


MEMORANDUM OF UNDERSTANDING BETWEEN GOVERNOR JAMES H. DOUGLAS AND THE STATE OF VERMONT SECRETARY OF STATE REGARDING THE TREATMENT OF PRIVILEGED AND CONFIDENTIAL GUBERNATORIAL PAPERS AND NON-ARCHIVAL RECORDS

The purpose of this Memorandum of Understanding is to establish clear guidelines to govern public access to the gubernatorial papers of Governor James H. Douglas ("Governor Douglas") deposited with the Vermont State Archives and Records Administration of the Vermont Secretary of State (hereinafter VSARA) that are either 1) privileged and confidential records that are archival or 2) non-archival records that are subject to some period of retention beyond the term of Governor Douglas pursuant to the General Record Schedule (GRS 1000.1102:Administration Records) approved by the State Archivist on March 30, 2009 and adopted by the Executive Office on June 14, 2010.

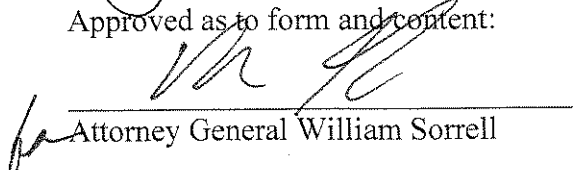
1. Any portions of Governor Douglas's official correspondence determined by Governor Douglas to be covered by the executive privilege may, pursuant to the MOU entered into between Governor Douglas and Secretary of State, be appropriately stored by VSARA (pursuant to the memorandum of understanding between Governor Douglas and the Secretary of State, § II). In the event of a request in any form for access to these records, VSARA shall notify both the Secretary of State and the Attorney General of the State of Vermont of the request(s). VSARA shall also make all reasonable efforts to notify Governor Douglas of the request(s). The Attorney General, in consultation with VSARA and Governor Douglas shall defend the privilege or confidentiality of the records. Governor Douglas shall be given the opportunity to participate in any litigation over access to these records.
2. Any portion of Governor Douglas's papers that are not official correspondence of the Governor that have been deposited with the VSARA records center for a period of retention pursuant to the General Record Schedule shall be appropriately managed by VSARA. In the event of a request in any form for access to these records, VSARA shall notify the Attorney General of the State of Vermont of the request(s) so that a determination may be made as to whether one or more privileges or limitations on access may be identified. VSARA shall also make all reasonable efforts to notify Governor Douglas of the request(s). Governor Douglas shall be given the opportunity to participate in any litigation over access to these records.

Governor Douglas and the Secretary of State join in this Memorandum of Understanding this 30<sup>TH</sup> day of DECEMBER.

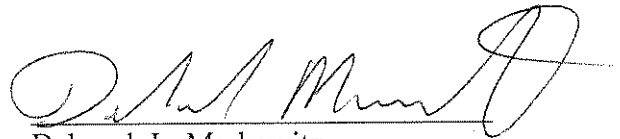


James H. Douglas  
Governor

Approved as to form and content:



Attorney General William Sorrell



Deborah L. Markowitz  
Secretary of State

12-30-10  
Date

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 Vermont State Archives and Records Management of the Office of the Secretary of State (hereafter "VSARA").<sup>1</sup>

The basis for these guidelines is a commitment, shared by Governor James H. Douglas 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 Vermont's Access to Public Records law under the constitutionally-based doctrine of executive privilege.<sup>2</sup>

The guidelines strike a balance between the desire, on the one hand, to preserve a full and complete record of Governor James H. Douglas'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 access to all of the Governor's official

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<sup>1</sup> Vermont statutes provide that upon retiring from office, the Governor is to cause the "official correspondence of the governor and an itemized list thereof to be deposited with the secretary of state," 3 V.S.A. § 4(a), who, in turn, "shall preserve these records in accordance with professional archival practices recommended by the state archivist." 3 V.S.A. §4(a). Additionally, the state archivist shall permit the public to inspect, examine, and study the archives provided that any record placed in keeping of the office of the secretary of state under special terms and conditions of law restricting their use shall be made accessible only in accord with those terms and conditions." 3 V.S.A. 117(g)(7).

<sup>2</sup> In Killington, Ltd. v. Lash, 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" and that records covered by the privilege are exempt from disclosure under Vermont's Access to Public Records law. 153 Vt. 628 (1990). In a later case, Judicial Watch v. State, 179 Vt. 214 (2005), the Court affirmed the state's longstanding practice of accepting a retiring governor's official papers with restrictions on public access to designated portions of the official correspondence for a period of years.

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.<sup>3</sup>

Guidelines to Govern Public Access  
To Governor James H. Douglas's Official Correspondence

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

II. Any portions of Governor James H. Douglas's official correspondence determined by Governor Douglas 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 9, 2017. Prior to that date, the following special terms and conditions of restriction shall apply:

A. Governor James H. Douglas's executive privilege documents shall be under the custodianship of VSARA and may be housed and preserved in the Middlesex record center in files that have been sealed and appropriately labeled and cross-referenced by the Governor's Office.

B. Governor James H. Douglas's executive privilege documents shall be accessible only:

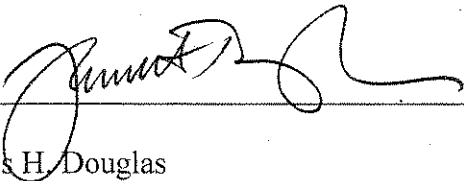
1. pursuant to a valid court order;
  2. in accordance with written authorization from Governor James H. Douglas;
  3. to the staff of the State Archives in so far as necessary to assure archival security;
- or
4. in the event that the document has been placed in the public domain.

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<sup>3</sup> 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. § 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).

C. When Governor James H. Douglas's executive privilege documents become open they shall be reintegrated with Governor Douglas's official correspondence within VSARA.

Governor James H. Douglas and Secretary Deborah L. Markowitz join in this Memorandum of Understanding.

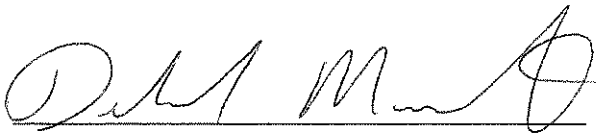


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James H. Douglas

12/30/10

Date



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Deborah L. Markowitz

12/30/10

Date

Approved:



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*for* Attorney General William Sorrell

12-30-10

Date