

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 Madeleine M. Kunin and Secretary of State James H. Douglas, 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. Sec.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. Sec.117(a)(2).

^{2/} In Killington, Ltd. v. 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,

The guidelines strike a balance between the desire, on the one hand, to preserve a full and complete record of Governor Kunin's administration for the benefit of future historians and the public's right to know, and, on the other hand, to respect, at least to a limited extent, the confidentiality of gubernatorial documents deemed 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, while at the same time setting the date for access to any executive privilege documents within the official correspondence to commence six years hence.^{3/}

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. Sec. 317(b)(4). See Killington, Slip. Op. at 11.

^{3/} The period of six 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. Sec. 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 Kunin's Official Correspondence

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

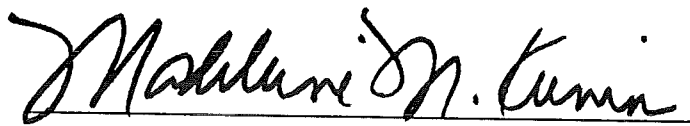
II. Any portions of Governor Kunin's official correspondence determined by Governor Kunin to be encompassed by executive privilege shall be open to the public, in accordance with the established policies and practices of the State Archives, commencing on January 11, 1997. Prior to that date, the following special terms and conditions of restriction shall apply:

A. Governor Kunin's executive privilege documents shall be housed and preserved in the State Archives in files that have been sealed and appropriately labelled and cross-referenced by the Governor's Office.

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

1. pursuant to a valid court order;
2. in accordance with written authorization from Governor Kunin; or
3. to the staff of the State Archives in so far as necessary to assure archival security.

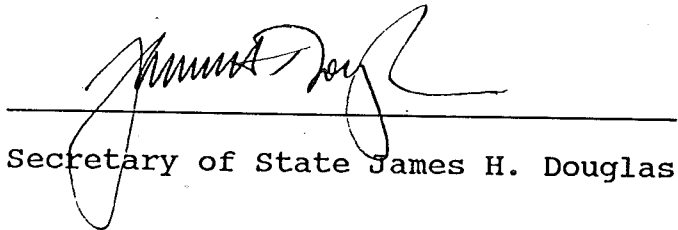
Governor Kunin and Secretary Douglas join in this
Memorandum of Understanding.



Governor Madeleine M. Kunin

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Date

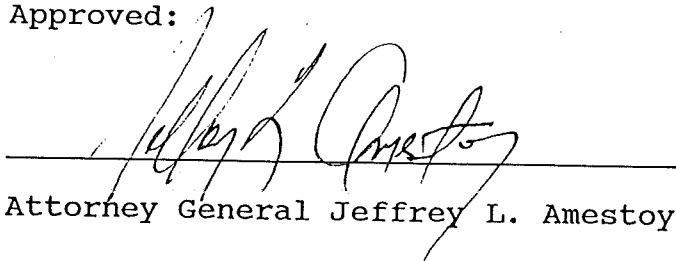


Secretary of State James H. Douglas

11/2/90

Date

Approved:



Attorney General Jeffrey L. Amestoy

11/5/90

Date