



December 2016

Inside this Briefing

- **Introduction**
- **General Assembly and Separation of Powers**
- **Iowa's Public Records Law**
- **Rules-of-Proceedings Constitutional Authority**
- **Legislative Privilege or Immunity**
- **Attorney-Client Privilege**
- **Legislative Information Access Policies**
- **Data Management Policies**
- **Protection of Legislative Privileges**
- **Research and Drafting Files**
- **Computer System Files**

Note to Reader:

Although a briefing may identify issues for consideration by the General Assembly, its contents should not be interpreted as advocating a particular course of action. The reader is cautioned against using information contained in a briefing to draw conclusions as to the legality of a particular behavior or set of circumstances.

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Information Access and Confidentiality in the Legislative Environment

Introduction

This legal background briefing sets out legal principles applicable to the legislative branch with regard to the use, access to, and disclosure of legislative information. The briefing specifically describes separation of powers and legislative privilege issues which are unique to the legislative branch. The briefing also describes the legislative policies that have been adopted to implement these legal principles.

General Assembly and Separation of Powers

The General Assembly subscribes to open deliberation with regard to law making and public policy debate. Article III, sections 9, 11, and 13, of the Iowa Constitution provide that each house of the General Assembly has authority to determine its own rules of proceedings, that the members retain certain privileges with regard to legislative acts, and that in each house legislative deliberations not requiring secrecy shall be open. The judicial branch relies on its authority under Article V, sections 1, 4, and 14, of the Iowa Constitution in its exercise of judicial power, issuance of process, and supervision of inferior courts and practice before the courts. The executive power of the state is vested under Article IV, sections 1, 8, and 9, in the Governor who is charged with transacting state executive business and taking care that the laws are faithfully executed. Statutory, rather than constitutional, authority controls public access to executive branch meetings and records through the open meetings and public records laws in Iowa Code chapters 21 and 22.

Iowa's Public Records Law

Iowa Code chapter 22 contains this state's general "Public Records Law." This statute controls public access to certain public records information in the possession of or created by state and local government agencies in Iowa, but the law does not specifically apply to the Iowa General Assembly.¹ The law defines public records broadly as "...all records, documents, tape, or other information, stored or preserved in any medium..."² Information stored in any medium includes electronic records.³ The law allows for public inspection and copying of public records under the supervision and control of the lawful custodian defined as the "government body currently in physical possession of the public record."⁴ The law contains nearly 70 specific confidentiality exemptions to the general rule of openness unless released by court order, by the lawful custodian of the records, or by any other authorized person.⁵

Rules-of-Proceedings Constitutional Authority

In Iowa, neither the Legislature nor the courts have addressed directly the issue of public accessibility of records created or received in the legislative arena, including the accessibility of lawmakers' e-mails. However, a 1996 Iowa Supreme Court case provides some guidance in this area. In *Des Moines Register and Tribune Company v. Dwyer*, the Court addressed the issue of the confidentiality of certain legislative telephone records.⁶ *Dwyer* involved the Iowa Senate's policy on public access to call detail records relating to the use of any incoming or outgoing telephone calls paid for by the Iowa Senate or General Assembly during the calendar years 1990 through 1993. The policy allowed public access to all records which did not show itemized call detail.⁷ Jack Dwyer, the Secretary of the Senate and legal custodian of the records, argued that call detail information was confidential and not open to the public on the theory that "production of such documents would violate privacy rights and constitutional guarantees of freedom of speech and would

have a detrimental chilling effect on citizens' rights and willingness to petition their elected officials."⁸ The Des Moines Register and the Iowa Freedom of Information Council argued that such information was open to the public under Iowa's public records law.

The Court determined that the public records law did not apply to the facts of the case, as the issue before the Court was ultimately the Senate's broad constitutional authority under Article III, section 9, of the Iowa Constitution to determine its rules of proceedings unless in violation of a fundamental constitutionally guaranteed right.⁹ The Court determined that the Senate's policy, which excluded call detail information from disclosure, constituted a Senate rule of proceeding and thus was beyond the Court's reach. Based upon the separation of powers doctrine, the Court concluded that neither the judiciary nor the executive branch could interfere with or contradict legislative rules of procedure.¹⁰

Following the logic in *Dwyer*, a rule of proceedings embodying a legislative policy of confidentiality would afford the Legislature certain protections from a statutory public records inquiry. See the discussion in this briefing regarding legislative information access policies for a description of legislative branch policies that stem from the rule-of-proceedings authority of the Senate and House of Representatives.

Legislative Privilege or Immunity

Legislative privilege or immunity generally protects legislators from civil or criminal liability on the basis of what they say or do while in session with respect to legislative business. The doctrine is based upon common law and the Speech or Debate Clause contained in the United States Constitution.¹¹ In Iowa, legislative privilege or immunity is contained in Article III, section 11, of the Iowa Constitution and codified in Iowa Code section 2.17. Although the scope of the privilege specifically written into Iowa law is arguably narrower than that afforded by the United States Constitution, the Iowa Attorney Gen-

eral has opined that the general policies of both protections appear to be identical.¹²

Legislative privilege provides protection to all “legitimate” legislative acts. In *Gravel v. United States*,¹³ the United States Supreme Court defined such legislative acts as “an integral part of the deliberative and communicative process by which Members of Congress participate in committee House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house.”¹⁴ Various federal and state courts have defined the legislative privilege to include legislative acts of a legislator related to committee hearings, introducing, voting, failing or refusing to vote on certain legislation, voting on the confirmation of an executive appointment, voting on impeachment proceedings, publishing reports, sending letters, drafting memoranda and other documents, lobbying for legislation, and making budgetary and personnel decisions.¹⁵

The foregoing is by no means an exhaustive list, as the determination of what constitutes a legitimate legislative act must be made on a case-by-case basis with the *Gravel* principles in mind. The United States Supreme Court has extended legislative privilege to legislative staff as well. In *Gravel*, the Court extended the privilege to a Senator’s aide where the aide had assisted the Senator in preparing certain classified documents for a committee meeting. The Court approved the lower court’s conclusion that, for the purpose of construing the privilege, a member and his aide are to be treated as one.¹⁶ Executive branch officials have also been extended the privilege.¹⁷

Once it is determined that a particular activity is within the scope of legitimate legislative activity, the privilege or immunity is absolute¹⁸ and specific to each individual legislator.¹⁹ The issue of whether the enactment of a state’s public records or open meetings law effectively waives legislative immunity has been raised, but as a general matter, courts have been reluctant to find that a state’s pub-

lic records law acts as a waiver of the broad legislative privilege.²⁰

Attorney-Client Privilege

The attorney-client privilege protects confidential communications between an attorney and the attorney’s client from disclosure against the will of the client.²¹ The privilege generally applies only if (1) the communication is made after the attorney-client relationship has been established by the parties, (2) the communication is intended by the parties to be made in confidence, usually where no third parties are present unless they are agents of either party; and (3) the communication is made to or legal advice is given by the attorney.²² The privilege is an evidentiary privilege against disclosure with its roots in the common law but also expressed in statute.²³ Its statutory counterpart is contained in Iowa Code section 622.10, which provides in part that a “practicing attorney ... who obtains information by reason of the person’s employment ... shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person’s professional capacity ...”²⁴

The attorney-client privilege is separate and distinct from the work product doctrine. The work product doctrine may shield a broader category of materials from evidentiary discovery such as trial preparation materials prepared by persons other than just the client and attorney, and may protect not only communications, but also “mental impressions, conclusions, opinions, or legal theories ... concerning the litigation.”²⁵ The privilege is also distinct from, and preceded the development of the ethical duty of the attorney to maintain the confidences or secrets of the client. This duty continues to evolve especially in regard to certain client confidences or secrets that the attorney may or may be required to reveal.²⁶

Attorneys practicing in the legislative branch and receiving or transmitting confidential communications as part of an attorney-client relationship with a constituent entity of the Legislature, such as a committee or individual

legislator or an agent of such, cannot waive the attorney-client privilege. The legislator as the client is the only person who can waive this privilege.

Legislative Information Access Policies

The legislative branch has instituted public access and confidentiality policies to provide access to legislative information and to protect its lawmaking functions. These policies have either been adopted through Senate and House written policy or custom or through the Legislative Council in its oversight of the central nonpartisan staff agencies.

Data Management Policies

In accordance with the constitutional authority of the Senate and of the House under Article III, §9, to each determine its own rules of proceedings, each house has adopted a data management policy setting out its authority to make decisions with regard to the maintenance, revision, dissemination, and retention of its own data, in a reasonable manner consistent with the duties and responsibilities of that house. Such decisions are made in the interest of furthering the free and unrestricted development and interchange of information, ideas, and proposals essential to each house's development of sound law and public policy.

Protection of Legislative Privileges

Iowa Code section 2A.1(3) protects and preserves the privileges of the legislative branch vis-a-vis the Legislative Services Agency's provision of services, in the following language:

3. The legislative services agency shall provide services to the general assembly in such a manner as to preserve the authority of the senate and the house of representatives to determine their own rules of proceedings and to exercise all other powers necessary for a separate branch of the general assembly of a free

and independent state, and to protect the legislative privileges of the members and employees of the general assembly. In providing services to the general assembly, the legislative services agency shall adhere to all applicable policies of the general assembly and its constituent bodies relating to public access to legislative information and related confidentiality restrictions.

Research and Drafting Files

The Legislative Council has adopted a confidentiality policy for the Legislative Services Agency which covers research files and bill and amendment drafting files.²⁷ That policy provides for general confidentiality for the contents of all research and amendment drafting files and limited confidentiality for bill drafting files until certain bill drafting files are delivered to the State Archives. Legislators can waive confidentiality and allow access to individual files.

Computer System Files

The Legislative Services Agency and its Computer Services Division, which maintains the legislative computer network, have also adopted a policy "to protect the legislative privileges of the members and employees of the General Assembly, including adherence to the public access and confidentiality policies of the General Assembly."²⁸ Individual legislators control all access to their computer system files and can assert rule-of-proceedings confidentiality or legislative privilege or waive the confidentiality or privilege and allow access.

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¹ Iowa Code §22.1(1).

² Iowa Code §22.1(3).

³ See, e.g., Iowa Code §22.3A.

⁴ Iowa Code §§22.1(2), 22.2(1).

⁵ Iowa Code §22.7.

⁶ 542 N.W.2d 491 (Iowa 1996).

⁷ Id. at 493-494.

⁸ Id. at 494.

⁹ Id. at 496.

¹⁰ Id. at 503. The Senate rule at issue was passed by the Senate Rules and Administration Committee after the Register and Council's requests for production of the records. The Court found that the question of whether such a rule was retroactive was moot, as the Senate's act of adopting the rule "was simply memorializing in writing a policy it had been applying informally all along." Id. at 502.

¹¹ U.S. Const. art. I, §6.

¹² 1979 Op. Iowa Att'y Gen. 13 (May 30, 1979), 1979 WL 20966, at 2.

¹³ 408 U.S. 606 (1972).

¹⁴ Id. at 625.

¹⁵ See, e.g., *United States v. Swindall*, 971 F.2d 1531 (11th Cir. 1992), *United States v. Helstoski*, 442 U.S. 477 (1979), and *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1994).

¹⁶ Gravel at 616.

¹⁷ *Campaign for Fiscal Equity v. State of New York*, 179 Misc.2d 907, 687 N.Y.S.2d 227, aff'd 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999). (Common law legislative privilege precluded compelled disclosure by employee of State Education Department with respect to her contacts with State legislators and their staff, where communications in question were undertaken by employee to assist executive branch officials in performance of a legislative function.)

¹⁸ *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

¹⁹ *Pataki v. New York State Assembly*, 190 Misc.2d 716, 729, 738 N.Y.S.2d 512, 523 (2002).

²⁰ See, e.g., *Campaign for Fiscal Equity v. State*, 179 Misc. 2d 907 (Supreme Court, New York County, N.Y. 1999), aff'd 265 A.D. 2d 277 (Supreme Court, Appellate Division, N.Y., 1999), *Wilkins v. Gagliardi*, 556 N.W.2d 171 (Mich. App. 1996).

²¹ *Shook v. City of Davenport*, 497 N.W.2d 883, 886 (Iowa 1993).

²² See 81 Am. Jur. 2d witnesses §§357, 363-365, 371, 372, 376, 382, 415.

²³ *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683-4 (Iowa 1995), citing *Robbins v. Iowa-Illinois Gas & Elec. Co.*, 160 N.W.2d 847, 855 (Iowa 1968).

²⁴ Iowa Code §622.10(1).

²⁵ See Iowa Civ. P. 1.503(3).

²⁶ See Iowa Code of Prof'l Responsibility, Rule 32:1.6.

²⁷ Legislative Council Policies and Procedures, Chapter 2, part I, paragraph B (in part), as adopted by Legislative Council on June 13, 2007:

B. Confidentiality of the Contents of Drafting and Research Requests and Files Prior to Introduction, Filing, Prefiling, or Formal Public Release

1. Contents of Requests. The Legislative Services Agency considers the contents of requests for bills, amendments, and research to be confidential. Therefore, any documents submitted with a bill draft, amendment, or research request are generally not available to the public.

2. Contents of Files. In addition to the confidentiality status of the contents of requests, information used for drafting a bill or amendment or preparing research is generally not available to the public. The information and the documents submitted with a request are retained in the drafting or research file or by the drafter, are considered the property of the Legislative Services Agency and the requester, and are available to Agency personnel and the requester only. The information and documents are considered working papers, as are any preliminary drafts or research in the drafting or research files or in the possession of the drafter. This confidentiality policy affords the requester the absolute right, prior to release of any information related to the draft or research, to review the draft or research to determine if the draft or research accomplishes the objectives desired by the requester and should be released.

3. Release of Contents. The contents of bill, amendment, and research requests and files can be made public or released to a specific individual only with the oral or written approval of the requester. The contents may also be released to a person working with the Legislative Services Agency on behalf of the requester, whether the request was made confidentially or nonconfidentially...

²⁸ Legislative Services Agency Policies and Procedures, Chapter 3, part XIII, paragraph A(1)(a), as adopted on January 11, 2007, and most recently revised on September 2, 2014, by the Legislative Services Agency.