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Office of the Secretary of State

August 21, 2002

TO: David Rocchio, Governor's Counsel

FROM: Gregory Sanford, State Archivist DGS

RE: Executive privilege questions

You asked me to further develop the idea that executive privilege closures might not be bound by a date certain, but rather reflect the Governor's status (i.e., being President, presidential candidate) at the time the records would normally be open under a memorandum of understanding.

What we discussed was the possibility of adding to the memorandum of agreement:

"In the event Governor Dean is President or a presidential candidate at the time the agreed executive privilege closure ends, the closed records will remain closed for an additional ___ years."

Having proposed that approach in our initial brainstorming session, I do not support it. In the same spirit of freely exchanging ideas, let me explain why.

--The open records law (1 V.S.A. §315) declares "it is in the public interest to enable any person to review and criticize [the officers of government] decisions even though such examination may cause inconvenience or embarrassment." So the scenario we were discussing--use of the gubernatorial records to embarrass a national campaign--is one not recognized by Vermont law.

The "Willie Horton" example was raised. It is an unfortunate reality that attack ads have become part of our political culture. It would be impossible to anticipate how opponents might mis/use even the most innocuous of documents. Setting new barriers to access in an attempt to anticipate attacks would be, at best, unfortunate. Ironically, such barriers would probably become an issue, detracting from the Governor's proud record of achievement (the reality of this possibility is evidenced by controversy surrounding President Bush's gubernatorial records, Mayor

Giuliani's records, and records of former Virginia Governor Gilmore; see attached sampling of clippings).

--3 V.S.A. §4 and Killington v. Lash address sitting governors; to begin building post-gubernatorial controls into memoranda of understanding raises legal issues and is bad precedent. President Bush's executive order weakening the Presidential Records Act by extending the powers of incumbent and former presidents to delay access is currently subject to congressional hearings and are being challenged in the courts.

--President Bush did not use his election to put restrictions on his gubernatorial records, beyond those allowed by Texas law. The Texas Attorney General recently furthered clarified Mr. Bush's gubernatorial records by declaring them "state records" subject to the Texas Public Information Act.

Texas law no longer requires gubernatorial records to be deposited with the secretary of state; the law was changed under Governor Bush to allow deposit at any state depository (Texas law allows the designation of official state depositories in addition to the state archives).

In the face of public outcry, Governor Bush's records were recently removed from his father's presidential library back to the Texas State Archives for review under the State's open record law.

The Texas Interim Memorandum of Understanding, by the way, offers a definition of "personal papers"--as distinguished from gubernatorial records. Personal papers are: "all material of a private or non-public character which do not relate to, have an effect upon, or arise out of the carrying out of the constitutional, statutory, or other official duties of the Governor's office and for which no public resources or funds were expended in their creation or maintenance."

Again the reality is that gubernatorial records are part of our collective institutional (state government) records and thus are important to government continuity across administrations. The numerous initiatives and actions of Governor Dean will continue to shape state government for years to come. To assure that those programs continue as intended it is important to put as few restrictions on access as possible. If Dean Administration records are inaccessible, if the intent of policies cannot be documented, subsequent administrations might have an easier path imposing their own interpretations on Governor Dean's initiatives and eliminating them.

As always, I am available for discussion.

Gregory Sanford

From: Gregory Sanford <gsanford@sec.state.vt.us>
To: dmarko@sec.state.vt.us
Subject: meeting with rocchio
Copies to: bdalton@sec.state.vt.us
Date sent: Tue, 3 Sep 2002 16:12:06 -0400

Just talked with David and will meet with him Thursday morning at 9:30 at Capital Grounds. He wants to nail down a closing date to present to the Governor. Governor leans toward 24 years; my immediate response to David was that presidents can only close their records for 12 years, plus the State cannot afford to fill space with records no one can review for a quarter century. I also raised the institutional, rather than historical, need for access.

Anyway, my underlying tack will be that the Secretary, not the Archivist, signs the moa, so the agreement must be with the Secretary. I will simply listen to, and report back, proposals.

Gregory Sanford

From: bdalton@sec.state.vt.us
To: "Gregory Sanford" <gstanford@sec.state.vt.us>, dmarko@sec.state.vt.us
Date sent: Wed, 04 Sep 2002 15:24:20 -0400
Subject: Re: e-records;governor
Send reply to: bdalton@sec.state.vt.us
Priority: normal

Just listen. Be sure David knows even eight years seems extreme. then tell him about any reasonable offer he wants to propose.

On 4 Sep 2002 at 14:13, Gregory Sanford wrote:

From: "Gregory Sanford" <gstanford@sec.state.vt.us>
To: dmarko@sec.state.vt.us
Date sent: Wed, 4 Sep 2002 14:13:38 -0400
Subject: e-records;governor
Copies to: bdalton@sec.state.vt.us
Priority: normal

We should get together soon on the above topics. It sounds like today is out and tomorrow as well (I have meeting with David Rocchio at 9:30, we then have picnic then I have some stuff I am doing at Twinfield starting at 3:30); so Friday?

I attach the latest version of the legal risk document designed for program heads so they understand why they would follow the trustworthy systems process.

If you have any thoughts/cautions for tomorrow's meeting let me know, though I am not going to be making any commitments in re closure period. Any thought on the 8 year offering?

September 4, 2002

TO: Deborah, Bill

FROM: Gregory

RE: Governor Dean's records

To recap my conversation with David Rocchio yesterday:

- 1) I suggested/we agreed that personnel records should be treated under the general record schedule for all agencies (transfer to Middlesex, film, hold fifty years) and should not be included as "official correspondence."
- 2) Pardons are public records; supporting material (evaluations of the risk of pardoning or paroling a particular person) has traditionally been treated as a permanently exempt record. I agreed to check any notes from previous governors and suggested that the records be deposited with Corrections. David seemed to suggest that the records should be destroyed.
- 3) Governor's hotline: Treat as established by general record schedule (dispose of routine messages; messages containing substantive information should be filed with records that pertain to the issue. David further argued that voice mail was not "correspondence," while I suggested the public record definition is what should be guiding the discussion, not the undefined official correspondence. We agreed to disagree on the latter point.
- 4) Governor's Counsel; lawyer/client privilege. David feels that under professional ethics he could not make those records open at anytime. We have not traditionally received them. Perhaps file with AG.
- 5) On-going legal issues. File with AG for incoming administration.
- 6) Confidentiality of correspondents (civil unions). David reiterated that the Office redacted the names since many (some?) gay people wrote in support of civil unions, but said they did not want to be outed in their community. I argued that there was no expectation of privacy when a person wrote to the Governor on policy issues. No agreement.
- 7) David said they would like to start transfer of records in a few weeks. I will suggest that they start by sending us the open records, exempt records, while remaining under our administrative control, should go to Middlesex until open or we have adequate space.
- 8) David reported that in his initial conversation with the Governor a closure of 24 years was mentioned. David is not wedded to that, but needs to reach agreement on a closure period. It was suggested that the alternative to an acceptable time period would be to permanently close the records under 1 V.S.A. 317(b) and other exemptions. I noted that the presidential records act sets a 12 year closure period so 24 years is excessive (he noted that some states allow 24 year closures and that NH simply destroys gubernatorial records--I will check with the NH archivist on that). I noted my disadvantage in not knowing what specific types of information they were considering closing, David posited a personal comment by the governor on an individual with whom the Office had to work.

Reality check: While David and I agreed earlier that "embarrassment" (ala Willie Horton type attack ads) was not grounds for exemption, we are really talking about "ambition. " By the by, I further noted that Willie Horton ads were based on a clearly public record, not one that would be considered exempt, and that current political charges over Jim's managing of the Treasurer's Office or Doug's true financial worth were also based on public records)

Without conceding that a governor's post-administration political ambitions are a legitimate basis for closure, can we offer, in the interest of moving forward, eight years? That would mean that the records would become open in 2011. If Gov. Dean became president in 2005 he would either be in his second term or out of office. If he failed in 2004, that would mean he would have had an opportunity to run again in 2008 and, if successful, be in the second year of his administration. If he ran and failed again in 2008, but wanted to run in 2012 it would mean that he was Harold Stassen (and what he did nine years before would not be a key issue).

September 18, 2002

TO: Deborah, Bill

FROM: Gregory

RE: Memorandum of Understanding, Gov. Dean

To frame our discussion, some thoughts:

1. Accept ten year closure. We have no bargaining chips under Killington v. Lash. The governor gets to say what is executive privilege and there is no requirement that the records ever become open. Ten years is better than 24 and we should take what we can get. If we insist on ten years, the Governor could simply deposit the records with no opening date; deposit fewer records (there is no records management oversight; even if there was it would be provided by a gubernatorial appointee); or invoke other reasons for closure that are open ended (lawyer/client privilege, the exemptions in 1 V.S.A. 317, etc). Even if we won that fight, the effect would be that future governors would simply not create records (to a degree this is already happening given Gov. Dean's reported use of his "home" e-mail).

Follow-up: Go to legislature and report on lack of tools in negotiating over gubernatorial records and ask for statutory redress: 1) change "official correspondence" to "public records"; 2, seek to define and limit executive privilege.

2. Insist on six-year closure. Six years is the established practice and that post-gubernatorial ambition should not become basis for keeping public policy documents from the public for extended periods of time. This would probably create a deadlock: the law requires us to accept gubernatorial records and case law gives Governor authority to close records; so what are the consequences of a deadlock? Two possible responses would be to go public with the issue and seek redress in courts.

3. Accept records without a memorandum of understanding. What is rationale for an mou? Under case law executive privilege is defined and implemented solely by Governor; there is no requirement for the Secretary to become a party to a Governor's decision through a mou. While a mou is a contract adding further legal recognition of a closure period, if I read Killington right the Governor holds all the cards when it comes to applying executive privilege and can make the closure decision unilaterally. A Secretary could not unilaterally revoke the executive privilege claims of a governor.

The advantage is the Secretary does not become a party to an agreement between unequal partners and the door is left open to legal or legislative solutions.

What do I think.? I lean toward # 1. It avoids a last moment public confrontation over trying to correct a larger problem. It increases the likelihood of receiving the most complete record. And it provides tools to support a legislative agenda for the archives and working toward legislative solutions.

September 19, 2002

TO: Deborah

FROM: Gregory

RE: Memorandum of Understanding for Dean Records; ten year closure

As you know, for the past several months I have been in communication with Governor Dean's staff over the transfer of his administration's records to the Secretary of State's Office, as required by law (3 V.S.A. §4). Tradition and case law give governors broad latitude over not only what they leave, but also over conditions of access.

Governor Dean has decided to extend executive privilege over some of his records for a period of ten years. That is, certain of his records will not be available for public inspection until January 2013.

The ten-year closure was a compromise. Governor Dean originally contemplated a much longer closure period. I supported the six-year closure that had been adopted by Governor Kunin and by the staff of Governor Snelling, following his death.

Like all compromises, no one got exactly what he wanted. I am sure Governor Dean would be more comfortable with the longer period he proposed. I know I was very reluctant to move beyond the established six-year period.

I did so for several reasons.

1. Governor Dean is the longest serving modern governor of Vermont. His tenure has covered important events that closely divided Vermonters from Act 60 to Civil Unions. His records will provide important documentation of those events.
2. I have no statutory authority to restrict or otherwise mandate how long gubernatorial records may be closed. To not compromise risked a longer closure period through which these important records would be unavailable to Vermonters. Indeed, given the lack of clear statutory guidance, failure to compromise might have lead to the permanent loss of some records.
3. The only way to force a shorter retention would be to seek clarification of executive privilege through either litigation or legislation. There would be no guarantee of success and a resolution would not be achieved until long after Governor Dean left office, leaving the placement and status of his records in limbo (I attach a news story on how litigation over gubernatorial records in Virginia has consumed years and money).
4. In order to assure an orderly and timely transfer of Governor Dean's records to the Archives it was important to reach an agreement and prevent a less systematic transfer.

Based on this experience I will work to:

1. Re-introduce a bill to bring Vermont's archival management in line with the authorities enjoyed by all the other states. Lack of specific archival authorities complicates our

ability to work with other agencies in identifying and keeping accessible important government records.

2. Sustain an effort to provide the Archives with adequate vault and research space so it can effectively preserve and keep accessible not simply gubernatorial records, but all government records deemed to have a continuing value.

3. Based on those two steps, work with the in-coming administration to articulate a plan for preserving access to gubernatorial records.

Long term measures, after we have pursued the above steps, might include:

1. Encourage the General Assembly to review the current language governing the official correspondence of governors, first adopted in, and largely unchanged since, 1864.

2. Initiate a dialogue among the branches of government, and with the citizens of Vermont, over the exercise of, and limits to, executive privilege and the right of access to public records.