

**MEMORANDUM OF UNDERSTANDING BETWEEN GOVERNOR PETER E.
SHUMLIN AND SECRETARY OF STATE JAMES C. CONDOS REGARDING
EXECUTIVE PRIVILEGED GUBERNATORIAL RECORDS**

The purpose of this Memorandum of Understanding (MOU) is to establish policy governing public access to the archival gubernatorial records of Governor Peter E. Shumlin ("Governor Shumlin") transferred into the legal custody of the Vermont State Archives and Records Administration Division of the Vermont Office of the Secretary of State (hereinafter VSARA) that are exempt from public inspection and copying pursuant to 1 V.S.A. § 317(c)(4) (hereinafter Executive Privileged records¹).

This MOU reflects a commitment, shared by Governor Peter E. Shumlin and Secretary of State James C. Condos, to openness and accessibility of state government, coupled with a recognition that certain gubernatorial records are exempt from Vermont's Public Records Act under the constitutionally based doctrine of executive privilege asserted by the Governor.

The guidelines strike a balance between the desire, on the one hand, to preserve a full and complete record of Governor Peter E. Shumlin's Administration for the benefit of future historians and the public's right to know and to respect, at least to a limited extent, the confidentiality of gubernatorial records deemed privileged by the Governor under the Vermont Constitution and common law. Specifically, the guidelines affirm the public's access to all of the Governor's official correspondence and other records, while at the same time setting the date for access to any executive privilege records within Governor Shumlin's Administration to commence approximately six years hence.²

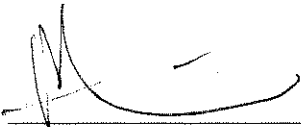
1. Any portions of Governor Shumlin's records determined by Governor Shumlin in the attached inventory to be Executive Privileged Records shall be sealed and appropriately secured in accordance with 3 V.S.A. § 117(g)(7).

¹ 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*, 2005 VT 108, 179 Vt. 214, 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.

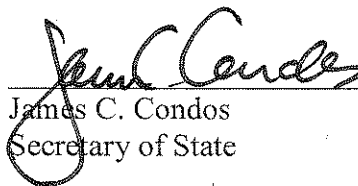
² Recent Vermont Governors and Secretaries of State have agreed to the temporary closure of executive privileged records for periods ranging from six to ten years. Noting the "express legislative intent to authorize the 'special term' restricting access to the former Governor's archived records," and the longstanding history of the Secretary of State's acceptance of "gubernatorial papers subject to special terms or conditions broadly and independently limiting access to materials designated by the outgoing governor as privileged," the Vermont Supreme Court has upheld a ten-year restriction of executive privileged records of a recent former Governor. *Judicial Watch, Inc. v. State*, 2005 VT 108 ¶¶ 8, 10-11. Here, the six-year period is consistent with previous MOU's and is within the ten-year period previously upheld by the Supreme Court.

2. 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 request(s). VSARA shall also make all reasonable efforts to notify Governor Shumlin of the request(s). The Attorney General, in consultation with VSARA and Governor Shumlin and in accordance with the Attorney General's statutory obligations, shall defend the privilege or confidentiality of the Executive Privileged Records.
3. Executive Privileged Records received by VSARA from agencies and departments within the Governor's Administration shall also be sealed and appropriately secured in accordance with 3 V.S.A. § 117(g)(7) until they are made available to the public as set forth in this MOU. Such records shall be appropriately marked as exempt by the sending agencies and departments.
4. Until January 9, 2023, any portions of Governor Shumlin's records determined by Governor Shumlin in the attached inventory to be Executive Privileged Records shall be accessible only: (1) pursuant to a valid court order; (2) in accordance with written authorization from Governor Shumlin; (3) to VSARA staff in so far as necessary to assure archival security; or (4) if exemption as an Executive Privileged Record has been waived through written authorization from Governor Shumlin or the Attorney General.
5. Commencing on January 9, 2023, any portions of Governor Shumlin's records determined by Governor Shumlin in the attached inventory to be Executive Privileged Records shall be open to the public unless further exempt from public inspection and copying pursuant to 1 V.S.A. § 317.

Governor Shumlin and Secretary of State Condos join in this Memorandum of Understanding this 28th day of December, 2016.

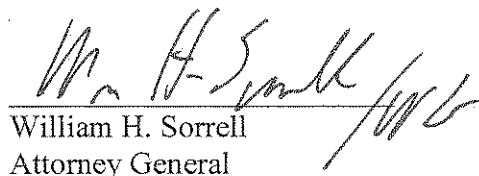


Peter E. Shumlin
Governor



James C. Condos
Secretary of State

Approved as to form and content:



William H. Sorrell
Attorney General

FINAL RECORD INVENTORY FOR GOVERNOR SHUMLIN OFFICE ARCHIVAL RECORDS

Pursuant to 3 V.S.A. § 4 and other applicable law¹, the Office of Governor Peter Shumlin transfers legal custody of the following records to VSARA. Executive Privileged Records shall be governed by the Memorandum of Understanding signed by Governor Shumlin, Secretary Condos, and Attorney General Sorrell on December 28, 2016.

The following records of the Governor's Office shall be permanently preserved but may be weeded should the transfer also include records appraised by the State Archivist as non-archival.

Records Description	Public Access	Format
Agreements	Open	Digital and paper
Appointments ²	Open with restrictions ³	Digital and paper
Authorizations (Governor approval of state land acquisitions, including conservation easements, and transactions of AOT, ANR, National Guard, VHFA and other matters)	Open	Digital
Authorizations (public record act requests and responses)	Open	Digital
Correspondence (Governor's letters)	Open	Digital
Correspondence (Governor's speeches)	Open	Digital
Correspondence (Governor's email)	Executive Privilege Records sealed until January 9, 2023 per MOU ⁴	Digital
Correspondence (Substantive correspondence of staff, includes email, staff letters, and bill reviews)	Executive Privilege Records sealed until January 9,	Digital

¹ Vermont statutes provide that upon retiring from office, the Governor is to cause his official "correspondence and an itemized list thereof to be deposited with the Secretary of State," 3 V.S.A. § 4(a). The Secretary of State "shall preserve these records in accordance with professional archival practices recommended by the State Archivist." *Id.*

² All "Be It Remembered" paperwork for the Governor's appointments has been sent to the Secretary of State's Office on an on-going basis throughout Governor Shumlin's term. The Governor's appointment records being sent to the Secretary of State's office pursuant to 3 V.S.A. § 4 and other applicable law contain duplicates of these records. The Governor's Office will retain originals of appointment paperwork for appointees who remain in office at the expiration of Governor Shumlin's term.

³ Appointment records of the Governor's Office contain certain information that is confidential by law, including the names of candidates provided to the Governor by the Judicial Nominating Board and Green Mountain Care Board Nominating Committee. Such information is exempt from public disclosure pursuant to 1 V.S.A. § 317(c)(1) and has been labeled and segregated within the Governor's appointment files.

⁴ In addition to executive privileged correspondence, the Governor's email contains information that is exempt from public disclosure pursuant to 1 V.S.A. § 317(c)(7) (personal health and personnel information), and § 317(c)(3) attorney client communications. Such information is segregated and labeled within the Governor's email account.

	2023 per MOU ⁵	
Correspondence (Constituent correspondence and Governor responses)	Open ⁶	Digital
Correspondence (Weekly Reports from the Cabinet to the Governor and related correspondence)	Executive Privilege Records sealed until January 9, 2023 per MOU	Digital
Daily Briefing Materials for Governor	Executive Privilege Records sealed until January 9, 2023 per MOU	Digital
Declarations (includes messages to the General Assembly of bills requested, signed, vetoed, or allowed into law without signature)	Open	Digital
Executive Orders and related correspondence	Open	Digital and paper
Extraditions	Open	Digital
Governor's Calendar	Executive Privilege Records sealed until January 9, 2023 per MOU	Digital
Governor's Public Appearance Calendar	Open	Digital
Governor-Elect Shumlin Transition Briefing Materials	Executive Privilege Records sealed until January 9, 2023 per MOU	Paper
Governor-Elect Scott Transition Briefing Materials	Executive Privilege Records sealed until January 9,	Digital

⁵ In addition to executive privileged correspondence, substantive correspondence of staff contains some attorney client communications that is exempt from public disclosure pursuant to 1 V.S.A. § 317(c)(3). Communications that may present issues of on-going legal concern to the state as of January 9, 2023, have been segregated and labeled.

⁶ In the interest of making the Governor's correspondence available to the public as required by 3 V.S.A. § 4 while respecting constituents' privacy, the Governor's Office has retained identifying information and the contents of all correspondence but has sought to remove constituents' social security numbers, personal phone numbers and email addresses.

	2023 per MOU	
Pardons	Open with restrictions ⁷	Digital
Photographs and Videos	Open	Digital
Plans (Annual Reports of Boards and Commissions)	Open	Digital
Press Releases and Announcements	Open	Digital
Procedures (Office policies and related documents)	Open with restrictions ⁸	Digital
Proclamations	Open	Digital
Waivers	Open	Digital
Website	Open	Digital

Per agreement between the Attorney General's Office and the Office of Governor Peter Shumlin, primarily duplicate records that are subject to the three, pending litigation hold notices issued by the Attorney General's Office and related to pending litigation will be temporarily transferred to the Attorney General's Office. Upon release of each litigation hold, the Attorney General shall transfer the litigation hold records of the Governor's Office to the Secretary of State's Office.

Case	Records Description	Public Access	Format	Volume
Litigation related to MTBE	Records of the Governor's Office described in the MTBE litigation hold notice.	To be determined by AGO	Electronic	Approx. 45 MB
Litigation related to PFOA	Records of the Governor's Office described in the PFOA litigation hold notice.	To be determined by AGO. Among other potential exemptions, these records include attorney-client communications.	Electronic	Approx. 747 MB
Litigation related to Jay Peak and EB-5	Records of the Governor's Office described in the Jay Peak litigation hold notice.	To be determined by AGO. Among other potential exemptions, these records include attorney-client communications.	Electronic and paper	Approx. 2.86 GB and one two-inch binder.

⁷ The pardon records of the Governor's Office include the following types of sensitive information: identifying information of a pardon recipient who has asked to remain anonymous due to security concerns, and detailed financial and personal information contained in all pardon applications. The Governor's Office has considered such information exempt from public disclosure pursuant to 1 V.S.A. § 317(c)(7) (personal and financial information) and § 317(c)(25) (security). Pardon records containing sensitive information are labeled within the Governor's Office pardon archives files. Records related to pardon applications that are pending as of January 5, 2017, will remain in the Governor's Office.

⁸ One folder in this category contains personnel memoranda that are confidential pursuant to 1 V.S.A. § 317(c)(7).



State of Vermont
Office of the Secretary of State

James C. Condos, Secretary of State
Christopher D. Winters, Deputy Secretary

Vermont State Archives & Records Administration
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Montpelier, VT 05633-7701
(802) 828-3700

Tanya Marshall, State Archivist

STATEMENT OF STATE ARCHIVIST TANYA MARSHALL

RE: RECORDS OF GOVERNOR PETER A. SHUMLIN

The Office of Governor Peter A. Shumlin (2011-2017) initiated the legal and physical transfer of its records to the Vermont State Archives and Records Administration (VSARA), a division within the Office of the Secretary of State, in November 2016. The Governor's Office transferred the equivalent of three cubic feet of paper records to VSARA on November 28, 2016 with the intent of transferring digital records later with the Department of Information and Innovation (DII) serving as its proxy for the bulk majority.

The Memorandum of Understanding regarding executive privileged gubernatorial records was signed by Governor Shumlin, Secretary of State Condos and Attorney General William Sorrell on December 28, 2016. The transfer process of digital records began the following day, December 29, 2016, with two websites, Food Fight Fund and the Governor's website. Both websites, in their entirety, were transferred using a web crawler tool designed for websites. On January 6, 2017, Governor Shumlin's last day in office, the Governor's Office transferred exports of its social media sites via USB flash drives.

Also on January 6, 2017, DII, serving as Governor Shumlin's proxy for digital records, transferred to VSARA, via an external hard drive, the contents of the Governor's Office's shared drive and staff personal drives. On January 11, 2017, a data export of the Governor's Office's constituent management system arrived at VSARA through the state postal system on a USB flash drive. DII also transferred the contents of the Governor's email mailbox and those of his most recent staff, along with the Office's SharePoint site, to VSARA on January 11, 2017 via the eDiscovery tool in the State of Vermont's Office 365 environment. Legacy email mailboxes from former Governor's Office staff were transferred by DII on April 11, 2017.

The legal and physical custody transfer of paper and digital records from the Office of Governor Peter A. Shumlin to VSARA was deemed complete on April 27, 2017, except for records transferred to the Office of the Attorney General pursuant to the MOU. The Office of the Attorney General is responsible for the preservation and accessibility of Governor's Office records in its custody until transferred to VSARA in accordance with the MOU.

The original order of the records transferred to VSARA by the Office of Governor Peter A. Shumlin vary in arrangement and description from the record inventory prepared and attached to the MOU by the Governor's Office on December 28, 2016.