

GRAMA Working Group
Statutory Definitions Subcommittee

June 22, 2011

Consensus Recommendations

1. Attorney Privileges. The exceptions in GRAMA for records subject to the attorney-client privilege and attorney work product doctrine should be made consistent with the privileges accorded non-governmental attorneys and clients. Proposed language is attached as Exhibit "A."
2. Legislative Intent and Balancing Test. GRAMA's legislative intent section should be retained. However, the language in Section 63G-2-102(3)(e) of the legislative intent section -- favoring public access when "countervailing interests are of equal weight" -- should be consistent with the balancing test that is applied by government entities, the State Records Committee, and the courts to determine whether records properly classified as non-public should be released. This can be accomplished by incorporating the legislative intent standard into each of the places in the statute that authorize use of the balancing test, as set forth in Exhibit "B." At the same time, the Attorney General and other government stakeholders have requested that that certain types of enforcement and litigation records be subject to a heightened evidentiary standard before such records could be released under the balancing test. A bill to accomplish this was sponsored by Senator Curt Bramble and Douglas Aagard in 2009, but failed to pass. The language found at lines 547-550 of Exhibit "B" would make this change.
3. Definition of Record and Personal Privacy Safe Harbor. The subcommittee could not reach a consensus on whether GRAMA's definition of "record" should be amended to expressly include or exclude text messages, instant messages, video chat logs, and similar modes of communicating information. The subcommittee does recommend, however, that the Legislature consider more clearly defining the exclusion contained in Section 103(22)(b)(i) for records that are prepared or received by government employees and officers in their non-governmental capacities, e.g., records that relate to personal, family, and/or professional matters that are unrelated to the conduct of the public's business. In addition, the subcommittee recommends that the Legislature consider more clearly defining the exclusion in Section 103(22)(b)(ii) concerning drafts prepared for the originator's own use and the exclusion in Section 103(22)(b)(ix) concerning daily calendars and notes prepared for the originator's own use.
4. Service of Notice of Appeal. To ensure that respondents receive timely notice of appeals to the State Records Committee, a party who files a notice of appeal to the Records Committee should

be required to simultaneously serve the notice on the adverse party. A proposed amendment to make this change is attached as Exhibit "C."

5. Constituent Communications. Concerns have been expressed by some members of the subcommittee and Working Group that disclosure of emails and other records sent by a constituent or other person to a legislator could have a chilling effect on persons wishing to contact legislators to express their views on pending or proposed legislation or other public issues. Concerns also have been expressed that, in some instances, disclosure of the content of such constituent communications could invade the personal privacy of constituents. On the other hand, prohibiting or restricting public access to communications between legislators and persons seeking to influence legislation, including constituents, raises legitimate concerns about public transparency and accountability in the legislative process. The subcommittee could not reach a consensus on this issue. A memorandum further discussing the issue and containing some possible legislative approaches is attached as Exhibit "D."