



## Confidentiality Policies (Attorney-Client Privilege)

A request for information on confidentiality policies was posted to the electronic discussion group of the Legal Services Staff Section in April 2005. Where possible, I have included statutory information we have found since that date.

### Alabama

One trial court has applied the Public Records Law to the following legislative officers: *Clerk of the State House and Secretary of the State Senate*: Remote access telephone assignment records. *Birmingham News Co. v. Swift*, CV 88-1390 G (Cir. Ct. of Montgomery County, Ala., Aug. 31, 1988).

#### Other statutory exclusions.

##### 15. Government

a. *Code of Ethics*: A complaint filed pursuant to this chapter and all other information and documents. Alabama Code §§ 36-25-1(7), -4(b) (Supp. 1996) (confidential records).

b. *Governor*: All reports, advice, counsel, or recommendations of the governor's councillor. Alabama Code § 36-13-13(b) (1991) (confidential records).

c. *Legislative reference service*: All requests for assistance and the contents thereof, any communications regarding such requests, any materials related to such requests, and any work product related to or arising from such request, *until* waived in whole or in part. Alabama Code § 29-7-6(c)(1) (1998) (confidential records); *see also Bassett v. Newton*, 658 So. 2d 398 (Ala. 1995) (when constitutionally required notice of intent to pass general law applying to only one municipality was given, information concerning the bill and its contents were released and the statutory confidentiality of a legislator's request for assistance from LRS in drafting the bill was waived) (§ 29-7-6 was revised after this decision was released to limit the holding of the case.).

### Alabama Statute

#### Section 29-7-6

##### **Powers and duties; requests for assistance; state agencies and departments to submit reports.**

(a) The Director of the Legislative Reference Service shall have all of the following powers and duties:

(1) To respond to questions concerning the organization and administration of state government or the operation of constitutional or statutory law.

(2) To render assistance in the drafting of bills and amendments to bills.

(3) To make studies and reports on problems of state and local government in Alabama, either upon request or on his or her own initiative.

(4) To conduct a continuous analysis of the scope, effect, and methods of federal, state, and local government operations in Alabama and make those recommendations to the Legislative Council as he or she determines to be appropriate.

(5) To prepare, when directed by the Legislature, a compilation or code of the statutes of Alabama.

(6) To act as Code Commissioner in determining the content of the code and any supplements thereto and to prepare an annual codification bill to adopt changes to the code enacted at prior sessions of the Legislature.

(7) To enter into a printing contract on behalf of the State of Alabama, when approved and directed by the Legislative Council, to publish the official code of the statutes of Alabama.

(8) To perform any other tasks related to service to the Legislature of Alabama as may be required by the Legislative Council.

(b) Requests for assistance under subdivisions (1) and (3) of subsection (a) shall be prepared only for a member of the Legislature or the Lieutenant Governor, or a person authorized by a member of the Legislature or the Lieutenant Governor. Requests for assistance under subdivision (2) of subsection (a) shall be prepared only for a member of the Legislature, the Lieutenant Governor, or the Governor, or a person authorized by a member of the Legislature, the Lieutenant Governor, or the Governor. A request for assistance made by a member of the Legislative Council or a person authorized by a member of the Legislative Council shall be given priority over any other request. A request for assistance made by a member of the Legislature or a person authorized by a member of the Legislature shall be given priority over any other requests other than by members of the Legislative Council. The director may respond to other requests for assistance, including, but not limited to, requests from other state governments, as he or she determines to be in the best interests of the state.

(c)(1) Communications concerning a request for assistance between the director and each officer and employee of the Legislative Reference Service and an individual authorized by this section to make a request for assistance shall be privileged and confidential. When responding to a request for assistance, the director and each officer and employee of the Legislative Reference Service shall maintain this privilege. All requests for assistance and the contents thereof, including, but not limited to, the fact a request was made, any materials related to the request, and any work product related to or arising from the request, shall be confidential and privileged until this privilege is waived. The privilege is waived when the Legislative Reference Service receives instructions to release the material from the member of the Legislature in whose name the request for assistance was made, or the Lieutenant Governor for a request for assistance made in the name of the Lieutenant Governor, or the Governor for a request for assistance made in the name of the Governor.

(2) The introduction of a bill prepared by the Legislative Reference Service is a waiver of the privilege imposed by this subsection only with respect to the contents of the bill.

(3) The advertising of a local bill by synopsis or in a form less than in its entirety is not, in and of itself, a waiver of the privilege for the purposes of this subsection.

(d) In order that the purposes of this chapter shall be best served, each department and agency of State of Alabama government shall furnish to the Legislative Reference Service copies of all monthly, quarterly, annual, biennial, quadrennial, and other regular reports which it is required by law to prepare for other agents or officials of the state government and copies of all printed publications that it issues. Each department or agency of State of Alabama government shall comply with requests for supplementary reports made by the Legislative Reference Service and approved by the Legislative Council. Each department and agency of State of Alabama government shall make its internal records available to the Legislative Reference Service upon request.

***(Acts 1945, No. 152, p. 190, §2; Acts 1949, No. 427, p. 609; Acts 1993, No. 93-618, p. 1020, §1; Acts 1995, No. 95-567, p. 1185, §1.)***

## **Alaska (manual)**

### **NEUTRALITY AND CONFIDENTIALITY**

In the performance of its duties, the division of legal and research services assists all members of the legislature in a neutral capacity. As required by AS 24.20.050, "members of the professional staff shall maintain the integrity of the (legislative) council's functions and services . . . by refraining from joining or supporting any partisan or political organization, faction, or activity that would tend to undermine the essential nonpartisan nature of their functions and services." In addition to this nonpartisanship in the public arena, the staff is neutral with regard to the policies involved in legislative work requests. A work request is processed without regard to the political leanings of its requester.

As with neutrality, confidentiality in relation to work requests is required by statute. (See AS 24.20.100) The division staff treats all work requests as confidential unless the legislator requesting the work directs or permits disclosure to others.

## **Arkansas (manual)**

### **1.1 BUREAU DRAFTING OF GENERAL LEGISLATION.**

#### **(a) NONPARTISAN SERVICE.**

The legal staff of the Bureau of Legislative Research prepares legislation for members of both the House of Representatives and the Senate. The Bureau serves the members of the General Assembly on a nonpartisan basis. Bureau attorneys provide advice to the legislators but it is not their role to be an advocate for or against an idea or a bill.

#### **(b) CONFIDENTIALITY.**

Members of the General Assembly have a right to confidentiality in their working papers and correspondence. The drafting staff must protect the member's right to confidentiality. The drafting staff must not release a draft without permission of the lead sponsor or, if a sponsor's name has not been added to the bill, the member who made the draft request. The drafter assigned to the legislation should avoid consulting persons outside the Bureau unless the member has authorized the staff attorney to do so.

## **California (manual)**

The law provides that "[n]either the Legislative Counsel nor any employee of the bureau shall oppose or urge legislation." This requirement of nonpartisanship, together with the confidentiality assured by the attorney-client relationship, enable the Office of Legislative Counsel to provide legal services, including the preparation of legislation, to each of the 120 Members of the Legislature and the Governor without regard to partisan political considerations.

## **California Statute (excerpts)**

6275. It is the intent of the Legislature to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article. The statutes listed in this article may operate to exempt certain records, or portions thereof, from disclosure. The statutes listed and described may not be inclusive of all exemptions. The listing of a statute in this article does not itself create an exemption. Requesters of public records and public agencies are cautioned to review the applicable statute to determine the extent to which the statute, in light of the circumstances surrounding the request, exempts public records from disclosure.

6276. Records or information not required to be disclosed pursuant to subdivision (k) of Section 6254 may include, but shall not be limited to, records or information identified in statutes listed in this article.

6276.28. Legislative Counsel records, subdivision (m), Section 6254, **Government Code**.

6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

(d) Contained in or related to any of the following:

(1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies.

(2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1).

(4) Information received in confidence by any state agency referred to in paragraph (1).

(l) Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary, provided that public records shall not be transferred to the custody of the Governor's Legal Affairs Secretary to evade the disclosure provisions of this chapter.

(m) In the custody of or maintained by the Legislative Counsel, except those records in the public database maintained by the Legislative Counsel that are described in Section 10248.

**Colorado - [http://www.state.co.us/gov\\_dir/leg\\_dir/olls/HTML/attorney\\_client\\_relationship.htm](http://www.state.co.us/gov_dir/leg_dir/olls/HTML/attorney_client_relationship.htm)**

We have a statute requiring our staff to maintain confidentiality of bills and amendments.

Bill requests and amendments are confidential prior to their introduction and can not be disclosed without the member's consent. This section is 2-3-505, C.R.S.

**2-3-505. Requests for drafting bills and amendments - confidential nature thereof - lobbying for bills.**

Statute text

(1) All requests made to the office for the drafting of bills or amendments thereto shall be submitted, either in writing or orally, by the legislator or by the governor or the governor's representative making the request, with a general statement respecting the policies and purposes which the person making the request desires the bill or amendment to accomplish. The office shall draft each bill or amendment to conform to the purposes so stated or to supplementary instructions of the person making the original request.

(2) (a) Prior to the introduction of a bill or amendment in the general assembly, no employee of the office shall reveal to any person outside the office the contents or nature of such bill or amendment, except with the consent of the person making the request. Nothing in this section shall prohibit the disclosure to the staff of any legislative service agency of such information concerning bills or amendments prior to introduction as is necessary to expedite the preparation of fiscal notes, as provided by the rules of the general assembly, but such staff shall not reveal the contents or nature of such bills or amendments to any other person without the consent of the person making the request.

(b) All documents prepared or assembled in response to a request for a bill or amendment, other than the introduced version of a bill or amendment that was in fact introduced, shall be considered work product, as defined in section 24-72-202 (6.5), C.R.S.

(c) (l) The final version of all documents prepared or assembled by the office for a member of the general assembly but not in response to a request for a bill or amendment and not containing legal analysis or expressing a legal opinion or conclusion shall not be considered work product as defined in section 24-72-202 (6.5), C.R.S. Except as otherwise provided in paragraph (e) of this subsection (2), the final version of such documents shall be a public record. These documents include, but are not limited to:

(A) Comparisons of existing law with the provisions of any bill or amendment, comparisons of any bills or amendments with other bills or amendments, comparisons of different versions of bills or amendments, and comparisons of the laws of this state with laws of other jurisdictions;

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

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

(II) Prior to delivery of the final version of such a document to the member who requested it, no employee of the office shall reveal to any person outside the office the contents or nature of the document, except with the consent of the member making the request.

(d) If a member of the general assembly requests a legal opinion or document from the office that is the same as or substantially similar to a legal opinion or document previously requested by another member, the office may produce an identical or substantially similar legal opinion or document for the second member. The office shall not disclose the identity of any member who made a previous request.

(e) A member may request that the final version of a document that would otherwise become a public record in accordance with paragraph (c) of this subsection (2) remain work product.

(3) No employee of the office shall lobby, personally or in any other manner, directly or indirectly, for or against any pending legislation before the general assembly.

**Source:** L. 68: R&RE, p. 141, § 178. **C.R.S. 1963:** § 63-3-5. **L. 88:** Entire section amended, p. 308, § 11, effective May 23. **L. 96:** Entire section amended, p. 1479, § 2, effective June 1. **L. 97:** (2) amended, p. 1103, § 1, effective August 6.

## Florida

Unless the legislature promulgates a contrary legislative rule, the public records law applies to records made or received in connection with official business by legislators. *See* Op. Att'y Gen. Fla. 75-282 (1975) (in the absence of a House or Senate rule to the contrary, Chapter 119 applies to legislative records); Op. Att'y Gen. Fla. 72-416 (1972) (the Legislature may provide by rule for the confidentiality of a report of a special master appointed by the Senate to conduct a suspension hearing until such time as the Senate meets to debate the suspension).

In addition, various statutory exemptions apply to legislative records. *See* Fla. Stat. sec. 15.07 (1995) (exempting the journal of the executive session of the Senate from disclosure except upon order of the Senate itself or some court of competent jurisdiction); Fla. Stat. sec. 11.26(1)(2) (1995) (legislative employees forbidden from revealing the contents of any requests for services made by member of legislature).

## FL Statute

### **11.0431 Legislative records; intent of legislation; exemption from public disclosure.--**

(1) It is the policy of the Legislature that every person has the right to inspect and copy records of the Senate and the House of Representatives received in connection with the official business of the Legislature as provided for by the constitution of this state. To that end, public records shall be open to personal inspection and copying at reasonable times except when specific public necessity justifies that public records be exempt from such inspection and copying.

(2) The following public records are exempt from inspection and copying:

(a) Records, or information contained therein, held by the legislative branch of government which, if held by an agency as defined in s. 119.011, or any other unit of government, would be confidential or exempt from the provisions of s. 119.07(1), or otherwise exempt from public disclosure, and records or information of the same type held by the Legislature.

(b) A formal complaint about a member or officer of the Legislature or about a lobbyist and the records relating to the complaint, until the complaint is dismissed, a determination as to probable cause has been made, a determination that there are sufficient grounds for review has been made and no probable cause panel is to be appointed, or the respondent has requested in writing that the President of the Senate or the Speaker of the House of Representatives make public the complaint or other records relating to the complaint, whichever occurs first.

- (c) A legislatively produced draft, and a legislative request for a draft, of a bill, resolution, memorial, or legislative rule, and an amendment thereto, which is not provided to any person other than the member or members who requested the draft, an employee of the Legislature, a member of the Legislature who is a supervisor of the legislative employee, a contract employee or consultant retained by the Legislature, or an officer of the Legislature.
- (d) A draft of a bill analysis or fiscal note until the bill analysis or fiscal note is provided to a person other than an employee of the Legislature, a contract employee or consultant retained by the Legislature, or an officer of the Legislature.
- (e) A draft, and a request for a draft, of a reapportionment plan or redistricting plan and an amendment thereto. Any supporting documents associated with such plan or amendment until a bill implementing the plan, or the amendment, is filed.
- (f) Records prepared for or used in executive sessions of the Senate until 10 years after the date on which the executive session was held.
- (g) Portions of records of former legislative investigating committees whose records are sealed or confidential as of June 30, 1993, which may reveal the identity of any witness, any person who was a subject of the inquiry, or any person referred to in testimony, documents, or evidence retained in the committee's records; however, this exemption does not apply to a member of the committee, its staff, or any public official who was not a subject of the inquiry.
- (h) Requests by members for an advisory opinion concerning the application of the rules of either house pertaining to ethics, unless the member requesting the opinion authorizes in writing the release of such information. All advisory opinions shall be open to inspection except that the identity of the member shall not be disclosed in the opinion unless the member requesting the opinion authorizes in writing the release of such information.
- (i) Portions of correspondence held by the legislative branch which, if disclosed, would reveal: information otherwise exempt from disclosure by law; an individual's medical treatment, history, or condition; the identity or location of an individual if there is a substantial likelihood that releasing such information would jeopardize the health or safety of that individual; or information regarding physical abuse, child abuse, spouse abuse, or abuse of the elderly.
- (3) Any record created prior to July 1, 1993, which was not available to the public from the house, commission, committee, or office of the legislative branch that created the record, is exempt from inspection and copying until July 1, 1993. Prior to July 1, 1993, the presiding officer of each house shall determine which records held by that house should remain exempt from inspection and copying. The presiding officers of both houses shall jointly determine which records held by joint committees should remain exempt from inspection and copying. No later than July 1, 1993, the presiding officers shall publish a list of records that remain exempt from inspection and copying.
- (4) For purposes of this section, "public record" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by the legislative branch.
- (5) Nothing herein shall be construed to limit the authority of each house of the Legislature to adopt rules pursuant to Art. I, s. 24 of the State Constitution.

**History.**--s. 1, ch. 93-405.

**11.26 Legislative employees; employment restrictions.**--No employee of the Legislature shall:

- (1) Subject to the provisions of s. [11.0431](#) reveal to any person outside the area of the employee's direct responsibility the contents or nature of any request for services made by any member of the Legislature, except with the consent of the member making such request.
- (2) Give legal advice on any subject to any person, firm, or corporation, except members or staff of the Legislature.

(3) No full-time legislative employee shall be otherwise employed, except with the written permission of the presiding officer of the house by which he or she is employed. Employees of joint committees must have the permission of the presiding officers of both houses.

**History.**--s. 11, ch. 25369, 1949; s. 19, ch. 68-35; s. 26, ch. 69-52; s. 1, ch. 75-208; s. 2, ch. 93-405; s. 15, ch. 95-147; s. 19, ch. 96-318.

## **Georgia**

We don't have a written policy on this in Georgia, but we treat all communications between the requesting member and the staff person as confidential. Even the fact that a bill or amendment has been drafted cannot be released to anyone, even leadership, if the sponsor has not "dropped" (made public) the bill.

### **Georgia Statute** (excerpts)

50-18-72.

(a) Public disclosure shall not be required for records that are:

(8) Related to the provision of staff services to individual members of the General Assembly by the Legislative and Congressional Reapportionment Office, the Senate Research Office, or the House Research Office, provided that this exception shall not have any application with respect to records related to the provision of staff services to any committee or subcommittee or to any records which are or have been previously publicly disclosed by or pursuant to the direction of an individual member of the General Assembly.

### **Hawaii Statutes** (excerpts)

**[§23G-4] Prohibitions.** Neither the director nor any employee of the bureau shall reveal to any person outside of the bureau the contents of matters of any request or statement for services except upon request of the person making the request or statement. [L 1972, c 171, pt of §2]

## **Idaho Code**

### **Idaho Statutes**

9-340F. RECORDS EXEMPT FROM DISCLOSURE -- DRAFT LEGISLATION AND SUPPORTING MATERIALS, TAX COMMISSION, PETROLEUM CLEAN WATER TRUST FUND. The following records are exempt from disclosure:

(1) Records consisting of draft legislation and documents specifically related to such draft legislation or research requests submitted to the legislative services office by a member of the Idaho legislature for the purpose of placing such draft legislation into a form suitable for introduction as official proposed legislation of the legislature of the state of Idaho, unless the individual legislator having submitted or requested such records or research agrees to waive the provisions of confidentiality provided by this subsection.

(2) All papers, physical and electronic records and correspondence or other supporting materials comprising the work papers in the possession of the legislative services office or the director of legislative performance evaluations prior to release of the related final audit and all other records or materials in the possession of the legislative services office or the director of legislative performance evaluations that would otherwise be confidential or exempt from disclosure.

(3) Records consisting of draft congressional and legislative redistricting plans and documents specifically related to such draft redistricting plans or research requests submitted to the commission staff by a member of the commission for reapportionment for the purpose of placing such draft redistricting plan into form suitable for presentation to the full membership of the commission, unless the individual commission member having submitted or requested such plans or research agrees to waive the provisions of confidentiality provided by this subsection.

(4) Records that identify the method by which the Idaho state tax commission selects tax returns for audit review.

(5) Underwriting and claims records of the Idaho petroleum clean water trust fund obtained pursuant to section 41-4905, 41-4909, 41-4911A, 41-4912 or 41-4912A, Idaho Code. Provided however, that this subsection shall not prevent the Idaho petroleum clean water trust fund's submittal to the Idaho department of environmental quality, or other regulatory agencies

of information necessary to satisfy an insured's corrective action requirement under applicable federal or state standards in the event of a release into the environment from a petroleum storage tank; and provided further that nothing in this subsection shall prevent the Idaho petroleum clean water trust fund from providing auditing, reporting, or actuarial information as otherwise required of it pursuant to section 41-4919, 41-4925A, 41-4928, 41-4930, 41-4932, 41-4937 or 41-4938, Idaho Code.

## Illinois Statute (excerpts)

(5 ILCS 140/7) (from Ch. 116, par. 207)

(Text of Section from P.A. 94-280)

Sec. 7. Exemptions.

(1) The following shall be exempt from inspection and copying:

(f) Preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body. The exemption provided in this paragraph (f) extends to all those records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents.

## Indiana

Unless covered by a specific exemption, all records of legislative bodies are subject to the Act. Ind. Code § 5-14-3-2. However, in a bizarre decision, the Indiana Supreme Court has held that separation of powers considerations prevent the courts from enforcing the access statutes against the Indiana General Assembly. *State ex rel. Masariu v. Marion Superior Court No.1*, 621 N.E.2d 1097 (Ind. 1993).

[Exemptions to the open records statute—see Ind. Code §§ 5-14-3-4(b)(1)-(18)]

(xiii) The work product of the Legislative Services Agency under personnel rules approved by the Legislative Council.

(xiv) The work product of individual members and the partisan staffs of the General Assembly.

## Indiana Statute (excerpts)

### IC 5-14-3-4

#### Records excepted from disclosure requirements; names and addresses; time limitations; destruction of records

Sec. 4. (a) The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

(1) Those declared confidential by state statute.

(2) Those declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute.

(3) Those required to be kept confidential by federal law.

(b) Except as otherwise provided by subsection (a), the following public records shall be excepted from section 3 of this chapter at the discretion of a public agency:

(2) The work product of an attorney representing, pursuant to state employment or an appointment by a public agency:

(A) a public agency;

(B) the state; or

(C) an individual.

(12) Records specifically prepared for discussion or developed during discussion in an executive session under IC 5-14-1.5-6.1. However, this subdivision does not apply to that information required to be available for inspection and copying under subdivision (8).

(13) The work product of the legislative services agency under personnel rules approved by the legislative council.

(14) The work product of individual members and the partisan staffs of the general assembly.

*As added by P.L.19-1983, SEC.6. Amended by P.L.57-1983, SEC.1; P.L.34-1984, SEC.2; P.L.54-1985, SEC.3; P.L.50-1986, SEC.2; P.L.20-1988, SEC.12; P.L.11-1990, SEC.111; P.L.1-1991, SEC.38; P.L.10-1991, SEC.9; P.L.50-1991, SEC.1; P.L.49-1991, SEC.1; P.L.1-1992, SEC.11; P.L.2-1993, SEC.50; P.L.58-1993, SEC.4; P.L.190-1999, SEC.2; P.L.37-2000, SEC.2; P.L.271-2001, SEC.1; P.L.201-2001, SEC.1; P.L.1-2002, SEC.17; P.L.173-2003, SEC.5; P.L.261-2003, SEC.7; P.L.208-2003, SEC.1; P.L.200-2003, SEC.3; P.L.210-2005, SEC.1; P.L.1-2006, SEC.102; P.L.101-2006, SEC.4; P.L.2-2007, SEC.101; P.L.172-2007, SEC.1; P.L.179-2007, SEC.9; P.L.3-2008, SEC.29; P.L.51-2008, SEC.2; P.L.98-2008, SEC.4; P.L.120-2008, SEC.2; P.L.94-2010, SEC.1; P.L.170-2011, SEC.1.*

## Iowa

Iowa has an extensive confidentiality policy that begins at the bill request stage. A bill can be requested "confidentially". That means that neither the name of the legislator nor the title of the bill request is made public until/unless the legislator decides to introduce it (only a bill number appears on the public print-out of all requested bills). (Bills can also be requested on a non-confidential basis.) Bills requested on a confidential basis are not archived in the usual sense, if they were never introduced. They will be destroyed after a certain number of years (possibly five years). Whether or not a bill is requested on a confidential basis, communications between the drafter and the legislator (or other requestor, since departments and the governor can request bills, too) are confidential. All contents of the bill file are confidential, unless the requestor approves the release of those documents. Even if someone calls, and knows that a certain bill is imminent, the bill cannot be discussed, unless authorized to do so by the requestor. Staff cannot confirm or deny the existence of a bill or amendment request. Therefore, staff cannot reveal the nature of bill or amendment draft to legislative leadership and cannot tell a floor manager of a bill how many amendments have been requested.

Some legal battles have occurred on what can/must be released to the public. There was a lawsuit a couple of years ago seeking the phone records of legislators. The court eventually declined to compel production, in part because it would risk violating confidential communications between legislators and counsel. Basically, unless a document is released according to the policy referenced above, or is generally a document produced for the public, staff probably wouldn't make it available to the public. Staff does not produce analyses of legislation.

## Kansas

2. Discussion of each exemption.

t. Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed. K.S.A. 45-221(a)(20).

u. Records of a public agency having legislative powers pertaining to proposed legislation. K.S.A. 45-221(a)(21).

v. Records of a public agency having legislative powers, which pertain to research prepared for one or more members of such agency. K.S.A. 45-221(a)(22).

## Kansas Statute

### 45-221 (Excerpts)

#### Chapter 45.--PUBLIC RECORDS, DOCUMENTS AND INFORMATION

#### Article 2.--RECORDS OPEN TO PUBLIC

**45-221. Certain records not required to be open; separation of open and closed information required; statistics and records over 70 years old open. [See Revisor's Note]** (a) Except to the extent disclosure is otherwise required by law, a public agency shall not be required to disclose:

(1) Records the disclosure of which is specifically prohibited or restricted by federal law, state statute or rule of the Kansas supreme court or the disclosure of which is prohibited or restricted pursuant to specific authorization of federal law, state statute or rule of the Kansas supreme court to restrict or prohibit disclosure.

(2) Records which are privileged under the rules of evidence, unless the holder of the privilege consents to the disclosure.

(3) Medical, psychiatric, psychological or alcoholism or drug dependency treatment records which pertain to identifiable patients.

(4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of public agencies once they are employed as such.

(5) Information which would reveal the identity of any undercover agent or any informant reporting a specific violation of law.

(6) Letters of reference or recommendation pertaining to the character or qualifications of an identifiable individual.

(7) Library, archive and museum materials contributed by private persons, to the extent of any limitations imposed as conditions of the contribution.

(8) Information which would reveal the identity of an individual who lawfully makes a donation to a public agency, if anonymity of the donor is a condition of the donation.

(20) Notes, preliminary drafts, research data in the process of analysis, unfunded grant proposals, memoranda, recommendations or other records in which opinions are expressed or policies or actions are proposed, except that this exemption shall not apply when such records are publicly cited or identified in an open meeting or in an agenda of an open meeting.

(21) Records of a public agency having legislative powers, which records pertain to proposed legislation or amendments to proposed legislation, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(22) Records of a public agency having legislative powers, which records pertain to research prepared for one or more members of such agency, except that this exemption shall not apply when such records are:

(A) Publicly cited or identified in an open meeting or in an agenda of an open meeting; or

(B) distributed to a majority of a quorum of any body which has authority to take action or make recommendations to the public agency with regard to the matters to which such records pertain.

(25) Records which represent and constitute the work product of an attorney.

**History:** L. 1984, ch. 187, § 7; L. 1984, ch. 282, § 4; L. 1986, ch. 193, § 1; L. 1987, ch. 176, § 4; L. 1989, ch. 154, § 1; L. 1991, ch. 149, § 12; L. 1994, ch. 107, § 8; L. 1995, ch. 44, § 1; L. 1995, ch. 257, § 6; L. 1996, ch. 256, § 15; L. 1997, ch. 126, § 44; L. 1997, ch. 181, § 15; L. 2000, ch. 156, § 3; L. 2001, ch. 211, § 13; L. 2002, ch. 178, § 1; L. 2003, ch. 109, § 22; L. 2004, ch. 171, § 30; July 1.

## Kentucky

Confidentiality and nondisclosure by legislative staff is required under several sections of the Kentucky Revised Statutes and thus, written nondisclosure agreements are usually unnecessary. Employees of the Legislative Research Commission and General Assembly are instead educated on the laws pertaining to nondisclosure of legislative communications and informed of the reasons that confidentiality is so necessary in the legislative arena.

The provisions set forth below ensure that any work done on behalf of a member of the General Assembly is kept private until such time as that legislator discloses or authorizes the disclosure of the matter.

**KRS 7.120 (3)** states:

The Commission shall keep in its office an accurate and complete record of all legislation enacted by the General Assembly and shall study same for the purpose of determining the intention and the effect thereof. The Commission shall advise and assist the members of the General Assembly in the preparation and revision of legislation and matters connected therewith.

**When preparing and revising legislation for members of the General Assembly, the Commission shall maintain the confidentiality of each item of legislation which it is requested to prepare, and of the fact that the request has been made, until the member or members of the General Assembly having made the request shall introduce the legislation at a regular or extraordinary session of the General Assembly or shall in writing authorize its publication by the Commission.** The Commission shall, when requested by the General Assembly or either house thereof, report to the General Assembly on bills introduced, calling attention to their effect on existing legislation and to any deficiencies in their form. (Emphasis added).

**KRS 7.117**, enacted in 2004, requires confidentiality of communications surrounding requests for legislative drafting on the part of legislators, staff, and former legislators and staff:

(1) A member of the General Assembly is immune from disclosing in a civil or criminal court proceeding, or in an administrative or legislative proceeding, any communication:

(a) Made by the member of the General Assembly to a member of the staff of the Legislative Research Commission, or to a member of the staff of the General Assembly, with regard to a request for legislative drafting of bills or resolutions or amendments thereto or to any information surrounding such a request; or

(b) Received from a member of the staff of the Legislative Research Commission, or from a member of the staff of the General Assembly, with regard to a request for legislative drafting of bills or resolutions or amendments thereto or to any information surrounding such a request.

(2) A member of the staff of the Legislative Research Commission or a member of the staff of the General Assembly is immune from disclosing in a civil or criminal court proceeding, or in an administrative or legislative proceeding, any communications:

(a) Made to him or her by a member of the General Assembly with regard to a request for legislative drafting of bills or resolutions or amendments thereto or to any information surrounding such a request; or

(b) Made to a member of the General Assembly with regard to a request for legislative drafting of bills or resolutions or amendments thereto or to any information surrounding such a request.

(3) This section shall not apply to a criminal court proceeding in which a member of the General Assembly, a member of the staff of the Legislative Research Commission, or a member of the staff of the General Assembly is the subject of the proceeding, and a subpoena has been issued for the communication or related information.

(4) The communications referenced in this section or documents related thereto are not subject to subpoena, deposition, writ of mandamus, interrogatory, or other disclosure.

(5) Any order or subpoena purporting to compel testimony or the production of evidence which is prohibited under this section shall be unenforceable.

**(6) This section applies to a former legislator or former member of the staff of the Legislative Research Commission or General Assembly only with regard to communications made or received while a member of the General Assembly or member of the staff of the Legislative Research Commission or General Assembly. For purposes of this section, legislative interns, paid or unpaid, are considered to be members of the staff of the Legislative Research Commission or General Assembly, as applicable.** (Emphasis added).

In addition, **KRS 7.119**, also enacted in 2004, states that "Requests for records or other documents in the custody of the Legislative Research Commission or the General Assembly shall be directed to the director of the Legislative Research Commission," and sets forth the procedures for such requests and for appealing a determination by the director.

Of further note, **KRS 6.734**, prohibits intentional disclosure of confidential information by a legislator for his or her own economic benefit::

A legislator shall not intentionally disclose or use confidential information acquired in the course of his official duties, if the primary purpose of the disclosure is to further his own economic interest or that of another person. Information shall be deemed confidential if it is not subject to public disclosure pursuant to the Kentucky Open Records Act, KRS 61.872 to 61.884, at the time of its disclosure or use. Violation of this section is a Class D felony

## Louisiana

Legislative bodies are covered by the statute. La. Rev. Stat. Ann. § 44.1. *See Times-Picayune v. Johnson*, 645 So. 2d 1174 (La. App. 4th Cir. 1994), *writ denied*, 651 So. 2d 260 (La. 1995) (individual legislators are "custodians" of nomination forms for legislative scholarships to private university). In *Copsey v. Baer*, 593 So. 2d 685 (La. App. 1st Cir. 1991), *writ denied*, 594 So. 2d 876 (La. 1992), however, the court held that the legislative work files related to two bills from prior sessions of the Louisiana legislature were privileged from public records disclosure under the legislative privileges and immunities clause of the Louisiana Constitution, Article III, § 8. The court found that the "demand for legislative files in this case calls for an inquiry into the motivations behind the preparation and introduction of legislative instruments into the Louisiana Legislature...." *Id.* at 689.

La. Rev. Stat. Ann. § 44:2.

#### §2. Records involved in legislative investigations

Subject to the proviso set forth in Sub-section B of R.S. 44:3, the provisions of this Chapter shall not apply to any records, writings, accounts, letters, letter books, photographs or copies thereof, in the custody or control of any attorney or counsel whose duties or functions are performed by or under the authority of the legislature and which concern or hold relation to any case, cause, charge or investigation being conducted by or through the legislature, until after the case, cause, charge or investigation has been finally disposed of.

After final disposition, the records, writings, accounts, letters, letter books, photographs or copies thereof, are public records and subject to the provisions of this Chapter.

## Maine

### Maine Manual

#### Section 4. Legislative confidentiality

Under the freedom of access provisions contained in the Maine Revised Statutes (see Title 1, section 402, subsection 3, paragraph C), legislative bill requests and related working papers are exempt from disclosure during the legislative session or sessions in which the papers are prepared or considered or to which the papers are carried over.

The Joint Rules, however, specify that the names of sponsors and the titles of requests for bills and resolves submitted by Legislators or by departments, agencies or commissions become public information on the cloture date. Under the Joint Rules, titles of requests for bills and resolves submitted by the Governor are considered public information upon filing unless the Governor has directed that a particular title remain confidential until the bill or resolve is printed.

The Legislative Council has adopted a comprehensive policy on legislative confidentiality, which provides, among other things, that:

- Legislative staff may prepare or change drafts of bills or amendments only for Legislators or others who have authority to introduce legislation;
- Drafts may be released only to the sponsor and persons that the sponsor has specifically designated; and
- Except for the title and name of the sponsor, any information concerning a bill request is completely confidential, unless a Legislator has expressly waived confidentiality, for all or a part of the request, except that nonpartisan staff may share confidential information with one another when necessary in accordance with their office policies.

### Maine Statutes (excerpts)

#### Title 1: GENERAL PROVISIONS

##### Chapter 13: PUBLIC RECORDS AND PROCEEDINGS (HEADING: PL 1975, c. 758 (rpr))

Subchapter 1: FREEDOM OF ACCESS (HEADING: PL 1975, c. 758 (rpr))

#### §402. Definitions

**3. Public records.** The term "public records" means any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, that is in the possession or custody of an agency or public official of this State or any of its political subdivisions, or is in the possession or custody of an association, the membership of which is composed exclusively of one or more of any of these entities, and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business, except:

A. Records that have been designated confidential by statute; [1975, c. 758 (new).]

B. Records that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding; [1975, c. 758 (new).]

C. Legislative papers and reports until signed and publicly distributed in accordance with legislative rules, and records, working papers, drafts and interoffice and intraoffice memoranda used or maintained by any Legislator, legislative agency or legislative employee to prepare proposed Senate or House papers or reports for consideration by the Legislature or any of its committees during the legislative session or sessions in which the papers or reports are prepared or considered or to which the paper or report is carried over; [1991, c. 773, §2 (amd).]

### Maine – Legislative Rule

JOINT Rule No.: 207

Title: Disclosure and Departments Bills

Text:

1. Legislator and Department Bills. The names of sponsors and the titles of requests for bills and resolves submitted by legislators or by departments, agencies or commissions become public information on the cloture date, and a list of titles and sponsors must be published as soon as practicable after cloture. The names of sponsors and the titles of requests for bills and resolves submitted after cloture are public information when transmitted to the Legislative Council pursuant to Joint Rule 205. The names of sponsors and the titles of requests for bills and resolves submitted for a special session are public information when transmitted to the Legislative Council. 2. Governor Bills. The titles of requests for bills and resolves submitted by the Governor are considered public information upon filing. The Governor may direct that the title of a particular bill or resolve remain confidential until that bill or resolve is printed.

### Maryland

#### Maryland Manual

##### *(H) Confidentiality of Files*

Requests by lobbyists and the general public for copies of adopted amendments should be referred to the information counter in the Legislative Services Building. Copies of proposed floor and committee amendments **not yet offered are to remain confidential** unless the sponsor agrees to their release or until after they have been offered for consideration in committee or on the floor.

#### Maryland Statutes (excerpts)

##### **§ 2-1226. Confidentiality.**

- (a) *In general.*- Except as provided in § 2-1225 of this subtitle and subsection (b) of this section, information that an employee of the Office of **Legislative** Audits obtains during an audit or review:
- (1) is confidential; and
  - (2) may not be disclosed except to another employee of the Office of **Legislative** Audits.
- (b) *Exceptions.*- The **Legislative** Auditor may authorize the disclosure of information obtained during an audit or review only to the following:
- (1) another employee of the Department, with the approval of the Executive Director;
  - (2) federal, State, or local officials, or their auditors, who provide evidence to the **Legislative** Auditor that they are performing investigations, studies, or audits related to that same audit or review and who provide justification for the specific information requested; or
  - (3) the Joint Audit Committee, if necessary to assist the Committee in reviewing a report issued by the **Legislative** Auditor.
- (c) *Identity.*- Except as provided in § 2-1225 of this subtitle, if information that an employee obtains during an audit or review also is confidential under another law, the employee or the **Legislative** Auditor may not include in a report or otherwise use the information in any manner that discloses the identity of any person who is the subject of the confidential information. [An. Code 1957, art. 40, § 61B; 1984, ch. 284, § 1; 1991, ch. 474; 1992, ch. 598; 1997, ch. 635, § 2; ch. 636, § 2; 2004, chs. 241, 242.]

### Massachusetts

The Legislature does not use confidentiality agreements, because our state conflict of interest law makes it illegal for a public employee (specifically including legislative staff) to "knowingly, or with reason to know . . .

(1) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority; [or]

(2) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest." Mass. Gen. Laws c. 268A, sec. 23(c): <http://www.mass.gov/legis/laws/mgl/268a-23.htm>. Violation is punishable by administrative action by the employee's superior (id. sec. 23(e)) or by civil fine of up to \$2,000 by the State Ethics Commission. M.G.L. c. 268B, sec. 4(j)(3).

**House Rule 16A(6)** and **Senate Rule 10** also contain similar prohibitions against misuse of confidential information. Violation of these provisions is also punishable by administrative action, up to and including dismissal.

## **Massachusetts Statutes**

### **Chapter 268A: Section 23 Supplemental provisions; standards of conduct**

Section 23. (a) In addition to the other provisions of this chapter, and in supplement thereto, standards of conduct, as hereinafter set forth, are hereby established for all state, county, and municipal employees.

(b) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(1) accept other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office;

(2) (i) solicit or receive anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, for or because of the officer or employee's official position; or (ii) use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion; or

(c) No current or former officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(1) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority;

(2) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest.

(d) Any activity specifically exempted from any of the prohibitions in any other section of this chapter shall also be exempt from the provisions of this section. The state ethics commission, established by chapter two hundred and sixty-eight B, shall not enforce the provisions of this section with respect to any such exempted activity.

(e) Where a current employee is found to have violated the provisions of this section, appropriate administrative action as is warranted may also be taken by the appropriate constitutional officer, by the head of a state, county or municipal agency. Nothing in this section shall preclude any such constitutional officer or head of such agency from establishing and enforcing additional standards of conduct.

(f) The state ethics commission shall adopt regulations: (i) defining substantial value; provided, however, that substantial value shall not be less than \$50; (ii) establishing exclusions for ceremonial privileges and exemptions; (iii) establishing exclusions for privileges and exemptions given solely because of family or friendship; and (iv) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest.

## Michigan

Legislative documents are subject to the Freedom of Information Act (FOIA). Attorneys maintain attorney-client confidentiality with each of legislative "clients", that is, each member of the Michigan Legislature. Public documents subject to the attorney-client privilege are exempt from FOIA. All of the documents sent to staff by legislators when requesting the drafting of legislation and all of the documents staff produces for legislators are confidential. Once a legislator introduces a bill, amendment, or substitute bill, it becomes public information. Staff does not share client information or work product with anyone outside a legislator's office without the legislator's permission. Staff is also required to maintain confidentiality of legislative documents and information under the Legislative Council Act, which is the enabling statute for our Legislative Service Bureau.

The attorneys in the Legal Division of the Michigan Legislative Service Bureau maintain the attorney/client privilege with each legislative client (38 Senate members and 110 House members). Also, the enabling act requires all divisions within the LSB to keep all information received from members confidential until it is "published". The specific cite is section 109 of the Legislative Council Act, 1986 PA 268, MCL 4.1109.

### LEGISLATIVE COUNCIL ACT (EXCERPT)

#### Act 268 of 1986

#### 4.1109 Employees not to urge or oppose legislation; duties of employees; recommendation of legislation by director; confidentiality.

Sec. 109.

An employee of the bureau shall not urge or oppose legislation, but upon request shall aid and assist the members of the legislature by advising as to bills and resolutions and by furnishing to them the fullest information upon all matters within the scope of the bureau relating to their public duties. However, the director may recommend legislation to the legislative council or the law revision commission. An employee of the bureau shall not reveal to any person outside the bureau the contents or nature of any matter not yet published without the consent of the person bringing the matter before the bureau. A substitute recommended by a committee, an amendment recommended by a committee, or a conference report shall be considered published when received by the clerk of the house of representatives or secretary of the senate or both, as is appropriate. The clerk of the house of representatives or the secretary of the senate, as is appropriate, shall notify the bureau upon receipt of a substitute, an amendment recommended by a committee, or a conference committee report.

**History:** 1986, Act 268, Imd. Eff. Dec. 19, 1986

## Mississippi

### Legislative Rule

#### CONFIDENTIALITY

141. (1) No employee of the Senate shall reveal to any person outside his department the contents or nature of any request for services made by any member of the Senate except with the written consent of the person making such request.

(2) All confidential communications between members of the Senate and staff attorneys are protected by an attorney-client privilege.

## New Jersey

### New Jersey Statute

#### 47:1A-1 Legislative findings, declarations.

1. The Legislature finds and declares it to be the public policy of this State that:

government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules

of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

L.1963,c.73,s.1; amended 2001, c.404, s.1.

#### **47:1A-1.1 Definitions.**

1. As used in P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

"Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented:

information received by a member of the Legislature from a constituent or information held by a member of the Legislature concerning a constituent, including but not limited to information in written form or contained in any e-mail or computer data base, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit;

any memorandum, correspondence, notes, report or other communication prepared by, or for, the specific use of a member of the Legislature in the course of the member's official duties, except that this provision shall not apply to an otherwise publicly-accessible report which is required by law to be submitted to the Legislature or its members;

any record within the attorney-client privilege. This paragraph shall not be construed as exempting from access attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege;

"Constituent" means any State resident or other person communicating with a member of the Legislature.

"Member of the Legislature" means any person elected or selected to serve in the New Jersey Senate or General Assembly.

L.1995,c.23,s.1; amended 2001, c.404, s.2; 2005, c.170.

## **New Mexico**

### **New Mexico Manual**

#### **. Legislative Council Service Confidentiality and Neutrality .**

In addition to the other constitutional and statutory provisions, the legislative council service drafter must be familiar with Chapter 2 NMSA 1978, which covers the legislative branch. Of special import are the confidentiality and neutrality provisions of Section 2-3-13 NMSA 1978: Neither the director nor any employee of the council service shall reveal to any person outside of the service the contents or nature of any request or statement for service, except with the consent of the person making such request or statement.

They shall not urge or oppose any legislation, nor give to any member of the legislature advice concerning the economic or social effect of any bill or proposed bill except upon the request of such member.

Unless authorized by the requester, the *fact* of a request is as confidential as the *content* of the request, which includes the name of the requester and the particulars of the request. The drafter should discuss confidentiality with the requester to determine what degree of confidentiality is to be maintained on the file. The requester may want strict confidentiality or may allow a range of options from discussing the request in general terms while withholding the requester's name to full disclosure. It is the requester's choice, and that choice must be marked on the green sheet in the 202 file.

Confidentiality must be zealously maintained by *all* legislative council service staff. To avoid a breach, support staff should assume all files are strictly confidential unless specifically notified otherwise by the drafter.

#### **New Mexico Statute (excerpt)**

##### **2-3-13. [Services; confidential nature.]**

Neither the director nor any employee of the council service shall reveal to any person outside of the service the contents or nature of any request or statement for service, except with the consent of the person making such request or statement. They shall not urge or oppose any legislation, nor give to any member of the legislature advice concerning the economic or social effect of any bill or proposed bill except upon the request of such member.

#### **North Carolina Statutes**

Article 17.

Confidentiality of Legislative Communications.

##### **§ 120-129. Definitions.**

As used in this article:

(1) "Document" means all records, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material regardless of physical form or characteristics.

(1a) "Legislative commission" means any commission or committee which the Legislative Services Commission is directed or authorized to staff by law or resolution and which it does, in fact, staff.

(2) "Legislative employee" means employees and officers of the General Assembly, consultants and counsel to members and committees of either house of the General Assembly or of legislative commissions who are paid by State funds, students at an accredited law school while in an externship program at the General Assembly approved by the Legislative Services Commission, and employees of the School of Government at the University of North Carolina at Chapel Hill; but does not mean legislators and members of the Council of State.

(3) "Legislator" means a member-elect, member-designate, or member of the North Carolina Senate or House of Representatives. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, ss. 1-3; 2006-264, s. 29(i); 2009-129, s. 1; 2010-96, s. 20; 2010-169, s. 24(a).)

##### **§ 120-130. Drafting and information requests to legislative employees.**

(a) A drafting request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator.

(b) An information request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator. Notwithstanding the preceding sentences of this subsection, the periodic publication by the Fiscal Research Division of the Legislative Services Office of a list of information requests is not prohibited, if the identity of the legislator making the request is not revealed.

(c) Any supporting documents submitted or caused to be submitted to a legislative employee by a legislator in connection with a drafting or information request are confidential. Except to the extent necessary to answer the request, neither the document nor copies of it, nor the identity of the person, firm, or association producing it, may be provided to any person who is not a legislative employee without the consent of the legislator.

(d) Drafting or information requests or supporting documents are not "public records" as defined by G.S. 132-1. (1983, c. 900, s. 1.)

**§ 120-131. Documents produced by legislative employees.**

(a) Documents prepared by legislative employees upon the request of legislators are confidential. Except as provided in subsection (b) of this section, the existence of the document may not be revealed nor may a copy of the document be provided to any person who is not a legislative employee without the consent of the legislator.

(b) A document prepared by a legislative employee upon the request of a legislator becomes available to the public when the document is a:

- (1) Bill or resolution and it has been introduced;
- (2) Proposed amendment or committee substitute for a bill or resolution and it has been offered at a committee meeting or on the floor of a house;
- (3) Proposed conference committee report and it has been offered at a joint meeting of the conference committees; or
- (4) Bill, resolution, memorandum, written analysis, letter, or other document resulting from a drafting or information request and it has been distributed at a legislative commission or standing committee or subcommittee meeting not held in executive session, closed session, or on the floor of a house.

A document prepared by a legislative employee upon the request of any legislator, that pursuant to this Article does not become available to the public, is not a "public record," as defined by G.S. 132-1.

(c) This section does not prohibit the dissemination of information or language contained in any document which has been prepared by a legislative employee in response to a substantially similar request from another legislator, provided that the identity of the requesting legislator and the fact that he had made such a request not be divulged. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 4; 1993 (Reg. Sess., 1994), c. 570, s. 9.)

**§ 120-131.1. Requests from legislative employees for assistance in the preparation of fiscal notes.**

(a) A request, including any accompanying documents, made to an agency employee by a legislative employee of the Fiscal Research Division for assistance in the preparation of a fiscal note is confidential. An agency employee who receives such a request or who learns of such a request made to another agency employee of his or her agency shall reveal the existence of the request only to other agency employees of the agency to the extent that it is necessary to respond to the request, and to the agency employee's supervisor and to the Office of State Budget and Management. All documents prepared by the agency employee in response to the request of the Fiscal Research Division are also confidential and shall be kept confidential in the same manner as the original request, except that documents submitted to the Fiscal Research Division in response to the request cease to be confidential under this section when the Fiscal Research Division releases a fiscal note based on the documents.

(a1) A request, and any accompanying documents, made to an agency employee by a legislative employee of the Program Evaluation Division for assistance in the preparation of an evaluation report is confidential. The request and any accompanying documents are not "public records" as defined by G.S. 132-1. An agency employee who receives a request under this subsection or who learns of such a request made to another agency employee of his or her agency may reveal the existence of the request to other agency employees to the extent that it is necessary to respond to the request and to the agency employee's supervisor. All documents prepared by the agency employee in response to the request of a legislative employee of the Program Evaluation Division are confidential, shall be kept confidential in the same manner as the original request, and are not "public records" as defined in G.S. 132-1.

(b) As used in this section, "agency employee" means an employee or officer of every agency of North Carolina government or its subdivisions, including every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority, or other unit of government of the State or of any county, unit, special district, or other political subdivision of government.

(c) Violation of this section may be grounds for disciplinary action. (1995, c. 324, s. 8.1(a); c. 507, s. 8.2; 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2008-196, s. 1(b).)

**§ 120-132. Testimony by legislative employees.**

(a) Except as provided in subsections (b) and (c) of this section, no present or former legislative employee may disclose any information that the individual, while employed or retained by the State, may have acquired:

- (1) In a standing, select, or conference committee or subcommittee of either house of the General Assembly or a legislative commission;
- (2) On the floor of either house of the General Assembly, in any office of a legislator, or at any other location of the State legislative buildings and grounds as defined in G.S. 120-32.1(d);
- (3) As a result of communications that are confidential under G.S. 120-130 and G.S. 120-131.
- (b) A present or former legislative employee may disclose information acquired under subsection (a) of this section that would be reflected in the official public record or was otherwise publicly disseminated.
- (c) Subject to G.S. 120-9, G.S. 120-133, and the common law of legislative privilege and legislative immunity, the presiding judge may compel disclosure of information acquired under subsection (a) of this section if in the judge's opinion, the disclosure is necessary to a proper administration of justice. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 5; 2010-169, s. 24(b).)

**§ 120-133. Redistricting communications.**

Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law. Present and former legislative employees may be required to disclose information otherwise protected by G.S. 120-132 concerning redistricting the North Carolina General Assembly or the Congressional Districts upon the act establishing the relevant district plan becoming law. (1983, c. 900, s. 1; 1995, c. 20, s. 13.)

**§ 120-134. Penalty.**

Violation of any provision of this Article shall be grounds for disciplinary action in the case of employees, for referral to the academic institution for appropriate discipline in the case of law student externs, and for removal from office in the case of public officers. No criminal penalty shall attach for any violation of this Article. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 6; 2009-129, s. 2.)

**§§ 120-135 through 120-139. Reserved for future codification purposes.**

**North Dakota**

Testimony or other evidence adduced at legislative investigating hearings closed to the public, unless authorized by a majority of the committees N.D.C.C. § 54-03.2-12(7).

All information of a defamatory or highly prejudicial nature received by or for a legislative committee conducting an investigation, unless the information was received at a hearing (but see #9), a majority of the committee authorizes public release, or its use is required for judicial purposes. N.D.C.C. § 54-03.2-12(8).

The following records, regardless of form or characteristic of or relating to the Legislative Counsel, the legislative assembly, the House of Representatives, the Senate, or a member of the legislative assembly: records of a purely personal or private nature, records that are attorney work product or are attorney-client communication, records that reveal the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental entity determining the proper use of telephone service, records of telephone usage which identify the parties or list the telephone numbers of the parties involved, except records distributed at open meetings. N.D.C.C. § 44-04-18.6.

**North Dakota Statute**

**44-04-18.6. Access to legislative records and information.** The following records, regardless of form or characteristic, of or relating to the legislative council, the legislative assembly, the house of representatives, the senate, or a member of the legislative assembly are not subject to section 44-04-18 and section 6 of article XI of the Constitution of North Dakota: a record of a purely personal or private nature, a record that is attorney work product or is attorney-client communication, a record that reveals the content of private communications between a member of the legislative assembly and any person, and, except with respect to a governmental

entity determining the proper use of telephone service, a record of telephone Page No. 8 usage which identifies the parties or lists the telephone numbers of the parties involved. This section does not apply to any record distributed at a meeting subject to section 44-04-19 and section 5 of article XI of the Constitution of North Dakota.

## Ohio

The language of the statute is broad enough to encompass all legislative bodies. The Ohio Supreme Court has not yet applied the statute to Ohio's General Assembly. The court's recognition that the constitutional doctrine of separation of powers may inhibit the statute's application could mean that separation of powers bars the statute from applying to certain internal records of state legislators. *See State, ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 99 Ohio St. 3d 1, 661 N.E.2d 187 (1996).

In the meantime, the General Assembly has immunized certain classes of its internal legislative records from the Public Records Act, specifically records that are not filed with the clerk of the General Assembly and arise out of the relationship between legislative staff and a member of the General Assembly. Ohio Rev. Code § 101.30.

### Ohio Statute (excerpts)

#### **§ 101.30. Confidential relationship among legislative and general assembly staffs; status of documents as public records.**

(A) As used in this section:

(1) "Legislative document" includes, but is not limited to, all of the following:

(a) A working paper, work product, correspondence, preliminary draft, note, proposed bill or resolution, proposed amendment to a bill or resolution, analysis, opinion, memorandum, or other document in whatever form or format prepared by legislative staff for a member of the general assembly or for general assembly staff;

(b) Any document or material in whatever form or format provided by a member of the general assembly or general assembly staff to legislative staff that requests, or that provides information or materials to assist in, the preparation of any of the items described in division (A)(1)(a) of this section;

(c) Any summary of a bill or resolution or of an amendment to a bill or resolution in whatever form or format that is prepared by or in the possession of a member of the general assembly or general assembly staff, if the summary is prepared before the bill, resolution, or amendment is filed for introduction or presented at a committee hearing or floor session, as applicable.

(2) "Legislative staff" means the staff of the legislative service commission, legislative budget office of the legislative service commission, or any other legislative agency included in the legislative service commission budget group.

(3) "General assembly staff" means an officer or employee of either house of the general assembly who acts on behalf of a member of the general assembly or on behalf of a committee or either house of the general assembly.

(B) Legislative staff shall maintain a confidential relationship with each member of the general assembly, and with each member of the general assembly staff, with respect to communications between the member of the general assembly or general assembly staff and legislative staff. Except as otherwise provided in this division and division (C) of this section, a legislative document arising out of this confidential relationship is not a public record for purposes of section 149.43 of the Revised Code. When it is in the public interest and with the consent of the commission, the director of the commission may release to the public any legislative document in the possession of the commission staff arising out of a confidential relationship with a former member of the general assembly or former member of the general assembly staff who is not available to make the legislative document a public record as provided in division (C) of this section because of death or disability, whom the director is unable to contact for that purpose, or who fails to respond to the director after the director has made a reasonable number of attempts to make such contact.

(C) (1) A legislative document is a public record for purposes of section 149.43 of the Revised Code if it is an analysis, synopsis, fiscal note, or local impact statement prepared by legislative staff that is required to be prepared by law, or by a rule of either house of the general assembly, for the benefit of the members of either or both of those houses or any legislative committee and if it has been presented to those members.

(2) A legislative document is a public record for purposes of section 149.43 of the Revised Code if a member of the general assembly for whom legislative staff prepared the legislative document does any of the following:

(a) Files it for introduction with the clerk of the senate or the clerk of the house of representatives, if it is a bill or resolution;

(b) Presents it at a committee hearing or floor session, if it is an amendment to a bill or resolution or is a substitute bill or resolution;

(c) Releases it, or authorizes general assembly staff or legislative staff to release it, to the public.

**HISTORY: 148 v H 283. Eff 9-29-99**

**§ 101.301. Application of attorney-client privilege to party caucuses**

(A) As used in this section, "caucus" means all of the members of the house of representatives, or all of the members of the senate, who are members of the same political party.

(B) Notwithstanding any contrary provision of section 2317.021 [2317.02.1] of the Revised Code, the members of the general assembly who are members of a caucus, and the officers and employees of the general assembly who either serve that caucus or serve the members of the general assembly who are members of that caucus, are clients, for purposes of the attorney-client testimonial privilege specified in division (A) of section 2317.02 of the Revised Code and for purposes of any other statutory or common law attorney-client privilege recognized in this state, of the employee of the house of representatives or senate who serves as the legal counsel for that caucus.

**HISTORY: 148 v H 283. Eff 9-29-99**

**Oregon**

**Oregon Legislative Rules**

SENATE Rule No.: 13.11

Title: Confidentiality; Consolidation of Requests

Text:

(1) A member may designate that a request for measure drafting services be treated as confidential in accordance with ORS 173.230. Requests from a committee may not be treated confidentially. (2) Whenever a request is made for measure drafting services, Legislative Counsel shall inform the requester of all nonconfidential requests for similar measures and attempt to consolidate all such requests in one measure. Legislative Counsel shall also inform requesters of confidential drafts when similar but nonconfidential requests are made. This will be done in order to determine whether the requester wishes to consolidate the confidential request with similar but nonconfidential requests.

SENATE Rule No.: 213.30

Title: Confidentiality; Consolidation of Requests

Text:

(1) A requester may designate that a request for a Legislative Counsel draft be considered confidential in accordance with ORS 173.230. Requests from a legislative committee shall not be treated confidentially. (2) When a request is made for measure drafting services, Legislative Counsel shall inform the requester of all nonconfidential requests of a similar nature previously submitted. An attempt shall be made to consolidate all such requests in one measure.

**Rhode Island**

Exemption (K): Preliminary drafts, notes, impressions, memoranda, working papers and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public. *R.I. Gen. Laws § 38-2-2(4)(i)(K)*.

**Rhode Island Statute (excerpts)**

**§ 38-2-2 Definitions.** – As used in this chapter:

(1) "Agency" or "public body" shall mean any executive, legislative, judicial, regulatory, or administrative body of the state, or any political subdivision thereof; including, but not limited to, any department, division, agency, commission, board, office, bureau, authority, any school, fire, or water district, or other agency of Rhode Island state or local government which exercises governmental functions, any authority as defined in § 42-35-1(b), or any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency.

(2) "Chief administrative officer" means the highest authority of the public body as defined in subsection (a) of this section.

(3) "Public business" means any matter over which the public body has supervision, control, jurisdiction, or advisory power.

(4) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, magnetic or other tapes, electronic data processing records, computer stored data (including electronic

mail messages, except specifically for any electronic mail messages of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities) or other material regardless of physical form or characteristics made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. For the purposes of this chapter, the following records shall not be deemed public:

(J) Any minutes of a meeting of a public body which are not required to be disclosed pursuant to chapter 46 of title 42.

(K) Preliminary drafts, notes, impressions, memoranda, working papers, and work products; provided, however, any documents submitted at a public meeting of a public body shall be deemed public.

(L) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment or promotion, or academic examinations; provided, however, that a person shall have the right to review the results of his or her examination.

(M) Correspondence of or to elected officials with or relating to those they represent and correspondence of or to elected officials in their official capacities.

(O) All tax returns.

(P) All investigatory records of public bodies, with the exception of law enforcement agencies, pertaining to possible violations of statute, rule, or regulation other than records of final actions taken provided that all records prior to formal notification of violations or noncompliance shall not be deemed to be public.

(Q) Records of individual test scores on professional certification and licensing examinations; provided, however, that a person shall have the right to review the results of his or her examination.

(R) Requests for advisory opinions until such time as the public body issues its opinion.

(S) Records, reports, opinions, information, and statements required to be kept confidential by federal law or regulation or state law, or rule of court.

#### **Rhode Island Legislative Rule**

SENATE Rule No.: 9.5

Title: Confidentiality of Drafting

Text:

At the request of any senator or senate attorney to the director of the legislative council, an entry into the word processing system may be made confidential so that the entry shall be accessible only to the senator or senate attorney making such request or his or her designee. An entry may be a bill, letter, memorandum or any other document.

#### **South Carolina**

"Memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs" are exempt from disclosure, but the exemption is not to be construed to limit public access to "source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information ... and not specifically exempted by any other provisions." S.C. Code Ann. (1991) § 30-4-40(a)(1).

## **South Carolina Statute** (excerpts)

### **SECTION 30-4-40.** Matters exempt from disclosure.

(a) A public body may but is not required to exempt from disclosure the following information:

(1) Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and nontariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation.

(7) Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.

(8) Memoranda, correspondence, and working papers in the possession of individual members of the General Assembly or their immediate staffs; however, nothing herein may be construed as limiting or restricting public access to source documents or records, factual data or summaries of factual data, papers, minutes, or reports otherwise considered to be public information under the provisions of this chapter and not specifically exempted by any other provisions of this chapter.

## **Tennessee**

We have also adopted office policies on confidentiality for our nonlawyer staff. The general rule is that everything is confidential unless the member gives consent to release.

### **Tennessee Statute** (excerpt)

3-12-105. Records are public - Exceptions.

(a) All books, papers, records, and correspondence of the office of legal services pertaining to its work shall be kept in the office of legal services and all such materials are public records except: (1) Intraoffice memoranda made by the director of the office of legal services or the director's staff; and (2) Work papers and correspondence with any person receiving service from the office of legal services. (b) Such papers and correspondence may become public records whenever the director of the office of legal services or the general assembly shall so order.

## **History**

[Acts 1977, ch. 89, § 9; T.C.A., § 3-1205.]

3-12-106. Relationships with members of general assembly. Statute text (a) The director of the office of legal services and the director's legal staff shall maintain the attorney-client relationship with each member of the general assembly with respect to communications between the member and the attorney, except as otherwise provided by the rules of either house of the general assembly. (b) All materials arising out of this relationship including, but not limited to, proposed bills and amendments, analyses, opinions, and memoranda prepared by an attorney are not public records nor subject to the provisions of title 10, chapter 7, part 5, except as otherwise provided by the rules of either house of the general assembly or when released by the member for whom the material was prepared. History [Acts 1977, ch. 89, § 10; T.C.A., § 3-1206.]

## **Texas**

### **Confidentiality Policy**

Under Section 323.017, Government Code, communications between a member of the legislature or the lieutenant governor and a council employee that relate to a request by the official for information, advice, or opinions from a council employee are confidential, and

information, advice, and opinions given privately by a council employee to a member of the legislature, or the lieutenant governor, acting in the person's official capacity, are confidential.

In addition, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct generally prohibits a lawyer from knowingly revealing to another person confidential information of a client, including confidential communications between the client and the lawyer made for the purpose of facilitating the rendition of professional legal services to the client. Since the work of the lawyers and other staff employed by the council is confidential, the council staff will not disclose the fact that a member of the legislature or the lieutenant governor has made a particular request for draft legislation or provide any other

information about the request to any other person, including other members of the legislature, without the express permission of the person for whom the draft is being prepared. After a draft becomes an introduced bill or resolution, the council staff will answer questions concerning the bill or resolution only to the extent that the answers do not disclose confidential information concerning the bill or resolution.

### **Duplicate Draft Requests**

Frequently, a member of the legislature requests the council to prepare a draft that is identical to a request previously made by another member. Treatment of duplicate requests is guided by three basic principles:

- Each member is entitled to have the council prepare a draft on any subject.
- Each member is entitled to have requests kept confidential.
- The legislature is best served by avoiding duplication of work to the extent practicable.

If a member makes a request that is identical to a request previously made by a member of the same house, the drafter will inform the second requestor of the previous request and offer to assist in getting the two requestors working cooperatively on the same draft. To

preserve confidentiality, the identity of the first requestor is not revealed at that time. Rather, the drafter will request permission of the second requestor to reveal the second requestor's identity to the first requestor. If the second requestor consents, the drafter will communicate with the first requestor to see if the first requestor is willing to work cooperatively with the identified second requestor.

If the second requestor declines to have his or her identity revealed to the first requestor or if the first requestor declines to work cooperatively, each requestor will have individual drafts prepared.

Identical requests are prepared for members of different houses or for members of the same house who have declined to work cooperatively. The drafts prepared for each requesting member will carry the same council unique number in the lower left corner of the document. The documents are usually delivered to the members in the order in which the requests were received.

### **Texas Statute**

§ 323.017(0). CONFIDENTIAL COMMUNICATIONS. Communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the council that relate to a request by the official for information, advice, or opinions from an assistant or employee of the council are confidential. Information, advice, and opinions given privately by an assistant or employee of the council to a member of the legislature, or the lieutenant governor, acting in the person's official capacity, are confidential. However, the member or lieutenant governor may choose to disclose all or a part of the communications, information, advice, or opinions to which this section applies, and such a disclosure does not violate the law of this state.

Added by Acts 1987, 70th Leg., ch. 1053, § 2, eff. June 20, 1987. Renumbered from § 323.016 by Acts 1989, 71st Leg., ch. 2, § 16.01(25), eff. Aug. 28, 1989. Amended by Acts 2001, 77th Leg., ch. 1420, § 9.002, eff. Sept. 1, 2001.

### **Utah**

#### **Utah Statute**

#### **63G-2-703**

(1) The Legislature and its staff offices shall designate and classify records in accordance with Sections 63G-2-301 through 63G-2-305 as public, private, controlled, or protected.

(2) (a) The Legislature and its staff offices are not subject to Section 63G-2-203 or to Part 4, Appeals, 5, State Records Committee, or 6, Collection of Information and Accuracy of Records.

(b) The Legislature is subject to only the following sections in Part 9, Archives and Records Service: Sections 63A-12-102, 63A-12-106, and 63G-2-310.

(3) The Legislature, through the Legislative Management Committee:

(a) shall establish policies to handle requests for classification, designation, fees, access, denials, segregation, appeals, management, retention, and amendment of records; and

(b) may establish an appellate board to hear appeals from denials of access.

(4) Policies shall include reasonable times for responding to access requests consistent with the provisions of Part 2, Access

to Records, fees, and reasonable time limits for appeals.

(5) Upon request, the state archivist shall:

(a) assist with and advise concerning the establishment of a records management program in the Legislature; and

(b) as required by the Legislature, provide program services similar to those available to the executive branch of government, as provided in this chapter and Title 63A, Chapter 12, Part 1, Archives and Records Service.

Renumbered and Amended by Chapter 382, 2008 General Session

### **63-2-305. Protected records.**

The following records are protected if properly classified by a governmental entity:

(11) records the disclosure of which would jeopardize the security of governmental property, governmental programs, or governmental recordkeeping systems from damage, theft, or other appropriation or use contrary to law or public policy;

(16) records prepared by or on behalf of a governmental entity solely in anticipation of litigation that are not available under the rules of discovery;

(17) records disclosing an attorney's work product, including the mental impressions or legal theories of an attorney or other representative of a governmental entity concerning litigation;

(18) records of communications between a governmental entity and an attorney representing, retained, or employed by the governmental entity if the communications would be privileged as provided in Section 78B-1-137;

(19) (a) (i) personal files of a state legislator, including personal correspondence to or from a member of the Legislature; and

(ii) notwithstanding Subsection (19)(a)(i), correspondence that gives notice of legislative action or policy may not be classified as protected under this section; and

(b) (i) an internal communication that is part of the deliberative process in connection with the preparation of legislation between:

(A) members of a legislative body;

(B) a member of a legislative body and a member of the legislative body's staff; or

(C) members of a legislative body's staff; and

(ii) notwithstanding Subsection (19)(b)(i), a communication that gives notice of legislative action or policy may not be classified as protected under this section;

(20) (a) records in the custody or control of the Office of Legislative Research and General Counsel, that, if disclosed, would reveal a particular legislator's contemplated legislation or contemplated course of action before the legislator has elected to support the legislation or course of action, or made the legislation or course of action public; and

(b) notwithstanding Subsection (20)(a), the form to request legislation submitted to the Office of Legislative Research and General Counsel is a public document unless a legislator asks that the records requesting the legislation be maintained as protected records until such time as the legislator elects to make the legislation or course of action public;

(21) research requests from legislators to the Office of Legislative Research and General Counsel or the Office of the Legislative Fiscal Analyst and research findings prepared in response to these requests;

(22) drafts, unless otherwise classified as public;

(29) records of the governor's office, including budget recommendations, legislative proposals, and policy statements, that if disclosed would reveal the governor's contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public;

(30) records of the Office of the Legislative Fiscal Analyst relating to budget analysis, revenue estimates, and fiscal notes of proposed legislation before issuance of the final recommendations in these areas;

Amended by Chapter 18, 2011 General Session

Amended by Chapter 46, 2011 General Session

Amended by Chapter 55, 2011 General Session

Amended by Chapter 80, 2011 General Session

Amended by Chapter 151, 2011 General Session

Amended by Chapter 161, 2011 General Session

## Vermont

### Vermont Statute

Statutory provision 2 V.S.A. 404(c) - all requests are confidential

c) All requests for legal assistance, information and advice and all information received in connection with research or drafting shall be confidential unless the party requesting or giving the information designates in the request that it is not confidential. Transcripts and minutes of committee meetings, including written testimony submitted to the committee, bills or amendments which have been released or approved for printing or introduction and material appearing in the journals or calendars of either house are official documents and shall not be confidential under this subsection. (Added 1971, No. 204 (Adj. Sess.), § 4, eff. March 31, 1972; amended

## Virginia

### Virginia Statute

§ 30-28.18. (Effective October 1, 2005) Requests for drafting bills or resolutions; bills to conform to request; public access.

A. All requests for the drafting of bills or resolutions by the Division shall be submitted in person, in writing, or by voice transmission. Each request shall contain a general statement respecting the policies and purposes that the requester desires incorporated in and accomplished by the bill. All written requests shall be signed by the person submitting them. Neither the Director nor any employee of the Division shall reveal to any person outside of the Division, except to the Division of Legislative Automated Systems in fulfilling its duties as provided in § 30-34.14, the contents or nature of any request or statements except with the consent of the person signing such request. Exceptions to this general rule are as follows:

1. When the Director or an employee receives a request that is substantially the same as one previously received, he may, unless specifically directed not to do so by the person first submitting such request, so inform the person submitting the similar request;
2. Unless specifically directed otherwise, the Director or employee may reveal the nature of a request when seeking information from anyone to assist in drafting the bill; and
3. Copies of all floor substitute bills, conference committee reports, and substitute bills accompanying a conference committee report shall be placed in a secure electronic file immediately following the final drafting of the legislation and may be accessed by either the Clerk of the House of Delegates or the Clerk of the Senate or their employee designees after such legislation is offered for introduction in either house.

Bills drafted by the Division shall conform to the statements submitted with the request or any supplementary instructions submitted by the person who originally made the request.

B. All legislative drafting requests and accompanying documents shall be maintained by the Division as permanent records. Each of these separate files shall be considered the property of the requester and no one other than members of the Division staff shall have access to any such file without the specific approval of the requester. However, on the effective date of legislation drafted for the 1989 Session or thereafter, the file for a bill that was enacted, including any amendments in the nature of a substitute or conference reports that were offered for consideration shall become public property.

C. All legislative drafting requests from the Governor, a Governor's Secretary, the Lieutenant Governor, the Attorney General, or the head of any judicial, legislative, or independent agency shall be submitted to the Division on or before the same deadline applicable to members of the General Assembly for submitting legislative drafting requests for legislation to be prefiled to the Division, as established by the procedural resolution adopted by the General Assembly, or in default thereof, as adopted by the Joint Rules Committee. Requests from the Governor may also be submitted in accordance with the procedures established by the Rules Committees of the House of Delegates and the Senate for the conduct of business during a legislative session.

(1966, c. 676; 1976, c. 112; 1988, c. 214; 1989, cc. 412, 512; 2001, cc. 568, 584; 2002, c. 2; 2005, c. 839.)

## Washington

### RCW 40.14.180

#### Legislative records — Construction — Confidentiality of bill drafting records.

The provisions of RCW 40.14.010 and 40.14.100 through 40.14.180 shall not be construed as repealing or modifying any other acts or parts of acts authorizing the retention or destruction of public records nor shall RCW 40.14.010 and 40.14.100 through 40.14.180 affect the provisions of chapter 40.07 RCW requiring the deposit of all state publications in the state library nor shall it affect the confidentiality of the bill drafting records of the code reviser's office.

March 13, 1998

Advisory Opinion 1998 - No. 1

Confidential bill drafts

#### QUESTION

The Board has received the following question regarding confidentiality of bill and amendment drafting, paraphrased for brevity: "would it be a violation of the ethics law if a staff person informed his or her staff administrative supervisor, the committee chair, or caucus leadership about a specific drafting request that the requesting member has not approved for circulation to the general public?"

Would the answer be different if the staff person is asked for the confidential information by a supervisor, chair or member of legislative leadership, or if the staff person is an attorney?

#### OPINION

Unauthorized disclosure of the substance of a confidential drafting request or the identity of the requester is a violation of the State Ethics Act. Disclosure of otherwise confidential drafting requests is permissible to persons entitled by law or formal written legislative policy to receive information about confidential drafting requests. Limited disclosure to co-workers and administrative supervisors is permissible, subject to the limitations set forth in this opinion.

#### ANALYSIS

Unauthorized disclosure of confidential information by a legislator or legislative employee is a violation of the State Ethics Act. The relevant portions of the statute are:

RCW 42.52.010(6) Definitions "Confidential information" means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law.

RCW 42.52.050(3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.

#### A. DRAFTING REQUESTS ARE CONFIDENTIAL.

It is apparent from the legislative and public records statutes that bill and amendment language in draft form is not "available to the general public on request." The definition of public record in RCW 42.17.010(36) incorporates all "legislative records" as defined by RCW 40.14.100.

That statute defines amendments which have been submitted to a committee or subcommittee as public records, but excludes bills on the basis that they are otherwise available. Clearly that reference is only to bills which have been printed and are available generally, not bills in draft form.

This interpretation is supported by RCW 42.17.310(1)(i), which exempts from public disclosure "preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action." Therefore, bill and amendment drafts are confidential until such drafts have been approved by the requester for circulation to the general public, or submitted by the requester for committee or floor consideration

#### B. AUTHORIZATION TO DISCLOSE CONFIDENTIAL INFORMATION

Although drafting requests and bill and amendment drafts and other staff work related to the drafting request are confidential, RCW 42.52.050(3) permits disclosure to any person "entitled or authorized to receive the information." There are three categories of persons who fall within this provision.

(1) Persons designated by law or official policy. Disclosure of confidential drafting requests is authorized to any persons or categories of persons specifically designated by law.

Disclosure would also be permissible to persons designated by formal written rules or policies of the House of Representatives, Senate, or legislative agencies. No such statutes, rules or policies have been discovered by, or cited to, the Board in this opinion request.

(2) Administrative supervisors. To respond to the question asked in this opinion, the Board must determine whether the staff person's administrative supervisor, committee chair, or members of legislative leadership are entitled or authorized persons. The Board recognizes that for proper supervision and workload decisions, it is necessary for administrative supervisors to be aware of the activities of the employees under their supervision. Additionally, it may be necessary for employees to consult with supervisors regarding a confidential drafting request. Administrative supervisors are thus considered entitled or authorized persons, but only to the extent necessary to accomplish these limited purposes.

The Board finds that these considerations do not apply to the relationship between legislators and staff. Furthermore, it appears that the purpose of requiring confidentiality about legislative proposals is to encourage unlimited exploration of public policy ideas. Therefore, it is not appropriate to extend this authorization for supervisor disclosure to chairs, members of legislative leadership, or other legislators, unless authorization for disclosure to these legislators has been specifically granted by formal written policy.

(3) Other persons needed to effectively perform the task. Employees may also find it necessary to disclose some aspects of a confidential drafting requests to co-workers within their work group in order to provide a thorough and accurate draft. In these cases, the drafter should disclose only the information necessary to obtain the needed assistance, and only to those co-workers with relevant expertise.

When confidential information regarding a drafting request is disclosed as permitted under (2) or (3) above, the duty to maintain confidentiality extends to the recipient of the information, who is subject to the same confidentiality requirements as the party who originally received the confidential drafting request.

On occasion it may be necessary for the drafter to seek additional sources of information outside the legislature. The drafter does not violate the confidentiality requirements by conducting general research. If it is necessary for the drafter to disclose the fact that he or she is working on a confidential drafting request, the identity of the requester, or the objectives of the request, the drafter must first seek permission from the requester to disclose such information.

#### C. ATTORNEY DRAFTERS.

The opinion request also asks whether the confidentiality duty is different for a legislative

employee who is an attorney. The Board does not believe that the State Ethics Act establishes confidentiality requirements for attorneys drafting bills and amendments that are any different than those specified for other legislative employees. In any case, such requirements would be established and enforced by the Washington State Supreme Court and the State Bar Association rather than the Board.

## Wisconsin

### Wisconsin Statutes on Legislative Confidentiality

Wisconsin has several general provisions requiring legislative staff to adhere to observe and comply with the confidential nature of their work. See below:

**13.92 Legislative reference bureau.** There is created a bureau to be known as the "Legislative Reference Bureau," headed by the chief of legislative reference bureau. The legislative reference bureau shall be strictly nonpartisan and shall at all times observe the confidential nature of the reference or drafting requests received by it.

#### 13.92(1)(c)

(c) *Drafting records; when confidential.* While the legislature remains in session the drafting section shall maintain the files for all drafting requests received during such session, but after final adjournment the drafting records to legislation introduced shall be turned over to the reference section under par. (a) 3. Records of drafting requests which did not result in legislation introduced shall remain confidential at all times and may be maintained by the drafting section in such form as will facilitate its operations.

**13.91 Legislative council staff.** There is created a bureau known as the "Legislative Council Staff", headed by a director. The legislative council staff shall be strictly nonpartisan and shall at all times observe the confidential nature of the research and drafting requests received by it. The legislative council staff may call upon any state department, agency or officer, or any agency of any political subdivision, for such facilities and data as are available and such departments and agencies shall cooperate with the legislative council staff to the fullest possible extent.

#### 13.95

**13.95 Legislative fiscal bureau.** There is created a bureau to be known as the "Legislative Fiscal Bureau" headed by a director. The fiscal bureau shall be strictly nonpartisan and shall at all times observe the confidential nature of the research requests received by it; however, with the prior approval of the requester in each instance, the bureau may duplicate the results of its research for distribution. Subject to s. 230.35 (4) (a) and (f), the director or the director's designated employees shall at all times, with or without notice, have access to all state agencies the University of Wisconsin Hospitals and Clinics Authority, the Wisconsin Aerospace Authority, the Health Insurance Risk-Sharing Plan Authority, the Lower Fox River Remediation Authority, the Wisconsin Economic Development Corporation, and the Fox River Navigational System Authority, and to any books, records, or other documents maintained by such agencies or authorities and relating to their expenditures, revenues, operations, and structure.

## Wyoming

### Wyoming manual

#### 4. CONFIDENTIALITY OF BILL DRAFTS.

- (a) Except as provided in subsection (c) below, the LSO treats bill drafting requests as confidential and the contents of proposed legislation will not be divulged to anyone without the specific consent of the sponsor or until a sponsor approval form for the bill is signed and returned.
- (b) Due to this rule of confidentiality, legislators may occasionally experience one of the following types of administrative delays:
  - (i) *Scenario 1:* A legislator requests a bill draft which impacts a state agency. LSO staff calls the agency for information and advises that an unnamed legislator is working on a bill draft. The agency wants to know the legislator's name in order to make direct contact. LSO staff declines disclosure at that time but agrees to

contact the legislator to request permission to disclose the legislator's name. LSO staff calls the legislator, then advises the agency.

- (ii) *Scenario 2:* A legislator requests a bill draft and then advises a constituent or other interested party to contact the LSO for a copy. The interested party calls the LSO and is advised of the confidentiality rules and that the staff cannot even confirm whether a bill draft request has been submitted to LSO by that particular legislator. The interested party then must call the legislator and request that the legislator call the LSO directly and authorize release of the draft. To avoid this delay, call LSO directly when you wish to authorize release of a bill draft to a member of the public.

- (c) Disclosure of draft request to subsequent requesting legislator. It is extremely common for more than one legislator to request a bill draft on the same topic. Furthermore, in most cases legislators requesting the same draft are willing to cosponsor a bill rather than proceeding with separate identical bills. To facilitate this process, the Management Council has approved the following procedures:

If you contact LSO and request a bill draft, your name will be disclosed to a subsequent legislator requesting the same bill draft UNLESS you specifically request that your name not be disclosed. Note that this exception to the normal rule of confidentiality applies only to subsequent legislators requesting a similar bill and disclosure will not be made to the general public.