Today, I would like to talk with you in general about why we keep legislative staff documents, why legislative staff documents might be treated differently than executive branch staff documents, and why we might not want to keep all documents forever. And I will share how our experience in North Carolina highlights new more complex issues of record retention and retrieval in the electronic age.

**Why do we keep records?**

North Carolina is probably like most other states in that it has a public records law governing access to public records. And North Carolina treat emails as any other public record like most states.

North Carolina defines a public records 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."

The North Carolina law does not specifically include the General Assembly under its public records law and whether the General Assembly is covered has never been tested in the courts. The General Assembly is not considered to be an agency of State government, but a branch of State government, and 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 is because the NC legislative confidentiality statute clearly defines certain documents created in the legislative process as not 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, since 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 1)

For an excellent compendium of the public records laws of the 50 states go to http://www.rcfp.org/ogg/.

**Why are staff documents different in the legislative vs. the executive branch?**

Because of legislative immunity and legislative 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

¹ Wattson, Peter, General Counsel, Minnesota Senate. “Legislative Immunity in Minnesota”, 2006.
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 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, Mississippi, 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.

Because legislative immunity is constitutionally based, I do not believe that it can be taken away by statute, under the constitutional concept that one session of the legislature cannot bind another session of the legislature. I also believe that this privilege or immunity rests with the individual legislator, and not just the institution or body, and therefore even a majority of a chamber or the legislature cannot take away the constitutional protections afforded the individual legislator.

For these reasons, I do not believe that the public records law can apply to matters covered by legislative immunity.

**The North Carolina Experience**

From 2005 through 2008, the North Carolina General Assembly has faced three interesting situations that has lead 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 in 2005 into the conduct of the then Speaker of the House Jim Black.
- Response to a discovery request for legislative emails in a civil lawsuit against the State of North Carolina in 2007 challenging the reasoning behind the passage of a law.
- Governor's Email Review Panel created after the Governor's order in 2008 to delete controversial emails.

**North Carolina General Assembly**

During the period from 2005 through 2008, the North Carolina General Assembly processed between 7 and 10 million e-mails a month. This number fluctuated based on whether or not the General Assembly was 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 had grown tremendously since 2000, when emails averaged about 2 million a month. The storage needs for legislative emails has grown even more sharply from 30,000 MBytes in 2000 to over 270,000 MBytes by 2007.

**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 subpoenas required production of all emails from 18 listed individuals.

The Division initially identified 5,701,820 potentially relevant 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 two bills 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 was to be 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 claimed the bills were 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 housed over 8.6 million 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 was dismissed on summary judgment arguments and is currently on appeal in the NC Court of Appeals. The plaintiff did not ask the court to rule on the General Assembly’s refusal to turn over all requested emails considered to be covered by legislative confidentiality or legislative privilege.

**Governor’s E-mail Records Review Panel.**

Early in 2008, then 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 then 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 in 2008 and developed a set of unanimous recommendations. The panel found that 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 were delivered a day (valid meaning not blocked due to virus/spam filtering) and about 9 million valid emails were delivered a month. The NC General Assembly operates its own email account, separate and independent of the executive branch.

In its report to the Governor, 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.

Other recommendations made by the panel included: public records training for state employees, random audit state agencies to ensure compliance with public records laws and agency record retention and disposition schedules, extending retention of back-up tapes from 30 days to at least 5 years, single e-mail system in the executive branch, and require employees who use personal e-mail.

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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.
accounts and other forms of technology to conduct state business to synchronize or otherwise copy the records to a state-assigned e-mail account for archiving.  

In July, 2009, Governor Perdue issued an executive order applicable to the executive branch which presumed that all email received in State government email accounts were public records and employees had no expectation of privacy in their electronic correspondence and should assume that personal emails would be subject to release in response to a public records request. All email accounts are to be backed up daily and maintained for a minimum of 10 years.

**NC e-mail retention**

In North Carolina, administration of the State’s archives and record retention policies is the responsibility of the NC Department of Cultural Resources. In its publication, “Email as a Public Record in North Carolina”, the Department states that electronic mail is a public record when sent or received in normal business processes. The Department 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.

For 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,

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6 Id.
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”, individual 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.

In this day and age of relative inexpensive electronic storage, the tendency to "clean out your file cabinet" is often thought unnecessary and certainly not cost efficient. But from our experience it is possible that the failure to dispose of documents that have out lived their usefulness may make the job of responding to subpoenas and public records request much more costly because we have let the number of file cabinets that have to be gone through, one document at a time, grow without restraint.

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