

HB

22

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 22

This bill amends AS 24.05 by adding a new section that makes a communication from a member of the public to a legislator or a legislator-elect, involving public policy or relating to the official duties of a legislator or legislator-elect, confidential unless confidentiality is waived by the member of the public, or the communication is offered as public testimony. The bill also makes a request to the Legislative Research Agency by a legislator, legislator-elect, or legislative committee for research confidential. And the bill makes a report prepared by the agency in response to a request confidential, unless the requestor directs the agency to release the report as a public record. Existing AS 24.20.100 already makes requests by legislators for research confidential, but this bill extends confidentiality to legislators-elect and makes completed reports confidential until released by the requestor. This legislation involves the operations of a separate co-equal branch of government, and it will not have a fiscal impact of the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1991 LEGISLATIVE SESSION

BILL NO: HB 22

Revision Date: _____
Title: "An Act... confidential communications
to legislators... confidential legislative records...
Sponsor: Representative C. Davis
Requestor: House State Affairs

Department Affected: Legislative Affairs Agency
BRU: Legislative Council
Component: Legislative Research Agency

COMPONENT SERIAL NO: 1174

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary)

Zero fiscal impact.

Prepared By: Pamela A. Stoops, Director
Division: Administrative Services

Pamela Stoops

Phone: 465-3850

Date: 1/29/91

Approved By: Warren W. Endicott, Executive Director
Agency: Legislative Affairs Agency

Warren Endicott

Date: 1/29/91

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

ALASKA STATE LEGISLATURE

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Representative Cheri L. Davis

STATEMENT ON HOUSE BILL 22

I have introduced House Bill 22 as a response to some concerns expressed by constituents about conversations on sensitive issues.

Section 1, parts A and B, deals with the confidentiality of communications and records. It allows for any communication to a legislator or legislator-elect to be confidential unless waived by the member of the public. However, legislator confidentiality will not apply to public testimony or if the information received can be released, while protecting the identity of the constituent.

These two parts of the bill transpired out of a conversation I had last interim with a constituent who came to me about a personal matter and asked if our conversation, and subsequent correspondences, could be kept confidential. I asked our Legal Services this question and found that there was no confidentiality provision. Apparently most legislators, like myself, assume that until they choose to release information in the form of a bill, or testimony to a committee, that their conversations with constituents and their files on those conversations are confidential.

Part C, relating to the Legislative Research Agency, provides for more direct language concerning confidentiality of requests and reports. There is a statute that somewhat addresses this now (AS 24.20.100), but this provision "tightens" the confidentiality of requests and reports.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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MEMORANDUM

February 12, 1991

SUBJECT: Confidential Communications to Legislators (HB 22)

TO: Representative Gene Kubina, Chair
House State Affairs Committee

FROM: Tamara Brandt Cook
Director

TBC

You have asked whether the confidentiality provision contained in HB 22 would create some form of a legislator/constituent privilege that would prevent the legislator from testifying in court regarding the content of communications. In my opinion it would not because the bill does not specifically address the issue of testifying.

The court has held that a statute that merely sets out that certain communications are confidential will not create a testimonial privilege, but is essentially an "anti-gossip" provision and that to create a privilege it is necessary to amend the court rules. (Allred v. State, 554 P.2d 411 (Alaska 1976)) Note, however, while rules of evidence are generally considered matters of procedure this is because those rules deal only with the orderly dispatch of judicial business. Certain rules of evidence, such as privilege, go beyond that and are considered matters of substance. Joiner and Miller, "Rules of Practice and Procedure: A Study of Judicial Rule Making" 55 Mich. L. Rev. 623 (1957)

The Allred case never specifically considered whether a privilege is a matter of procedure (requiring a change to court rule) or a matter of substance (which does not require a change to court rule). The court, apparently, now agrees with the commentators that the question of privilege is a matter of substance which the legislature can address through simple enactment of a bill creating a specific privilege not to testify. Evidence Rule 501 provides:

Except as otherwise provided by the Constitution of the United State or of this state, by enactments of the Alaska Legislature, or by these

or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

- (1) refuse to be a witness; or
- (2) refuse to disclose any matter; or
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing. (Emphasis added)

So, while there is no need to amend a court rule to create a testimonial privilege, a statute creating a privilege not to testify must so state specifically. This bill would need to be amended to do that.

It is my understanding, however, that the legislation was not intended to create a specific legal privilege and that, in fact, there was no intent to shield communications from situations involving litigation. Rather, I understood that the thrust of the legislation was to enable a legislator to decline to make a letter from a constituent available to the press or another when the constituent intended the communication to be private. Arguably, those items are now public records subject to disclosure on request.

You have also asked whether the bill modifies the open meetings statute (AS 44.62.-310) as it applies to meetings of legislative bodies. In my opinion, the bill does not do so. Meetings of legislative committees and subcommittees would still be subject to that statute. Only a communication to a legislator not intended as public testimony would be treated as confidential, and that type of communication could not be included in the public records of a committee.

TBC:gc
91-073.glc

Alaska State Legislature



Legislative Research Agency

P.O. Box Y
Juneau, AK 99811-3100
Phone: (907) 165-3991
Fax: (907) 163-3331

January 31, 1991

Honorable Cheri Davis
Alaska House of Representatives
P.O. Box V
Juneau, Alaska 99811-3100

Dear Representative Davis:

This letter is to express my support for the provision of House Bill 22 (paragraph c) that deals with the confidentiality of research prepared by the Legislative Research Agency. The language in House Bill 22 is more direct and explicit than that currently found in AS 24.20.100 concerning confidentiality ("Members of the legislature may utilize the research and bill drafting services of the Legislative Affairs Agency. Requests by members of the legislature are confidential"). It describes the existing practice of the Agency. Thus, to the extent that it removes any ambiguity that may reside in AS 24.20.100, we would prefer to rely on the provision in House Bill 22 for statutory authority to safeguard the confidentiality of our work.

Sincerely,

A handwritten signature in cursive script that reads "Gordon S. Harrison".

Gordon S. Harrison
Director

Enclosure

STATE LEGISLATIVE REPORT



CONFIDENTIALITY OF LEGISLATIVE RESEARCH DOCUMENTS

by

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Principal Research Analyst

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An Information Service of the National Conference of State Legislatures
1050 17th Street, Suite 2100, Denver, Colorado 80265. Earl S. Mackey, Executive Director

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CONFIDENTIALITY OF LEGISLATIVE RESEARCH DOCUMENTS

INTRODUCTION

In most states, some or all of the legislative research documents* are kept confidential in the research stage, or indefinitely, because of the legislature's perceived need for privileged communication to foster innovation. But that need must be balanced with the public's right to know about the internal workings of its government and its right to know that lawmaking is being conducted openly. For instance, a legislator may request that a bill be drafted but at the end of the process come to the conclusion that he does not want to introduce that type of legislation. If every bill draft or bill draft request were public information, legislators would be less likely to look at new ideas and approaches for fear of "mistakes" being publicized. Similarly, discussions and notes of legislators and legislative staff on the budget or other sensitive subjects need some privacy so people can speak candidly. To eliminate that privacy creates a chilling effect on communication which generally hinders the legislative process. On the other hand, if too much privacy is granted, the public fears that laws are being created through deals behind closed doors. Another reason for keeping preliminary work papers confidential is competition for new ideas. Some legislators take a proprietary interest in their work and don't want others to take credit for their ideas. This also is true in a partisan sense, as legislators of one party certainly do not want their ideas leaked to the other party. Each state deals with this issue somewhat differently, but generally most try to balance these competing interests by disclosing bills, reports and other documents as the work is put into final form.

OVERVIEW

This State Legislative Report compares and contrasts the treatment of these documents by the various states. The information is based on a survey of all 50 states and American Samoa. Central non-partisan legislative research agencies were surveyed wherever possible. They were asked to list the types of legislative research documents that are treated as confidential

*Documents considered under the broad heading of "research documents" include bill drafts, bill draft requests, research requests, background papers, staff notes and correspondence.

under either statute or office policy, and whether any of these documents have been subpoenaed from the office in the last 10 years. The survey responses were supplemented by a review of the relevant statutes supplied by most respondents. The survey information was gathered in January 1986.

Forty-two states and American Samoa consider bill drafts confidential, and bill draft requests are confidential in 45 states and American Samoa. Thirty-six states protect research requests from disclosure. Legislators' correspondence is confidential in 33 states, while legislative employees' correspondence is confidential in 27, and committee correspondence is confidential in only 18. Thirty states and American Samoa protect background papers and staff notes, and 28 states and American Samoa do so for preliminary reports by and for committees. (Appendix I lists the types of documents considered confidential in each state.)

EXEMPTIONS FROM DISCLOSURE

Most states enacted open records laws during the mid 1970s. Also known as public records acts, sunshine acts or freedom of information acts, they require the disclosure of public records in the custody of public agencies unless there are specific statutory exemptions. A number of states exempt legislative research documents from disclosure. These exemptions (if there are any) can be found in the open records laws, which often exempt legislative work papers from their provisions. This is the case in Arkansas, California, Connecticut, and nine other states. But Alaska, North Carolina, Rhode Island, Vermont and Wisconsin achieve the same result by excluding these documents from the definition of "public records." Another road to the same end is to adopt laws that prohibit disclosure of legislative documents. This works in conjunction with prohibitions found under statutory sections on the legislative branch (Alaska), the legislative counsel (California), legislative services (Colorado) or the legislative employee (Florida). Some states generally provide for disclosure but give the agency director discretion to deny disclosure of specified documents (such as "work product" in Indiana) or to protect individual privacy (Montana) or if the public interest (Connecticut) outweighs the merits of public disclosure. The opposite is true in Utah where work product is not considered to be "public record" unless the State Records Committee decides that the public interest in disclosure clearly outweighs the public interest in exempting the documents from disclosure. These provisions for discretion may be located in either the open records law or the statutes governing the legislature.

Several states provide specifically in their statutes or office policies for the exemption of material prepared in anticipation of litigation or that which would not be available to a party in litigation with the agency. Among these states are Maine, Maryland, Minnesota, Montana and Oregon. In addition, Minnesota statutes provide that drafting files are not subject to subpoena, search warrant, deposition, writ of mandamus, interrogatories or other disclosure.

RELEASE OF CONFIDENTIAL INFORMATION

In most states where work papers are afforded protection, the agencies will not release them without the prior, express and specific permission of the requesting legislator. This practice is often based on the theory that the legislative employee is considered to be in an attorney-client relationship with each member and committee of the legislature. This is specifically provided in the statutes or office policies of California, Kansas, Maine, Missouri, South Carolina, South Dakota and Texas. West Virginia considers research for legislators or legislative committees to be the property of the requestor until he or she releases it to the public. In Utah, disclosure is made only with the drafting attorney's authorization. And Oklahoma requires the approval of the presiding officer of each house respectively. In contrast to those states is North Dakota, which considers work papers to be public unless the requestor designates them as confidential. Even when so designated, the papers become public when the finished document is delivered to the legislator.

Some states have different policies in different agencies. In Illinois, for example, all requests and work having to do with legislative subjects are confidential at the Legislative Reference Bureau but are treated confidentially at the Legislative Research Unit only if so requested.

Iowa, Maryland and Montana maintain the confidentiality of the content of requests but are required to keep public record of the requestor and the subject matter or title. In addition, Maryland must disclose the expenditures and the date when the final project summary will be available.

When and what is eventually disclosed varies considerably. In Missouri, all preparation material for bill drafts becomes public record after the introduction of the bill, whereas documents written or provided prior to the bill's introduction cannot be obtained in New Jersey. Maine assures legislators only that their proposals will be confidential during the biennium in which the proposal or report is prepared. Ohio provides that the public may examine a bill file only after a staff member has had an opportunity to remove any items that may have been requested by a legislator but never made public.

CONCLUSION

The states vary greatly in their treatment of legislative research documents. At one extreme is Massachusetts, which claims no confidentiality at all. At the other are 16 states such as Hawaii, New Jersey and South Carolina, which claim confidentiality in all categories of documents. Delaware has no policy regarding confidentiality of legislative work papers. No matter where a state draws the line, it is a balancing act between what should be private and what should be public. This delicate balance must be drawn for each state in accordance with the standards of the day.

National Conference of State Legislatures

APPENDIX I

CONFIDENTIAL DOCUMENTS

Data gathered January, 1986

Key

- S - Statutory
- O - Office Policy
- B - Both

	BILL DRAFTS	BILL DRAFT REQUESTS	BACKGROUND PAPERS & STAFF NOTES	RESEARCH REQUESTS	PRELIMINARY REPORTS OR FOR COMMITTEES	LEGISLATIVE EMPLOYEE CORRESPONDENCE	COMMITTEE CORRESPONDENCE	LEGISLATORS' CORRESPONDENCE	COMMITTEE MEETING MINUTES	OTHER DOCUMENTS	NOTE (Includ)
ALABAMA	O	O		O				O			X
ALASKA	B	B	B	B	B	B1		B1		B2	
ARIZONA	O	O		O							X
ARKANSAS	O	O	O	O	O	O		B			
CALIFORNIA	S	S	S	S	S	S	S	S	S		X
COLORADO	S	S		O						O1	
CONNECTICUT	B	B	B	B	B	B	B	B		B1	
DELAWARE	NO POLICY ON CONFIDENTIALITY										X
FLORIDA	H	B	B	B	B	O	B	O	B		X
	S	O	O	O	O	O	O	O	O		X
GEORGIA	O	O	O	O	O	O	O	O			X
HAWAII	B	B	B	B	B	B	B	B			
IDAHO	O	O									X
ILLINOIS											X
INDIANA	O1	O	O	O	O2	O		O			
IOWA	O	O	O	O	O		O	O			X
KANSAS	B	B	B	B	B	B	B	B			
KENTUCKY	B	B	B1	B1	B	B	B	B			X
LOUISIANA	O	O		O		O	O	O			
MAINE	B	B	B	B	O	B	O	O		O1	X
MARYLAND	O	O								O1	X
MASSACHUSETTS											X
MICHIGAN	NO RESPONSE										
MINNESOTA	B	B	O	O	O			O			X
MISSISSIPPI	O	O	O	O	O	O		O			X
MISSOURI	O	O	O	O	O	O		O			X
MONTANA	B	B1	B	B	B	B	B	S2			
NEBRASKA	O	O									
NEVADA	B	B		B	O		O	O			X
NEW HAMPSHIRE	NO RESPONSE										
NEW JERSEY	S	S	S	S	S	S	S	S			
NEW MEXICO	B	B	B1	B1	B	B	B	B			
NEW YORK	NO RESPONSE										
NORTH CAROLINA	S	S	S	S	S1	S2		S			X
NORTH DAKOTA		O1		O1							
OHIO	O	O	O	O	O	O	O	O			X
OKLAHOMA	B	B	B	B		B		B			X
OREGON	B	B	O		O	O					X
PENNSYLVANIA	B	B	B	B	B	B	B	B		B1	X
RHODE ISLAND	B	B	B	B	B1		B1	B			
SOUTH CAROLINA	B	B	B	B	B		B	B			
SOUTH DAKOTA	O	O		O		O		O			X
TENNESSEE	B	S	S	S	B	S	B				X
TEXAS	B	B	O	O	O			O			
UTAH	O	O						O		O1	X
VERMONT	B	B	B	B	B	B	B	B			X
VIRGINIA	S	S		B		B		B			
WASHINGTON	B	B	S								
WEST VIRGINIA	O	O	O	O	O						
WISCONSIN	B	B	B					B:			X
WYOMING	O	O	S		S						X
AMERICAN SAMOA	S	S	S		S						

--NCSL State Leg's Actv. Report--

NOTES TO APPENDIX I

ALABAMA

Note: Documents are confidential until the work is made public by the requesting member.

ALASKA

1. Confidential only if related to bill drafting or research requests.
2. Internal reports showing request numbers and descriptive titles.

Note: All work requests and all files relating to them are confidential. Only the requestor can permit or direct disclosure to others.

CALIFORNIA

Note: Government Code secs. 10207 and 10208 require the Legislative Counsel to maintain the attorney-client relationship with each member of the legislature. This prohibits the outside disclosure of any material that has not become a public record.

COLORADO

1. Joint Budget Committee staff write-ups in preparation for hearings are available three days after the hearing; staff documents with regard to figure setting remain confidential at all times.

CONNECTICUT

1. Amendments to bills on the floor.

FLORIDA HOUSE

Note: Notes, drafts and unfinished reports are generally not made available without permission of the committee chairman or the speaker.

FLORIDA SENATE

Note: A bill analysis becomes a public document at the time of the first committee meeting where the bill is placed on the agenda.

GEORGIA

Note: Senate Administrative policy is that all Senate Research Office work is done expressly for the senator requesting the work. The work can be disseminated only at the request of the senator for whom the work was done.

IDAHO

Note: No legislative documents are made "public" unless the requesting legislator gives permission.

ILLINOIS

Note: Legislative Reference Bureau--requests and all work having to do with legislative subjects are confidential.

Legislative Research Unit--work is treated as confidential if so requested (rarely requested).

INDIANA

1. Except approved study committee drafts.
2. Until presented to committee.

IOWA

Note: The subject matter being worked on is listed in a subject index that the public may see. But some requests are confidential, and there is no record of these available to the public.

Note: Work product is not available until it has been delivered to the member or committee, and then it can be obtained from them.

KENTUCKY

1. Only if related to bill request.

Note: Research for bill drafts, reports and related correspondence is confidential until filed or released at a public meeting.

MAINE

1. All papers used in relation to preparing or amending a bill.

Note: All documents and work sessions are confidential until the end of the biennium. No one may examine a legislative file without the express consent of the individual legislator. However, access can be made with permission of the governor.

MARYLAND

1. Bill summaries prepared for committee chairmen (at the option of the chairman).

Note: Bill and amendment drafting requests are confidential until introduced or proposed.

MASSACHUSETTS

Note: All documents and papers are open to the public.

MINNESOTA

Note: All legislative staff offices regard everything as confidential that has not been published as a public document.

Note: Drafting files are not public and not subject to "subpoena, search warrant, deposition, writ of mandamus, interrogatory or other disclosure."

MISSISSIPPI

Note: No information about a research request, including the existence of the request, is released unless the legislator specifically authorizes its release.

MISSOURI

Note: All bill drafters are lawyers. Until legislation is actually introduced, such work is attorney-client material and therefore confidential. After introduction, all preparation material becomes public record.

MONTANA

1. Name of bill draft requestor and subject may be disclosed. All work in progress is confidential.

2. Material prepared in anticipation of litigation that would not be available to a party in litigation with the council under the Montana Rules of Civil Procedures on pretrial discovery.

NEVADA

Note: Documents are confidential unless specifically released by the requestor.

NEW MEXICO

1. Published research reports, background papers and research requests--if requested by a legislator and not of staff origin.

NORTH CAROLINA

1. Confidential until distributed at a public meeting of a committee.

2. Confidential if arises out of request of legislator.

Note: All drafting and information requests and documents prepared at request of a legislator are confidential but become public when offered on the floor or in committee.

NORTH DAKOTA

1. If a legislator specifically requests that a work request be kept confidential, the staff will not discuss that request with any non-staffer until the finished document is delivered to the legislator.

OHIO

Note: A document is confidential prior to introduction or being made public by the legislator. Memoranda of a general nature may, however, be distributed to the public. The public may examine a bill file after a staff member has had an opportunity to remove any items that may have been requested by a legislator but never made public by him.

OKLAHOMA

Note: The records and files of the legislature, not otherwise provided by law to be open to public inspection, shall be confidential and privileged and may be released for public consumption only upon approval by the presiding office of each house respectively.

OREGON

Note: Legislative counsel staff are prohibited from revealing the content of a member's request if declared confidential by the member. If not so declared, committee rules prohibit revealing the content except to avoid duplication.

PENNSYLVANIA

1. Material filed by administrative agencies relating to rulemaking.

Note: All unpublished material is confidential without the consent of the originating member.

RHODE ISLAND

1. Items for internal use only are considered confidential, otherwise they are considered open public records.

Note: Under Senate Rule 9.5, senators may request computer access confidentiality for bills, letters, memoranda or any other documents.

SOUTH DAKOTA

Note: The staff functions in a relationship to the legislator that is similar to the attorney-client relationship.

TENNESSEE

Note: Documents are confidential until made public by a committee or legislator for whom it was prepared.

Note: Confidentiality has always applied to legislative attorney and research records for legislators and committees by the central office staff.

A legislator's correspondence in the office of legal services is confidential; however, there has been no determination on such correspondence in other legislative offices. In 1984, legislative records were added to the records management law (TCA 10-7-303). There have been no lawsuits on the question of what is a public legislative record.

UTAH

1. Research surrounding bill drafts.

Note: Materials are confidential if the legislator requests. Disclosure is made only with the drafting attorney's authorization.

VERMONT

Note: All information received in connection with research or drafting is confidential unless the requestor or the party giving the information designates in the request that it is not confidential.

WISCONSIN

1. "Drafts, notes, preliminary computations" prepared for the legislator's personal use or prepared by a staff person in the name of the legislator are exempt from definition as "public records" under the open records law.

Note: Records of drafting and reference requests, including their existence, are confidential until they become part of the record of an introduced proposal.

WYOMING

Note: Research for committees is released after it is supplied to the committee.

APPENDIX II

Applicability of Open Record Laws to
Legislative Research Documents

ALASKA

Alaska Stat. sec. 24.20.100

Records required by state law to be confidential are not "open records." AS 24.20.100 makes legislative work requests confidential.

ARKANSAS

Ark. Stat. Ann. sec. 12-2804

Freedom of Information Act exempts "unpublished memoranda, working papers and correspondence of the governor, legislators..." from disclosure.

CALIFORNIA

Cal. Govt. Code sec. 9070
(Title 2, Div. 2, Part 1,
Chap. 1.5)

Open records act exempts all materials arising out of the attorney-client relationship between the legislative counsel and any member of the legislature.

COLORADO

Colo. Rev. Stat. secs.
24-72-202(6); 24-72-203

All documents in the custody of 24-72-505 legislative employees are probably "public records" within the meaning of 24-72-202(6), but 24-72-203 provides that the open records law may be superseded by other provisions of law, such as 2-3-505 which provides that the contents and nature of bill draft requests be confidential.

CONNECTICUT

Conn. Gen. Stat. sec.
1-19(b)(1)

Freedom of Information statute exempts from disclosure "preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure.

ILLINOIS

Ill. Rev. Stat. Ch. 116,
Par. 207(f) [Freedom
of Information Act,
P.A. 83-1013 (1984)]

Records which pertain to the preparation
of legislative documents are exempt from
copying or inspection under the Freedom
of Information Act.

INDIANA

Ind. Code sec. 5-14-3-4

Law allows the Legislative Services Agency
discretion in releasing information on
"work product" of the agency.

KANSAS

Kan. Stat. Ann. secs. 45-22
(a)(1)(20)(21),(25); 45-221(b)

Open records law exempts research done for
members and records pertaining to proposed
legislation until disclosed in an open
meeting. Attorney work product is also
exempt under the attorney-client
principle.

KENTUCKY

Ky. Rev. Stat. secs. 61.878
(1)(g),(h); 6A.100; 7.120

Exempted from open records law are
preliminary drafts, notes, correspondence
with private individuals (other than
correspondence which is intended to give
notice of final action of a public
agency), preliminary recommendations and
preliminary memoranda in which opinions
are expressed or policies formulated or
recommended.

LOUISIANA

La. Rev. Stat. Ann. secs.
44.2; 44.3

Open records law exempts records retained
by legislative attorneys that concern any
case, cause charge or investigation being
conducted by or through the legislature
until final disposition, at which time
they become public records.

MAINE

Me. Rev. Stat. Ann. tit. 1,
sec. 402(3)

Exempted are records within the scope of a
privilege against discovery or use as
evidence recognized by the courts if the
records or inspection thereof were sought
in the course of court proceedings. Also
exempted are records, working papers and
inter-office and intra-office memoranda
used or maintained by any legislator.

legislative agency or legislative employee to prepare proposed senate or house papers or reports for consideration by the legislature or committees during the biennium in which the proposal or report is prepared.

MARYLAND

Md. State Govt. Code Ann.
sec. 10-618(b),(d)

Under the Public Information Act, a custodian may deny inspection of any part of any inter-agency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the unit. Also, custodian may deny inspection of a public record that contains the specific details of a research project that an institution of the state or of a political subdivision is conducting (this does not include the part of a public record which gives the name, title, expenditures and date when the final project summary will be available).

MASSACHUSETTS

Mass. Gen. Law Ann. tit. X,
ch. 66, secs. 1-10

Records are open for public inspection.

MISSOURI

Mo. Rev. Stat. tit. 39,
ch. 610

Open records law generally applies, particularly after a bill is introduced.

MONTANA

Mont. Const. Art. II, secs. 8,9
& 10; Mont. Code Ann. secs.
2-3-201 through 2-3-221;
2-6-101 through 2-6-104

Generally, everything is open to the public except information that the Executive Director of the Legislative Council determines not to be available because the demands of individual privacy clearly exceed the merits of public disclosure.

NEW JERSEY

N.J. Rev. Stat. secs. 52:11-70
47:1A-1

Open records law applies only to legislative documents that are public and required by law to be made and maintained, such as introduced bills, committee statements, etc. Documents made prior to the bill's introduction are not obtainable.

NORTH DAKOTA

N.D. Const. Art.XI, sec. 6;
N.D. Cent. Code sec. 44-04-18

All records of public agencies are public records unless specifically excepted, which legislative documents are not.

OHIO

Ohio Rev. Code Ann. ch. 121

Legislative documents are not expressly included in open records act. No court decision or opinion of the attorney general clearly resolves the issue.

OREGON

Or. Rev. Stat. secs. 192.410-500

Exempted from public disclosure are records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. Also exempt are the contents or nature of any matter brought before the legislative counsel if the person bringing it before the counsel designates it as confidential.

PENNSYLVANIA

65 Pa. Cons. Stat.
secs. 261; 264

Open records act applies to minutes of policy-making meetings of the General Assembly.

RHODE ISLAND

R.I. Gen. Laws secs. 38-2-2(d)
(11), (13)

Research papers are considered "work papers" or "work products" under the public records law and therefore are not deemed public records.

SOUTH CAROLINA

S.C. Code Ann. secs. 30-4-40;
30-4-70

Public records law exempts correspondence or work products of legal counsel for a public body and any other material that would violate the attorney-client relationship and memoranda, correspondence and working papers in the possession of members or their staffs.

TENNESSEE

Tenn. Code Ann. sec. 3-12-106

Public Records Law applies to documents that are part of public proceedings. Materials arising out of the attorney-client relationship between legal staff and legislators are not considered to be open records. This exception from the Open Records Law does not apply to non-legal legislative staff. No question has been raised nor any determination made on whether the individual legislator's records are public records.

TEXAS

Tex. Stat. Ann. tit. 110A,
Art. 6252-17a, 3(a)(6);
tit. 87, Art. 5429b-3

Open records law exempts "drafts and working papers involved in the preparation of proposed legislation." The work product of staff lawyers is considered privileged as a result of attorney-client relationship.

UTAH

Utah Code Ann. sec. 63-2-61(5)
(1985)

The term "public records" does not include preliminary drafts or personal notes made or received, and retained by the agency in the ordinary course of business, unless, in the opinion of the State Records Committee, a public interest in disclosing these records clearly outweighs the public interest in exempting them.

VERMONT

Vt. Stat. Ann. tit. 2,
sec. 404(c)

Open records law applies to committee transcripts and minutes, written testimony submitted to committees, bills or amendments that have been released or approved for printing or introduction and material appearing in the journals or calendars.

VIRGINIA

Va. Code secs. 30-28.18; 2.1-342

"Memoranda, working papers and correspondence held or requested by members" are exempt from the Freedom of Information Act.

WASHINGTON

Wash. Rev. Code secs. 1.08.027;
42.17.310

"Preliminary drafts, notes, recommendations and inter-agency memorandums in which opinions are expressed or policies formulated" are exempt from the public records law.

WEST VIRGINIA

W.Va. Code Art. 9A

Research for legislators or legislative committees is the property of the requestor until it is released by them or becomes public information (usually through public release or discussion). Internal memoranda or letters received or prepared are exempt from disclosure under the public records law.

WISCONSIN

Wis. Stat. sec. 13.92; 905.03;
19.31-19.39

The open records law favors public inspection of public records except where the harm done to the public interest by disclosure outweighs the right of access to the particular record.

APPENDIX III

Legislatures That Have Had Research Documents Subpoenaed In The Last 10 Years

ARKANSAS

The court found there was a strong public policy in favor of public records and construed the Freedom of Information Act exemption of legislators' work papers narrowly. Since the Legislative Joint Auditing Committee was not made up of legislators, their work papers were public records and had to be disclosed.

Note: In its 1987 session, the Arkansas legislature amended the Freedom of Information Act to exempt the working papers of the state auditor.

CALIFORNIA

California is subpoenaed approximately 15 times a year. Most subpoenas are valid, and the state usually complies. However, when a legislative aide was subpoenaed for the purpose of establishing legislative intent, the state resisted successfully on the grounds of relevancy. California law provides that testimony of legislators and legislative aides is irrelevant to a court's construction of a statute.

FLORIDA

Subpoenas of legislators and staff have been contested on the grounds of legislative privilege, separation of powers and relevancy. The legislature has virtually always been successful.

MARYLAND

A request for access to bill drafting files was initially denied, but a compromise was later reached allowing the plaintiff to inspect and copy all documents in the files except those reflecting communications between Maryland legislators (or their staff) and persons employed by the legislative branch of government.

MINNESOTA

Motions to quash have been successful on several occasions. More usually, when it has been indicated that any subpoena would be resisted on constitutional grounds (speech or debate clause), the attempt has been dropped.

NEW JERSEY

As part of various law suits, legislative employees and records have been subpoenaed. An attorney accompanies the individual to ensure that N.J.S.A. 52: 11-70 (which provides for the confidentiality of legislative work and requests) is not violated. Public documents are provided.

NEVADA

Records of the bill draft were used in court in determining legislative intent.

NORTH CAROLINA

A legislative services officer was subpoenaed to bring certain public legislative documents. He did so and testified only to the fact that they were originals of the committee minutes.

In another incident, the director was subpoenaed to testify about what happened in the 1949 General Assembly. The director informed the plaintiff's attorney that his testimony would be useless because 1949 was before he was born, and the subpoena was withdrawn.

OHIO

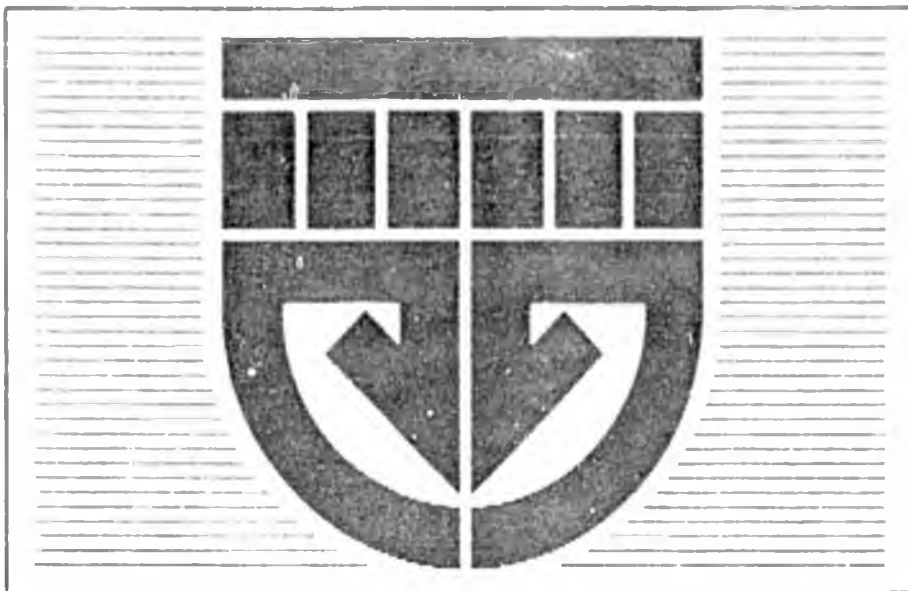
Copies of documents subpoenaed were supplied.

PENNSYLVANIA

Records pertaining to a legislative investigation into the propriety of a no-bid source contract to furnish granite for an extension of the state capitol building were requested under a blanket federal grand jury subpoena. The House of Representatives' motion to quash was granted in federal district court. The Third Circuit Court of Appeals reversed. The House has applied for certiorari to the U.S. Supreme Court.

VERMONT

The court protected the confidentiality of documents under the attorney-client relationship.



**STATE
LEGISLATIVE
REPORT**

**National Conference
of State Legislatures
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Proposal fosters Capitol secrets

Now before the House State Affairs Committee is a question that contains its answer. Briefly stated, the question is as follows:

A member of the public writes a letter to a public official involving a matter of public policy or relating to the legislator's official duties.

Should that letter be public?

When a constituent contacts a legislator, presumably that contact has to do with public policy. That is a statement of the obvious, sort of like saying when someone writes to a car dealer, it has to do with a car.

There are some people, however, who believe that what they tell their legislators is nobody else's business. How could that be? If a legislator is working for the public on the public payroll about matters of public policy, then it would seem that the public would have a perfect right to know about it.

The State Affairs Committee in the House is considering House Bill 22, which would add a new section to state law making communications between a member of the public and a legislator or a legislator-elect confidential unless:

- Confidentiality is waived by the member of the public.
- The communication is offered as public testimony.

In addition, the bill would not only make reports prepared by the Legislative Research Agency secret unless the legislator who requested it wants it released, it would make legislator's requests for reports secret.

Such a broad-brush amendment would have the effect of making any public-records laws as they current pertain to legislator-constituent communications and research reports.

Our system of government is based on the premise that the public has a right to elect its representatives - and to know what they do once they are elected.

This legislation has the effect of negating that most basic premise and, if enacted, could open the door to any number of abuses.

The public must trust its elected representatives. The way to build that trust is to maintain openness in every facet of government.

This bill would do precisely the opposite. Alaska's legislators would do well to reject it in its entirety.

ISSUE: Bill would
make all constitu-
ent letters secret

he served his time, he's struck again.

Who let this guy out on furlough? Why doesn't his p.r. man have him under electronic surveillance?

At a nearly all-male, all-jock event in Connecticut, the Ramington reaper was being roasted about a season in which the losses on the playing field were more than matched by the losers in the locker room. Some of his players were more dangerous out of uniform - and I mean OUT of uniform - than in.

The naked aggression against reporter Olson had produced an unrivaled flap about sexual harassment. Our boy Victor, who called the incident "a flyspeck in the ocean" and called Olson a "classic bitch," had ended up in full-flight, full-page, all-network apologies.

But here he was on a weekday pass and he couldn't help himself. He told the crowd a joke: "What do the Iraqis have in common with Lisa Ol-

Democrats

TROBINE MEDIA SERVICES

Perhaps, the war has distracted us all.

But, last week, the Bush administration passed several milestones in American history, virtually without notice.

• For the first time since World War II, federal spending is scheduled to exceed 25 percent of America's gross national product.

• This year and next we will run the two largest deficits in U.S. history - \$318 billion this fiscal year, \$281 billion in fiscal year '92 - dwarfing the two largest Reagan deficits by nearly 40 percent.

• Federal tax revenues will move back up to levels unseen since before the Reagan tax cuts, near one-fifth of GNP.

Big Government is crowding us out.

Compared to the last Great Society, guns-and-butter budget of LBJ, the Bush budget for 1992 - \$1.45 trillion in spending - is a giant. Not since 1945 has the federal government made so huge a claim on America's resources. As The Wall Street Journal notes: "One dollar of every four produced by working Americans will be handed over to Congress and its various Departments of Good Intentions." After Congress takes its 25 percent bite, state, county, and city governments are lining up for their share.

Few have noticed the crossing of this fiscal equator, and fewer complain, though Mr. Bush's '92 budget will take 3 percent more of GNP than Mr. Reagan's last, which claimed

Legislators consider secrecy bill

By BRIAN S. AKRE

THE ASSOCIATED PRESS

Letters and memos from the public to lawmakers involving public policy would be secret under legislation considered Wednesday by the House State Affairs Committee.

House Bill 22 also would make legislators' research requests to the Legislative Research Agency confidential, as well as reports prepared in response to those requests.

Sponsoring Rep. Cheri Davis, R-Ketchikan, testified that the bill would put into law what legislators already thought they could do: keep personal correspondence from constituents and sensitive research reports confidential.

"There are times when they need to be confidential," she said.

The committee took no action on the bill.

Chairman Gene Kubina, D-Valdez, referred it to a subcommittee, which will try to narrow the effect of the legislation. The bill should apply only to personal matters, not public policy, he said.

Kubina had invited members of the news media to testify on the bill, but none did. Committee members did read an editorial from Tuesday's Juneau Empire, which sharply criticized the bill.

"Such a broad-based amendment would have the effect of negating any public-records laws as they currently pertain to legislator-constituent com-

munications and research reports," the editorial said.

"Our system of government is based on the premise that the public has a right to elect its representatives, and to know what they do once they are elected."

Davis said constituents who write her about problems with state social-service agencies often "spill their guts" with sensitive personal information, and most don't realize their letters are public record. If such letters are not kept secret, the public will be discouraged from writing lawmakers, she said.

State law already protects the confidentiality of many social service agency files, such as those pertaining to child adoption, child abuse and foster care, but the protection does not cover letters on those subjects sent to legislators by members of the public.

The bill would not affect letters that legislators put in their bill files, which are public record, Davis said.

Rep. Max Gruenberg, D-Anchorage, urged the committee to move slowly on the bill.

"This bill is a very difficult public issue, and it is not the kind of thing we should rush through," Gruenberg said. "I don't think it's as simple as the editorial says. I don't think it's as simple as the sponsor says."

Under the legislation, confidentiality of letters could be waived by the writer, and correspondence of-

ferred as public testimony would be exempt from the secrecy provision.

The bill also would allow statistics and "information regarding the substance of the communication" to be released if the identity of the source could be withheld.

Gordon Harrison, director of the Legislative Research Agency, said the bill would put into law what has for years been an unwritten policy in dealing with research requests and reports.

The research agency's budget is about \$1 million a year, and about half of its work is never released.

Juneau Empire 2-13-91

Open letters

Correspondence should remain public

ADN 2-16-91

Lawmakers rarely get to choose explicitly between good and bad, between right and wrong. Usually, they are compelled to choose between competing interests — between opposing positions supported by both logic and merit.

Such is the case with Rep. Cheri Davis' bill that would make secret the letters and memos the public sends lawmakers.

Rep. Davis, R-Ketchikan, has a point when she says constituents with problems often don't expect their communications to become part of the public record. One can sympathize with her desire to protect unsuspecting writers.

But then look at the other side. The letter writers, after all, are writing to public officials. A letter can influence a legislator's behavior or a bill. The relationship between a constituent and a lawmaker takes place in the public realm. Traditionally, a constituent's comments to his or her representative become part of the public record. A public official and a constituent don't have a private relationship like a patient and a doctor or a client and a lawyer, so why should a constituent expect — much less receive — privacy?

In the Daily News' judgment, the public interest will be better served by keeping constituent mail on the public record. The fact that a relatively small number of letter writers might be embarrassed by what they've written does not provide compelling reason to make all constituent communications disappear into locked files.

Nor should reports prepared in response to constituents' requests remain confidential. Such reports, after all, provide analysis and understanding of the public world — and they're prepared at public expense.

Rep. Davis has raised a problem that vexes a small number of Alaskans. Unfortunately, she's come up with a solution bad for everyone else.