

# Public or Privileged? Preserving Legislative Records: Outline

Tuesday, Aug. 15 | 2:45-3:45 p.m.

**Kristen Fraser, senior counsel, House Program Research Office, Washington** — The legal issue at hand.

1. Strode's Case; [Privilege of Parliament Act](#) (also known as Strode's Act). Separation of powers: codified into English Bill of Rights, 1689; reflected in the speech or debate clauses found in 43 state constitutions.
2. Powers of state legislatures over own documents may be codified into their statutes, which:
  - a. May contain privileges against involuntary disclosure (under records laws or discovery) of legislative internal records.
  - b. May provide for legislative control of archiving or retention, or may leave legislative records in a gray area or subject to executive control or influence.
3. In Washington, the [Associated Press v. Wash. State Legislature 194 Wn.2d 915](#) decision made legislators' records "public" and fully subject to the statutory disclosure duty. But in [Freedom Foundation v. Gregoire, 178 Wn.3d 686 \(2013\)](#), the state Supreme Court found an executive communications privilege for the governor that operated as a constitutional limitation on the public records disclosure statutes. Washington is currently in litigation over whether the state constitution's freedom of debate clause operates as a similar restriction.
4. General public records retention law [chapter 40.14 RCW](#) and legislative records under [RCW 40.14.100](#) et seq. Washington public records disclosure statutes are codified in a separate chapter, [chapter 42.56 RCW](#), and compliance with the records retention laws in ch. 40.14 will promote compliance with the disclosure obligations in ch. 42.56.

**Jon Heining, General Counsel, Texas legislative Council** — Practical Considerations

1. The potentially faulty premise of archiving the legislature.
2. Texas' statutory waiver of legislative immunity from the archival statute.
  - i. Bad incentives
  - ii. Poor service
3. Reclaimed in 2021:
  - i. Sunset bill
  - ii. Legislative reform bill
4. Considerations:
  - i. Am I complying with the law?

- ii. Do I REALLY need to keep it?
- iii. How long?
- iv. Records maintained appropriately?
  - Safe?
  - Clean?
  - Easily accessible?
  - Tracked?
  - Technology changes?
  - Can we simplify?
- v. What incentives are created?
- vi. Training
- vii. Regular dispositions
- viii. Archivist must:
  - Collaborate in establishing disposition schedule
  - Provide instructions
- ix. Be flexible and thoughtful

**Jimmy Entrekin, general counsel, Alabama Legislative Services Agency** — A snapshot of Alabama's legislative privilege and retention policies.

1. The Alabama Legislature has a healthy and robust legislative privilege policy codified into state law.
  - a. [Ala. Code Section 29-6-7.1\(c\)](#): "A communication regarding legislation, potential legislation, the legislative process, or legislative activity between legislative staff and a client or a client's agent is privileged and confidential."
  - b. [Ala. Code Section 29-6-7.1\(d\)](#): "A legislative staff member may not disclose the content of a communication or the fact that a communication occurred unless the privilege under subsection (c) is waived expressly by the client to whom the communication was made or, with respect to a communication made to a client's agent, the client on whose behalf the communication occurred."
  - c. **All legislative staff communications are covered, even those of non-lawyers.**
2. Alabama's legislative privilege statute is especially helpful given the broad and wide-ranging scope of Alabama's public records laws.
  - a. Public records definition in the preservation context:

- i. [Ala. Code Section 41-13-1](#): “[A]ll written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business ....”
  - b. Public writings to be disclosed upon demand to the public:
    - i. [Code Section 36-12-40](#): “Every citizen has a right to inspect and take a copy of **any** public writing of this state, except as otherwise expressly provided by statute.”
      - 1. Exceptions include: 1) information related to children, schools and libraries; 2) security plans, protocols and related information; and 3) a general exception for the safety and best interests of the public.
    - ii. [Code Section 36-12-41](#): “Every public officer having the custody of a public writing ... is bound to give him, on demand, a certified copy of it ....”
    - iii. **No definition of a public writing is provided.**
  - c. The Alabama Supreme Court has stepped in to provide parameters and guidelines as to what should be considered a “public writing.”
    - i. [Stone v. Consolidated Publishing Company, 404 So. 2d 678 \(Ala. 1981\)](#): “[S]uch a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by the citizens.”
    - ii. This decision adopts a balancing test between the citizens’ interests in access to records versus the public’s interest in government carried on efficiently and without undue interference.
3. Retention/Preservation Policies for Alabama Legislative Records:
- a. [Code Section 41-13-21](#): “No state officer or agency head shall cause **any** state record to be destroyed or otherwise disposed of without first obtaining approval of the State Records Commission.”
  - b. [Code Section 41-13-5](#): “Any public records ... which have no significance, importance or value may, upon the advice and recommendation of the custodian thereof and upon the further advice, recommendation **and consent** of the State or Local Government Records Commission, be destroyed or otherwise disposed of.”
  - c. LSA currently submits all project files that are older than four years to the Alabama Department of Archives and History. These files include bill drafts, memos, agency-produced documents and other items that are both public and privileged.

- d. LSA is currently updating and modernizing agency retention policies in accordance with current standards and practices.
- e. Key areas to address and modernize/standardize:
  - i. Should privileged legislative records ever be archived? If so, under what circumstances?
  - ii. If not archived, how long should the agency retain the privileged records?
  - iii. Who should oversee the determination of legislative records as public or privileged?