chastain v. Sundquist*, 833 F.2d 311, 314-15 (D.C. Cir. 1987).

²⁵ *Bogan*, 523 U.S. at 51; *Amy v. Supervisors*, 78 U.S. 136, 138 (1871) (“The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.”); *U.S. v. Nixon*, 418 U.S. 683 (1974); *U.S. v. Gillock*, 445 U.S. 360, 370 (1980).

²⁶ *League of Women Voters of Michigan v. Johnson*, 2018 U.S. Dist. LEXIS 86398 (E.D. Mich. 2018).

²⁷ *Doe*, 412 U.S. 306; *Brewster*, 408 U.S. 501.

²⁸ *Sands v. Whitnall School Dist.*, 754 N.W. 2d 439, 449 (Wis. 2008) (internal citations omitted).

²⁹ *Id.*

³⁰ *Perez v. Perry*, 2014 U.S. Dist. LEXIS 1838, *16 (W.D. Tex. 2014).

³¹ See, e.g., *Michigan State A. Philip Randolph Institute v. Johnson*, 2018 U.S. Dist. LEXIS 87623, *21 (E.D. Mich. 2018).

³² *Pulte Home Corp. v. Montgomery Cty.*, 2017 U.S. Dist. LEXIS 82935, *22 (D. Md. May 31, 2017).

conducting legislative business, and mere disclosure of documents or communications to third parties does not waive the privilege.³³

How does legislative immunity relate to legislative privilege?

The protections created by the speech or debate clause—and, by extension, common law and state constitutions—include the concepts of both legislative immunity and legislative privilege. Immunity shields a person from having legal action brought against him or her, either in civil or criminal court, whereas a privilege gives a person the right to withhold information whether or not the person is a party to the legal action. Under the speech or debate clause, once a member of Congress acts within a “legitimate legislative sphere,” legislative immunity creates an absolute bar to civil or criminal action based on that legislative act.³⁴

Importantly, unlike the absolute immunity from suit provided to members of Congress under the speech or debate clause, immunity for state legislators under federal common law extends only to federal civil actions. State legislators may be subject to federal criminal prosecutions arising from their conduct. State legislators may also be subject to state civil or criminal prosecutions arising from their conduct, depending on the scope of the legislative protections in their state constitutions.³⁵

How do deliberative privilege and attorney-client privilege relate to legislative privilege?

Deliberative process privilege: Though similar in scope and often confused with each other, the privilege recognized for deliberative processes is distinct from legislative privilege. Deliberative privilege—also referred to as executive privilege—shields advice, recommendations and deliberations made as part of the executive branch’s policy-making process.³⁶ Both legislative and deliberative privileges depend on the context in which the conduct occurs (legislative or executive actions) and are thus largely exclusive of each other.

Attorney-client privilege: Attorney-client privilege may provide protection to speech or conduct that overlaps with legislative conduct, but not to the same extent as legislative privilege. The attorney-client privilege is meant to “encourage full and frank communication between attorneys and their clients,”³⁷ which could include legislators and their staff. However, unlike legislative privilege, which may extend to a variety of relationships and contexts within the legislative sphere, attorney-client privilege turns on the specific presence of an attorney-client relationship and is often more narrow in application.

How do courts balance legislative privilege?

Members of Congress benefit from the strongest recognition of legislative privilege, deriving that protection from the federal Constitution. State courts generally give a high level of deference to state legislators’ privilege arising under state law, although this depends on the specific language in their state

³³ Id. Note that this holding rested on the court’s finding that the local officials in the case were entitled to an absolute, not qualified, legislative privilege in federal court. Id.

³⁴ *Eastland*, 421 U.S. at 503.

³⁵ *Gillock*, 445 U.S. at 372.

³⁶ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

³⁷ *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

constitution or statutes. However, when an action is brought in federal court against a state legislator, principles of comity are at their weakest, and legislative privilege arising under federal common law is at greater risk of being “overridden in circumstances where reason and experience suggest that the claim of privilege should not be honored.”³⁸ In those situations, the legislative privilege is qualified, even when concerning core legislative activities, and must be balanced against competing public interests.³⁹

Importantly, in either state or federal venues, merely raising a claim related to an important public interest or the decision-making of a state legislature is insufficient alone to defeat legislative privilege. Courts have developed a variety of balancing factors to determine whether legislative privilege should be recognized in a particular case. Generally, these factors consider (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.⁴⁰

*Example: Courts have allowed piercing of legislative privilege in redistricting cases, where legislative intent is a necessary part of the alleged violation.*⁴¹

Due to the strong public interest at stake, redistricting cases have provided the bulk of otherwise sparse jurisprudence on state legislators’ privilege. Where individuals seek to prove that a legislature made race or partisan politics a predominant motive for a plan’s configuration, evidence of what individual legislators thought they were doing could be especially probative evidence but can also blur the distinction between evidence relevant to an act of a legislative body and evidence relevant to an individual legislator’s motive. As a result, state legislatures have had varying levels of success asserting legislative privilege in redistricting cases.

Some decisions have turned on whether the communication or document at issue could be characterized as truly legislative in nature or if the issues raised in the litigation implicate a grander, societal interest.⁴² For example, in Virginia, the state supreme court concluded that legislative privilege is absolute under that state’s constitution and protected members of the legislature from disclosing legislative redistricting documents and communications related to activity occurring within the scope of a member’s legislative activities.⁴³ Conversely, the Florida Supreme Court concluded in a redistricting case that legislative privilege was not absolute under that state’s constitution, upholding a trial court order for legislators and staff to disclose redistricting-related testimony or documents, as the privilege was outweighed in that case by the competing interest of effectuating an explicit constitutional mandate that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting.⁴⁴ Ultimately, questions of legislative privilege have been resolved on a case-by-case basis,

³⁸ See *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100-101 (S.D.N.Y. 2003).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *Veasey v. Perry*, 2014 U.S. Dist. LEXIS 45935 (S.D. Tex. Apr. 3, 2014).

⁴² See *Citizens Union of New York v. AG of New York*, 269 F. Supp. 3d 124 (S.D.N.Y. 2017); *McDonough v. City of Portland*, 2015 U.S. Dist. LEXIS 173763 (D. Me. 2015); *Favors v. Cuomo*, 2013 U.S. Dist. LEXIS 189355 (E.D.N.Y. 2013).

⁴³ *Edwards v. Vesilind*, 790 S.E.2d 469 (2016).

⁴⁴ *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135 (Fla. 2013).

and the field of law is still developing as courts weigh the implications of social interests against the need for a democratic legislature's functional independence.

Frequently Asked Questions Regarding State Legislative Privilege

When would a legislator need to invoke legislative privilege?

Lawsuits, particularly those involving constitutional questions, may challenge the motives of legislators. For example, redistricting plans adopted by a legislature have been questioned for any intentional discrimination against groups of voters. To prove discriminatory intent, individuals may seek evidence from legislators in depositions or subpoenas for documents in order to discover if there was an underlying unlawful purpose for passing a law. In response, legislators may seek to invoke legislative privilege.

Why should I be concerned about legislative privilege? Isn't everything the legislature does protected by privilege?

While federal and state courts have extended privilege to members of Congress and state legislators in many contexts, that privilege is not absolute in all situations. Courts have declined to extend the protections of legislative privilege to speech or conduct that occurs outside the legislative arena or is not required as part of legislative duties. For example, legislative privilege typically will not protect information from being disclosed when it relates to possible criminal conduct of a legislator. Furthermore, courts often balance a state legislator's claim of legislative privilege, even when concerning core legislative activities, against competing public interests. It is imperative for legislators and their staff to be aware of the various balancing factors courts consider when determining whether the privilege's protections apply.

Can legislative members waive their legislative privilege?

Yes, legislative members can waive their legislative privilege. Members can intentionally or unintentionally waive legislative privilege. A member can intentionally waive legislative privilege by disclosing documents that could be protected. A member may unintentionally waive legislative privilege when the member discusses otherwise privileged information or shares privileged documents with a party that is not necessary to the legislative function. For example, a member who shares privileged information with a curious lobbyist may be found to have waived his or her privilege as to that information. However, some courts have held that disclosure to third parties does not waive the privilege if a legislator is entitled to claim an absolute legislative privilege.

How do I protect privileged documents and information?

Whether a document or other information is privileged depends on how the information is created, the purpose of the information and with whom the information is shared. Legislative offices should

act intentionally when gathering information or creating documents to ensure there is a direct legislative purpose implicated. Legislative offices should also ensure there are clear policies on taking documents outside the office, safely accessing documents from personal computers and devices and sharing information with individuals outside the office. Further, it's important to regularly review the material kept in the office and securely destroy any information or documents that are no longer necessary or preserve those items required to be retained under state law. Maintaining and adhering to an updated records retention schedule can protect legislative offices and staff from holding unneeded documents that could be subpoenaed or requested through open records or freedom of information laws.

What is a records retention schedule, and why do I need one?

Many states require state agencies to maintain official records retention schedules that address how different types of documents must be kept, by whom and for how long. While retention schedules typically set the minimum time for which various types of records must be kept, setting a maximum retention period can also help ensure that legislative offices do not over-retain records. Over time, the nature and purpose of documents may be forgotten or become harder to prove, creating unnecessary risk of possessing documents and information that are not recognized as privileged. Retention schedules are useful to have as a policy, even if they aren't required by law, to consistently maintain and destroy documents and reduce risk of exposing sensitive information. Legislative offices should provide regular training to staff to ensure all employees understand the importance of properly retaining and destroying records and the best ways to do so.

What if someone requests a privileged document through my state's open records law?

Legislators may choose to release documents and waive their privilege. However, if you wish to protect the document from disclosure, you will need to follow your state's procedure for denying the request under the open records law. Some states have specific statutes that will allow you to deny a request based on legislative privilege; other states refer to privileges recognized in rules of evidence. Some states do not recognize legislative privilege as a ground for denying an open records request, so you may need to rely on another statutory ground for protecting the document. Drafts, internal memoranda and working papers will often have specific exemptions from open records laws.

How can a legislator work with the public but maintain his or her privilege?

If a legislator seeks input and advice from members of the public in anticipation or consideration of legislation, one could argue that this communication relates to core legislative duty and should be privileged. Documents a member produces from those discussions to create legislation could also be privileged. However, some courts have recognized a distinction between documents meant to inform the general public—like a newsletter to constituents—which typically are not privileged, and

documents that support a legislative function—such as notes a legislator takes to draft a bill for his or her constituents.

What if I released a document to one person but want to claim legislative privilege now?

Inconsistent action related to disclosing information or documents could be seen as waiving a claim to legislative privilege. Discussing privileged matters with one group of constituents, or providing a document to those individuals, could preclude a legislator from denying the same information or documents to another group.

Can a third party establish a relationship with a legislator to claim legislative privilege if the third party doesn't work for that legislator?

Legislative privilege can extend to persons outside the legislative branch when they perform legislative functions. The nature of a relationship between a legislator and a third party can be best evidenced by a signed written request or agreement for a specific purpose or service. Such a relationship may also be supported by clear statutory direction to provide assistance, records of communications or a pattern of behavior between the member and third party.

I've never gotten a subpoena. Is it like a request for public information?

A subpoena is a judicial tool to compel the production of testimony or information, typically in preparation for litigation, whereas a request for public information is a non-judicial tool for members of the public to obtain information to which they are entitled. Ignoring either can be problematic, but the rules for responding are different. Other than differences in timeline and formality for responding, a subpoena is more difficult to defend against because the compelled information can be protected through court orders or limited review even when disclosed. In contrast, open records or freedom of information laws presume a requestor is entitled to all public information without limitation on its use or production.

If my office gets subpoenaed, how can I prepare to defend documents I believe are privileged?

If your office receives a subpoena it is important that you immediately consult with legal counsel familiar with litigation in the federal or state venue that has issued the subpoena. While your office's general counsel might be qualified counsel, you should consider seeking advice from counsel who is familiar with responding to subpoenas to ensure you adequately respond to the subpoena without inadvertently waiving any legal privileges or other rights. Your legislature may employ outside counsel to represent it in litigation or may rely on the state's attorney general for representation.

One of the first and most time-consuming tasks you'll likely need to complete is a privilege log for any documents you plan to argue are protected by the legislative (or any other) privilege or confidentiality laws. For large requests, consider grouping documents according to your records retention schedule, categories of information found in your state's open records law or groups of statutorily confidential and public information. You must be thorough and be prepared to uniquely defend each category of documents.

What if the subpoena is for my testimony, not my documents?

Some states are less likely to compel testimony related to legislative acts than they are to compel the production of documents. If your state has a constitutional speech or debate clause similar to the federal Constitution's provision for members of Congress, then you are more likely to be able to claim legislative privilege for your testimony. As stated above, you should immediately seek legal counsel to adequately respond to any subpoena you receive.

Guide to Tagged Cases

To assist you in determining which cases to read first, depending on your interest in legislative privilege, the following case list has been tagged to indicate that a case contains a helpful discussion or analysis of a key issue relating to the privilege. The tags represent core concepts that are likely to be of interest to legislative staff. The tags are:

- **T1 Definition of “privilege.”** The case discusses the meaning of legislative privilege, with a focus on whether the conduct at issue is a protected legislative act, as opposed to other conduct that, even if occurring in the legislative sphere, is not protected by the privilege.
- **T2 State vs. federal.** The case may discuss legislative privilege protections arising under a state constitution and compares the state protections to those arising under federal common law.
- **T3 Documents or actions that are privileged products.** The case illustrates the types of documents or actions that are privileged products, such as bill drafting files, audit files, communications between legislators and their staff, communications from outside parties and research documents used to develop legislation.
- **T4 Who may claim privilege.** The case addresses who may claim legislative privilege besides legislators, such as personal staff, nonpartisan or partisan central staff and individuals outside the legislative branch.
- **T5 Legislative immunity.** The case discusses the concept of legislative immunity, which is separate from, but related to, legislative privilege.
- **T6 Balancing test.** The case discusses whether the legislative privilege is qualified or absolute; if the court finds the privilege is qualified, the court applies a balancing test to determine whether a claim of privilege should be recognized under the specific facts of the case.
- **T7 Redistricting.** The case is a challenge to a redistricting plan. Because redistricting cases often focus on whether legislators intentionally discriminated against groups of voters and whether the legislature complied with the federal Voting Rights Act, the legislative privilege analysis in the tagged cases addresses issues common to these types of claims.
- **T8 Waiver.** The case addresses the circumstances under which a legislator or other party may be found to have waived legislative privilege.

In some instances, a tagged case provides a robust discussion of the relevant legal standards and application of those standards to the case’s specific facts and circumstances. In other instances, a case provides only a brief discussion of the tagged information that, while short, is helpful because it illustrates a key concept, such as a statement by a court as to whether a memorandum from outside legal counsel qualifies for the privilege or whether a legislator waived the privilege by communicating with an outside party.

A Compendium of Authority on Legislative Privilege

U.S. Supreme Court Cases

Bogan v. Scott-Harris, 523 U.S. 44 (1998).

Officials outside the legislative branch, such as a city's mayor, are entitled to legislative immunity when they perform legislative functions. An act is legislative if it is an integral step in the legislative process, such as discussing bills or signing ordinances into law.

T1 Definition of "privilege"

T4 Who may claim privilege

T5 Legislative immunity

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

Members and legislative aides are treated as one for purposes of legislative privilege or immunity when their action is essential to legislating, but the speech or debate clause does not insulate legislative functionaries carrying out non-legislative tasks, such as unconstitutional or illegal acts.

T4 Who may claim privilege

Gravel v. United States, 408 U.S. 606 (1972).

While legislative privilege may be extended to committee staff, it applies only insofar as that individual performs legislative acts on behalf of a member that would also enjoy the privilege and does not immunize against testifying as to charges of conspiring to violate the constitutional rights of another.

T4 Who may claim privilege

Tenney v. Brandhove, 341 U.S. 367 (1951).

Members of a legislative committee have absolute immunity from civil suit for acts done within the sphere of legislative activity. In dicta, officials acting on behalf of the legislature are afforded less immunity, and legislative privilege is less absolute than immunity.

T1 Definition of "privilege"

T5 Legislative immunity

United States v. Gillock, 445 U.S. 360 (1980).

Federal courts in a federal criminal prosecution are not required to recognize legislative privilege for state legislators.

T1 Definition of “privilege”
T2 State vs. federal

Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977).

In dicta, city council members may be called to testify in trials concerning the purpose of official actions when legislative or administrative history is highly relevant, but such testimony is often barred by legislative privilege.

T4 Who may claim privilege

Federal Appellate Court Cases

Alabama Education Association v. Bentley (In re Hubbard), 803 F.3d 1298 (11th Cir. 2015), decision reached on appeal, 663 Fed. Appx. 766 (11th Cir. 2016).

Legislative privilege protects the legislative process itself, covering the proposal, formulation and passage of legislation, and it does not matter if the legislators themselves are named in the lawsuit. In a case involving first amendment rights of appellants, legislative privilege need not yield in challenges to the motivations behind otherwise constitutional statutes.

T1 Definition of “privilege”
T2 State vs. federal
T3 Documents or actions that are privileged products

Almonte v. City of Long Beach, 478 F.3d 100 (2nd Cir. 2007), summary judgment denied in part on other grounds by 2009 U.S. Dist. LEXIS 29421 (E.D.N.Y. 2009).

Legislative immunity applies to all aspects of the legislative process, including discussions and agreements in furtherance of a legislative act, even when those discussions and agreements involve persons outside the legislature. Discussing issues that bear on potential legislation, and participating in caucuses to form united positions, are both routine parts of the modern-day legislative process.

T3 Documents or actions that are privileged products
T5 Legislative immunity

EEOC v. Washington Suburban Sanitary Commission, 631 F.3d 174 (4th Cir. 2011).

A claim of privilege was premature to quash a subpoena in a preliminary inquiry of alleged violations of the Age Discrimination in Employment Act, particularly when the EEOC was not investigating the motives behind the actions.

T1 Definition of “privilege”
T3 Documents or actions that are privileged products
T5 Legislative immunity

In re Grand Jury, 821 F.2d 946 (3rd Cir. 1987).

Legislative privilege is comparable to deliberative process privilege in that both are limited to opinions, recommendations or advice and not to severable, factual material.

T1 Definition of “privilege”

T2 State vs. federal

T3 Documents or actions that are privileged products

T6 Balancing test

In re Grand Jury Investigation into Possible Violations of Title 18, 587 F.2d 589 (3rd Cir. 1978).

Legislative privilege, unlike attorney-client privilege, is a “use privilege” to protect the legislator and associates involved in the legislative process from the harassment of hostile questions, but not to encourage confidences by maintaining secrecy. The privilege, when applied to records or third-party testimony, is one of non-evidentiary use, not of nondisclosure.

T3 Documents or actions that are privileged products

T4 Who may claim privilege

T5 Legislative immunity

Jeff D. v. Otter, 643 F.3d 278 (9th Cir. 2011).

Citing *Gravel v. United States*, legislative privilege applies to a legislative budget analyst by reason of the analyst’s function in the legislature, under the theory that aides and assistants act as the alter egos of legislators.

T4 Who may claim privilege

Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Gov’t, 849 F.3d 615 (5th Cir. 2017).

Briefly analyzing whether legislative immunity and privilege apply to local jurisdictions’ council members, citing *Perez v. Perry* and *Rodriguez v. Pataki*: legislative privilege is a qualified privilege to be applied narrowly for a public good and cannot be used to bar the adjudication of a claim.

T2 State vs. federal

T5 Legislative immunity

T6 Balancing test

National Association of Social Workers v. Harwood, 69 F.3d 622 (1st Cir. 1995).

Legislative immunity extends to legislators and legislative aides who carry out the will of the legislative body as part of their official duties, such as in enforcing a rule. The regulation of

admission to the House floor comprises an integral part of legislative deliberative and communicative processes.

T3 Documents or actions that are privileged products

T5 Legislative immunity

North Carolina State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) cert. denied.

When legislative history is highly relevant, but specific testimony is of limited value, legislative privilege may bar the disclosure of some, but not all, evidence.

T3 Documents or actions that are privileged products

Williams v. Brooks, 945 F.2d 1322 (5th Cir. 1991) cert. denied, 501 U.S. 931 (1992), complaint dismissed on other grounds by 862 F. Supp. 151 (S.D.T.X. 1994).

A congressman was not entitled to legislative immunity from suit alleging defamation on the basis of communications that were political in nature but not legislative. Not everything a member of Congress may regularly do is a legislative act protected by the speech or debate clause.

T3 Documents or actions that are privileged products

T5 Legislative immunity

Federal District Court Cases

ACORN v. County of Nassau, 2009 U.S. Dist. LEXIS 82405 (E.D.N.Y. 2009).

Following *Rodriguez v. Pataki*, the court found the seriousness of litigation involving multiple alleged civil rights violations, and the critical interest of the documents and testimony to be produced, outweighed the factors favoring application of legislative privilege.

T3 Documents or actions that are privileged products

T4 Who may claim privilege

T6 Balancing test

Baldus v. Members of the Wisconsin Government Accountability Board, 11-CV-562 JPS-DPW-RMD, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis. Dec. 8, 2011).

Members of the legislature waived legislative privilege to the extent they relied on outside consultants.

T6 Balancing test

T7 Redistricting

T8 Waiver

Benisek v. Lamone, 241 F. Supp. 3d 566 (D. Md. 2017).

Legislative privilege is a qualified privilege that is available to non-legislator members of a committee performing legislative functions.

T3 Documents or actions that are privileged products

T4 Who may claim privilege

T6 Balancing test

T7 Redistricting

Bethune-Hill v. Virginia Board of Elections, 114 F. Supp. 3d 323 (E.D. Va. 2015), *aff'd* in part, vacated in part, 137 S. Ct. 788 (2017).

When the state faces liability, legislative privilege is qualified when it acts as a barrier against redressing important federal interests and public rights. The interest to be free from distraction alone is insufficient to invoke legislative privilege when the legislator is not personally threatened with liability; the privilege must be balanced against evidentiary need. Legislative privilege affects a broader scope of evidence than deliberative process privilege and is not necessarily waived by disclosure to third parties.

T3 Documents or actions that are privileged products

T4 Who may claim privilege

T6 Balancing test

T7 Redistricting

T8 Waiver

Commission for a Fair & Balanced Map v. Illinois State Board of Elections, 2011 U.S. Dist. LEXIS 117656 (N.D. Ill. 2011), argued, 835 F. Supp. 2d 563 (N.D. Ill. 2011).

Applying *Rodriguez v. Pataki*, non-factual communications that contained opinions, recommendations, or advice about public policies or possible legislation are privileged, but facts and other information available to lawmakers at the time of the decision are not.

Communications between legislators and outsiders, as opposed to staff, are also not privileged.

T3 Documents or actions that are privileged products

T5 Legislative immunity

T6 Balancing test

T7 Redistricting

T8 Waiver

Favors v. Cuomo, 285 F.R.D. 187 (E.D.N.Y. 2012), dismissed as moot in part, granted in part, and denied in part by 2013 U.S. Dist. LEXIS 189355 (E.D.N.Y. 2013).

Failure to assert legislative immunity did not waive legislative privilege. Legislative privilege protects a process, but its application depends on a functional analysis of the roles of the participants to the communication or information. The court also discusses in discovery

proceedings the attorney-client privilege, work product protections, deliberative process privilege and waiver.

- T1 Definition of “privilege”
- T3 Documents or actions that are privileged products
- T4 Who may claim privilege
- T5 Legislative immunity
- T6 Balancing test
- T7 Redistricting
- T8 Waiver

Florida v. United States, 886 F. Supp. 2d 1301 (N.D. Fla. 2012).

State legislators have a qualified privilege from testifying in a civil case about the reasons for votes, and the privilege extends to staff to the extent that the testimony would intrude on the legislators’ own deliberations and ability to communicate with staff.

- T2 State vs. federal
- T4 Who may claim privilege
- T6 Balancing test
- T7 Redistricting

Harris v. Arizona Independent Redistricting Commission, 993 F. Supp. 2d 1042 (D. Ariz. 2014), *aff’d*, 136 S. Ct. 1301 (2016).

Applying *Rodriguez v. Pataki*, members of an independent redistricting commission were found to not have privilege. Private citizens appointed to a commission did not have legislative privilege comparable to appointed legislator members, and all legislative privilege is limited, particularly in the redistricting context. Comity can yield to important federal interests, especially equal voting rights.

- T4 Who may claim privilege
- T6 Balancing test
- T7 Redistricting

Kay v. City of Rancho Palos Verdes, 2003 U.S. Dist. LEXIS 27311 (C.D. Cal. 2003), *aff’d* on other grounds, 504 F.3d 803 (9th Cir. 2007).

Legislative privilege extends to objective facts, as well as pre-decisional and deliberative materials, and may extend to employees who work closely with legislators. An eight-factor balancing test can be used interchangeably to determine legislative and deliberative process privileges: (i) the interests of the litigants and society; (ii) the relevance of evidence; (iii) the availability of comparable evidence; (iv) the seriousness of the litigation; (v) the presence of issues concerning alleged governmental misconduct; (vi) the role of the government in the litigation; (vii) the possibility of future timidity; and (viii) the federal interest involved.

T4 Who may claim privilege
T6 Balancing test

McDonough v. City of Portland, 2015 U.S. Dist. LEXIS 173763 (D. Me. 2015).

State legislators claim privilege in federal courts based on common law, not the speech or debate clause, for federal causes of action, and based on state law for state causes of action. The five-factor balancing test in *Rodriguez v. Pataki* shields from disclosure testimony that is non-central to a case and may have a chilling effect on the legislative process.

T1 Definition of “privilege”
T2 State vs. federal
T6 Balancing test
T8 Waiver

Michigan State A. Philip Randolph Institute v. Johnson, 2018 U.S. Dist. LEXIS 87623 (E.D. Mich. 2018).

Legislative privilege was not outweighed by evidentiary need based on *Rodriguez v. Pataki* as to documents between legislators or between legislators and staff, and privilege was waived as to communications shared between legislators or staff and third parties.

T1 Definition of “privilege”
T2 State vs. federal
T3 Documents or actions that are privileged products
T4 Who may claim privilege
T6 Balancing test
T8 Waiver

Perez v. Perry, 2014 U.S. Dist. LEXIS 1838 (W.D. Tex. 2014).

Legislative privilege is personal and may not be raised on behalf of a legislator, aide or staff member by another. To determine if a specific document or testimony is privileged, the court will apply the five-factor test in *Rodriguez v. Pataki* to determine if the privilege is waived or outweighed by a compelling, competing interest.

T4 Who may claim privilege
T6 Balancing test
T7 Redistricting
T8 Waiver

Puente Arizona v. Arpaio, 314 F.R.D. 664 (D. Ariz. 2016).

Emails sent to third parties from a state senator were created in connection with bona fide legislative activity, and even though relevant, the availability of other evidence and need to protect the legislative process from unwarranted intrusion support the applicability of the

privilege. The case also discusses First Amendment privilege from compelled disclosure of political associations.

T1 Definition of “privilege”
T3 Documents or actions that are privileged products
T6 Balancing test
T8 Waiver

Pulte Home Corp. v. Montgomery Cty., 2017 U.S. Dist. LEXIS 82935, *22 (D. Md. May 31, 2017).

State and local legislators in federal court are entitled to an absolute legislative privilege in civil suits brought by private plaintiffs to vindicate private rights. Confidentiality is not the fundamental concern of legislative privilege. Therefore, the absolute privilege is not waived by disclosure to third parties.

T1 Definition of “privilege”
T5 Legislative immunity
T6 Balancing test
T8 Waiver

Rodriguez v. Pataki, 280 F. Supp. 2d 89 (S.D.N.Y. 2003), *aff’d*, 293 F. Supp. 2d 302 (2003).

Legislative privilege protects against disclosure that may chill legislative deliberations, based on a balancing of: (i) the relevance of evidence sought; (ii) the availability of other evidence; (iii) the seriousness of the litigation and issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees whose secrets could be violable.

T3 Documents or actions that are privileged products
T4 Who may claim privilege
T5 Legislative immunity
T6 Balancing test
T7 Redistricting
T8 Waiver

Veasey v. Perry, 2014 U.S. Dist. LEXIS 45935 (S.D. Tex. 2014).

Legislative privilege cannot be raised by another when the legislator who holds the privilege waives it voluntarily. Where a motion opposing production during discovery is denied, the privilege may nonetheless be asserted during trial, and access to those documents may be restricted until that time.

T6 Balancing test
T8 Waiver

State Supreme Court Cases

Edwards v. Vesilind, 790 S.E.2d 469 (2016).

The Virginia Supreme Court held that the Virginia Constitution's speech or debate clause is the source of an absolute legislative privilege protecting legislators and staff from having to testify or disclose documents that relate to the sphere of legitimate legislative activity. Such activity must be an integral part of the deliberative and communicative processes by which members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters that the constitution places within the jurisdiction of either House.

T2 State vs. federal

T3 Documents or actions that are privileged products

T4 Who may claim privilege

League of Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135 (Fla. 2013).

The Florida Supreme Court recognized a qualified privilege shielding legislators and staff from testifying and surrendering documents disclosing their thoughts or impressions about redistricting plans, but requiring disclosure of other documents, files, or information regarding plans. The court rejected the legislators' arguments that the legislative privilege is absolute, noting that there are other important interests that must be balanced against legislative interests. These interests include open government mandates and the state's fair redistricting requirements. Florida bases the privilege on the constitutional doctrine of separation of powers because the Florida Constitution lacks a speech or debate clause.

T2 State vs. federal

T6 Balancing test

T7 Redistricting

Federal Rules

Fed. R. Civ. P. 45(d)(3)(A) Quashing or Modifying a Subpoena

A timely motion can be made to quash or modify a subpoena that requires disclosure of privileged or other protected matter, if no exception or waiver applies; if it subjects a person to undue burden; or for other specific reasons.

T8 Waiver

Fed. R. Civ. P. 45(e)(2) Claiming Privilege or Protection

To withhold privileged information, a person must expressly make the claim and describe the nature of the withheld documents.

T3 Documents or actions that are privileged products

Fed. R. Evid. 501

Federal common law governs the claim of a privilege unless otherwise governed by the Constitution, federal statutes or rules prescribed by the Supreme Court. In a civil case, state law governs privilege for claims for which state law supplies the rule of decision.

T2 State vs. federal

State and Territorial Constitutional Speech or Debate Clauses⁴⁵

Ala. Const. Art. IV, sec. 56
Alaska Const. Art. II, sec. 6
Ariz. Const. Art. IV, pt. 2, sec. 7
Ark. Const. Art. V, sec. 15
Colo. Const. Art. V, sec. 16
Conn. Const. Art. III, sec. 15
Del. Const. Art. II, sec. 13
Ga. Const. Art. III, sec. 4, par. 9
Hawaii Const. Art. III, sec. 7
Idaho Const. Art. III, sec. 7
Ill. Const. Art. III, sec. 12
Ind. Const. Art. IV, sec. 8
Kans. Const. Art. II, sec. 22
Ky. Const. sec. 43
La. Const. Art. III, sec. 8
Maine Const. Art. IV, pt. 3, sec. 8
Md. Const. Art. III, sec. 18
Mass. Const. Art. XXI
Mich. Const. Art. IV, sec. 11
Minn. Const. Art. IV, sec. 10
Mo. Const. Art. III, sec. 19
Mont. Const. Art. V, sec. 8
N.H. Const. Pt. 1, Art. 30
N.J. Const. Art. IV, sec. 4, para. 9
N.Mex. Const. Art. IV, sec. 13
N.Y. Const. Art. III, sec. 11
N.Dak. Const. Art. IV, sec. 15
Ohio Const. Art. II, sec. 12
Okla. Const. Art. V, sec. 22
Ore. Const. Art. IV, sec. 9
Pa. Const. Art. II, sec. 15
P.R. Const. Art. III, sec. 14
R.I. Const. Art. VI, sec. 5
S.Dak. Const. Art. III, sec. 11
Tenn. Const. Art. II, sec. 13
Tex. Const. Art. III, sec. 21
Utah Const. Art. VI, sec. 8
Vt. Const. Ch. I, Art. 14
Va. Const. Art. IV, sec. 9

⁴⁵ There is no constitutional speech or debate clause in California, Florida, Guam, Iowa, Mississippi, Nebraska, Nevada, North Carolina or South Carolina.

Wash. Const. Art. II, sec. 17
W. Va. Const. Art. VI, sec. 17
Wis. Const. Art. IV, sec. 16
Wyo. Const. Art. III, sec. 16

State Statutes Related to Confidentiality

Ala. Code 1975 § 29-6-7.1
Alaska Stat. § 24.20.100
Ark. Stat. Ann. §§ 10-2-129; 10-4-422(c)(1); and 25-19-105(b)(7)
Calif. Gov't Code §§ 6254 and 9075
Colo. Rev. Stat. §§ 2-3-505(2) and 24-72-202(6)-(6.5)
Conn. Gen. Stat. §§ 1-2109(b)(1) and (10); 1-210; and 52-146r
Del. Code Tit. 29 §10002(l)(6), (16), and (19)
D.C. Code § 2-1714
Fla. Stat. §§ 11.0431, 11.26, and 15.07
Ga. Code Ann. § 50-18-72(a)(12)
Guam Code. Ann. Tit. 2 § 3107
Hawaii Rev. Stat. § 92F-13
Idaho Code Ann. § 74-109
Ill. Comp. Stat. ch. 5 § 140/7(1)(f)
Ind. Code §§ 5-14-3-2(q); 5-14-3-4(b)(13)-(14)
Iowa Code tit. 1 §2A.1
Kans. Stat. Ann. § 45-221(a)(20)-(22)
Ky. Rev. Stat. Ann. §§7.117-.120
La. Rev. Stat. § 44.2
Maine Rev. Stat. § 402(3)(c)
Md. State Gov't Code Ann. § 2-1226
Mass. Gen. Laws ch. 66 § 18
Mich. Comp. Laws § 4.1109
Minn. Stat. § 3C.05, subd. 1 (a)
Miss. Code Ann. § 25-61-17
Mo. Rev. Stat. § 610.010
Mont. Const. II, sec. 9 ⁴⁶
Neb. Rev. Stat. § 84-712.05
Nev. Rev. Stat. Ann. § 218F.150
N.H. Rev. Stat. Ann. § 91-A:5
N.J. Stat. § 47:1A-1.1
N.Mex. Stat. §2-3-13
N.Y. Pub. Off. Law § 74
N.C. Gen. Stat. §§ 120-129; 120-130; 120-131; 120-131.1; 120-132
N.Dak. Cent. Code § 44-04-18.6
Ohio Rev. Code Ann. § 101.30
Okla. Stat. Ann. tit. 51 § 24A.3
Ore. Rev. Stat. § 192.311
Pa. Cons. Stat. tit. 65, ch. 7, sec. 716
P.R. 2 § 12 (speech or debate)

⁴⁶ Constitutional language in Montana grants the right to examine documents of all public bodies.

R.I. Gen. Laws § 38-2-2
S.C. Code Ann. § 30-4-40
S.Dak. Codified Laws §§ 1-27-1.5; 19-19-508
Tenn. Code Ann. §§ 3-12-105; 3-12-106; 3-14-109
Tex. Gov't Code §§ 306.003; 306.004 323.018; 323.020; 552.106; 552.111; 552.116; 552.146
Utah Code Ann. §§ 63G-2-305; 63G-2-703
Vt. Stat. Ann. tit. 1 § 317; tit. 2 §§ 404; 502
Va. Code Ann. §§ 2.2-3705.7; 30-28.18; 30-117
Wash. Rev. Code §§ 1.08.027; 40.14.180; 42.56.010; 42.56.280
W. Va. Code §§ 4-1A-6; 4-1A-7
Wis. Stat. §§ 13.91; 13.92; 13.94; 13.95; 13.96
Wyo. Stat. Ann. § 28-8-116

Sample Forms

The following sample forms have been adapted from documents provided by different state legislatures and are designed to address legislative privilege, guide decision-making on proper maintenance of legislative documents and allow legislative members to waive legislative privilege if they so choose. While the forms may provide guidance, they are merely examples of language used by other state legislatures. Each state legislature should use the forms to create documents that specifically address the laws, issues and peculiarities of the individual state legislature. The forms include:

- Attorney-Client Agreement between a Legislator and a Legislative Services Agency.
- Confidentiality Agreement between a Legislator and a Legislative Services Agency.
- Interagency Agreement.
- Litigation Materials Retention Form and Instructions for Outgoing Members.
- Log of Denied Records.
- Records Retention Policy.
- Technology Use Policy: Draft Resolution for Use and Security of Legislative Computer Equipment, Communications Devices and Networks.
- Waiver of Confidentiality.

Attorney-Client Agreement between a Legislator and a Legislative Services Agency

This attorney-client agreement is between [name of legislator] and the [name of the legislative service agency].

Throughout the remainder of this agreement, the [name of the legislative service agency] shall be referred to as “Agency” and the [name of legislator] shall be referred to as “Legislator.”

This agreement sets forth the attorney-client agreement between the Agency and the Legislator.

SECTION 1. Effective Date.

This agreement is effective upon the date that the Legislator and Executive Director of the Agency sign this agreement.

The attorney-client agreement described in this document applies unless the Legislator specifically states in a written document that the Legislator has waived the agreement.

This attorney-client agreement continues while the Legislator is serving in the legislature and when the Legislator is not serving in the legislature with respect to services the Agency provided to the Legislator during his or her term of office.

SECTION 2. Scope of Agreement.

The Agency is a[n] [non-partisan] agency established by the [State General Assembly/Legislature] and is governed by [a joint committee of the Senate and House of Representatives]. The Agency provides the following services to all members of the Legislature:

- Legal services including legal counseling, legal research, and legal interpretation for the Legislator in his or her capacity as a legislator.
- Legislative research.
- Legislative bill, resolution, and amendment drafting.
- Fiscal analysis of bills.
- [Information technology services].
- [Other services].

All communication between the Legislator in his or her capacity as a legislator and any Agency staff person is confidential. All communication between the Legislator and an Agency attorney is subject to attorney-client privilege [, legislative privilege and deliberative privilege.]

All records, documents, emails, voicemails and texts that are produced as the result of communication between the Legislator and a staff person or documents requested by the Legislator are confidential and not subject to the [state’s] open record laws under [cite statute].

[may list other state laws or legislative rules protecting documents or communications]

An Agency staff person may not disclose any communication between the staff person and the Legislator to a person outside of the Agency unless the Legislator specifically gives the staff person specific instructions to disclose the communication. An Agency staff person may not provide copies of

any records or documents produced as the result of a request from the Legislator unless the Legislator specifically instructs the staff member to share the record or document.

SECTION 3. Signatures.

This attorney-client agreement is agreed to:

Legislator

Date

[Name] [Executive Director of the legislative service agency]

Date

Confidentiality Agreement between a Legislator and a Legislative Services Agency

This confidentiality agreement is between [name of legislator] and the [name of the legislative service agency].

Throughout the remainder of this confidentiality agreement, the [name of the legislative service agency] shall be referred to as “Agency” and the [name of legislator] shall be referred to as “Legislator.”

This confidentiality agreement sets forth the confidentiality agreement between the Agency and the Legislator.

SECTION 1. Effective Date.

This confidentiality agreement is effective upon the date that the Legislator and Executive Director of the Agency sign this agreement.

The confidentiality agreement described in this document applies unless the Legislator specifically states in a written document that the Legislator has waived the confidentiality agreement.

This confidentiality agreement continues while the Legislator is serving in the legislature and when the Legislator is not serving in the legislature with respect to services the Agency provided to the Legislator during his or her term of office.

SECTION 2. Scope of Agreement.

The Agency is a[n] [non-partisan] agency established by the [State General Assembly/Legislature] and is governed by [a joint committee of the Senate and House of Representatives]. The Agency provides the following services to all members of the Legislature:

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- Legislative research.
- Legislative bill, resolution, and amendment drafting.
- Fiscal analysis of bills.
- [information technology services].
- [other services].

All communication between the Legislator in his or her capacity as a legislator and any Agency staff person is confidential. All communication between the Legislator and an Agency attorney is confidential [, and is subject to attorney-client privilege, legislative privilege and deliberative privilege].

All records, documents, emails, voicemails, and texts that are produced as the result of communication between the Legislator and a staff person or documents requested by the Legislator are confidential and not subject to the [state’s] open record laws under [cite statute].

[May list other state laws or legislative rules protecting documents or communications.]

An Agency staff person may not disclose any communication between the staff person and the Legislator to a person outside of the Agency unless the Legislator specifically gives the staff person specific instructions to disclose the communication. An Agency staff person may not provide copies of

any records or documents produced as the result of a request from the Legislator unless the Legislator specifically instructs the staff member to share the record or document.

SECTION 3. Signatures.

This confidentiality agreement is agreed to:

Legislator

Date

[Name] [Executive Director of the legislative service agency]

Date

Interagency Agreement

Agreement of Procedures for [General Topic]

Sharing Information between Agency A and Agency B

Purpose: Lay out the general situation giving need for the agreement, including an introduction of each agency and the authority under which it is entering into the agreement. Then briefly explain the purpose of the agreement.

Responsibilities of parties: Language in the following paragraphs may need modification based on provisions in your state's open records laws regarding draft iterations of documents, interagency communications and transitory information. Take into consideration both agencies' retention requirements.

By this agreement, [Agency A] agrees to establish a process to facilitate the collection and submission of information between [Agency A and Agency B] relevant to the [purpose or function for agreement]. Further, [Agency A] agrees to create a form through which information may be uniformly requested by and submitted to [Agency A] staff. [Agency A] and [Agency B] agree that this form will be clearly marked as a draft until it and any attached documentation have been returned to and verified as completed by [Agency A] staff. Once verified, each completed form returned in response to a request from [Agency A], including all attached documentation, will be considered the final version.

[Agency B] agrees to use the process established by [Agency A] to respond to requests for information from [Agency A] staff. [Agency B] agrees to respond to requests for information on the form provided or, if necessary, to clearly attach and incorporate by reference additional documentation as necessary. Further, [Agency B] agrees that the form returned to [Agency A] in response to a request is the final version of that document, including all documentation clearly attached to and incorporated in the request. Transitory information, such as emails produced during the collection of information to respond to a/an [Agency A] request, will be retained only by [Agency B] as required by any applicable retention schedule approved by the [Agency with authority to set retention policies]. Further, upon [Agency A]'s verification of returned draft forms and incorporated documentation as completed, [Agency B] agrees to destroy any transitory information remaining in its possession, subject to its retention schedule.

Confidentiality and control of records: These paragraphs establish the agency with control for purposes of notice and responsibility in response to any potential open records requests. On the basis of statutory language in your state, consider whether any language should be amended to reflect additional or alternative requirements.

Information, documents and communications, including email communications, relating to [purpose or function] under this agreement are confidential and potentially privileged. Information, documents and communications—including initial, drafted and completed information requests and reports created on behalf of [Agency A]—submitted by [Agency B] to [Agency A] as a result of a request by [Agency A] are confidential. At all times, [Agency A] retains direction and control over all information, documents and communications related to requests for information, final versions of requests and responsive

documentation provided by [Agency B]. This agreement does not change the nature of any privilege or confidentiality of documents held by [Agency B] that do not implicate this agreement or the [purpose or function for agreement] or are not under the direction or control of [Agency A].

[Agency B] agrees to inform [Agency A] as soon as practicable, but no later than the following business day, of receipt of any requests for information, documents or communications from entities not party to this agreement that may implicate information, documents or communications, including email communications, relating to this agreement or the [purpose or function for agreement], and to consult [Agency A] legal staff before responding to the request. Further, [Agency B] agrees to assert applicable privileges and obligations of confidentiality in cooperation with and on behalf of [Agency A] as deemed necessary by [Agency A].

[Agency B] agrees to inform [Agency A] as soon as practicable, but no later than the following business day after notification, of potential or actual litigation that may implicate this agreement or the [purpose or function for agreement]. [Agency B] agrees to consult [Agency A] legal staff prior to responding to such litigation, to join [Agency A] as a party to the litigation when necessary, and to otherwise seek to protect any privilege or other legal right asserted by [Agency A] over the subject of this agreement.

Criminal Justice Information and Physical Review: You may need to consider if criminal history, personally identifiable information or health information may be implicated in the relationship between the agencies. These paragraphs provide an example of one approach to avoiding transferring criminal history information.

The Federal Bureau of Investigation defines Criminal Justice Information (CJI) in the *Criminal Justice Information Services (CJIS) Security Policy*.⁴⁷ To ensure the protection of CJI, [Agency B] will not transfer data received from CJIS through the process established by [Agency A]. If [Agency A] staff requires review of CJI from CJIS, [Agency A] agrees that staff will physically inspect those records on [Agency B] premises.

If [Agency A] staff requests to physically review or inspect records on [Agency B] premises, any notes or documentation taken by [Agency A] staff are confidential and potentially privileged work product under the direction and control of [Agency A]. However, physical review or inspection by [Agency A] staff does not, on its own, affect the confidential or privileged nature of the record. If a release of CJI occurs outside the protections set forth in this agreement, [Agency A] agrees to notify [Agency B] of the release as soon as practicable, but no later than the following business day.

⁴⁷ Federal Bureau of Investigation, *Criminal Justice Information Services (CJIS) Security Policy*, version 5.7, August 2018.

Litigation Materials Retention Form and Instructions for Outgoing Members

Federal evidentiary law, or in some cases state evidentiary law, requires legislators who are leaving public office to preserve office-related materials in their possession and control that are related to ongoing federal litigation. Before leaving your position in public service, please properly preserve and turn in any relevant materials in your office, or otherwise in your possession or control, by following the instructions below.

For more information about the types of materials relevant to this requirement or about how these materials will be maintained and ultimately disposed of, please contact [Name, Title], either by phone at [number], or by email at [email address].

Instructions:

- I. Identify the documents, files and other materials in your office that are in your possession or under your control, including any digital or electronic materials, and that relate to the following ongoing or anticipated federal or state litigation:
[Listed items could include general types of legislation during certain applicable periods that are commonly the subject matter of litigation, such as redistricting or voting-related legislation, or could include specific types of legislative materials or bills that relate to ongoing federal or state litigation.]
 - A. “Materials” means records of information, documents or communications (including electronic mail, video or audio recordings or diary/calendar notations), that are office-related and that are in your possession or control.
 - B. In addition to any printed or tangible materials, please search through all of your electronic equipment where you stored or saved office-related materials, such as computers, smartphones, other digital storage devices and electronic mail (email) files and folders with office-related archived and saved messages such as your legislative email account and any personal accounts that were used for official business.
 - C. Most, if not all, operating systems used by computers, smartphones and other electronic devices include a keyword search functionality for assistance with locating files or materials stored on the device or on a digital storage account connected to the device. Additionally, most, if not all, email accounts such as your legislative email, Gmail, Yahoo and Hotmail are also equipped with keyword search functionality to help locate certain email correspondence or attached files containing the searched term or terms.
 - D. In addition to directly searching through relevant and appropriate digital folders or locations for relevant materials, our office recommends utilizing keyword search functionality wherever available when searching for relevant digital or electronic files or materials for preservation and retention.
 - E. Please feel free to contact [Name, Title, phone, email] with any questions regarding the applicability or relevancy of any materials.
- II. Place any responsive printed or tangible materials in the manila envelope provided to you and after copying all applicable electronic materials onto the digital storage device (i.e., thumb drive)

that has been provided to you, please place the thumb drive in the envelope as well. If you need any additional assistance or supplies, please contact our office using the contact info provided above.

- III. If you have any instructions regarding the final disposition of any materials you have provided pursuant to this request, please place a signed letter to that effect in the envelope. Otherwise, our office will dispose of the materials at the appropriate time and manner in accordance with applicable law or our retention policies or both.
- IV. Place your initials next to the appropriate statement below, provide contact information, sign and date this form and place this form in the envelope.
- V. Send the envelope with all applicable enclosed materials via interoffice legislative mail or via certified mail to [Name, Title, Legislative Agency, Address, Suite #, City, Zip Code].

Office contact name:	Contact:	Phone:
Office contact email:	Contact:	Fax:

Use of materials maintained by the Legislative Services Agency: Materials submitted to our office will be maintained in accordance with all applicable privacy and privilege policies, as well as retention, open records and disposition policies. The submission of materials to our office does not necessarily mean that such materials will be made public or be used or disclosed to a court or litigants engaged in litigation. Unless specifically waived by you, our office will review all submitted materials for applicable confidentiality privileges and maintain all such privileges on your behalf and on behalf of the State Legislature except and until required otherwise in accordance with applicable laws, rules and orders of court.

MY SIGNATURE BELOW INDICATES THAT I HAVE READ AND UNDERSTAND THIS FORM AND THAT THE INFORMATION I HAVE PROVIDED IS TRUE TO THE BEST OF MY KNOWLEDGE.

Legislator signature:	Legislator name: <i>(please print)</i> Date:
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Log of Denied Records

Case name and citation: []

Date: []

Date of request	Date of denial	Requester	Description	Reason for denial	Individual denying request	Other information	File or control number

Examples of reasons for denial: attorney-client privilege; legislative privilege; confidentiality applied to any staff member (based on confidentiality provision in statute); privileges and immunities clause; speech or debate clause.

Records Retention Policy

[Note: This is an example. Tailor this form to your state’s public records law and retention policies.]

I. Public records.

- A. Policy. This policy is adopted to comply with [provision], regarding retention, access and reproduction of public records in the custody of any legislative body.
- B. Definitions. For purposes of this policy, “legislative body” means the House, the Senate, or any committee or office of the legislature. All applicable statutory definitions also apply.
- C. Authority. Each legislative body may adopt its own policy addressing the subjects contained in this policy, however such a policy may not diminish any rights to public access provided for under law or be less protective of these rights than this policy.
- D. Inspection and copying of public records.
 - i. All public records as provided by statute under the custody of any legislative body are available for public inspection and copying [insert days and times they may be inspected by the public].
 - ii. A request to inspect or copy any public record may be made orally or in writing to the [name of office].
 - iii. Within [number of days] days of receipt of a public records request, the [name of office] shall respond by any of the following:
 - 1. Providing the records;
 - 2. Acknowledging receipt of the request and providing a reasonable estimate of the time required to respond to the request;
 - 3. Denying the request and stating the reason for such denial; or
 - 4. Asking for clarification for what the requester is seeking.
 - iv. As provided by law, the [appropriate authority of the legislative body] shall determine if a requested public record is exempt from disclosure and may delete identifying details in public records if disclosure would be an invasion of privacy.
 - v. No fee shall be charged for inspection of public records. Any fee charged for copying a public record shall be reasonable and set at a level necessary to recapture the cost of copying the public record.
 - vi. A fee of [amount] per audio or video tape of any proceeding shall be charged. The legislative body will provide audio and video tapes as appropriate.
 - vii. Additional fees may be charged for the actual cost of preparing a public record for inspection or copying and for restoring the public record, if necessary.
 - viii. Fees are payable at the time the copy is furnished.

II. Records retention.

- A. Policy. Unless otherwise provided by law, and pursuant to [provision], all legislative records shall be and remain the property of the state. All legislative records, regardless of form, shall be retained in accordance with this policy.
- B. Definition. For purposes of this policy, “legislative record” includes those records defined in [provision], subject to storage and retention as required by law as correspondence, amendments, reports, and minutes of meetings made by or submitted to legislative committees or subcommittees and transcripts or other records of hearings or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions. “Legislative record” does not include the records of an official act of the legislature kept by the [name of office], bills and copies of bills, published materials, digests, multi-copied materials that are routinely retained and otherwise available at the state library or in a public repository or reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature.
- C. Retention period. All legislative records shall be retained for a period of at least [number of years] years.
- D. Storage. In accordance with [provision], each legislative body may designate which legislative records should be transferred for retention and storage at the state archives.
- E. Duplicates. Once legislative records have been transferred to the state archives, any duplicates maintained within the legislature may be recycled or destroyed.
- F. Recycled or destroyed records. Records that are not legislative records may be recycled or destroyed within the discretion of members of the legislature and legislative employees.
- G. Digital records. Legislative records that are kept in computer, digital or electronic form shall be maintained for at least [number of years] years, except that a document need only be kept in either electronic, digital, computer or printed version and duplicates need not be maintained once a legislative record has been transferred to the state archives.

III. E-Mail retention.

- A. Storage of electronic documents is a necessary part of the legislature’s operations and an option for collecting and maintaining important records which the legislature has a responsibility to provide and the public has a right to review.
- B. Resource limitations make electronic storage of all documents increasingly impractical. In particular, the use and volume of e-mail continue to increase dramatically over time, and there is every reason to expect that this trend will continue.
- C. In order to balance the need to provide e-mail service and protect public records against the demands on resources needed to maintain an e-mail system, the legislature adopts the following e-mail record retention policy:

- i. All e-mails received by any member, staff or agent of the legislature that are “legislative documents” for purposes of document retention law shall be maintained in electronic or hard-copy format for no fewer than [number of years] years unless such e-mail is a duplicate of a legislative record that has already been stored with state archives;
 - ii. Each legislative body may develop processes to automatically delete any e-mail that is older than [number of days] days. Each legislative body may also develop processes that enable users to archive or otherwise retain e-mails older than [number of days, months or years] in a way that meets the needs of the users and minimizes the storage burden on computer systems.
- IV. **Conflict with other laws.** This policy shall control retention, access and reproduction of any legislative records except to the extent that it is inconsistent with the provisions of the [document retention law, and the public records law]. Nothing herein shall create any right to inspect or reproduce any record that has not been declared to be a public record by provision of [provision].
- V. **Privileged Communications.** No provision in this policy constitutes a waiver of any privilege created by the constitution or laws of the state of [state] or by any provision of federal law.

Technology Use Policy: Draft Resolution for Use and Security of Legislative Computer Equipment, Communications Devices and Networks

The following is a draft for a concurrent or joint resolution for policies on use of legislative computer equipment, communications devices and networks. The draft is intended for legislatures without centralized management of staff and technological resources.

WHEREAS: The legislature acknowledges that, to effectively and efficiently carry out its responsibilities, the use of legislative computer equipment, communications devices and networks is essential.

WHEREAS: While legislative computer equipment, communications devices, and networks facilitate effective and efficient work and communication, the use of legislative computer equipment, communications devices and networks can also threaten the confidential and sometimes privileged character of information stored and disseminated.

AND WHEREAS: The legislature must address the proper and secure use of legislative computer equipment, communications devices and networks to protect the continued effectiveness and efficiency of the legislature.

IT IS HEREBY RESOLVED BY THE HOUSE, THE SENATE CONCURRING THEREIN, THAT THE FOLLOWING POLICIES ARE ADOPTED FOR THE HOUSE, SENATE, AND THE LEGISLATIVE STAFF UNDER THE DIRECTION OF THE LEGISLATURE.

SECTION 1. Scope.

- (1) The policies in this resolution apply to the use of legislative computer equipment, communications devices or networks to which the legislature, its members, staff or contractors have access.
- (2) In this resolution:
 - (a) "Authorized user" means any legislator, legislative employee, paid or unpaid, or contractor of the legislature when specifically authorized by the [committee] of the House, the [committee] of the Senate or the LSO directors to use legislative computer equipment, communications devices, or networks.
 - (b) "LSO" means any legislative service office, and legislative staff of the office, supported by appropriated funds and whose principal function is to provide staff support to the legislature.

SECTION 2. Authority.

- (1) Each LSO shall adopt policies and procedures that are in conformity with this resolution.
- (2) Each house of the legislature, acting through the [committee] of the House and the [committee] of the Senate, shall adopt policies and procedures that are in conformity with this resolution.
- (3) The [committee] of the House, the [committee] of the Senate and the LSOs may establish policies and procedures that are more restrictive than the policies and procedures established in this resolution.

(4) The [committee] of the House and the [committee] of the Senate and the LSO directors may establish minimal personal use policies for all users of legislative technology, but the policies may not conflict with the policies under this resolution.

SECTION 3. Application.

(1) The [committee] of the House, the [committee] of the Senate and the LSOs shall provide authorized users training on the policies in this resolution. No authorized user may access any secure state server, or any other server operated by an LSO, until the authorized user has completed the training under this section.

SECTION 4. Passwords.

(1) Effective [date], all login passwords will expire annually or as directed by [committee] of the House, the [committee] of the Senate, or the LSO directors. After the expiration of a password, an authorized user shall create a new password. An authorized user may not share a password created under this section. An authorized user is responsible for all activity conducted or information accessed with the use of a password created under this section.

SECTION 5. Acceptable Use.

(1) The [committee] of the House, the [committee] of the Senate, and the LSOs shall adopt policies and procedures for authorized users on unacceptable use and acceptable use of legislative computer equipment, communications devices or networks, including the following:

(a) Unacceptable use includes the following:

1. Using the Internet for illegal activities, such as gambling.
2. Accessing sites with adult content, such as pornography or dating services.
3. Posting personal, commercial or campaign-related information on social media sites or websites.
4. Using state resources for personal gain or campaign activity.
5. Engaging in copyright infringement, such as downloading unauthorized music, movies or software.
6. Using state resources for personal purposes other than minimal personal use.
7. Without authorization, intentionally seeking information, obtaining copies, modifying files or data or using passwords belonging to other authorized users.
8. Knowingly allowing unauthorized access to legislative computer equipment, communications devices or networks.
9. Damaging or altering software or other components of legislative computer equipment, communications devices or networks.
10. Installing unauthorized software or hardware peripherals even if the software or hardware is related to legislative business.

11. Intentionally developing or propagating programs that harass other authorized users or infiltrate another computer or technology system.

(b) Acceptable use includes the following:

1. Respecting the privacy of other users and intellectual property or data.
2. Respecting the legal protection provided by copyright and licensing laws to software and data.
3. Protecting the integrity of legislative computer equipment, communications devices or networks.

(2) (a) The [committee] of the House, the [committee] of the Senate and the LSO directors shall enforce the policies under this resolution.

(b) Suspected violations of policies under this resolution shall be investigated as provided in Section 8.

SECTION 6. Data release authorization.

(1) When a legislator resigns or otherwise leaves the legislature, he or she will receive written notification and a data release authorization from the [committee] of the House or the [committee] of the Senate of his or her options relating to technology files. The legislator may designate that files, including shared files, be deleted, turned over to another legislator, or archived. If the authorization under this subsection is not returned, the technology files will be deleted by directive of the [committee] .

(2) When the legislature elects new committee chairpersons, committee technology files will not be deleted, except for files that are identified by the previous committee chairperson or legal counsel as protected by attorney client privilege or as confidential legislative correspondence or memoranda.

(3) (a) When a legislative employee terminates service to the legislature, all of his or her technology files will be deleted after 30 days unless otherwise directed by an LSO director. Prior to deletion, the director shall, in consultation with staff legal counsel, determine whether any such files must be maintained for the purpose of protecting the integrity, efficiency or effectiveness of any ongoing work of the staff or of an individual legislator or a legislative committee.

(b) As soon as practicable before a legislative employee leaves service to the legislature, the LSO director shall request that the employee make recommendations as to which files or records should be retained or discarded.

SECTION 7. Violations; penalties.

(1) Suspected violations of the policies under this resolution should be reported to the [committee] of the House or the [committee] of the Senate when the suspected violation involves a legislator or to an LSO director when the suspected violation involves the legislative staff of the LSO.

(2) If a suspected violation of the policies under this resolution could adversely affect the safety of legislative computer equipment, communications devices, or networks, the chair of the [committee] of the House or the chair of the [committee] of the Senate shall immediately notify the clerk of the

House or the secretary of the Senate, who shall take appropriate action to protect the equipment or network or both. If a suspected violation involves a legislator, the clerk of the House or the secretary of the Senate may examine only relevant information relating to the suspected violation.

- (3) If a violation of the policies under this resolution or of state or federal law is discovered, any of the following may occur:
 - (a) If the violation is by a legislator, appropriate disciplinary action, including temporarily suspending, blocking or restricting access to legislative technology equipment or secure network, by the clerk of the House or the secretary of the Senate.
 - (b) If the violation involves legislative staff, the LSO director will initiate an investigation and take all reasonable action necessary, including termination, to address the violation. If, in the course of the investigation, the director has reason to believe that a legislator has been involved in the violation, the director shall report the violation to the [committee] of the House or [committee] of the Senate.
 - (c) If the violation involves illegal activity, the clerk of the House, the secretary of the Senate or the LSO director shall notify appropriate law enforcement.
- (4) An authorized user has no right to privacy from the [committee] of the House, the [committee] of the Senate, or an LSO director as it relates to his or her use of the legislative computer equipment, communications devices or networks to which the legislature, its members, staff or contractors have access.

SECTION 8. Use of member- or staff-owned devices.

- (1) The [committee] of the House, the [committee] of the Senate, and each LSO director may establish procedures for allowing access by legislators or legislative staff to legislative computer equipment, communications devices or networks to which the legislature, its members, staff or contractors have access through personally owned computers or devices. Such access must be consistent with existing rules of the House and the Senate, policies of the LSOs and rules of the committees regarding confidentiality and access to files.
- (2) The use of a personal device to receive or transmit information to legislative computer equipment, communications devices, or networks to which the legislature, its members, staff or contractors have access may subject the entire contents of the personal devices to public records requests under the Public Records Act or to subpoena by a court of competent jurisdiction.
- (3) For purposes of this section “access” means any receipt or transmission of files, records or other information kept on a legislator’s or legislative staff’s personal computer or device that is sent to legislative computer equipment, communications devices or networks to which the legislature, its members, staff or contractors have access, or information maintained on legislative computers or servers that is sent to the legislator’s or legislative staff’s personal computer or device.

SECTION 9. Policy Revisions.

- (1) No policy can specify every scenario that may occur, especially in the ever-changing area of technology. Therefore, the [committee] of the House, the [committee] of the Senate, and the LSO

directors may regularly review current policies and adopt revisions that are consistent with this resolution.

SECTION 10. Effective date.

(1) This resolution shall take effect and be in force 90 days after its adoption.

Waiver of Confidentiality

The records maintained by the [name of agency] that relate to drafting or research requests made by legislators and legislative staff are confidential. [Insert an explanation of the confidentiality of records maintained by your office and the rationale for the confidentiality, which could include an explanation of your office's position on any or all of the following principles: (1) legislative privilege; (2) attorney-client privilege; (3) work product privilege; or (4) confidentiality conferred by statute, rule or policy.]

The [name of agency] will preserve the confidentiality of drafting or research requests made by you, or other communication with you or prepared on your behalf, along with the work product created by this agency in response to such requests. This form allows you to waive the confidentiality of drafting or research requests and, thus, allows the [name of agency] to disclose the contents of such requests and any work product created in response to such requests. If you want to waive confidentiality for requests made by you or your staff, fill out this form and return it to:

[Name of Agency]

[Address of Agency]

[Email of Agency]

- I waive the confidentiality of all drafting and research requests submitted by me to the [name of agency]. The [name of agency] may release the contents of such requests and any work product created by the [name of agency] in response to such requests.

- I waive the confidentiality of all drafting and research requests submitted by me to the [name of agency], except all of the following requests:

The [name of agency] may release the contents of all drafting and research requests submitted by me, and any work product created by the [name of agency] in response to such requests, other than the requests I identified above.

- I waive the confidentiality of only the following request(s):

The [name of agency] may release the contents of the request(s) identified above. I do not waive confidentiality for any other request(s) not identified above.

- I do not waive the confidentiality of any drafting or research requests submitted by me to the [name of agency]. However, if the [name of agency] receives a request for the contents of a drafting or research request submitted by me, or for any work product created by the [name of agency] in response to such request, the [name of agency] should contact me to seek a waiver of confidentiality for that request. The [name of agency] should contact me at:

- I do not waive the confidentiality of any drafting or research requests submitted by me to the [name of agency]. The [name of agency] may not release the contents of such requests or any work product created by the [name of agency] in response to such requests.

Printed Name

Signature

Date

Takeaways

While the materials in this toolkit provide a foundation for understanding legislative privilege, they are not, nor are they intended to be, exhaustive. The case law provided in the toolkit is largely representative of the various treatments of legislative privilege across state and federal jurisdictions, but everything depends upon the facts of your particular case and the specific rules that apply in your court's jurisdiction. Are you in state or federal court? Are you entitled to assert an absolute privilege or only a qualified one? Does use immunity or testimonial privilege, or both, apply in your situation? Does your case involve redistricting? Have the courts in your jurisdiction even addressed the notion of legislative privilege? Are legislative aides or nonpartisan staff covered by the legislative privilege in your jurisdiction? What rules apply with respect to waiver?

The discussion of the scope of legislative privilege and the FAQs in this toolkit will set you on the road to addressing such questions in a meaningful way. However, for each particular facet of the law of legislative privilege, you must know the rule of decision, if any, that applies in your jurisdiction.

Finally, the provided sample forms will help you think about and manage the relationship between your legislative service agency and legislators. If you decide to use one or more of the forms, you will have to tailor them to the particular needs of your state.

These materials are intended to provide you with information and tools to help you defend the institution of the legislature in your state. A well-functioning state legislature, free from undue interference by the other branches of government, is essential to the success of the American form of government. It is likewise essential to understand legislative privilege and be equipped to assert and argue the privilege when—not if—your state's legislature ends up in court. Our hope is that this toolkit will help you in that endeavor.

Legal Hold Policy

Sec. 1. Introduction and applicability. (a) This policy describes the state name and legislative office process for preserving physical and electronic documents, records, and metadata in the legislative office's possession, custody, or control related to civil litigation that actually or potentially involves the legislative office.

(b) Relevant information must be preserved until the actual or potential threat of litigation has been resolved. Failure to preserve relevant information under this legal hold policy could adversely affect the interests of the legislative office or the legislative office's clients and could subject individual legislative office employees, the legislative office, and the legislative office's clients to sanctions and penalties. Compliance with this policy by each legislative office employee to whom this policy applies is essential.

Sec. 2. Definitions. In this policy:

(1) "Custodian" means a legislative office employee who generates or maintains relevant information and is charged with preservation of the information.

(2) "Relevant information" means any physical or electronic document, record, or metadata in the legislative office's possession, custody, or control that is related to civil litigation that actually or potentially involves the legislative office.

Sec. 3. Initiation. (a) The legislative office management will analyze all information reasonably available to the legislative office in order to determine if litigation against or otherwise involving the legislative office is reasonably foreseeable.

(b) Relevant factors for determining whether litigation is reasonably foreseeable include the existence of formal legal process or a demand letter, the specificity and clarity of a claim or threat, previous experience with an entity or individual making a claim, media coverage of an issue, and the existence of an incident involving serious injuries or fatalities.

(c) Upon determining that litigation against or otherwise involving the legislative office has been initiated or is reasonably foreseeable, the legislative office management will initiate a legal hold.

(d) The legislative office management may also initiate a legal hold:

(1) at the direction of the office of the attorney general; or

(2) if the legislative office maintains records relating to a legislative office service provided to a client and:

(A) the legislative office management is aware that litigation relating to the service has commenced; or

(B) the client requests a legal hold.

(e) The legislative office management will re-evaluate any determination regarding the initiation of a legal hold as new information becomes available.

(f) Upon a determination by the legislative office management that a legal hold is necessary, the general counsel will document the justification for the legal hold.

Sec. 4. Scope. (a) In cooperation with each applicable division director, the general counsel will determine the scope of the legal hold. The goal of any legal hold is to balance the need to preserve relevant information with the need to continue routine business operations.

(b) Factors to consider in determining what information constitutes relevant information include the issues in dispute, the accessibility of the information, the probative value of the information, and the burdens involved with preservation.

(c) In cooperation with each applicable division director, the general counsel will identify how relevant information is created, the format and general location of the information, and each custodian.

(d) If appropriate, the general counsel will consult with the legislative office to determine the best method for collecting and preserving relevant information that is in an electronic format and to identify preferred methods for maintaining relevant information in its native format.

Sec. 5. Preservation. (a) The general counsel will provide written notice of a legal hold to each custodian with instructions describing relevant information and the process for preserving the information. If appropriate, legislative office employees may provide technical assistance.

(b) Upon receipt of a notice of the legal hold, a custodian will provide written acknowledgment of receipt and begin to retain and not alter, destroy, or otherwise dispose of relevant information, regardless of format or physical location, for as long as the legal hold is in effect. Where practical, the custodian will preserve relevant information in its native format to prevent alteration of metadata.

(c) The general counsel will provide guidance regarding the definition of relevant information and the proper manner of preserving the information.

(d) A custodian will notify the general counsel and the custodian's division director if the custodian identifies relevant information that is not being preserved.

(e) The general counsel will provide regular reminders to each custodian regarding the custodian's duties under the legal hold, and each custodian will acknowledge receipt of the reminder in writing.

Sec. 6. Adjustment and termination. (a) The general counsel will track the status of the legal hold and coordinate with any litigation counsel retained by or representing the legislative office.

(b) Each division director will inform the general counsel regarding any staffing change that would affect the legal hold, such as a change in job responsibility or employment status. The general counsel will work with the applicable division director to ensure that any staffing change does not result in a loss of relevant information.

(c) The general counsel will continually re-evaluate the necessity of continuing the legal hold and whether any legislative office employee should be designated as a custodian or discharged from custodian status.

(d) As appropriate, the general counsel will notify the legislative office, the applicable legislative office management, and any affected custodian of any recommended adjustment to the legal hold.

(e) The legislative office management will adjust or terminate a legal hold as appropriate.

(f) The general counsel will document the justification for any substantive change made to the legal hold.

(g) Information preserved subject to this policy will be disposed of in accordance with state law, as applicable.

DRAFT POLICY