

MEMORANDUM OF UNDERSTANDING BETWEEN
THE GOVERNOR AND THE SECRETARY OF STATE OF VERMONT REGARDING ARCHIVAL
STORAGE OF GUBERNATORIAL PAPERS.

The purpose of this Memorandum of Understanding is to establish clear guidelines to govern public access to "the official correspondence of the Governor," upon the deposit of that correspondence in the custody of the Archives of the Office of the Secretary of State (hereafter "the State Archives").¹

The basis for these guidelines is a commitment, shared by Governor Howard. Dean, M.D. ("Governor Dean") and Secretary of State Deborah L. Markowitz, to openness and accessibility of state government, coupled with a recognition that certain gubernatorial documents are exempted from the Right-to-Know law under the constitutionally-based doctrine of executive privilege.²

¹ The only guidance provided by the Vermont statutes is that, upon retiring, the Governor is to deposit "the official correspondence of the governor . . . with the secretary of state," 3 V.S.A. § 4(a), who, in turn, "shall . . . permit the public to inspect, examine and study the archives of his or her office: provided that any record placed in the keeping of the office under special terms or conditions of law restricting their use shall be made accessible only in accordance with those terms and conditions," 3 V.S.A. § 117(a)(2). The statute does not define "correspondence."

² In Killington, Ltd. vs Lash (February 16, 1990), the Vermont Supreme Court drew upon the Vermont constitution, as well as upon common law precedents, to hold that the Governor of Vermont may assert "executive privilege" to preserve "the confidentiality of intergovernmental documents reflecting advisory opinions, recommendations and deliberations comprising parts of the process by which governmental decisions and policies are formulated," Slip Op. At 8-9, quoting Archibald Cox, Executive Privilege, 122 U.Pa.L.Rev. 1383, 1410 (1974). The Court held further that documents encompassed by "executive privilege" are, by definition, not "public records" but, rather, are excepted from the mandatory disclosure provisions of the Right to Know law as "records which, if made public pursuant to [the Right to Know law] would cause the custodian to violate [a] statutory or common law privilege," 1 V.S.A. § 317(b)(4). See Killington, Slip.Op. at 11.

The guidelines strike a balance between the desire, on the one hand, to preserve a full and complete record of Governor Dean's Administration for the benefit of future historians and the public's right to know, and, on the other hand, to respect the public policy reasons to deem certain gubernatorial documents privileged under the Vermont Constitution and common law. Specifically, the guidelines affirm the public's right to access to all of the Governor's official correspondence, even those exempted from disclosure, while at the same time setting the date for access to any executive privilege documents within the official correspondence to commence ten years hence.³

³ The period of ten years was chosen as a reasonable but brief period in comparison to the "executive privilege" closing periods used in other jurisdictions (e.g. up to twelve years federally, see the Presidential Records Act, 44 U.S.C.S. § 2204(a); twenty years for the official papers of former Governor Thomas H. Kean of New Jersey (1982 - 1990), see Guidelines for Access to Governor Kean's Official Papers; and thirty years in Maryland, see Policy of the Hall of Records Commission regulating the Use of The Gubernatorial Files).

Guidelines to Govern Public Access
To Governor Howard M. Dean's Official Correspondence

I. Subject to the special terms and conditions of restriction set forth in paragraph II, below, Governor Dean's official correspondence shall be open to the public, in accordance with the established policies and practices of the State Archives.

II. Any portions of Governor Dean's official correspondence determined by Governor Dean to be encompassed by executive privilege shall be open to the public, in accordance with the established policies and practices of the State Archives, commencing on January 10, 2013. Prior to that date, the following special terms and conditions of restriction shall apply:

A. Governor Dean's executive privilege documents shall be under the custodianship of the Archives and may be housed and preserved pursuant to appropriate archival standards by the State's Department of Buildings and General Services, or any successor agency or department, in files that have been sealed and appropriately labeled and cross-referenced by the Governor's Office (the "sealed gubernatorial records").


B. Governor Dean's executive privilege documents shall be accessible only:

1. Pursuant to a valid court order;
 2. In accordance with written authorization from Governor Dean;
 3. To the staff of the State Archives in so far as necessary to assure archival security;
- or
4. In the event that the document has been placed in the public domain.

C. When Governor Dean's executive privilege documents become open they shall be reintegrated with Governor Dean's official correspondence within the Archives.

D. The Secretary of State and the Commissioner of Buildings and General Services shall notify the Attorney General of the State of Vermont and make all reasonable efforts to notify Governor Dean in the event of a request in any form for access to sealed gubernatorial records and shall defend the privilege and the seal agreed to through this memorandum. Governor Dean shall be given the opportunity to participate in any litigation over access to his sealed gubernatorial records.

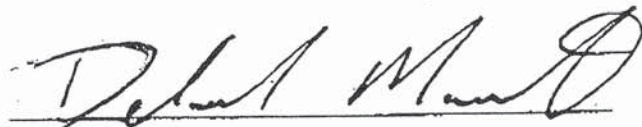
Governor Dean and Secretary Deborah L. Markowitz join in this Memorandum of Understanding.



Governor Howard . Dean M.D.

1/2/13

Date

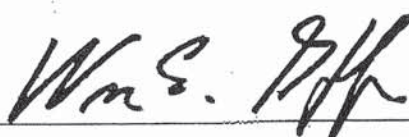


Secretary of State Deborah L. Markowitz

1/7/13

Date

Approved:




Attorney General William Sorrell

1-9-03

Date