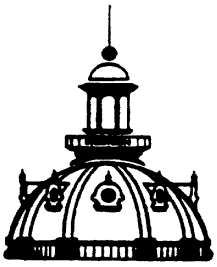

Iowa Legislative Services Agency

November 2003

Inside this Briefing

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.

About the Authors:

The portions of this briefing relating to public disclosure of confidential information, legislative privilege or immunity, and Fourth Amendment Privacy were prepared by Rachele Hjelmaas, Legal Counsel. The portion relating to the attorney-client privilege was prepared by Richard Johnson, Legal Services Division Director, from research completed by Jan Johnson, Legal Counsel.

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Legal Background Briefing on…

Information Technology Access, Confidentiality, and Privacy in the Legislative Environment

Overview

This legal background briefing relates to the use, access to, and disclosure of information electronically generated or stored on legislative computer systems by state legislators and state legislative employees and the legislative policies and procedures governing such use, access, and disclosure. Public disclosure of confidential information, legislative privilege or immunity, attorney-client privilege, and Fourth Amendment privacy concerns are some of the legal issues related to the use of legislative computer systems and the transmission of information using such systems.

Iowa Public Records Law and Separation of Powers

A. 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. The law allows "every person"[1] to inspect and copy public records "under the supervision of the lawful custodian of the records or the custodian's authorized deputy."[2] The "lawful custodian" of the public records "means the government body currently in physical possession of the public record … but does not mean an automated data processing unit of a public body if the data processing unit

holds the records solely as the agent of another public body, nor does it mean a unit which holds the records of other public bodies solely for storage."[3] Failure on the part of the record custodian to provide access to public records can result in civil or criminal penalties.[4] The public policy set by statute is therefore one of openness, and before access to a public record is denied, the legal custodian of the public record must demonstrate the confidential nature of the document in question.

The public records law through its broad definition of a public record establishes a liberal policy of public access. "Public record" is defined as:

> … all records, documents, tape or other information, stored or preserved in any medium, of or belonging to[5] this state or any county, city, township, school corporation, political subdivision, nonprofit corporation whose facilities or indebtedness are supported in whole or in part with property tax revenue and which is licensed to conduct pari-mutuel wagering pursuant to chapter 99D, or tax-supported district in this state, or any branch, department, board, bureau, commission, council, or committee of any of the foregoing.[6]

This definition includes all communications regardless of physical form, and includes electronic data and electronic mail. The law does not specifically exempt legislative records, documents, tapes, or other information as a whole from the general rule of openness.

The public records law contains 47 specific confidentiality exemptions to the general rule of openness unless released by court order, by the lawful custodian of the records, or by another person duly authorized to release the records.[7] The more common confidentiality exemptions relate to hospital and medical records, personal information in confidential personnel records, certain library records, and certain communications not required by law, rule, procedure, or contract that are made to a governmental body by identified persons outside of government if the government body could reasonably believe that general public examination would discourage those persons from communicating with the governmental body. The exemptions must be narrowly construed so that the legislative policy of openness will be honored.[8] Moreover, the Iowa Supreme Court has identified the following factors as a means of weighing individual privacy interests against the public's need to know where a statutory exemption under Iowa Code section 22.7 is ambiguous: (1) the public purpose of the party requesting the information; (2) whether the purpose could be accomplished without the disclosure of personal information; (3) the scope of the request; (4) whether alternative sources for obtaining the information exist; and (5) the gravity of the invasion of personal privacy.[9]

Although the public records law is generally applicable to all branches of state government, it has most often been applied and tested in relation to the executive branch.

B. Separation of Powers

In Iowa, neither the Legislature nor the courts have addressed the issue of public accessibility of electronic data created or received in the legislative arena directly, including the accessibility of lawmakers' e-mails. However, a 1996 case decided by the Iowa Supreme Court may provide 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.[10] 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. Jack Dwyer, the Secretary of the Senate and legal custodian of the records,[11] argued that call detail information was confidential and not open to the public on the theory that "production of such information 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."[12] 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.[13] 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.[14]

Following the logic in Dwyer, a rule of procedure embodying a legislative policy of confidentiality would afford the legislature certain protections from a statutory public records inquiry. Such a confidentiality policy that may constitute a rule of procedure has been specifically adopted by the Iowa Legislative Council covering bill draft, amendment, and research documents and files prepared by the Legal Services Division of the Iowa Legislative Services Agency.

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.[15] 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 General has opined that the general policies of both protections appear to be identical.[16]

Legislative privilege provides protection to all "legitimate" legislative acts. In Gravel v. United States,[17] the United States Supreme Court defined such legislative acts as "an integral part of the deliberative and communicative process by which members 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." 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.[18]

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."[19] Executive branch officials have also been extended the privilege.[20]

Once it is determined that a particular activity is within the scope of legitimate legislative activity, the privilege or immunity is absolute[21] and specific to each individual legislator.[22] 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 public records law acts as a waiver of the broad legislative privilege.[23]

Attorney-Client Privilege

A. Common Law and Statutory Origin

The attorney-client privilege protects confidential communications between an attorney and the attorney's client from disclosure against the will of the client.[24] It is an evidentiary privilege against disclosure with its roots in the common law but also expressed in statute.[25] 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 …"[26]

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 litigation."[27] 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.[28]

B. Elements of Privilege

The courts generally apply the attorney-client privilege if three elements regarding a communication are present:[29]

1. The communication is made to or legal advice is given by an attorney. This element requires that the primary purpose of the communication is to seek the attorney's knowledge or skill as a lawyer.[30]
2. The communication is intended by the parties to be made in confidence. This element would

likely not be found to be present if a communication were made in the presence of a third party, unless the third party were merely an agent of either the attorney or the client.[31]

3. The communication is made in the course of an attorney-client relationship. This element requires that the attorney-client relationship has been established by the parties. This requirement would generally require that the attorney is authorized to practice law and that the client believes this to be the case.[32]

C. Waiver of Privilege

The attorney-client privilege belongs to the client and only the client can waive the privilege.[33] However, the waiver may be express or implied in some circumstances.[34] Inadvertent disclosure of privileged documents or communications presents an often difficult issue of whether a waiver has occurred, especially with the advent, and now prevalence, of electronic communications. 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, should take appropriate precautions to assure that the attorney-client privilege is not waived without the consent of the client.

Fourth Amendment Privacy and Employer Monitoring

In the employment setting, issues arise concerning an employee's right of privacy concerning electronic data and information created, received, and stored in the employer's office computer system. This issue includes data in computer files, as well as electronic messages sent or received over the employer's e-mail system, and Internet usage.

Courts have given many employers the right to access an employee's computer files, including e-mail, and to monitor an employee's computer use, including Internet activity, on the employer's computer system.[35] The argument proffered is that the workplace is a public place, and the employer's computer system is a means of conducting the employer's business and facilitating communications in the workplace. This right of employers to monitor employees in the public sector workplace is not absolute and is subject to the constraints of the Fourth Amendment to the United States Constitution and Article I, section 8, of the Iowa Constitution. The Fourth Amendment, as applied to the states through the Fourteenth Amendment, protects people from unreasonable searches and seizures by government actors. The search and seizure provisions of the Fourth Amendment implicate certain personal privacy rights, or the general right of an individual to be left alone as to their own personal effects.[36]

A public sector employee can sue a public sector employer for an invasion of the "reasonable expectation of privacy" for monitoring practices in the workplace unrelated to legitimate business needs.[37] The reasonableness of a public sector employee's privacy expectation in the workplace is fact-specific and depends upon the circumstances of each case. The reasonableness issue involves a balancing of the employee's right to privacy against the employer's own competing interests in monitoring computer files, e-mail, and Internet use for legitimate business reasons such as

supervision, control, efficiency, and security in the workplace. The employer's assumption is that the computer system will be used for business purposes only, unless the employer has a specific employment policy stating otherwise. The existence of an employer's policy with regard to computer use may affect an employee's expectation of privacy particularly if the policy is acknowledged by the employee, although ignorance is not necessarily an excuse. Moreover, if an employer has a policy in place, employee consent to monitoring may be implied. An employer policy that limits the employer's reasons for monitoring may also affect any express or implied consent to monitoring by an employee.

In addition to state and federal constitutional protections, Fourth Amendment-related privacy protections are found in certain federal and state statutes. The Electronic Communications Privacy Act (ECPA) is a federal statute relevant to claims of workplace privacy by "electronic" means.[38] The ECPA prohibits unauthorized and intentional or willful interception of wire, oral, or electronic communication by government authorities. It also prohibits unauthorized access of electronically stored wire or electronic communications. The Act does contain exceptions allowing an employer to monitor wire or electronic communications that are sent and stored in the ordinary course of business and that are monitored with the employee's consent. Although the ECPA does not specifically identify e-mail monitoring, legislative history expresses a congressional intent that "electronic communications" includes e-mail.[39] Critics have argued that the exceptions contained in the ECPA effectively render any workplace employee privacy protection moot.[40] In addition, the recently enacted USA PATRIOT Act, passed in October of 2001 by Congress in response to the catastrophic events of September 11, 2001, is designed to give federal law enforcement officials more extensive authority to monitor and eavesdrop on electronic communications, and encourages electronic communications providers to turn over suspicious communications. The law is targeted at suspected terrorist activity.[41] The Act has come under harsh criticism, with critics arguing that the Act may seriously damage and infringe upon civil liberties.

In Iowa, no specific state statute governs employee privacy or employer monitoring of employees in the workplace. However, Iowa does have certain laws that create restrictions on monitoring certain communication transmissions, similar to the ECPA. Iowa Code section 727.8 (Electronic and Mechanical Eavesdropping) and Iowa Code chapter 808B (Interception of Communications) make it unlawful for a person who is not a party to certain communications to "[w]illfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, a wire, oral, or electronic communication."[42] A person whose communication is accepted, disclosed, or used in violation of either law has both criminal and civil causes of action.[43] Like the ECPA, neither law specifically refers to e-mail monitoring.

ENDNOTES

[1] Iowa Code § 22.2.

[2] Iowa Code § 22.3.

[3] Iowa Code § 22.1(2).

[4] Iowa Code § 22.10.

[5] The Florida Supreme Court recently examined the issue of public employee use of e-mail accounts on government-owned computers, concluding under Florida law that certain personal e-mails were not

subject to mandatory public disclosure because they did not meet the Florida definition of public record.

[6] Iowa Code § 22.1(3).

[7] Iowa Code § 22.7.

[8] In re Des Moines Indep. Community Sch. Dist. Pub. Records, 487 N.W.2d 666, 669 (Iowa 1992).

[9] Clymer v. City of Cedar Rapids, 601 N.W.2d 42, 45 (Iowa 1999). In Clymer, the Iowa Supreme Court held that the amount of sick leave and vacation time used by individual city employees is not confidential, but information in personnel records revealing gender, home address, or birth date is confidential and not subject to public access.

[10] 542 N.W.2d 491 (Iowa 1996).

[11] Jerry Gamble, the administrator of the Administrative Services Division of the Department of General Services, an executive branch agency, was also sued by the Register and the Council. Gamble's responsibilities included billing state agencies for communications services and overseeing accounting for the department. The Register and the Council contended Gamble was a legal custodian of the legislative records under Iowa's public records law. The Court concluded Gamble had no authority to release the records in question because to do so would constitute clear judicial interference with the internal procedures of the legislative branch. Dwyer at 503.

[12] Dwyer at 494.

[13] Id. at 496.

[14] Id. at 503. The Senate rule at issue was actually 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.

[15] U.S. Constitution, Article I, section 6.

[16] Op. Atty. Gen. #79-5-23 at 177.

[17] 408 U.S. 606 (1972).

[18] See, e.g., United States v. Swindall, 971 F.2d 1531 (11th Cir. 1992), United States v. Helstoski, 442 U.S. 477 (1970), Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1970), and Kraus v. Kentucky State Senate, 872 S.W.2d 433 (Ky. 1994).

[19] Gravel at 618.

[20] Campaign for Fiscal Equity v. State, 179 Misc.2d 907, 687 N.Y.S.2d 227, aff'd 265 A.D.2d 277, 697 N.Y.S.2d 40 (1999).

[21] Eastland v. United States Serviceman's Fund, 421 U.S. 491, 501 (1975).

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

[23] See, e.g., Campaign for Fiscal Equity v. State, 687 N.Y.S.2d 227 (Supreme Court, New York County, N.Y. 1999), aff'd 697 N.Y.S.2d 40 (Supreme Court, Appellate Division, N.Y., 1999), Wilkins v. Gagliardi, 556 N.W.2d 171 (Mich. App. 1996).

[24] Shook v. City of Davenport, 497 N.W.2d 883, 886 (Iowa 1993).

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

[26] Iowa Code § 622.10(1)(2003).

[27] See Iowa Ct. R. 1.503(3)(2003).

[28] See Iowa Code of Prof'l Responsibility Canon 4 and DR 4-101.

[29] See generally 81 Am.Jur.2d Witnesses §§ 357-435 (noting essential requirements, variations, and exceptions).

[30] See generally 81 Am.Jur.2d Witnesses §§ 357, 363, 371, 372.

[31] See 81 Am.Jur.2d Witnesses §§ 364, 376, 382.

[32] See 81 Am.Jur.2d Witnesses §§ 357, 363, 365, 415. See also Moyers v. Fogarty, 140 Iowa 701, 119 N.W. 159 (1909) (privileged communication between attorney and client requires that the professional relationship exist when the communication is made, that it is made because of the relationship, and it is necessary to enable the attorney to perform the attorney's duties). The attorney-client relationship in the legislative environment presents several issues for clarification. The first issue is whether a legislative attorney will be recognized under the privilege as authorized to practice law. Most legislative attorneys are admitted to practice before the courts and thus subject to similar practice requirements as applied to attorneys in private practice. However, legislative attorneys working for the Iowa General Assembly, and specifically for the Legislative Services Agency, need not be admitted to practice before the courts but must possess a law degree from an accredited college of law. Some legislative attorneys are admitted to practice in other jurisdictions; others are not admitted to practice before the courts of any jurisdiction.

The second issue relates to the identity of the client in the attorney-client relationship. The Model Code of Professional Responsibility adopted by the Iowa Supreme Court acknowledges attorney practice in a multiclient environment for corporate and governmental organizations. See Iowa Code of Prof'l Responsibility Canon 5 and more specifically EC 5-14 through EC 5-20 and DR 5-105. This multiclient approach provides that an attorney for a governmental organization, such as the Legislature, may in some cases represent multiple clients, such as individual legislators, legislative committees, and the Legislature as a whole, with such clients either having a single interest or having numerous interests which may be complementary or potentially conflicting. However, such an attorney must be primarily concerned with ethical compliance through communications notifying the multiple clients that the

attorney may be representing multiple clients and numerous interests regarding a legislative action, and securing the consent of the multiple clients to continue representing their numerous interests. See Iowa Code of Prof'l Responsibility EC 5-16 and DR 5-105. Common practice has been existent for more than 35 years in the Legislative Services Agency, and its predecessor agency, the Legislative Service Bureau, that legislative attorneys draft sometimes conflicting legislation for two or more legislators or legislative committees. This practice is recognized implicitly in the Confidentiality Policies Relating to Bill Draft, Amendment, and Research Requests and Files as adopted by the Iowa Legislative Council, a copy of which is available from the Secretary of the Iowa Legislative Council, the Director of the Iowa Legislative Services Agency.

The newer Model Rules of Professional Conduct authored by the American Bar Association adopt an organizational client approach. See Rule 1.13, Organization as Client (2002 edition). This approach provides that the legislative attorney represents the organization, i.e., the Legislature as a whole, acting through the Legislature's duly authorized constituent entities, presumably the Senate and the House of Representatives, their standing and ad hoc committees, and individual legislators. Attorney representation of these different constituent entities is possible if such representation does not conflict with the representation of the interests of the organization, i.e., the interests of the legislature as a whole. However, dual representation may be possible if the organization consents to such representation. See Rule 1.7, Conflicts of Interest: General Rule (2002 edition).

[33] State v. Bean, 239 N.W.2d 556, 560 (Iowa 1976). See also Iowa Code § 622.10(2)(2003), which provides, in relevant part, that the prohibition against disclosure of confidential communications "does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred ...".

[34] See generally ABA/BNA Lawyers' Manual on Professional Conduct, 91:2201 et. seq. (1992) (discussing waiver in the corporate setting).

[35] See, e.g., Smyth v. Pillsbury, 914 F. Supp. 97 (E.D. Pa. 1996), Garrity v. John Hancock Mutual Life Insurance Co., 2002 U.S. Dist. LEXIS 8343 (D. Mass. May 7, 2002), Bourke v. Nissan, No. B068705, Cal. Ct. App. (July 26, 1993) (unreported decision).

[36] See generally, Charles Warren and Louis Brandeis, The Right to Privacy, 4 Harvard L. Rev. 193 (1890).

[37] O'Connor v. Ortega, 480 U.S. 709 (1987). Ortega is the first United States Supreme Court case involving employee privacy in the public sector workplace.

[38] 18 U.S.C. §§ 2510-2522. Congress passed the ECPA in 1986 as an extension of Title III of the Omnibus Crime Control and Safe Streets Act of 1986, which established procedures that govern electronic surveillance.

[39] Mark S. Dichte and Michael S. Burkhardt, Electronic Interaction in the Workplace: Monitoring, Retrieving and Storing Employee Communications in the Internet Age, October 1996.

[40] Tim Nusraty and John Pascua, E-Mail Privacy in the Workplace, Internet publication, http://gsulaw.gsu.edu/lawand/papers/fa99/nusraty-pascua/.

[41] Pub. L. No. 107-56, H.R. 3162 (October 24, 2001).

[42] Iowa Code § 808B.2.

[43] Iowa Code §§ 808B.2 and 808B.8.

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