Over the past three years, the North Carolina General Assembly has faced three interesting situations causing us to look more closely at the professional and legal issues involved with emails in the legislative context.

- Response to a federal grand jury subpoena for legislative email as part of a criminal investigation into the conduct of the then Speaker of the House Jim Black in 2005.
- Response to a discovery request for legislative emails in a civil lawsuit against the State of North Carolina challenging the reasoning behind the passage of a law in 2007.
- Governor’s Email Review Panel created after the Governor’s order to delete controversial emails in 2008.

A. North Carolina General Assembly

The North Carolina General Assembly processes between 7 and 10 million e-mails a month. Fluctuation is based on whether or not the General Assembly is in session; i.e., sessions average about 8 million emails a month and interims between sessions average about 6 million emails a month. This number has grown tremendously since 2000, when emails averaged about 2 million a month. (See Attachment 1)

Response to federal grand jury subpoena.

In 2005, the Legislative Information Systems Division (ISD) was formally engaged in the research and forensics of e-mails related to the three subpoenas of former House Speaker Jim Black on federal corruption charges. The subpoena required production of all emails from 18 listed individuals.

The Division started out looking at 5,701,820 emails, which was reduced to 483,877 after filtering out all email accounts that were not identified as being within the scope of the subpoena. ISD examined on-line e-mail accounts, network drives, and local hard drives and further reduced the number of applicable e-mails to 434,222. This process took more than 5 calendar days to complete.

In addition to on-line emails, emails contained on backup tapes were also requested. These tapes also contained text files and databases along with email that ISD would have to sort through. Due to the magnitude of information that would have to be searched, the Division built a “forensics lab” environment that would not be a part of the NC General Assembly computer network, but would have sufficient processing power and disk space to search and process the backup tapes. In the process of locating the tapes containing emails, over 1,700 tapes were scanned. To accomplish this task, ISD spent approximately 1,662 staff hours (at a cost of an average of $36 per hour totally $59,832) and required the purchase of $7,000 in additional hardware and software.

During the process the General Assembly worked with the FBI and the U.S. Attorney's Office to satisfy the federal investigators that the protocol being followed would produce results that would comply with the subpoena. After six months of processing and review of documents retrieved, approximately 2500 emails were turned over to the grand jury. (See Attachment 2)
Response to civil discovery request.

In 2007, Waste Industries USA Inc. (doing business as Black Bear Disposal) sued the State of North Carolina and the NC Department of Environment and Natural Resources (DENR) after the General Assembly enacted Senate Bills 1492 and 6, which made significant changes to the law governing the location of sanitary landfills within the State. These bills amended the law to prohibit DENR from issuing a permit to construct a sanitary landfill if any portion of the proposed sanitary landfill is located within five miles of the outermost boundary of a national wildlife refuge. The provision directly affected the proposed landfill site of the plaintiffs, located within 5 miles of a national wildlife refuge. The plaintiffs claim the bills are an improper abdication of the General Assembly's authority to a subordinate administrative agency, and sued under both State and federal law. The plaintiff's claims against the State include: regulating commerce among the several states, denying equal protection under the law, depriving plaintiff's property without due process, taking property without just compensation, and taking the plaintiff's property in an arbitrary, capricious, and confiscatory manner.

As part of the lawsuit, the General Assembly was requested to produce all emails produced or received within the General Assembly concerning the passage of these bills. The Black Bear discovery request involved searching the electronic records for more than 100 individuals and an undetermined number of "search terms". As of April 2008, the NCGA computer network currently houses over 8,600,670 on-line electronic files.

In its response to the discovery request, the State asserted legislative confidentiality and legislative immunity as the basis for refusing to turn over all emails covered by the discovery request. The State turned over all documents considered to be public records.

The case is currently in the process of discovery and summary judgment arguments are likely to be heard within the next 6 months. The court has not been asked to rule on the General Assembly's refusal to turn over all requested emails. (See Attachment 3)

Legislative immunity/confidentiality.

The doctrine of legislative immunity has origins in the common law in the struggles between the English Crown and Parliament that began more than 600 years ago. ¹ The United States Constitution provides for legislative immunity in Article I Section 6, which states, "For any speech or debate in either house [the members] shall not be questioned in any other place". Legislative immunity is not provided for in North Carolina's constitution. G.S. 120-9 constitutes the NC Speech and Debate clause saying:

"The members shall have freedom of speech and debate in the General Assembly, and shall not be liable to impeachment or question, in any court or place out of the General Assembly, for words therein spoken."

The United States Supreme Court has recognized the deep roots of legislative immunity in American and English Common law and its application to state legislators. Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed 1019 (1951). In Tenney, the court stated the reason for legislative immunity:

"In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense".

The court concluded in Tenney, due to its common law origins, legislative immunity under federal law is afforded to state legislators even where not specifically provided for in a state's constitution. Id. As

¹ Wattson, Peter, General Counsel, Minnesota Senate. “Legislative Immunity in Minnesota”, 2006.
a result, state courts have likewise afforded common law legislative immunity to legislators or legislative staff, or both, even when not provided for in a state’s constitution or by statute.

Today, forty-three states have constitutional legislative privilege provisions; twenty three of them have provisions essentially identical in the text to the federal Speech or Debate Clause. Seven states: California, Florida, Iowa, Mississipi, Nevada, North Carolina, and South Carolina are entirely without any constitutional language granting legislative immunity.²

The scope of legislative immunity is extremely broad. The court in Gravel v. United States, 408 U.S. 606, 625 (1972) has described a legislative act as any act that is (1) “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings”, and (2) relates “to the consideration and passage or rejection of proposed legislation or with respect to matters which the Constitution places within the jurisdiction of either House”. This includes sending a letter containing defamatory material from one Senator to another in response to the second Senator’s inquiry into the first Senator’s exercise of his official powers, Ray v. Proxmire, 581 F.2d 998 (D.C. Cir. 1978), and drafting memoranda and documents for discussion between a legislator and staff, even when the documents proposed action outside the sphere of legitimate legislative activity. United Transp. Union v. Springfield Terminal Ry., 132 F.R.D. 4 (D. Me. 1990).

There are several activities of legislators that do not fall under the doctrine of legislative immunity; most notably, legislative immunity does not bar inquiry into whether a legislator’s activities and conversations were, in fact, legislative in nature. (See Attachment 4)

B. North Carolina E-mail Retention Law.

Governor’s E-mail Records Review Panel.

Early in 2008, NC Governor Mike Easley created the E-mail Records Review Panel after his administration was accused of ordering state employees to delete their email correspondence with the Governor’s office. Governor Easley charged the panel with studying the issue of managing e-mail as a public record and recommending any necessary changes to the current North Carolina e-mail and electronic text communication record retention policies and procedures in light of changes in technology.³

The Panel met six times from March to May 2008 and developed a set of unanimous recommendations. The panel was given a plethora of information including email statistics from the NC Office of Information Technology Services. There are more than 33,000 email accounts used within agencies in North Carolina, including county and local government entities. Statistics show that about 300,000 valid email messages are delivered a day (valid meaning not blocked due to virus/spam filtering) and about 9 million valid emails are delivered a month. The NC General Assembly operates its own email account, separate and independent of the executive branch.⁴

In a report delivered to the Governor on May 20, 2008, the panel recognized that state employees should be directed to treat e-mail as they do paper documents or other records handled in the course of their employment and to do so in compliance with existing public records laws. The panel felt the content of the information in e-mail, rather than e-mail format, should determine how an employee should manage e-mail. The panel also added that in managing email, each agency’s records retention and disposition schedule could instruct an employee on how long e-mail should be saved and how to distinguish between e-mail created in the course of state business and personal/junk e-mail, which the Panel felt state employees should retain the ability to delete.⁵

³ Letter from Franklin Freeman, Chair, E-mail Records Review Panel to Governor Easley. May 20, 2008.
⁴ E-mail Services Customer Profile, Office of Information Technology Services.
⁵ Letter from Franklin Freeman, Chair, E-mail Records Review Panel to Governor Easley. May 20, 2008.
Other recommendations made by the panel include: mandating training for state employees who handle public records, implementing an archiving system for all executive branch state agencies, directing the N.C. Department of Cultural Resources, the State agency charged with supervising the State's public records, to randomly audit several state agencies each year to ensure compliance with public records laws and agency record retention and disposition schedules, expanding the retention on back up tapes from 30 days to at least 5 years, moving toward a single e-mail system in the executive branch, and requiring employees who use personal e-mail accounts, personal computers, personal digital assistants and other forms of technology to conduct state business to synchronize or otherwise copy the records to a state-assigned e-mail account, or print a paper copy of the public records, and properly archive them. 6

(See Attachment 5)

**NC e-mail retention**

According to the NC Department of Cultural Resources, in a document titled, “Email as a Public Record in North Carolina”, electronic mail is a public record when sent or received in normal business processes. The department also mandates that electronic mail may not be disposed of, erased, or destroyed without authorization from the Department. Some examples of email messages that are public records include: policies and directives, correspondence related to official business, work schedules, meeting agendas or minutes, any document that initiates, authorizes, or completes a business transaction, reports, and draft documents that are to be reviewed and/or commented upon.

There are also other email messages that qualify as public records but have extremely limited value. These messages may be disposed of when they no longer have reference value to the sender or receiver of the message, or in conjunction with an approved records retention and disposition schedule. A records retention and disposition schedule is made by a government agency and approved by the Department. There is also a statute for State agency records, which addresses records commonly found in agencies throughout State government, provides uniform descriptions and disposition instructions, and indicates minimum retention periods.

In the NC General Assembly, there is currently no specific policy concerning email records in the retention and disposition schedule approved by the Department of Cultural Resources. However, under NC's Public Records Law, email content is subject to the same access and inspection conditions as other records, unless exempted from access by another statute. In the General Assembly's records and retention schedule, the disposition of daily records and operations of the Fiscal Research, Legislative Drafting, and Research Divisions of the General Assembly directs employees to destroy these materials in office when the administrative value of the document ends, “if no litigation, claim, audit, or other official action involving the records had been initiated.” If official action has been initiated, employees are instructed to destroy the documents in office after completion of the action or resolution of issues involved. Since there is no specific statute in the public records law exempting emails of this nature, emails concerning records of daily operations of each division may be destroyed in office when the administrative value ends. These records include correspondence, memorandums, copies of project materials handled by staff attorneys, materials for special projects or subjects, policies and procedures, and other related records and data.

In a policy statement titled “Custodianship of Legislator E-mail and other Electronic Documents”, members of the General Assembly are given custodianship of their email and other electronic documents because legislative immunity may shield some of the documents received or made by the member. The policy gives members of the General Assembly custodianship of documents that are made or received by the member or the personnel in the member’s office, and allows the member to access the documents after they leave office.

(See Attachment 6)

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6 Id.
C. Comparing North Carolina to Other States

North Carolina is like most other states in that it has a public records law governing access to public records. North Carolina also treats emails as any other public record under these laws like several other states.

North Carolina defines a public record as "…all documents …regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions."

North Carolina law does not specifically include the General Assembly under its public records law and whether the General Assembly is covered under the law has never been tested in the courts. The General Assembly is not considered to be an agency of State government, but rather a branch of State government; therefore, an argument could be made that the public records laws do not apply to the General Assembly. One reason this question has not been tested in courts is because the NC legislative confidentiality statute clearly defines certain documents created in the legislative process as not being public records. This would apply to emails as well as other documents.

Additionally, the North Carolina public records law not only requires that in order for a document to be a public record the document has to be made or received in connection with the transaction of public business, but that it also be made or received pursuant to law or ordinance. As to legislative documents made or received, except for administrative operations of the General Assembly that may be governed by law (personnel matters, procedures for paying expenses, purchasing equipment, etc) the constitutional role of the General Assembly is only to enact laws. Other documents, not related to these two purposes, would not be made or received pursuant to law or ordinance and therefore would not be public records. This could include personal and political correspondence (caucus matters and political strategy) as well as constituent correspondence.

Legislatures in other states seem to handle public records issues in different ways. Some appear to treat legislature documents the same as documents in the executive branch. Some treat legislative documents different from other public documents, like North Carolina, and others do not specifically address legislative documents in their public records but rely on separation of powers and legislative immunity concepts to shield certain documents. (See Attachment 7)

An excellent source for a compendium of the public records laws of the 50 states can be found at www.rcfp.org/0gg/index.php.

Special thanks to Michele Andrejco, Legislative Legal Intern, 3rd-year law student at Elon University School of Law, Greensboro, NC for her substantial contribution to this analysis.
ATTACHMENT 1

Statistical and Administrative Data on NC General Assembly
Dennis McCarty, ISD Director
May, 2008

- The NCGA processes between 7 million and 10 million e-mails a month. Fluctuation is based on Session
  - Interim – averages @ 6 million a month (excludes inside e-mails)
  - Spread (based on current Post Office Use):
    - Members 26%
    - Staff 74%
  - Session – @ 8 million a month (excludes inside e-mails)
  - Peak times @ 10 million

(Id e-mails are those sent to-from @ncleg users and those sent from inside @ncleg to outside email accounts)

- Confidentiality issues:
  Legislative Confidentiality, immunity, and privilege:
  - What transpires between a staff member and a legislator is confidential. Discussions/verbal or written between staff relating to a member request are confidential.
  - G.S. 120-131 states, “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”
  - E-mails may or may not be confidential dependent on content and timing

- Public record requests are approved by the document custodian:
  - Members are the custodians of their own documents (this does NOT project upward to the President Pro Tem or the Speaker of the House)
  - Directors are the custodians of Divisional documents (barring Legislative Confidentiality/immunity/privilege matters)
  - The Legislative Services is the Custodian of Division Director’s documents, including Divisional documents in the absence of the Divisional Director)

- There are no limitations on storage consumption.
ATTACHMENT 2

Statistical and Administrative Data on Black Subpoena
Dennis McCarty, ISD Director, North Carolina General Assembly

Subpoena Process
4/05/2006

The Information Systems Division was formally engaged in the research and forensics of e-mails related to the three subpoenas of Speaker Black’s office in December 2005.

On December 13, 2005, ISD received the related “search terms” provided by the Federal Attorney’s office. Before applying the “search terms,” ISD had to filter out all e-mail accounts that were not identified in the subpoena. This reduced the base amount of e-mails to process from 5,701,820 down to 483,877. After reviewing of the “search terms” provided, ISD reported the “search terms” would produce too many false-positive and duplicate “hits.” However, the “search terms” were used as provided and, using The Ultimate Forensics Toolkit Product, ISD examined on-line e-mail accounts, network drives, and local hard drives of the identified 18 individuals (483,877 emails) and further reduced the number of applicable e-mails to 434,222. This took a little over 5 calendar days to complete.

In addition to on-line e-mails, e-mails contained on backup tapes were requested. This involves individual backup tape sets corresponding with 12 periods in time (YE 2003, YE 2004, 1/05, 2/05….10/05). It was noted that the tape sets are part of our disaster recovery backups, were not designed to restore e-mail, and have commingled data. In other words, the tapes contain text files, databases, not just e-mail and that ISD would have to identify which tapes contained the e-mail Post Office. Initial estimates of 26 hours per restore were provided based on network speeds and barring any technical problems.

The sheer size of the e-mail Post Office required ISD to build a “forensics lab” environment that would not be part of the NCGA Network and would have sufficient processing power and disk space to restore the Post Office (the Post Office is over 130GB). A “forensics lab” was established using existing servers that were being decommissioned.

When ISD began the identification and restoration process, several problems surfaced:

- Scanning of the backup tape sets to see which tapes were needed was not included as part of the 26 hour restore estimate. This is an extremely time-consuming process.
- There was insufficient external disk storage to house the extracted e-mails. External disk storage needed to be purchased.
- Changes to the Microsoft Active Directory over the time period required creative technical workarounds.
- Multiple tape media and equipment failures prompted purchases of new tape equipment.
To date, ISD has:

- Spent approximately 1,694 staff hours (using an average of $36/hr = $60,984)
- Spent $7,000 in hardware and software
- Scanned over 1,700 backup tapes (it takes anywhere between 5 minutes to one hour per tape)
- Analyzed and preserved all requested staff on-line email
- Successfully restored three (of 12 requested time periods) post office mailboxes from backup tapes and have located four more backup tape sets for restoration
- Successfully restored five (of 12 requested time periods) individual archived emails from backup tapes and have located two more backup tape sets for restoration and have located four backup tape sets
- Still attempting to locate backup tapes for five post office mailboxes
- Still attempting to locate backup tapes for five individual archived emails

Remaining tasks:

- Restore the mailboxes from backup tapes (four sets)
- Restore individual archived emails from backup tapes (two sets)
- Complete scanning for the remaining backup tapes that contain mailboxes (five time periods)
- Complete scanning for the remaining backup tapes that contain individual archived emails (five time periods)
- Index and run forensic tool against all restored data

On 3/29, we provided a “guess” estimate to complete the remaining tasks as four to six weeks. It was noted that hardware, software complexities, and media failures will affect this estimate.

Today, staff has reported that these same complexities preclude additional restores and have concluded that they can not restore any additional data.
Subpoena Process
4/5/2006

Summary

We started out looking at 5,701,820 on-line e-mails (contents of current mailboxes and on-line archive files). After selecting the 18 people identified in the subpoenas this was reduced to 483,877. After eliminating duplicates and applying the "search terms" (70+), this was further reduced to 434,222 e-mails. It is important to understand that the may report duplicate results and cause the numbers of e-mails to be artificially inflated. This is because they are searched for individually.

We still have to include e-mails from 12 additional points-in-time (i.e., YE 2003, YE 2004, Jan 05…Oct 05) of post office e-mail and 12 individual personal archive files (PSTs) for a total of 24 restores. Eight (8) restores were performed and are ready for forensics. We expect most of these will be duplicates.

In the process of locating the tapes containing e-mails over 1,700 tapes were scanned.

To accomplish this, we spent approximately 1,662 staff hours (using an average of $36/hr this is equivalent to $59,832) and purchased $7,000 in hardware and software.
<table>
<thead>
<tr>
<th>Item</th>
<th>Status</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spinning E-mails</td>
<td>C</td>
<td>As of 12/12/2005</td>
</tr>
<tr>
<td>&quot;C&quot; Drives</td>
<td>C</td>
<td>As of 12/17/2005</td>
</tr>
<tr>
<td>POST OFFICE</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>YE 2003</td>
<td>U</td>
<td>Unable to process 12/2003 tapes, tape 75 in set is unreadable</td>
</tr>
<tr>
<td>YE 2004</td>
<td>C</td>
<td>Restored to October 2004</td>
</tr>
<tr>
<td>Jan 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>Feb 2005</td>
<td>R</td>
<td>Ready to restore</td>
</tr>
<tr>
<td>Mar 2005</td>
<td>R</td>
<td>Restores on 3/15 and 3/27 were incomplete. Starting again</td>
</tr>
<tr>
<td>Apr 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>May 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>Jun 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>Jul 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>Aug 2005</td>
<td>R</td>
<td>Failed due to license error. Starting again</td>
</tr>
<tr>
<td>Sep 2005</td>
<td>C</td>
<td>Restored on 3/20/06</td>
</tr>
<tr>
<td>Oct 2005</td>
<td>R</td>
<td>First restore, tape broke in drive. Second set ready to restore</td>
</tr>
<tr>
<td>Nov 2005</td>
<td>C</td>
<td>1/27/06 - Out of scope; can be used to verify &quot;Spinning&quot; with date filters</td>
</tr>
<tr>
<td>Individual PSTs</td>
<td>--</td>
<td>From individual's F drives</td>
</tr>
<tr>
<td>YE 2003</td>
<td>S</td>
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<tr>
<td>YE 2004</td>
<td>R</td>
<td>Restoring to Nov 2004</td>
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<tr>
<td>Jan 2005</td>
<td>S</td>
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<td>C</td>
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</tr>
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<td>Mar 2005</td>
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<td>Apr 2005</td>
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<td>May 2005</td>
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</tr>
<tr>
<td>Jun 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>Jul 2005</td>
<td>S</td>
<td>Scanning tapes for complete set</td>
</tr>
<tr>
<td>Aug 2005</td>
<td>C</td>
<td>Restored on 3/13/06</td>
</tr>
<tr>
<td>Sep 2005</td>
<td>C</td>
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<tr>
<td>Oct 2005</td>
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<td></td>
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<tr>
<td></td>
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<tr>
<td></td>
<td>U</td>
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RESPONSES TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS

Defendants State of North Carolina and the North Carolina Department of Environment and Natural Resources (hereafter “DENR”) hereby submit the following objections and responses to Plaintiffs’ First Set of Interrogatories and First Request for Production of Documents pursuant to Rules 26, 33, and 34 of the North Carolina Rules of Civil Procedure.

...  

6. With regard to those portions of Plaintiffs’ First Set of Interrogatories and Request for Production of Documents directed toward information or documents possessed by the North Carolina General Assembly, Defendants object to said Interrogatories and Requests to the extent that they seek the discovery of information or documents protected by the doctrines of legislative immunity and/or legislative confidentiality existing under common law and under N.C. Gen. Stat. § 120-9 and N.C. Gen. Stat. § 120-129 et seq. In reliance on said doctrines, Defendants object to producing any information or documents from members of the North Carolina General Assembly or their staff as well as any other documents that fall within the doctrines of legislative immunity and/or legislative confidentiality existing under common law and under N.C. Gen. Stat. § 120-9 and N.C. Gen. Stat. § 120-129 et seq. or which are protected by the attorney/client privilege or the attorney work product doctrine. Defendants have made a good faith effort to obtain and to make available all non-privileged responsive documents
reasonably available to them from the General Assembly which have been deemed to be public records. With regard to documents which are being withheld pursuant to the doctrines of legislative immunity and/or legislative confidentiality existing under common law and under N.C. GEN. STAT. § 120-9 and N.C. GEN. STAT. § 120-129 et seq., all such documents fall within the sphere of legitimate legislative activity and are therefore immune from disclosure. With regard to any documents possessed by the General Assembly which are being withheld pursuant to the attorney/client privilege or the attorney work product doctrine (to which the doctrines of legislative immunity and/or legislative confidentiality would arguably not apply), all such documents consist of either communications between Defendants and their attorneys since the present lawsuit was filed or documents prepared since the present lawsuit was filed which relate to Defendants’ defense of this action or otherwise relate to this litigation. Any inadvertent disclosure of material protected by the attorney-client privilege, the work product doctrine, the doctrines of legislative immunity and/or legislative confidentiality, or any other applicable privilege or exemption is not intended, and should not be construed, to constitute a waiver.

7. Defendants also object to any interpretation of Plaintiffs’ First Set of Interrogatories and Request for Production of Documents that would purport to require them to access and produce documents stored electronically at the General Assembly on the ground that attempting to do so would be unduly burdensome and would require time-consuming and highly expensive special programming that would outweigh any anticipated probative value of said documents. Plaintiffs’ discovery requests in this case would require searching the electronic records for more than 100 individuals using an undetermined number of “search terms.” As of April 10, 2008, the General Assembly computer network houses over 8,600,670 on-line electronic files as defined in these discovery requests. In addition, there are 20 backup sets (stored on hundreds of backup tapes) that span the time-frame outlined in Plaintiffs’ discovery requests.

...  

10. Identify and describe in detail all reasons for the retroactive (versus prospective) application of Senate Bill 1492 and specifically describe any and all reasons why Senate Bill 1492 applies to all landfill applications that were pending as of August 1, 2007 as opposed to applying to only landfill applications that were filed on or after August 1, 2007.

RESPONSE: Defendants object to this Interrogatory to the extent that it improperly asks Defendants to provide the purpose of legislative enactments beyond the words used by the General Assembly.
in said enactments. Defendants further object to the inaccurate use of the word “retroactive” in this Interrogatory in that the buffer provisions do not, in fact, apply retroactively since they do not apply to permits already granted by DENR at the time the laws went into effect. An application of the laws to applications that had previously been filed for which no permits have been granted is not a “retroactive” application. Without waiving these objections, but instead relying specifically thereon, Defendants refer Plaintiffs to the text of North Carolina Session Law 2007-550.

...  

12. Identify any and all information requested from DENR by or on behalf of any legislator in the North Carolina General Assembly that references, relates to or otherwise regards:
   a. Black Bear;
   b. Camden County;
   c. The Camden Landfill;
   d. The Franchise Agreement;
   e. The Amended and Restated Franchise Agreement;
   f. The Site Hydrogeologic Report (and/or any revised or subsequent versions thereof; and
   g. Studies, reports or projections regarding the importation of out-of-state waste in North Carolina.

   RESPONSE: Defendants object to this Interrogatory on the ground that it is overly broad and unduly burdensome in that it is not limited to a reasonable time period, is not limited to any specific legislators or staff members or to any specific individuals employed by DENR, and encompasses subjects that are impermissibly far-reaching and overbroad (such as “the importation of out-of-state waste in North Carolina”). Defendants further object to this Interrogatory on the ground that it improperly seeks information as to matters protected by the doctrines of legislative immunity and/or legislative confidentiality. Without waiving these objections, but instead relying specifically thereon, Defendants will make available for inspection and/or copying at a mutually convenient date and time all responsive non-privileged documents which Defendants have been reasonably able to locate.

13. Identify any and all data, information or documents actually provided by DENR to representatives or agents of any legislator in the North Carolina General Assembly that references, relates to or otherwise regards:
a. Black Bear;
b. Camden County;
c. The Camden Landfill;
d. The Franchise Agreement;
e. The Amended and Restated Franchise Agreement;
f. The Site Hydrogeologic Report (and/or any revised or subsequent versions thereof); and
g. Studies, reports or projections regarding the importation of out-of-state waste in North Carolina.

RESPONSE: Defendants object to this Interrogatory on the ground that it is overly broad and unduly burdensome in that it is not limited to a reasonable time period, is not limited to any specific legislators or staff members or to any specific individuals employed by DENR, and encompasses subjects that are impermissibly far-reaching and overbroad (such as “the importation of out-of-state waste in North Carolina”). Defendants further object to this Interrogatory on the ground that it improperly seeks information as to matters protected by the doctrines of legislative immunity and/or legislative confidentiality. Without waiving these objections, but instead relying specifically thereon, Defendants will make available for inspection and/or copying at a mutually convenient date and time all responsive non-privileged documents which Defendants have been reasonably able to locate.

...  

1. Produce all documents related to, referring to, or reflecting any and all communications DENR had with North Carolina legislators and/or their representatives regarding Plaintiffs’ landfill project in Camden County prior to August 1, 2007.

RESPONSE: Defendants object to this Request on the ground that it contains the assumption that DENR had communications with North Carolina legislators and/or their representatives uniquely relating to Plaintiffs’ proposed landfill project as opposed to in conjunction with communications encompassing a wide variety of issues and facts relating to the disposal of solid waste in North Carolina. Defendants further object to this Request based on the fact that it is overbroad in that it is not limited to a reasonable period of time and is not limited to specific employees of DENR or specific individuals affiliated with the General Assembly. Defendants further object to this Request to the extent that it seeks the production of documents protected by
the attorney/client privilege, the attorney work product doctrine, and/or the doctrine of legislative immunity and/or legislative confidentiality. Without waiving these objections, but instead relying specifically thereon, Defendants will make available for inspection and copying at a mutually convenient date and time all responsive non-privileged documents which Defendants have been reasonably able to locate.

2. Produce all information, studies, reports, analyses and/or other documents DENR provided to North Carolina legislators and/or their representatives regarding Plaintiffs’ landfill project in Camden County prior to August 1, 2007.

   RESPONSE: Defendants object to this Request on the ground that it contains the assumption that DENR had communications with North Carolina legislators and/or their representatives uniquely relating to Plaintiffs’ proposed landfill project as opposed to in conjunction with communications encompassing a wide variety of issues and facts relating to the disposal of solid waste in North Carolina. Defendants further object to this Request based on the fact that it is overbroad in that it is not limited to a reasonable period of time and is not limited to specific employees of DENR or specific individuals affiliated with the General Assembly. Defendants further object to this Request to the extent that it seeks the production of documents protected by the attorney/client privilege, the attorney work product doctrine, and/or the doctrine of legislative immunity and/or legislative confidentiality. Without waiving these objections, but instead relying specifically thereon, Defendants will make available for inspection and copying at a mutually convenient date and time all responsive non-privileged documents which Defendants have been reasonably able to locate.

3. Produce all information, studies, reports, analyses, projections, data and/or other documents DENR provided to North Carolina legislators and/or their representatives prior to August 1, 2007, regarding importation of out-of-state waste into North Carolina.

   RESPONSE: Defendants object to this Request based on the fact that it is overbroad in that it is not limited to a reasonable period of time and is not limited to specific employees of DENR or specific individuals affiliated with the General Assembly. Defendants further object to this Request on the ground that the phrase “regarding importation of out-of-state waste into North Carolina” is impermissibly far-reaching and overbroad. Defendants further object to this Request to the extent that it seeks the production of documents protected by the attorney/client privilege, the attorney work product doctrine, and/or the doctrine of legislative immunity and/or legislative confidentiality. Without waiving these objections, but
instead relying specifically thereon, Defendants refer Plaintiffs to the documents which Defendants are making available for inspection and/or copying, some of which relate to the subject of this Request.

4. Produce all information, studies, reports, analyses, projections, data and/or other documents known to have been considered by the North Carolina General Assembly prior to August 1, 2007, regarding importation of out-of-state waste into North Carolina.

**RESPONSE:** Defendants object to this Request based on the fact that it is overbroad in that it is not limited to a reasonable period of time and is not limited to specific employees of DENR or specific individuals affiliated with the General Assembly. Defendants further object to this Request on the ground that the phrase “regarding importation of out-of-state waste into North Carolina” is impossibly far-reaching and overbroad. Defendants further object to this Request to the extent that it seeks the production of documents protected by the attorney/client privilege, the attorney work product doctrine, and/or the doctrine of legislative immunity and/or legislative confidentiality. Without waiving these objections, but instead relying specifically thereon, Defendants refer Plaintiffs to the documents which Defendants are making available for inspection and/or copying, some of which relate to the subject of this Request.

5. Produce all information, studies, reports, analyses projections, data and/or other documents known to have been considered by the North Carolina General Assembly prior to August 1, 2007, regarding Plaintiffs’ landfill project in Camden County.

**RESPONSE:** Defendants object to this Request on the ground that it contains the assumption that documents may have been considered by individuals affiliated in some way with the General Assembly uniquely relating to Plaintiffs’ proposed landfill as opposed to documents encompassing a wide variety of issues and facts relating to the disposal of solid waste in North Carolina. Defendants further object to this Request based on the fact that it is overbroad in that it is not limited to a reasonable period of time and is not limited to specific individuals affiliated with the General Assembly. Defendants further object to this Request to the extent that it seeks the production of documents protected by the attorney/client privilege and/or the doctrine of legislative immunity and/or legislative confidentiality. Without waiving these objections, but instead relying specifically thereon, Defendants will make available for inspection and copying at a mutually convenient date and time all responsive, non-privileged documents which Defendants have been reasonably able to locate.
Respectfully submitted, this the ___ day of April, 2008.

ROY COOPER
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North Carolina General 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, 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).)

§ 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.)

(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 made to an employee of a State agency other than the General Assembly by an employee of the Fiscal Research Division for assistance in the preparation of a fiscal note is confidential. An employee of a State agency other than the General Assembly who receives such a request or who learns of such a request made to another employee of his or her agency shall reveal the existence of the request only to other employees of the agency to the extent that it is necessary to respond to the request, and to the employee's supervisor and to the Office of State Budget and Management. All documents prepared by the 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.
   (b) As used in this section, "employee" means an employee or officer of a State agency.
   (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. 8.2; 2001-424, s. 12.2(b).)

§ 120-132. Testimony by legislative employees.
   No present or former legislative employees may be required to 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, or in any office of a legislator;
   (3) As a result of communications that are confidential under G.S. 120-130 and G.S. 120-131.

Notwithstanding the provisions of the preceding sentence, the presiding judge of a court of competent jurisdiction may compel that disclosure, if in his opinion, the same is necessary to a proper administration of justice. (1983, c. 900, s. 1; 1983 (Reg. Sess., 1984), c. 1038, s. 5.)

§ 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 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.)
ATTACHMENT 5

North Carolina E-Mail Records Review Panel

May 20, 2008

Dear Governor Easley:

In March, you created the E-mail Records Review Panel and appointed its members (a list of the Panel members is attached). You directed that we propose any necessary changes to the current North Carolina e-mail and electronic text communication record retention policies and procedures in light of changes in technology. The Panel met six times from March 27, 2008 to May 15, 2008 and developed a set of unanimous recommendations which are enclosed herewith. The Panel held a public hearing during which Panel members heard from representatives from the N.C. Press Association, the N.C. Association of Broadcasters, the State Employees Association of N.C. and the UNC system, among others. At a later meeting, the Panel again heard from members of the N.C. Press Association, including Charlotte Observer Editor, Rick Thames, and News and Observer Senior Editor, Steve Riley.

In formulating its recommendations, the Panel recognized the importance of a transparent government and the public’s right to access public records, including e-mail used in the course of state business. The Panel recognized that state employees should be directed to treat e-mail as they do paper documents or other records handled in the course of their employment, and to do so in compliance with existing public records laws. The Panel felt the content of the information in the e-mail, rather than the e-mail format, should determine how an employee should manage e-mail. The Panel further recognized that in managing e-mail, each agency’s records retention and disposition schedule could instruct an employee on how long e-mail should be saved and how to distinguish between e-mail created in the
course of state business as opposed to personal and junk e-mail, which both the Panel and many presenters felt state employees should retain the ability to delete. (Although present technology does not allow state employees to delete personal e-mail and junk without taking the minimal risk that e-mails related to state business may be purged, we ask that you direct Information Technology Services to search for solutions that would keep users from purging matters of state business.)

Among the Panel’s unanimous recommendations enclosed herewith are: directing state employees to treat electronic records as they do paper records; mandating training for state employees who handle public records; implementing an archiving system for all executive branch state agencies; directing the N.C. Department of Cultural Resources to randomly audit several state agencies each year to ensure compliance with public records laws and agency record retention and disposition schedules; expanding the retention of back up tapes from 30 days to at least five years; moving toward a single e-mail system in the executive branch; and requiring employees who use personal e-mail accounts, personal computers, personal digital assistants and other forms of technology to conduct state business to synchronize or otherwise copy the records to a state-assigned e-mail account, or print a paper copy of the public records, and properly archive them.

We appreciate the opportunity to serve you and the people of North Carolina in conducting this comprehensive review of policies concerning the retention of electronic records under North Carolina’s public records law.

Respectfully,

Franklin Freeman
Chair, E-mail Records Review Panel
E-MAIL RETENTION TRAINING SOLUTION

BACKGROUND

Current resources available through the North Carolina Department of Cultural Resources (DCR) to train state employees on how to handle public records include face-to-face workshops presented monthly at DCR; these workshops are also provided for agencies on-site by request by DCR’s Government Records staff. In addition, the 2002 publication *E-mail as a Public Record in North Carolina: Guidelines for Its Retention and Disposition* is available on the DCR Web site. While these resources are helpful tools for employees seeking to strengthen their understanding of e-mail records retention and public records law, the Panel recognizes that training resources must be expanded and the obligations of state employees concerning e-mail (and all other public records) more clearly defined.

RECOMMENDATION

The Panel recommends that training for managing e-mail as a public record be made available online to all state, local, and municipal government employees and be required for state employees who handle public records. State agency heads will require training for all employees in their respective agencies who handle public records. Completion of the training, in the form of certification, will be noted in the employee’s personnel file. Whenever substantive changes in public records law occur, agency heads will require recertification of employees. Additionally, agency heads may require recertification as they deem appropriate.

The tutorial will be posted on the DCR Web site and linked from the “Other Resources” section of Information Technology Services’ (ITS) www.ncmail.net. Agency Chief Records Officers will be notified of the tutorial’s publication and communicate its availability to their agencies. This training, based on current workshop materials and in the form of an online tutorial, will cover public records law, public records found in e-mail and how to retain and archive e-mails based on DCR’s *General Schedule for State Agency Records*, as well as the program records retention and disposition schedule specific to each agency. The tutorial will be updated as necessary based upon changes in public records law.

IMPLEMENTATION

The tutorial will be created using an open-source content management system (CMS) that allows comprehensive reporting and tracking of users and completion rates. DCR will work closely with ITS to launch a state-wide training initiative. ITS will implement and manage the CMS that will host content developed by DCR.

The appearance of the tutorial will closely resemble a Web site. Brief quizzes will be included throughout the tutorial to assist the individual and the results can be recorded as described above.

SOME POTENTIAL ADVANTAGES

- The CMS allows for a variety of reports to identify employees who have and have not completed the tutorial.
• The CMS allows the log-in to be linked to a pre-existing log-in (such as the North Carolina Identity Management NCID), and groups of users can be defined, allowing existing groups of employees different levels of access to the content and reporting tools.

• Confirmation of completion can be easily disseminated to each employee’s personnel file.

• The tutorial can be completed in multiple sessions based on the employee’s schedule and preference, rather than one thirty-minute session.

• Should future training on other topics be recommended for government employees, the content could easily be incorporated in the CMS.

**Some Potential Disadvantages**

• The CMS requires additional financial and human resources to provide the necessary set-up and additional programming.
E-MAIL ARCHIVING SOLUTIONS

BACKGROUND
Governor Mike Easley charged the E-mail Records Review Panel with studying the issue of managing e-mail as a public record. The Panel recognizes the importance of a transparent government and the public’s right to access public records, including e-mail used in the course of state business. State employees, through training offered by the North Carolina Department of Cultural Resources (DCR) and the publication *E-mail as a Public Record in North Carolina*, available on the DCR Web site, are directed to treat e-mail as they do paper documents or other records handled in the course of employment by the State and to do so in compliance with existing public records laws. The content of the information in the e-mail, rather than the e-mail format, determines how an employee will manage e-mail. Employees are directed to the *General Schedule for State Agency Records* as well as their records retention and disposition schedule, specific to each agency, to determine how to manage e-mail and how long to save it.

The Panel’s goal is to ensure that all employees are sufficiently trained and have the tools to comply with existing public records law and other applicable laws, using the General Schedule and the program records retention and disposition schedule for their agency’s records.

RECOMMENDATIONS
Technology can be used to augment the above guidelines through enhanced training resources; management of records; as well as collection and preservation of e-mail records of enduring, permanent value. The Panel proposes the following solution as the most advantageous response to the challenges of e-mail retention and preservation:

- State employees are directed to treat e-mail as they do paper documents or other records handled in the course of employment by the State and to do so in compliance with existing public records laws.
- Information Technology Services (ITS) will save back-up tapes of all Executive Branch e-mail a minimum of five years [projected costs for storage are $75,000/year]. This will provide a longer window of opportunity to recover e-mails that may not previously have been saved.
- All executive branch agencies shall collaborate with the State Chief Information Officer (CIO) and DCR toward the goal of employing a software platform that complies with the Panel’s recommendations, including saving back up tapes for at least five years.
- DCR will make online training on how to handle e-mail as a public record available to all state, local, and municipal government employees, and any other interested parties. Whenever substantive changes in public records law occur, agency heads will require recertification of employees. Additionally, agency heads may require
recertification as they deem appropriate. The DCR tutorial will be updated as necessary based upon changes in public records law.

- Through the competitive bidding process, the Office of the State CIO will procure an archive system and will work jointly and in collaboration with DCR to provide the archives/records management software package to be used by state agencies in the executive branch to archive and manage e-mail and electronic records made or received in the course of business.

- DCR shall conduct random audits of state agencies in the executive branch to ensure agencies are in compliance with their records retention and disposition schedule. In addition, DCR will conduct an annual review of and report on the number of requests made for e-mails on backup tapes and report its findings to the Governor and the State CIO. The reports should include information regarding the request, who made it and the cost incurred as a result of responding to each request. The annual reports will be used to evaluate the efficacy of the retention of backup tapes and may result in changes to the required five-year retention of backup tapes.

Additionally, the Panel recognizes the need to provide an e-mail archiving solution to agencies for e-mail records of enduring, permanent value. These e-mails document the activities of state government and are a historical record. We recommend the following:

- DCR will continue to manage and provide access to e-mail records that have been archived.

- ITS, working in close collaboration with DCR, will expedite the full development of an e-mail collection and preservation tool (EMCAP) that will allow employees with e-mail of enduring, permanent value to archive their agency’s e-mail using their client software and in compliance with existing public records laws.

The Panel also recognizes the need to address evolving portable data devices and the use of personal computers and personal e-mail accounts to conduct state business. We recommend the following:

- State employees who use technology including, but not limited to, home computers, personal digital assistants, or other recording technologies in the course of state business, are required to manage such records in accordance with the General Schedule for State Agency Records and their agency’s records retention and disposition schedule. Employees are directed to ensure that all such records are synchronized or otherwise copied to the appropriate state-assigned e-mail accounts or state computers, or that a paper copy is created. All such records must be properly archived.

- DCR will incorporate into the training recommended by this Panel information regarding compliance with public records laws and records retention and disposition schedules for records created, sent or received on mobile devices, in personal e-mail accounts or on personal computers.
IMPLEMENTATION

- The Panel recommends that all executive branch state agencies use an e-mail system employing a platform consistent with the archiving platform offered by ITS and which will save back up tapes of e-mail for five years.

- The State CIO has the authority and will work in collaboration with agencies toward the goal of consolidating e-mail services and utilization of one e-mail system for state agencies.

- ITS will require additional funding to begin immediately implementing an archives/records management software solution for executive agencies. DCR will require additional funding to support this initiative including the audit function.

- DCR and ITS will work cooperatively to make an online tutorial on e-mail management available to all state and local employees as well as interested parties. The training results will be tracked through a content management system (CMS), possibly linked to the North Carolina Identification Management (NCID) system currently in place at ITS. This will allow agency heads to audit employees’ compliance regarding e-mail records. This training will instruct employees on their responsibilities with regard to public records laws and their records retention and disposition schedule.

- Employees will be able to access their retention schedules via the DCR Web site.

- Employees will still be required to manage their e-mail and determine its value in accordance with existing public records laws and using the General Schedule for State Agency Records, as well as their program-specific records retention and disposition schedule.

- Agency heads will require all state employees in their respective agencies who handle public records to take either the online training or the workshop offered by DCR. Whenever substantive changes in public records law occur, agency heads will require recertification of employees. Additionally, agency heads may require recertification as they deem appropriate.

- Employees will manage their records utilizing a records management software procured through the competitive bidding process. ITS will purchase and house the software and hardware. The State CIO’s office will work jointly with DCR to implement an archives/records management software program.

- Funding for additional staff in DCR to support this initiative will be allocated.
From their desktop computers, employees with e-mail records of enduring value will have the ability to archive their e-mail with DCR. ITS and DCR will work together expeditiously to seamlessly integrate and expedite the DCR E-mail Collection and Preservation (EMCAP) tool with Microsoft Exchange to ensure that e-mail of enduring, permanent value can be collected and preserved in accordance with public records laws and the mission of the North Carolina State Archives.

**Some Potential Advantages:**

This recommendation:

- Is in compliance with the provisions of General Statutes Chapters 121 and 132;
- Provides state employees with additional training to ensure understanding of public records law, records retention and disposition schedules, and the responsibilities of state employees;
- Provides state employees in the executive branch with the tools to manage their records;
- Promotes good records management practices and efficient use of state government resources;
- Makes the employees responsible for managing their e-mail records in the same manner that they manage their records in all other formats;
- Allows a more manageable quantity of e-mail to be saved than a save-it-all scenario;
- Addresses concerns regarding the availability of records for public inspection.

**Some Potential Advantages of EMCAP:**

Technology changes rapidly and both media and file formats quickly become obsolete. As a result, great expense is incurred to access e-mails in formats that are no longer supported. The proposed e-mail preservation tool, EMCAP, moves e-mail messages out of proprietary software formats into a more stable, software independent format—Extensible Markup Language or XML—an industry standard that can be read by almost any software platform.

EMCAP:

- Allows users to choose which e-mails are to be archived in accordance with public records law and the agency’s records retention and disposition schedule;
- Does not require special software to be purchased by agencies;
- Is a familiar tool because it mimics current practices of “dragging and dropping” e-mails into folders;
- Does not require special training;
• Can be incorporated into the existing training vehicles;
• Allows preserved e-mails to be searched and accessed;
• Captures all the information about an e-mail, including not only the typical data of “to” and “from” but also transmission data that details how and when e-mail was sent, valuable evidential and historical information.

Some Potential Disadvantages:

• ITS may be required to expeditiously migrate all state agencies to a new e-mail platform which requires adequate funding and staff;
• This recommendation will require funding for additional technology and staff for ITS and DCR.
§ 132-1. "Public records" defined.
(a) "Public record" or "public records" shall mean all documents, 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, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include 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.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

(1935, c. 265, s. 1; 1975, c. 787, s. 1; 1995, c. 388, s. 1.)

§ 132-1.1. Confidential communications by legal counsel to public board or agency; State tax information; public enterprise billing information; Address Confidentiality Program information.

(a) Confidential Communications. – Public records, as defined in G.S. 132-1, shall not include written communications (and copies thereof) to any public board, council, commission or other governmental body of the State or of any county, municipality or other political subdivision or unit of government, made within the scope of the attorney-client relationship by any attorney-at-law serving any such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which such body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. Such written communication and copies thereof shall not be open to public inspection, examination or copying unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body.

(b) State and Local Tax Information. – Tax information may not be disclosed except as provided in G.S. 105-259. As used in this subsection, "tax information" has the same meaning as in G.S. 105-259. Local tax records that contain information about a taxpayer's income or receipts may not be disclosed except as provided in G.S. 153A-148.1 and G.S. 160A-208.1.

(c) Public Enterprise Billing Information. – Billing information compiled and maintained by a city or county or other public entity providing utility services in connection with the ownership or operation of a public enterprise, excluding airports, is not a public record as defined in G.S. 132-1. Nothing contained herein is intended to limit public disclosure by a city or county of billing information:

1. That the city or county determines will be useful or necessary to assist bond counsel, bond underwriters, underwriters' counsel, rating agencies or investors or potential investors in making informed decisions regarding bonds or other obligations incurred or to be incurred with respect to the public enterprise;

2. That is necessary to assist the city, county, State, or public enterprise to maintain the integrity and quality of services it provides; or

3. That is necessary to assist law enforcement, public safety, fire protection, rescue, emergency management, or judicial officers in the performance of their duties.

As used herein, "billing information" means any record or information, in whatever form, compiled or maintained with respect to individual customers by any owner or operator of a public enterprise, as defined in G.S. 160A-311, excluding subdivision (9), and G.S. 153A-274, excluding subdivision (4), or other public entity providing utility services, excluding airports, relating to services it provides or will provide to the customer.
(d) Address Confidentiality Program Information. – The actual address and telephone number of a program participant in the Address Confidentiality Program established under Chapter 15C of the General Statutes is not a public record within the meaning of Chapter 132. The actual address and telephone number of a program participant may not be disclosed except as provided in Chapter 15C of the General Statutes.

(e) Controlled Substances Reporting System Information. – Information compiled or maintained in the Controlled Substances Reporting System established under Article 5E of Chapter 90 of the General Statutes is not a public record as defined in G.S. 132-1 and may be released only as provided under Article 5E of Chapter 90 of the General Statutes.

(f) Personally Identifiable Admissions Information. – Records maintained by The University of North Carolina or any constituent institution, or by the Community Colleges System Office or any community college, which contain personally identifiable information from or about an applicant for admission to one or more constituent institutions or to one or more community colleges shall be confidential and shall not be subject to public disclosure pursuant to G.S. 132-6(a). Notwithstanding the preceding sentence, any letter of recommendation or record containing a communication from an elected official to The University of North Carolina, any of its constituent institutions, or to a community college, concerning an applicant for admission who has not enrolled as a student shall be considered a public record subject to disclosure pursuant to G.S. 132-6(a). Nothing in this subsection is intended to limit the disclosure of public records that do not contain personally identifiable information, including aggregated data, guidelines, instructions, summaries, or reports that do not contain personally identifiable information or from which it is feasible to redact any personally identifiable information that the record contains. As used in this subsection, the term "community college" is as defined in G.S. 115D-2(2), the term "constituent institution" is as defined in G.S. 116-2(4), and the term "Community Colleges System Office" is as defined in G.S. 115D-3. (1975, c. 662; 1993, c. 485, s. 38; 1995 (Reg. Sess., 1996), c. 646, s. 21; 2001-473, s. 1; 2002-171, s. 7; 2003-287, s. 1; 2005-276, s. 10.36(b); 2007-372, s. 2.)

§ 132-1.2. Confidential information.

Nothing in this Chapter shall be construed to require or authorize a public agency or its subdivision to disclose any information that:

1. Meets all of the following conditions:
   a. Constitutes a "trade secret" as defined in G.S. 66-152(3).
   b. Is the property of a private "person" as defined in G.S. 66-152(2).
   c. Is disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in compliance with laws, regulations, rules, or ordinances of the United States, the State, or political subdivisions of the State.
   d. Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

2. Reveals an account number for electronic payment as defined in G.S. 147-86.20 and obtained pursuant to Articles 6A or 6B of Chapter 147 of the General Statutes or G.S. 159-32.1.

3. Reveals a document, file number, password, or any other information maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes.

4. Reveals the electronically captured image of an individual's signature, date of birth, drivers license number, or a portion of an individual's social security number if the agency has those items because they are on a voter registration document. (1989, c. 269; 1991, c. 745, s. 38; 1995 (Reg. Sess., 1996), c. 646, s. 21; 2001-473, s. 1; 2002-171, s. 7; 2003-287, s. 1; 2005-276, s. 10.36(b); 2007-372, s. 2.)
Open Records

I. STATUTE -- BASIC APPLICATION

B. Whose records are and are not subject to the act?

2. Legislative bodies.


Alabama

All legislative bodies are presumptively subject to the Public Records Law, although the Law itself is silent on this point. One trial court has applied the 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).

Alaska

Subordinate legislative bodies such as school boards and municipal assemblies are clearly covered by the public records law. Records of the Alaska Legislature itself are also public by virtue of legislative rules and statutes. It is possible that legislators would argue the laws and rules are not judicially enforceable, citing Abood v. League of Women Voters, 743 P.2d 333 (Alaska 1987). In that case, the Alaska Supreme Court held that violations by the state legislature of the Alaska Open Meetings Act were "nonjusticiable," even though the OMA and legislative rules expressly required the legislature to meet publicly in accordance with the law. This means the court simply will not entertain disputes over such violations, because of the need to respect the relationship between coordinate branches of government established by the constitution.

Would the same reasoning be applied by the courts to duck problems with legislative violations of public records laws? Possibly, though there are good arguments to the contrary. The Abood decision rests on two constitutional provisions. First, the Alaska constitution provides, in Article II, Section 12: "Rules. The houses of each legislature shall adopt uniform rules of procedure." Further, the court found that when, where and how legislators meet and deliberate is a question of legislative rules and that only the legislature can decide whether and how the law should apply to it. This reasoning could be applied to records, as well, since the premise of the court's opinion is that "out of respect owed to a coordinate branch of state government, [the court must] defer to the wisdom of the legislature concerning violations of legislative rules which govern the internal workings of the legislature." 743 P.2d at 337. In this context, however, records and meetings present very different issues. It is less obvious that access to records involves procedural rules. Also, there is no provision in the records laws
comparable to AS 44.62.312(f) in the OMA, which -- as it was written at the time -- would have
voided legislation enacted as the result of a process involving open meetings law violations.

A different problem is posed by the other ground for the Court's decision -- Article II, Section 6,
of the Alaska Constitution, dealing with legislative immunity. In essence, it would prevent
questioning a legislator, and many legislative aides, about alleged violations of public records
laws whether in depositions or in court. This should not be such a major stumbling block in the
records context, however, since there will normally be records custodians other than the
legislators or their aides. It is different from the situation of a meeting of legislators, when only
they know what was said, or who attended. Further discussion of the interesting constitutional
issues raised by access to legislative records is beyond the scope of this outline. Reporters
should assume legislative records are generally open to the public unless and until it is
determined otherwise.

Arkansas

Records of a "public official or employee" and a "governmental agency" are covered by the
FOIA. Ark. Code. Ann. § 25-19-103(5)(A). This definition includes the General Assembly,
legislators, legislative committees, city councils, and other bodies with legislative powers. E.g.,
96-123 (county quorum court), 84-091 (legislative committees).

Arizona

There is no information under this heading in this state's outline. Because there might be
relevant text in the parent point in the outline, the text for that section follows:

Open Records
 I. STATUTE -- BASIC APPLICATION
 B. Whose records are and are not subject to the act?

The Arizona Public Records Law contains two operative definitions -- "officer" and
"public body" -- for the purpose of subjecting certain documents to disclosure under the
law.

"Officer" is defined as "any person elected or appointed to hold any elective or
appointive office of any public body and any chief administrative officer, head, director,
superintendent or chairman of any public body" and is obliged to preserve, maintain,
care for and disclose public records pursuant to Arizona law. A.R.S. § 39-121.01(A)(1).

"Public bodies" are defined by statute as "the state, any county, city, town, school
district, political subdivision or tax-supported district in the state, any branch,
department, board, bureau, commission, council or committee of the foregoing, and
any public organization or agency, supported in whole or in part by monies from the
state or any political subdivision of the state or expending monies provided by the state
or any political subdivision of the state." A.R.S. § 39-121.01(A)(2).

The operative definition of a "public body" in Arizona is very broad. Indeed, any "public
organization or agency" supported by or expending public funds falls within the ambit
of the Act.

_Exempt Agencies:_ No Arizona agencies are exempted in their entirety.
California

The CPRA does not apply to the State Legislature or its committees. Cal. Gov't Code § 6252(a). Records of the Legislature are subject to the Legislative Open Records Act. Cal. Gov't Code § 9070, et. seq. The California Constitutional Sunshine Amendment does apply to the Legislature because it applies generally to "public bodies" and to the "writings of public officials," without excluding the Legislature. Cal. Const. Art. I, § 3(b)(1). The Amendment, however, specifically maintains exemptions and protections for confidentiality of records of the Legislature as provided for by "Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions . . . ." Cal. Const., Art. I, § 3(b)(1). No case has addressed what additional access to the records of the Legislature, if any, is afforded under the Sunshine Amendment. However, a constitutional right of access arguably would extend to records not exempt or otherwise protected under existing law.

Colorado

The records of the General Assembly are covered by the Act.

Connecticut

The legislative branch is subject to FOIA. Conn. Gen. Stat. § 1-200(1). See also Conn. Gen. Stat. § 2-23 (copies of bills, resolutions, and records of hearings and proceedings shall be kept at state library for public inspection).

District of Columbia


Delaware

Legislative bodies are covered. However, the General Assembly, or any caucus thereof, or committee, subcommittee, ad hoc committee, special committee or temporary is specifically exempted. 29 Del. C. § 10002(c); News-Journal Co. v. Boulden, 1978 WL 22024 (Del. Ch. May 24, 1978). For example, the Wilmington City Council is covered. News-Journal Co. v. McLaughlin, 377 A.2d 358 (Del. Ch. 1977).

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
Minnesota

The legislature was crafty enough to draft the Act so that it did not apply to the legislature. However, in 1993, as a result of a controversy over personal use of long distance telephone cards, the legislature passed legislation rendering certain records, including telephone records, public. § 10.46.

Georgia

The Act applies to all governmental bodies or other entities that serve a "public function," legislative or otherwise. See Jersawitz v. Fortson., 213 Ga. App. 796, 446 S.E.2d 206 (1994) (applying related Open Meetings Act to Olympic Task Force Selection Committee) The Act specifically exempts from its disclosure requirements privileged and confidential official communications with the Office of Legislative Counsel, O.C.G.A. § 50-18-75, as well as certain records 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, O.C.G.A. § 50-18-72(a)(8). Moreover, the Act has been held inapplicable to the General Assembly, "since the Legislature [has] historically exercised the authority to adopt its own internal operating procedures, and [has] subsequently adopted [procedures] inconsistent with the Act." Fathers Are Parents Too v. Hunstein, 202 Ga. App. 716, 717, 415 S.E.2d 322 (1992), citing Coggin v. Davey, 233 Ga. 407, 410-11, 211 S.E.2d 708 (1975).

Hawaii

The State Legislature is subject to the UIPA, but Section 92F-13(5) provides an exception for "[i]nchoate and draft working papers of legislative committees including budget worksheets and unfiled committee reports; work product; records or transcripts of an investigating committee of the legislature which are closed by rules adopted pursuant to Section 21-4 and the personal files of members of the legislature." Legislative rules provide that committee reports (as opposed to drafts) are public records.

Iowa

Similarly, no provision is made in the statute for exclusion of records in the custody of legislative bodies or the courts. "It is the nature and purpose of the document, not the place where it is kept, which determines its status." 79 Op. Att'y Gen. 19, 20 (Oct. 9, 1979). Des Moines Independent Community School District Public Records v. Des Moines Register & Tribune Company, 487 N.W.2d 666, 670 (Iowa 1992) ("The nature of the record is not controlled by its place in a filing system."). But see, Des Moines Register and Tribune Co. v. Dwyer, 542 N.W.2d 491, 503 (Iowa 1996) (Senate decision to keep the records in question (long distance telephone records) confidential falls within the constitutionally granted power of the Senate to determine its rules of proceedings under Iowa Const. Art. III, § 9).

Idaho

The definition of "state agency" in the Public Records Act also includes all legislative bodies. Idaho Code § 9-337(13). The records maintained by officers of all legislative bodies, except as
expressly provided otherwise by law, are open to the public.

**Illinois**

Public bodies whose records are subject to the Act include legislative bodies. See 5 ILCS 140/2(a). It should be noted that records of officers and agencies of the General Assembly that pertain to the preparation of legislative documents are exempt from disclosure if those records are in the nature of preliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated. 5 ILCS 140/7(1)(f) (emphasis added).

**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).

**Kansas**

Legislative bodies are subject to KORA. *Id.*

**Kentucky**

The General Assembly is not exempt from the ORA. "The General Assembly did not exclude itself from the Open Records Act, but made the Act binding upon itself by defining the term public agency to include 'any body created by state or local authority in any branch of government." 98-ORD-92 (citing KRS 61.870(1)(g)). "Every state or local legislative board" is a public agency under the ORA. KRS 61.870(1)(c).

**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.

**Massachusetts**

Maryland

The PIA applies. The records of all units or instrumentalities of State government or of a political subdivision of the State concerning the affairs of government and the official acts of public officials and employees are subject to the PIA. See §§ 10-611(g), 10-601, 10-604. The public record statutes pertains whether the document was created or merely received by the instrumentality. Id.

Maine

Records of the Legislature itself are subject to the Freedom of Access Act, but legislative papers and reports, working papers, drafts, internal memoranda, and similar works in progress are not public until signed and publicly distributed in accordance with rules of the Legislature. 1 M.R.S.A. § 402(3)(C).

Michigan


Missouri

Legislative bodies are subject to the Sunshine Law. Mo.Rev.Stat. § 610.010(4) (definition of "public governmental body" includes any legislative governmental entity created by the constitution, statutes, order or ordinance).

Mississippi

Legislative records are covered by the Act, but an ambiguous section retains for the legislature "the right to determine the rules of its own proceedings and to regulate public access to its records." § 25-61-17.

Montana

The Public Records Act does not specifically exempt legislative records. Further, the Montana Constitution, Article V, § 10(3), requires that "(t)he sessions of the legislature and of the committee of the whole, all committee meetings, and all hearings shall be open to the public." Although no court has addressed legislative records, this constitutional mandate for open meetings coupled with the lack of exemption on legislative branch records all mitigate in favor of openness.

North Carolina

Most records of legislative bodies are covered by the law, but a separate statute allows legislators to maintain the confidentiality of their requests to the legislative staff for information or drafting assistance. G.S. § 120-129. The Attorney General has opined that correspondence sent to legislators by their constituents is public.
North Dakota

All legislative bodies are covered by the open records law.

Nebraska

The definition of public records above appears to include records of legislative bodies as well. Neb. Const. Art. III, § 11, however, provides “the Legislature shall keep a journal of its proceedings and publish them (except such parts as may require secrecy).” The Legislature has recently taken the position that the exemption for “Correspondence, memoranda, and records of telephone calls related to the performance of duties by a member of the Legislature” prohibits access to telephone records even by the State Auditor.

New Hampshire

There is no information under this heading in this state’s outline. Because there might be relevant text in the parent point in the outline, the text for that section follows:

Open Records

I. STATUTE -- BASIC APPLICATION
   B. Whose records are and are not subject to the act?

The Statute begins by defining “public proceedings” by reference to the activities of certain enumerated bodies. RSA 91-A:1-a. It then sets forth rules governing access to the meetings of “a public body, as provided in RSA 91-A:1-a.” RSA 91-A:2. Public bodies are those bodies whose activities constitute the “public proceedings” as set forth in section 1-a. In section 4, the statute confers upon citizens the right to inspect “all public records” of “all such bodies and agencies,” referring to the state and local bodies enumerated in section 1-a. Case law has made clear that the law applies to a wide spectrum of “bodies and agencies.” Lodge v. Knowlton, 118 N.H. 574, 576 (1978) (“With the exception of the department of employment security, all State executive branch agencies and departments were meant to be and are included within the provisions of RSA 91-A”); see 1975 N.H.H.R. Jour. 600; Exec. Order 74-1 (statute applies to “each department, agency, board and commission within the state”).

Specific Bodies Subject to the Statute. The statute contemplates within the term “public records” in RSA 91-A:4, the records of the following:

· The General Court (legislature), including executive sessions of committees. RSA 91-A:1-a(l)(a).

· The Governor's Council and the Governor with the Governor's Council. Note that aside from meetings with the Governor's Council, the Governor is not specifically listed under the “public proceedings” section, and the Attorney General takes the position that the Statute does not apply to records in the Governor's Office. Nevertheless, such records may be sought under Part 1, Article 8 of the New Hampshire Constitution. The Supreme Court has held that agency budget requests and income estimates submitted to the Governor are within the scope of the law. Chambers v. Gregg, 135 N.H. 478 (1992).

· Boards and commissions of state, county or municipal agencies or authorities, including the Board of Trustees of the University System of New Hampshire. RSA 91-
A:1-a, l(c)-(d).

- Advisory committees established by any of the foregoing public bodies.


- Committees of state boards, commissions, councils, and the General Court. *Bradbury v. Shaw*, 116 N.H. 388 (1976). Note that it is not necessary that a board or committee be formally established by statute or ordinance for it to fall within the provisions of the law. *Id.* An "industrial advisory committee" established by a town mayor without statutory authority, consisting of local businessmen, which advised the mayor informally on development issues, solicited businesses to locate in the town, and negotiated sale of city-owned land, was held within the scope of law because of its "involvement in governmental programs." *Id.* at 390.

- A municipal finance committee, which has power only to make recommendations to a city council. *Selkowe v. Bean*, 109 N.H. 247 (1968).

**Specific Bodies Not Subject to the Statute.** The following are not subject to the statute:


- Courts: The Statute nowhere defines courts as public bodies, nor imposes upon courts any requirements of disclosure. Access to court records is provided by Part I, Articles 8 and 22 of the New Hampshire Constitution as interpreted by judicial decisions. *The Associated Press v. State*, 888 A.2d 1236 (2005), and cases cited.

**New Jersey**

A government record shall *not* include information received by a member of the Legislature from a constituent or information obtained 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 database, or in any telephone record whatsoever, unless it is information the constituent is required by law to transmit.

A government record shall also *not* include 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 that is required by law to be submitted to the Legislature or its members.

See *N.J.S.A. 47:1A-1.1*
New Mexico

The Legislature is generally subject to the Inspection of Public Records Act. § 14-2-6(D), NMSA 1978.

Nevada

The statute does not distinguish legislative bodies from any other governmental entity. See N.R.S. 239.005.

New York

Records of the New York State Legislature are subject to FOIL under a separate provision of that law which delineates the specific records which are subject to public inspection and copying. N.Y. Pub. Off. Law § 88 (McKinney 1988). The "State Legislature" is defined by FOIL to mean "the legislature of the State of New York, including any committee, subcommittee, joint committee, select committee, or commission thereof." N.Y. Pub. Off. Law § 86(2) (McKinney 1988). See Weston v. Sloan, 201 A.D.2d 778, 607 N.Y.S.2d 478 (3d Dept. 1994), modified 84 N.Y.2d 462, 643 N.E.2d 1071, 619 N.Y.S.2d 255 (granting access to facts and figures memorializing the expenditure of public funds for legislative printings and mailings, but denying access to copies of newsletters and information targeted mailings). Local legislative bodies are governmental entities within the definition of "agency" and thus subject to FOIL. See generally King v. Dillon, No. 20859/84 (Sup. Ct., Nassau County, Dec. 19, 1984) (granting access to minutes of village board meeting); Malman v. Supervisor (Town of Islip), No. 7361/81 (Sup. Ct., Nassau County, Aug. 20, 1981) (granting access to resolution passed by Town Board).

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.

Oklahoma

Records of the legislature or of individual legislators are not subject to the Act except for records kept and maintained on receipt and expenditure of any public funds reflecting all financial and business transactions relating thereto. 51 Okla. Stat. Supp. 2005 § 24A.3.2.

Oregon

The records of legislative bodies other than the state legislature are subject to inspection under ORS 192.420 and the definitions of ORS 192.410(3). The state Legislative Assembly is not subject to the Public Records Law. ORS 192.410(5); see also ORS 171.405 (no requirement to
keep records of acts of legislature other than enrolled laws and joint resolutions themselves) and ORS 192.005(5)(a) and (6).

Pennsylvania


Rhode Island

Subject to the APRA.

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. § 30-4-40(a)(1). Other than this "working papers" exception, other records of the General Assembly are subject to the same provisions as other public records.

South Dakota

Legislative bodies are not excluded.

Tennessee

The joint legislative services committee has sole authority to determine whether any member of the public may be permitted access to the legislative computer system in which confidential information is stored or processed. T.C.A. § 3-10-108(a). Direct access to such a computer may not be permitted unless protection of any confidential information is ensured. Id. at § 3-10-108(b). No information available in printed form may be obtained from the legislative computer system pursuant to the Open Records Act. Id. at § 3-10-108(c). A legislator's e-mail is subject to the Act if it was made or received in connection with the transaction of official business. Op. Atty's Gen. No. 05-099 (June 20, 2005).

Texas

The legislative branch of state government and any governmental body created by it is subject to the Act, which exempts certain categories of information pertinent to the legislature. Drafts or working papers involved in the preparation of proposed legislation are excluded from the Act. § 552.106.

Private correspondence or communications by an elected office holder, the disclosure of which would constitute an invasion of privacy, are excepted from the Act. § 552.109. This exception applies only to correspondence sent out by the official, not to correspondence that is received by the official. In addition, this exemption only protects the privacy interests of the public official. See Tex. Att'y Gen. ORD-473 (1987). It does not protect the privacy interests of the person discussed in the communication or the privacy of the recipient of the communication.

Certain records of communications between citizens and members of the legislature or the lieutenant governor may be confidential by statute. See id. Exempt correspondence includes handwritten notes on a personal calendar. See Tex. Att'y Gen. ORD-145 (1976).

An itemized list of long distance calls made by legislators and charged to their contingent expense accounts is not excepted because such a list is not a "communication." See Tex. Att'y Gen. ORD-40 (1974).

Section 552.111 exempts from disclosure interagency or intraagency memoranda or letters that would not be available by law to a party in litigation with the agency.

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**Utah**

The legislative branch, with the exception of "any political party, group, caucus, or rules or sifting committee of the Legislature." See Utah Code Ann. § 63-2-103(10)(a)(ii) (2004) (listing legislative offices covered by Act). However, the Legislature and its staff offices are not subject to GRAMA’s fees or appeals provisions. See Utah Code Ann. § 63-2-703(2)(a) (2004). In addition, all letters of inquiry submitted by any judge at the request of any judicial nominating committee as well as records received from the governor shall be classified as private under GRAMA. Utah Code Ann. § 67-1-2 (2004).

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**Virginia**

Working papers and correspondence prepared by or for members of the General Assembly or the Division of Legislative Services are exempted from disclosure. Va. Code Ann. § 2.2-3705.7(2).

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**Vermont**

There is no case law negating the statute's apparently broad application to all "branch[es] or authority of the State." An early opinion of the Attorney General expressly holds that the companion public meetings law applies to legislative committees. See 1966-68 Op. Atty. Gen. 101.

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**Washington**

The Washington State Supreme Court has not decided whether the Public Records Act applies to all records of the legislature. Cowles Publishing Co. v. Murphy, 96 Wn.2d 584, 637 P.2d 966 (1981). The Act does apply to administrative records of the Clerk of the State House of Representatives and of the Secretary of the Senate. RCW 42.17.290 (recodified as RCW 42.56.100, eff. 7/1/06).

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**Wisconsin**

Legislative records are not exempt.

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**West Virginia**

Records of legislative bodies are subject to the FOIA to the same extent as records of any
other public body. In *Common Cause of West Virginia v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), the state Supreme Court invalidated the process by which the Legislature’s Conferees Committee on the Budget traditionally prepared an informal but influential budget “digest” setting forth its view of the specific purposes for which general appropriations should be used. The court ruled the contents of the digest must be determined by the Conferees Committee in a public meeting, and the Committee must create and maintain for public inspection “memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the Budget Digest.” *Id.*, Syllabus pt. 5.

**Wyoming**

All public records of the legislature should be subject to the Act. Wyo. Stat. § 16-4202(a) (1977, Rev. 1982).