

Vermont Supreme Court decides Dean Public Records Case

The Vermont Supreme Court has ruled against a national advocacy organization in its campaign for public disclosure of former Governor Dean's gubernatorial records. *Judicial Watch, Inc., v. State of Vermont, Deborah L. Markowitz, Secretary of State, Gregory Sanford, State Archivist and Howard Dean, M.D., Former Governor*, 2005 VT 108 (November 4, 2005). Judicial Watch, a self-described "watchdog" organization based in Washington, D.C., filed a request under Vermont's Public Records Act to inspect and copy all of Governor Dean's gubernatorial papers. The Secretary of State denied the request, noting that they had been sealed pursuant to a memorandum of understanding signed by the Secretary, the former Governor, and the Attorney General.

The memorandum specifically provided that any correspondence determined by the Governor to be covered by executive privilege would be closed to public disclosure until January 10, 2013, ten years after the signing of the memorandum. Until that time, the privileged records were to be sealed, and accessible in only a few limited circumstances, including written authorization from the Governor or "pursuant to a valid court order."

The Vermont Supreme Court concluded that the exemption from public disclosure was permissible, reversing the trial court's decision. The Court's decision turned on whether the memorandum of understanding was permitted under Vermont law. The two provisions that cover "archival records" include both the State Archives Act and the Public Records Act. Under both of these laws, there is a presumption that all records are public unless they fall within a specific exemption. However, the State Archives Act confers broad authority on the Secretary of State, through the Division of State Archives, to take custody of "archival records" of "continuing legal administrative, or historic value." Moreover, the Archives Act permits the public to "inspect, examine, and study the archives, provided that any record placed in the keeping of the office of the secretary of state under special terms or conditions of law restricting their use shall be made accessible only in accord with those terms and conditions." 3 V.S.A. § 117(g)(9).

It was this provision concerning "special terms" that granted the authority to the Secretary of State and the Governor to seal the records. The Court felt compelled to sanction the clear legislative policy of the Archives Act, which was to permit public disclosure of the records of the executive branch, subject to the discretion of that branch and the state's recordkeeping officials. Justice Dooley wrote a concurring opinion in what he termed a "very close case." He was troubled by the "special terms" permitted by the statute, and the fact that the statute places no limits on the ability of the government to restrict public access to records.

While this provision of the Archives Act has little application for Vermont municipalities, the *Judicial Watch* case is useful because it explores one of the few exceptions to Vermont's public records laws, which typically favor public access over government secrecy. Most of the case law in this field seeks to promote the public nature of government records, something that custodians of municipal records should always consider when faced with a public records request.

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