



# From Sunshine to Moonshine: How the Louisiana Legislature Hid the Governor's Records in the Name of Transparency

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# **From Sunshine to Moonshine: How the Louisiana Legislature Hid the Governor’s Records in the Name of Transparency**

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## **I. INTRODUCTION**

Government records fill up boxes, filing cabinets, and hard drives across Louisiana. They are the evidence, the breadcrumbs, the snail slime trails that show where government has been and in what direction it is heading. Most seem innocuous enough—forms, license applications, or property tax assessments—just a narrow slice of the government decision-making process that fuels the routine paper-pushing of a bureaucracy. But all public records are

not created equal. The higher up the bureaucratic food chain it was generated, the more likely that a public record will involve a decision that has real-life ramifications for a wider audience. A neighbor's property tax assessment is small beans. A proposal to raise the homestead exemption for all Louisiana property owners is a big deal.

People paid attention, then, when Governor Bobby Jindal proposed legislation in 2009 to rework the way public records law applies to the governor's office. Of the mountains of public records in this state, the governor's have some of the highest value. A governor is elected, in large part, to make decisions that affect the entire state. Governor Jindal swept into office in 2008 on a wave of voter dissatisfaction over perceived government mismanagement during Hurricanes Katrina and Rita.<sup>1</sup> He declared a "war on corruption and incompetence in government";<sup>2</sup> then, in his first year of office, he fought and won an entrenched battle with the Louisiana Legislature over changes to the state's ethics rules.<sup>3</sup>

In 2009, Governor Jindal turned his attention to the availability of public records in his own office.<sup>4</sup> The governor's representatives touted the measure as a "transformational" move toward greater transparency in government.<sup>5</sup> The opposition thought differently, to put it mildly. Critics described the governor's rhetoric as

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1. Adam Nossiter, *An Improbable Favorite Emerges in Cajun Country*, N.Y. TIMES, Oct. 19, 2007, at 17A, available at <http://www.nytimes.com/2007/10/19/us/19louisiana.html>.

2. Bobby Jindal, *Governor Jindal's Inaugural Address*, OFF. OF THE GOVERNOR (Jan. 14, 2008), <http://gov.louisiana.gov/index.cfm?articleID=24&md=newsroom&tmp=detail>.

3. Robert Travis Scott, *Watchdog Seeks Reversal of Change in Ethics Law; Standard of Proof for Violations at Issue*, TIMES-PICAYUNE (New Orleans, La.), May 1, 2008, at 4A, available at <http://www.nola.com/news/t-p/capital/index.ssf?/base/news-6/1209620079213470.xml&coll=1>. The politically charged fight over those ethics rules overshadowed a slight change to the public records law in 2008. At Jindal's urging, the legislature disallowed those agencies under the governor's office from being able to claim the governor's blanket exemption from public records law. Act No. 765, § 3, 2008 La. Acts 2925, 2926 ("The provisions of this Section shall not apply to any agency transferred or placed within the office of the governor.").

4. *Hearing on SB 278 Before the Senate and Gov. Affairs Comm.*, 2009 Reg. Sess. (La. May 6, 2009) [hereinafter *Senate Hearing*], available at <http://senate.legis.state.la.us/Video/default.asp>; see also Public Records in the Office of the Governor (2009) (PowerPoint presentation by the Governor's Office, on file with the author and available from the Senate and Governmental Affairs Committee) (describing the measure as the governor's proposal).

5. Ed Anderson, *Jindal Vetoes Bill to Create a 'Homeless Czar'; Governor Concerned by Effect on Budget*, TIMES-PICAYUNE (New Orleans, La.), July 8, 2009, at 2A.

Orwellian<sup>6</sup> and called the bill “a devastating blow to open government.”<sup>7</sup> Newspaper editorials described the bill as “ill-considered and dangerous”<sup>8</sup> and wondered what the governor “has to hide.”<sup>9</sup> One legislator, state Senator Robert Adley, Jindal’s fellow Republican,<sup>10</sup> said the bill would result in Louisiana being more closed than a Communist state like Cuba.<sup>11</sup> The bill, Adley said, would “take the state of Louisiana from sunshine to moonshine.”<sup>12</sup>

Governor Jindal and his legislative allies prevailed over the heated rhetoric.<sup>13</sup> On the surface, the resulting language of Act 495 amends Louisiana Revised Statutes section 44:5 in a truly

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6. James Gill, Op-Ed., *Doublespeak, with a Louisiana Accent*, TIMES-PICAYUNE (New Orleans, La.), July 22, 2009, at 7B, available at [http://blog.nola.com/jamesgill/2009/07/james\\_gill\\_in\\_gov\\_bobby\\_jindal.html](http://blog.nola.com/jamesgill/2009/07/james_gill_in_gov_bobby_jindal.html) (“Our current administration has evidently been inspired by the Ministry of Truth to turn words on their heads and bamboozle the masses. In ‘1984,’ War is Peace, Freedom is Slavery, and Ignorance is Strength. In Baton Rouge today, Secrecy is Transparency . . . Only a few legislators protest at the brainwashing of the proles.”).

7. *PAR Says Public Records Bill Would Stifle Open Government*, PUB. AFF. RES. COUNCIL OF LA. (June 17, 2009), <http://www.la-par.org/article.cfm?id=268&cateid=2>.

8. Editorial, *ADVOCATE* (Baton Rouge, La.), June 18, 2009, at 8B.

9. Editorial, *ADVOCATE* (Baton Rouge, La.), June 26, 2009, at 8B.

10. Adley is a Republican from Benton, La. who served as the Vice-Chairman of the Senate Revenue & Fiscal Affairs Committee. See *Louisiana State Senate—Robert Adley*, LA. ST. SENATE, <http://senate.legis.state.la.us/Adley/> (last visited Dec. 13, 2010).

11. Mark Ballard, Op-Ed., *Open Should Mean Open*, *ADVOCATE* (Baton Rouge, La.), May 10, 2009, at 7B, available at <http://www.2theadvocate.com/blogs/politicsblog/44643182.html> (quoting state Senator Robert Adley: “He’s making horrible arguments and the Legislature, because of all the lobbying he’s doing, is swallowing the whole thing. . . . Transparency is gone. Checks and balances are gone. I’m beginning to believe I’m sitting in a communist state.”); Marsha Shuler, *Governor’s Office Records Access Bill Gets Final Approval*, *ADVOCATE* (Baton Rouge, La.), June 25, 2009, at 6A, available at <http://www.2theadvocate.com/news/49054976.html>.

12. Shuler, *supra* note 11. Adley was part of a group of state legislators, including Representative Wayne Waddell, a Republican from Shreveport, who championed competing legislation.

13. In 2010, legislators attempted to heavily amend Louisiana Revised Statutes section 44:5, but the attempt died. Bill Barrow, *Governor’s Office Records Bill Advances over Bobby Jindal’s Objection*, TIMES-PICAYUNE (New Orleans, La.), May 26, 2010, available at [http://www.nola.com/politics/index.ssf/2010/05/senate\\_committee\\_approves\\_gove.html](http://www.nola.com/politics/index.ssf/2010/05/senate_committee_approves_gove.html). Another bill requiring the governor to disclose records from his office dealing with the BP oil spill passed the Louisiana Legislature but did not survive a veto from Governor Bobby Jindal. Mark Ballard, *Jindal Vetoes Bill Opening Oil Leak Records*, *ADVOCATE* (Baton Rouge, La.), June 26, 2010, at 6A, available at <http://www.2theadvocate.com/news/97210804.html>.

unprecedented manner. The old version of Section 44:5 gave a near blanket exemption to records of the governor.<sup>14</sup> The new version appears to remove that blanket, declaring that records of the governor are now subject to disclosure unless certain exemptions apply.<sup>15</sup> But the language in the statute is subject to several interpretations, meaning that courts will be faced with choices of interpretation that could indeed result in a *less*—not more—transparent government.

Act 495 exempts from disclosure those records that (1) are intra-office communications; (2) relate to the deliberative process of the governor; (3) relate to the governor's schedule or security (or that of his family); or (4) contain pre-decisional advice and recommendations to the governor concerning the budget.<sup>16</sup> Each of these categories raises issues that Louisiana courts will have to address in the future.

The statutory deliberative process privilege allows the governor to fight the disclosure of any government record used in his decision-making process, even if that record is located outside the governor's office.<sup>17</sup> Some scholars criticize the very concept of the deliberative process privilege as eroding the "power and effectiveness of the citizens who we regard as sovereigns."<sup>18</sup> By adopting the phrase "deliberative process," the legislature has attempted to implicate a body of law interpreting a particular exemption under the federal Freedom of Information Act

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14. Act No. 195, § 5, 1940 La. Acts 832, 834–35 ("That the provisions of this Act shall not apply to any books, records, writings, accounts, letters, letter books, photographs or copies thereof ordinarily kept in the custody or control of the Governor of the State of Louisiana in the usual course of the duties and business of his office; provided that the provisions of this section shall not be construed to prevent any person otherwise herein authorized so to do from examining and copying any books, records, papers, accounts or other documents pertaining to any money or moneys or any financial transactions in the control of or handled by or through the Governor of the State of Louisiana.").

15. LA. REV. STAT. ANN. § 44:5 (Supp. 2010).

16. *Id.* § 44:5(A).

17. *Id.* § 44:5(B)(1).

18. Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 892–93 (1990) ("[E]xecutive secrecy operates to disempower citizens by depriving them of the information that they may need in order [to] effectively promote their interests. . . . Additionally, the establishment of the general deliberative privilege will operate to diminish the sense of accountability under which executive officials do their business. That diminished sense of accountability may increase the likelihood that the official will act in a way that is sloppy or incompetent, that he will confuse his own self-interest (or that of a particular constituency) with the interests of the public, or that he will engage in various kinds of bad acts with which he would not want to be publicly associated.").

(FOIA).<sup>19</sup> But it is not quite the clean fit the legislature might have envisioned.<sup>20</sup> Left unsettled is whether Louisiana courts will or should embrace all the various intricacies in FOIA jurisprudence or craft solutions more faithful to Louisiana's historically liberal public records doctrine.

Under Act 495, the governor will also be able to deny access to "intra-office communications" between himself and his staff.<sup>21</sup> Courts will have to decide just what types of communications qualify for this exemption, as a broad interpretation will result in this "new" addition to the statute amounting to little more than a smaller version of the governor's prior custody-based exemption.<sup>22</sup>

Act 495 also inserts into public records law a six-month privilege against the release of records, "limited to pre-decisional advice and recommendations" made to the governor concerning the state's budget process.<sup>23</sup> Certain budgetary information that has always been discoverable in the past may now be withheld from public scrutiny.<sup>24</sup> The scope of this budgetary privilege—to which documents it can be applied, by whom it may be applied, and to what extent factual information can be withheld—could be wide or narrow, depending on how courts interpret the provision.

The governor's schedule is also off limits—even, apparently, his past schedule.<sup>25</sup> Although this result clearly reflects legislative intent, it raises public policy concerns, as a governor is now permitted to hold secret, yet official meetings with whomever he wishes—withholding both the communications and the communicators. The public deserves assurances that future governors cannot carry on meaningful public business in complete secrecy.

Finally, Act 495 raises an interesting dilemma: are governors now required to archive records, rather than shred them upon leaving office? One reading of the new law seems to allow governors to shield forever the documents that they independently deem as revealing of their deliberative process, denying potentially valuable and enlightening information to historians and future generations.<sup>26</sup>

Although none of the above possible interpretations would comport with the stated intent of the supporters of the bill to open

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19. 5 U.S.C. § 552(b)(5) (2006); see discussion *infra* Part IV.A.1.

20. See discussion *infra* Part IV.A.1.

21. LA. REV. STAT. ANN. § 44:5(A).

22. See discussion *infra* Part IV.C.

23. LA. REV. STAT. ANN. § 44:5(B)(2).

24. See discussion *infra* Part IV.B.

25. LA. REV. STAT. ANN. § 44:5(A).

26. See discussion *infra* Part IV.F.

more records to public view, the newness of this statute—and the introduction of the deliberative process privilege into Louisiana law—provide courts an opportunity. Because they will be operating from a near-blank slate of controlling jurisprudence, however, Louisiana courts can and should choose those interpretations that will best promote the state's constitutionally based public policy of openness.<sup>27</sup>

Part II of this Comment will review the legal history and policy behind the public's access to government information and explore the concept of "deliberative process" in the federal context. Part III will discuss the history and development of Louisiana's public records law as it applies to the governor, concluding with a wrap-up of the provisions of Act 495. Part IV will propose interpretations Louisiana courts may adopt, and changes the Legislature should consider making, in order to protect the public's right to access information used by its government to reach decisions.

## II. THE PUBLIC'S RIGHT TO ACCESS IN THE FEDERAL CONTEXT: FOIA, EXEMPTION 5, AND THE DELIBERATIVE PROCESS PRIVILEGE

### A. *The Constitutional Right to Know: "A River Without Water"*<sup>28</sup>

To be clear, the people have no affirmative, federal *constitutional* "right to know" what is contained in the records of the Governor of Louisiana—or any public official.<sup>29</sup> Despite its recognition in the Pentagon Papers case that the government bears the heaviest of burdens when it seeks to place prior restraints on the publication of information,<sup>30</sup> the U.S. Supreme Court in *Pell v. Procunier* acknowledged that neither the public nor the press has a constitutional guarantee to gather information from the

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27. LA. CONST. art. XII, § 3 ("No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.").

28. *In re Mack*, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting) ("A print shop without material to print would be as meaningless as a vineyard without grapes, an orchard without trees, or a lawn without verdure. Freedom of the press means freedom to gather news, write it, publish it, and circulate it. When any one of these integral operations is interdicted, freedom of the press becomes a river without water.").

29. The Louisiana Constitution acknowledges a general right to know, but qualifies that right by providing that "no person shall be denied the right to . . . examine public documents, except in cases established by law." LA. CONST. art. XII, § 3.

30. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971).

government.<sup>31</sup> Months after writing *Pell*, Justice Stewart expounded on his view in a speech at Yale Law School.<sup>32</sup> The Constitution frees the press, Stewart said, to “do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed.”<sup>33</sup> Thus, the public, through the press, has only an “indirect” protection of its right to know about government doings.<sup>34</sup>

Although not established as a constitutional right, the public’s right to know still deserves special reverence for the role it plays in self-governing democracy. Professor Alexander Meiklejohn argued that the First Amendment protects self-government by helping the public retain control over its government.<sup>35</sup> He wrote that without the ability to both share and gather information about their government, people cannot intelligently participate in the democratic process.<sup>36</sup> One author combined Meiklejohn’s argument for effective self-government with the idea that the press must act as a “fundamental check” on government power and excess, arguing that the public has a need for liberal access to the information used in the government’s decision-making process.<sup>37</sup> Under settled constitutional law, though, what results is a “river without water”—a nearly limitless right to publish information, but no established right of the public or press to tap into that information at its source.<sup>38</sup> But even if the Constitution does not provide a way to fill that riverbed, in the last few decades legislative bodies have constructed, by statute, river lock mechanisms that allow for varying degrees of flow.

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31. 417 U.S. 817, 834 (1974) (“[T]here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.”). Justice Douglas countered in dissent that the public’s “right to know is crucial to the governing powers of the people.” *Id.* at 839 (Douglas, J., dissenting) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)); see also Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631 (1975).

32. Sigman L. Splichal, *The Right to Know*, in ACCESS DENIED: FREEDOM OF INFORMATION IN AN INFORMATION AGE 3, 10 (Charles N. Davis & Sigman L. Splichal eds., 2000).

33. Stewart, *supra* note 31, at 636. Justice Stewart added that “[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” *Id.*

34. *Id.*

35. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 89–94 (1948).

36. *Id.*

37. Splichal, *supra* note 32, at 10 (synthesizing Meiklejohn’s theory that effective, intelligent self-government requires citizens to have the ability to gather and share information about their government and Vincent Blasi’s argument that the press must act as a counter-weight to government power).

38. *In re Mack*, 126 A.2d 679, 689 (Pa. 1956) (Musmanno, J., dissenting).

*B. Statutory Solutions to the Right of Public Access to Information*

Congress began focusing on statutory remedies to allow public access to government information in part because of a movement sparked by the 1953 work *The People's Right to Know* by media attorney Harold Cross.<sup>39</sup> Cross detailed the dismal state of public records law across the country, calling for stronger laws to grant access to public records.<sup>40</sup> The public, Cross believed, has a “legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.”<sup>41</sup> Cross’s book helped fuel a movement in Congress to reform early federal public access laws—then used more as a shield to disclosure—into reasonable and effective means to gain information.<sup>42</sup>

In 1966, Congress enacted FOIA to govern the release of information from federal agencies.<sup>43</sup> FOIA purports to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”<sup>44</sup> Each state deals with access to information in different ways.<sup>45</sup> Some states have closely modeled their statutes after FOIA.<sup>46</sup> Others, like Louisiana, either adopted

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39. Splichal, *supra* note 32, at 18.

40. See generally HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* (1953). The preface to Cross’s book, which was commissioned by the American Society of Newspaper Editors, begins: “Public business is the public’s business. The people have the right to know. Freedom of Information is their just heritage. Without that the citizens of a democracy have but changed their kings.” *Id.* at xiii.

41. *Id.*

42. Splichal, *supra* note 32, at 17.

43. *Id.* at 18.

44. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

45. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, *OPEN GOVERNMENT GUIDE* (2006), available at <http://www.rcfp.org/ogg/index.php>. The guide is a compilation of public records and open meetings law compiled by attorneys from each state. The online version of the guide is searchable.

46. See, e.g., N.Y. PUB. OFF. LAW § 84 (McKinney 2009); W. VA. CODE § 29B-1-1 (2009). In addition, many courts have recognized the usefulness, or lack thereof, of using FOIA jurisprudence to aid the interpretation of state public records laws. See, e.g., *Bowers v. Shelton*, 453 S.E.2d 741 (Ga. 1995) (stating that Georgia’s Open Records Act, enacted before FOIA, “materially differs” from FOIA); *Fink v. Lefkowitz*, 393 N.E.2d 463 (N.Y. 1979) (stating that New York’s Freedom of Information Law was patterned after FOIA); *State ex rel. Findlay Publ’g Co. v. Schroeder*, 669 N.E.2d 835 (Ohio 1996) (stating that Ohio’s public records exemptions were not patterned after FOIA, and as such, FOIA cannot provide an interpretative model); *Daily Gazette v. W. Va. Dev. Office*, 521 S.E.2d 543 (W. Va. 1999) (recognizing that the similarities with

their laws before FOIA or do not follow FOIA's general structure.<sup>47</sup> Louisiana, like most states, sometimes looks to on-point FOIA jurisprudence for guidance when its own courts have yet to address a similar provision of state public records law.<sup>48</sup>

On the state level, public records law has developed into what one author calls a "crazy quilt of definitions, exemptions and judicial interpretations."<sup>49</sup> Because each state develops its own body of law—through statutes or cases or both—under its own unique political climate and historical development, finding common threads among the states can be a daunting, if not impossible, task.<sup>50</sup> In general, though, there are two approaches: either a FOIA-like approach, with a handful of subjective exemptions open to court interpretation, or a Louisiana-like statute that presumes all records are public unless they neatly fit into one of many specific statutory exemptions.<sup>51</sup>

### *C. FOIA Exemption 5's Deliberative Process Protection*

The deliberative process privilege, an offshoot of the more "glamorous" executive privilege, has greatly affected the everyday functioning of government over the last decades.<sup>52</sup> Court cases before the adoption of FOIA established the idea that disclosing

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FOIA give value to federal precedent when interpreting the West Virginia Freedom of Information Act).

47. See, e.g., ARIZ. REV. STAT. ANN. § 39-121 (2001); LA. REV. STAT. ANN. § 44:1 (2007).

48. See *Angelo Iafrate Constr., LLC v. State*, 879 So. 2d 250 (La. Ct. App. 1st 2004) (pointing out that similarities between the Louisiana Constitution's right-to-privacy clause and FOIA's exemption for documents that constitute an invasion of privacy make federal cases interpreting privacy rights under FOIA "instructive"); *Trahan v. Larivee*, 365 So. 2d 294 (La. Ct. App. 3d 1978) ("[W]e next turn to the jurisprudence which may assist us in determining the issue herein. Finding no Louisiana cases on this issue, we turn to the federal cases for their treatment of the subject."); see also *Landis v. Moreau*, 779 So. 2d 691 (La. 2001). But see *Capital City Press v. E. Baton Rouge Metro. Council*, 696 So. 2d 562 (La. 1997) (noting that although FOIA and 34 other states might disallow the disclosure of public job applications, Louisiana public records law contained no such exemption, so other jurisprudence was not helpful).

49. Splichal, *supra* note 32, at 19.

50. *Id.*

51. See generally REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 45.

52. Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 279 (1989); see *Maine v. Norton*, 208 F. Supp. 2d 63, 66 (D. Me. 2002) ("The most frequently invoked privilege incorporated within Exemption 5 is the deliberative process privilege.").

the internal deliberative process of agencies might result in inhibited discussion and lower-quality decisions.<sup>53</sup> Courts have held that Congress intended to incorporate that same deliberative process privilege into FOIA through Exemption 5,<sup>54</sup> which protects from disclosure "inter-agency . . . memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."<sup>55</sup> The purpose behind the exemption, according to the jurisprudence, is to let government withhold documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."<sup>56</sup> Congress was concerned that the "frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result."<sup>57</sup> This "chilling" effect has been criticized as unsupported by any empirical study, or even by anecdote.<sup>58</sup> Frequent litigation

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53. See *Morgan v. United States*, 304 U.S. 1 (1938); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958) (retired Justice Reed writing for the federal Court of Claims). Authors have written extensively about the "roots" of the deliberative process privilege, whether its origins are more likely derived from the common law or the Constitution. See, e.g., RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974); Weaver & Jones, *supra* note 52, at 288–90.

54. *EPA v. Mink*, 410 U.S. 73, 86 (1973).

55. 5 U.S.C. § 552(b)(5) (2006).

56. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); see also *Int'l Paper Co. v. Fed. Power Comm'n*, 438 F.2d 1349, 1358–59 (2d Cir. 1971); *Kaiser*, 157 F. Supp. at 946. The purpose of the privilege is to protect (1) "creative debate and candid consideration of alternatives within an agency"; (2) "the public from the confusion that would result from premature exposure to discussions occurring" before the policy decision was made; and (3) "the integrity of the decision-making process itself," because "officials should be judged by what they decided, not for matters they considered before making up their minds." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772–73 (D.C. Cir. 1978). Act 495 sponsor, state Senator Jody Amedee, a Democrat from Gonzales, made reference to this passage during legislative testimony on the bill in front of the Senate and Governmental Affairs Committee on May 9, 2009. See *Senate Hearing*, *supra* note 4.

57. *Sears*, 421 U.S. at 150 (internal quotation marks omitted) (citing S. REP. No. 813, at 9 (1965)). In the executive privilege context, the U.S. Supreme Court said that "human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision-making process." *United States v. Nixon*, 418 U.S. 683, 705 (1974). But see Wetlauffer, *supra* note 18, at 897–98 ("[T]he deliberative [process] rationale rests on the conclusory and unverified assertions of interested parties and has never been supported by anything that might fairly be called evidence.").

58. Wetlauffer, *supra* note 18, at 886–87. An additional criticism is that if the possibility of future disclosure did truly have a chilling effect, it would have

requiring an interpretation of this phrase has given courts the opportunity to further flesh out the deliberative process concept.<sup>59</sup> For a record to qualify for Exemption 5's deliberative process privilege, it must be both "pre-decisional" (i.e., generated prior to the adoption of a policy or decision) and "deliberative" (i.e., actually related to the process of formulating a policy).<sup>60</sup>

The first prong of the deliberative process privilege is that the document must be pre-decisional.<sup>61</sup> A document generated *after* a decision has been made—a so-called "post-decisional" record—is not privileged.<sup>62</sup> A pre-decisional document, though, does not lose its protection after the decision is made.<sup>63</sup> However, the privilege is waived if the agency incorporates the pre-decisional information into its final decision, either expressly or by reference.<sup>64</sup> Nevertheless, establishing that the pre-decisional document was actually incorporated into a final decision can be a difficult hurdle for a requester.<sup>65</sup>

The second prong of the deliberative process privilege—that the document be "deliberative"—focuses on the content of the communication rather than its time of generation. For a communication to be deliberative, it must "make[] recommendations or express[] opinions on legal or policy matters."<sup>66</sup> Factual material is not ordinarily included within the

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its greatest chilling effect against someone who was offering advice known to be "bad" or against public interest. Society *wants* that type of advice to be chilled, not protected. *Id.* at 888–89.

59. 5 U.S.C. § 552(b)(5) (2006) (exempting from disclosure under FOIA "inter-agency . . . memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency").

60. *See Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988).

61. *Id.*

62. *Sears*, 421 U.S. at 151–52; *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980).

63. *May v. U.S. Dep't of the Air Force*, 777 F.2d 1012, 1014–15 (5th Cir. 1985).

64. *Sears*, 421 U.S. at 161; *Bristol-Meyers Co. v. FTC*, 598 F.2d 18, 24 (D.C. Cir. 1978).

65. *See Weaver & Jones, supra* note 52, at 294–95. In *Ashfar v. U.S. Department of State*, after a district court refused to force the government to state whether the pre-decisional memoranda at issue had in fact been adopted, the D.C. Circuit Court of Appeals remanded to "allow the government an opportunity to show that [the pre-decisional materials] were not so adopted." 702 F.2d 1125, 1143 (D.C. Cir. 1983).

66. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975); *see also Paisley v. CIA*, 712 F.2d 686, 699–700 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984).

privilege,<sup>67</sup> because the privilege is designed to protect the process of deliberation itself. But if the disclosure of facts underlying the decision would in some way injure the quality of the decision making process or subject policy deliberations to "unwarranted scrutiny," then those facts can be withheld.<sup>68</sup> Factual material that can be segregated from privileged material must be released unless it is so "intertwined" with the deliberative process that separation is not possible without revealing the policy-making process.<sup>69</sup>

#### *D. Procedural Requirements Under FOIA*

The government bears the burden of showing a document is privileged.<sup>70</sup> The government must specifically assert a privilege over every record sought, usually in what is called a *Vaughn* index.<sup>71</sup> The court is not mandated to conduct an *in camera* review of the requested records to determine whether they are exempt from disclosure.<sup>72</sup> The *Vaughn* court set up an indexing alternative to *in camera* production, allowing those who seek disclosure a chance to dispute the government's characterization of the documents.<sup>73</sup> In a *Vaughn* index, the government must detail each assertion of the privilege, including a description of the record sought—the author, recipient, and subject matter<sup>74</sup>—as well as an explanation of why that record is privileged.<sup>75</sup> If an index is so

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67. *EPA v. Mink*, 410 U.S. 73, 87–88 (1973) ("[M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.").

68. *Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1537–40 (D.C. Cir. 1993) ("[T]he selection of the facts thought to be relevant clearly involves 'the formulation or exercise of . . . policy-oriented judgment' or 'the process by which policy is formulated.'" (quoting *Petroleum Info. Corp. v. U.S. Dep't of the Interior*, 976 F.2d 1429, 1435 (D.C. Cir. 1992))).

69. *Soucie v. David*, 448 F.2d 1067, 1077–78 (D.C. Cir. 1971).

70. *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984).

71. The *Vaughn* index is named after the case in which a court first imposed such a requirement. *See generally Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

72. *Mink*, 410 U.S. at 93. An *in camera* review in this context would involve a judge reviewing in private those records in question to determine whether those records fall under an exemption to release. *See* 5 U.S.C. § 552(a)(4)(B) (2006).

73. *Vaughn*, 484 F.2d at 824 ("This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversarial nature of our legal system's form of dispute resolution.").

74. *See Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982).

75. *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 250–51 (D.C. Cir. 1977).

vague that the district court cannot adequately rule, then the court must engage in some other type of review, such as *in camera* review.<sup>76</sup> A *Vaughn* index may be preferred when the nature and number of disputed documents would place a large burden on a court undertaking *in camera* review.<sup>77</sup>

Even though Louisiana courts have for years talked about the importance of an index in determining whether a record must be released, courts have stopped short of making such an index a requirement.<sup>78</sup> The deliberative process privilege, on the other hand, is a newcomer to Louisiana jurisprudence.<sup>79</sup> How Louisiana courts decide to incorporate these federal concepts will greatly impact the effect Section 44:5 has on the public's right to access records. But just because the legislature inserted a definition of the deliberative process privilege into Section 44:5 does not mean that courts must now adopt an entire body of federal precedent.<sup>80</sup> Instead, courts will necessarily have to mold these new concepts to fit within the state's well-established public records doctrine.

### III. LOUISIANA'S PUBLIC RECORDS LAW AND ITS SPECIAL TREATMENT OF THE GOVERNOR

When Louisiana enacted its public records law in 1940, it was only the eleventh state to do so.<sup>81</sup> For seven decades, Louisiana's public records law gave the governor's office a near blanket exemption.<sup>82</sup> Whether the governor was a reformer or a governor-in-need-of-reform, the public had very little ability to get a glimpse into what informed the decisions of the state's most powerful decision-maker. That lack of transparency had even more pronounced effects considering that some believe the Louisiana

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76. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994).

77. *Arthur Andersen & Co.*, 679 F.2d at 258.

78. See discussion *infra* Part IV.D.

79. See discussion *infra* Part IV.A.1.

80. See discussion *infra* Part IV.A.2.

81. Splichal, *supra* note 32, at 19.

82. See Act No. 195, § 5, 1940 La. Acts 832, 834–35 (“That the provisions of this Act shall not apply to any of the books, records, writings, accounts, letters, letter books, photographs or copies thereof ordinarily kept in the custody or control of the Governor of the State of Louisiana in the usual course of the duties and business of his office; provided that the provisions of this section shall not be construed to prevent any person otherwise herein authorized so to do from examining and copying any books, records, papers, accounts or other documents pertaining to any money or moneys or any financial transactions in the control of or handled by or through the Governor of the State of Louisiana.”). The provision requiring disclosure of financial transactions of the governor has survived through today. LA. REV. STAT. ANN. § 44:5(C) (Supp. 2010).

governor to be one of the most powerful governors in the country,<sup>83</sup> demonstrated by a long history of governors who exerted a great deal of control over the state, including powerful governors like Huey Long and Edwin Edwards.<sup>84</sup>

By 2009, this blanket exemption for the governor left Louisiana an outlier from the rest of the country, where only two other states similarly exempted the governor.<sup>85</sup> Most states treat the records of the governor's office under the same body of law applicable to any other government record.<sup>86</sup> To understand just how far the governor's blanket exemption once spread, one should look at the whole of public records law in Louisiana. Public records are defined as

[a]ll . . . records . . . having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction or performance of *any* business, transaction, work, duty, or function [of government] . . . except as otherwise provided in this Chapter or the Constitution of Louisiana.<sup>87</sup>

The Louisiana Constitution provides that “[n]o person shall be denied the right to . . . examine public documents, except in cases established by law.”<sup>88</sup> Any exemption in the statute—and there are

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83. *Hearing on SB 278 Before the House and Gov. Affairs Comm.*, 2009 Reg. Sess. (La. June 16, 2009) [hereinafter *House Hearing*], available at [http://house.louisiana.gov/H\\_Video/Hse\\_Video\\_OnDemand.htm](http://house.louisiana.gov/H_Video/Hse_Video_OnDemand.htm) (statement of Carl Redman, executive editor of the *Baton Rouge Advocate*).

84. The Louisiana governor can adjust the budgets of all state agencies and departments, even those headed by separate elected officials. See Jeremy Alford, *Members Only*, INDEP. WKLY. (Lafayette, La.), Nov. 4, 2009, at 10. The Louisiana governor holds a large sway in the election of the leadership of the state legislature, including committee chairs. See Mark Ballard, Op-Ed., *Jindal Sticks with Tradition*, ADVOCATE (Baton Rouge, La.), Nov. 25, 2007, at 9B; Michelle Millhollon, *Jindal Favors Tucker for Post*, ADVOCATE (Baton Rouge, La.), Nov. 21, 2007, at 1A; Michelle Millhollon, *Jindal's Choice: Democrat Joel Chaisson II Tapped for Senate President*, ADVOCATE (Baton Rouge, La.), Nov. 13, 2007, at 1A. The governor has appointment power over not only dozens of boards and commissions, but also over the department heads of powerful state departments that do things like build highways and manage health care. See Marsha Shuler, *Jindal Sends Senate List of Appointees*, ADVOCATE (Baton Rouge, La.), June 11, 2008, at 6A.

85. MICH. COMP. LAWS ANN. § 15.232(d)(i) (West 2004) (Michigan Freedom of Information Act applies to the executive branch, but not the Governor, Lieutenant Governor, or their executive offices); MISS. CODE ANN. § 25-61-3(a) (West Supp. 2009) (public bodies, for the purpose of public records law, do not include elected officials).

86. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 45.

87. LA. REV. STAT. ANN. § 44:1(A)(2) (2007) (emphasis added).

88. LA. CONST. art. XII, § 3.

hundreds—must be construed narrowly, with any doubt resolved in favor of the public's right of access.<sup>89</sup> As such, under the version of the law in place for decades, the blanket exemption kept the governor safe above the normal public records fray. Because of this, Louisiana courts have never handled a public records case involving a governor.<sup>90</sup> Hence, courts will be addressing this new law with a near-clean jurisprudential slate.

In 2001, the legislature opened the door slightly, amending the governor's exemption so that 70 agencies, boards, and commissions placed under the authority of the governor no longer enjoyed the same blanket exemption as the governor.<sup>91</sup> But the largest change to public records law—and the most controversial—came in the summer of 2009.<sup>92</sup> The governor proposed, and the legislature approved, a revision that essentially reworks the entire concept of public records law as it applies to the governor.<sup>93</sup> The revision purports to place the governor on the same public records playing field as the rest of government, but lets the governor play by a different set of rules.

On the surface, the now-amended law would seem to treat the governor's office the same as other public bodies, i.e., what the governor's office produces is a public record, unless that record falls within an exemption. However, few states have statutory exemptions that apply only to the governor, and some of Louisiana's new exemptions—one for records involving the deliberative process of the governor and another for agency records prepared in connection with the budget—could be applied in such a way that ironically results in a *less* transparent government than before the revision.<sup>94</sup>

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89. *Times Picayune Publ'g Corp. v. Bd. of Supervisors*, 845 So. 2d 599, 605 (La. Ct. App. 1st 2003). There are several lists of exemptions contained in public records law and throughout the body of Louisiana law. Included in the exemptions are birth and death certificates, taxpayer records, fishing licenses, juvenile court records, and adoption records. *See, e.g.*, LA. REV. STAT. ANN. § 44:4.1(B)(24)–(35) (Supp. 2010).

90. The handful of Louisiana court cases to even mention Section 44:5 do so only when including the governor's exemption as one of many exemptions in the state's public records law. *See Bester v. La. Sup. Ct. Comm. on Bar Admissions*, 779 So. 2d 715, 719 (La. 2001).

91. Act No. 9, § 6, 2001 La. Acts 28, 36 (“[T]he provisions of this Subsection shall not apply to any state agency placed within the governor's office pursuant to R.S. 36:4.1.”).

92. Editorial, *Our Views: Veto Public Records Bill*, ADVOCATE (Baton Rouge, La.), June 26, 2009, at 8B.

93. Act No. 395, 2009 La. Acts 3026.

94. *See* discussion *infra* Part IV.B–C.

Critics were quite vocal about the problems with Act 495. The state's largest newspapers lobbied against the bill,<sup>95</sup> saying future governors could take advantage of the deliberative process privilege by extending its reach far beyond the three floors of the State Capitol occupied by the governor's office.<sup>96</sup> Newspapers also worried that the new budgetary privilege would allow the government to withhold budget preparation information to which the public previously had access, resulting in a lack of meaningful public debate over the state's \$30 billion budget.<sup>97</sup> Archivists and historians testified that the lack of clear archive requirements could endanger the study of history.<sup>98</sup> Even eventual supporters of the measure, the Louisiana Press Association, acknowledged that "issues" still caused them pause,<sup>99</sup> like the subjective nature of deliberative process and the ability to withhold the governor's past schedule.<sup>100</sup> But the governor's office insisted that Act 495, by moving from a custody-based prohibition to a content-based test, represented a transformational move toward transparency.<sup>101</sup> Can these divergent views be reconciled?

#### IV. POSSIBLE INTERPRETATIONS AND AMENDMENTS TO ACT 495: HOW TO TURN MOONSHINE BACK INTO SUNSHINE

The truth is that no one can be certain exactly how Act 495 will impact the public's ability to gather information from the state

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95. The statewide organization of newspapers, the Louisiana Press Association, negotiated with the governor's office and, in the end, supported the legislation. *House Hearing*, *supra* note 83 (statement of David Woolridge, Louisiana Press Association attorney). Carl Redman with the *Baton Rouge Advocate* told the same committee that his newspaper, along with the *New Orleans Times-Picayune*, were against the measure because, as the newspapers with the most Capitol coverage, the bill would "create huge problems for us." *Id.* (statement by Carl Redman).

96. Under the old law, the public could not access records in the "fourth, fifth and sixth floors" of the State Capitol—where the Office of the Governor and its various components are located—but if the records were *also* located outside of the Governor's Office, those records were subject to the Public Records Act. *Id.* (statement by Carl Redman) ("Now, it's too broad. I'm worried about [the deliberative process privilege] extending way beyond this big pointy building.").

97. *Id.* (statement by Carl Redman).

98. *Id.* (statement by Tara Laver, archivist).

99. *Id.* (statement by David Woolridge). Woolridge made a baseball analogy, saying the association was "playing small ball," looking for small victories. *Id.*

100. *Id.* (statement by David Woolridge).

101. *Id.* (statement by Jimmy Faircloth, Jr., then-executive counsel for Governor Bobby Jindal).

government. That determination will have to play out over the years as courts interpret the new statute. Given the controversial nature of the passage of Act 495, it is also possible that the state legislature will tinker with Section 44:5 in the future. What is certain is that Act 495 will present the governor, the public, and the courts with some critical questions to answer in the coming years.

### *A. The Deliberative Process Privilege in Louisiana*

What is it that a governor does, really, besides make decisions? As the head of the executive branch, a governor's role in administering the law is necessarily top-down.<sup>102</sup> Those under the governor—his advisors, agencies, and departments—make proposals and give him options; then the governor makes decisions based on those proposals and options.<sup>103</sup> Unlike the legislative or judicial branches, the executive branch is embodied in one person. Therefore, that single person's decisions and actions have great import and, in a democracy, deserve serious scrutiny. The deliberative process privilege is designed to improve the function of decision-making, to ensure that those who advise the governor feel free to offer candid advice.<sup>104</sup> But as written, it is unclear how far that deliberative process will reach in Louisiana. What types of records will it cover? Will courts adopt a pure FOIA approach, or will they, like other states, fashion their own interpretation?

One problem with the deliberative process privilege as found in Section 44:5 is that the legislature took what is a common law concept, developed from years of federal case law, and attempted to define it in statute without the benefit of applicable Louisiana precedent.<sup>105</sup> No other state has taken this cart-before-the-horse approach.<sup>106</sup> Had Louisiana already developed a common law deliberative process privilege, or if it had instead passed a statute

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102. Those in the highest of executive positions have described this differently. President Harry S. Truman had a sign on his desk that read "The Buck Stops Here." President George W. Bush said, "I listen to all voices, but mine is the final decision. . . . I am the decider. And I decide what is best." Jimmy Faircloth, Jr. said the governor's office is primarily about receiving information and thinking about it. "The fourth floor is really for the governor [to receive information] and think about what he's going to do. That's really what it does. We try to give advice, make good decisions, weed out bad decisions, think about the consequences. No real work goes out of the fourth floor in terms of product." *Id.* (statement by Jimmy Faircloth, Jr.).

103. *Id.* (statement by Jimmy Faircloth, Jr.).

104. *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772–73 (D.C. Cir. 1978).

105. See discussion *infra* Part IV.A.1.

106. See REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 45.

that more closely mirrors the approach of FOIA's Exemption 5,<sup>107</sup> then this new statute would not present such a challenge of interpretation. Instead, Act 495's definition of deliberative process was piecemealed from the one Louisiana case to ever discuss the concept of a deliberative process privilege.<sup>108</sup>

*1. Kyle v. Louisiana Public Service Commission Is a Flawed Source of Deliberative Process Doctrine for Louisiana*

The drafters of Act 495 apparently leaned heavily on *Kyle v. Louisiana Public Service Commission*<sup>109</sup> to help define "deliberative process" in the new statute because there was nowhere else to look in Louisiana jurisprudence. Unfortunately, *Kyle* proves unusable in establishing a solid base on which courts can fashion future interpretations of deliberative process. In 2004, State Legislative Auditor Dan Kyle, in the course of an audit, requested all emails of the Louisiana Public Service Commission.<sup>110</sup> When the commission's counsel notified the auditor that it needed some time to redact privileged material, the auditor responded with a writ of mandamus seeking immediate release of all emails, asserting that the commission did not have the discretion to decide which emails to send.<sup>111</sup> The bulk of the Louisiana First Circuit's opinion deals with the propriety of the issuance of a writ of mandamus in the legislative audit context and the ability of the commission to assert attorney-client privilege over some of the emails.<sup>112</sup> Not until the last page of the ten-page opinion does the court dip its toe into the sea of deliberative process jurisprudence.<sup>113</sup> After acknowledging the lack of controlling cases, the court turns to federal cases that it deems "instructive" and that "contain an excellent discussion of the deliberative process privilege."<sup>114</sup> The first circuit quotes a lengthy

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107. For example, some states mirror the statutory language of Exemption 5. See, e.g., TEX. GOV'T CODE ANN. § 552.111 (West 2004) (exempting any "interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency"); WYO. STAT. ANN. § 16-4-203(b) (West 2007).

108. *Kyle v. La. Pub. Serv. Comm'n*, 878 So. 2d 650 (La. Ct. App. 1st 2004).

109. *Id.*

110. *Id.* at 651.

111. *Id.*

112. *Id.*

113. *Id.* at 659.

114. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn* is a leading case defining the scope of the attorney-client privilege in corporate settings. Other than *Upjohn*'s statement that the application of a privilege should be dealt with on a "case-by-case" basis, the first circuit does not make clear what

section of *Taxation with Representation Fund v. IRS*,<sup>115</sup> in which the U.S. Court of Appeals for the D.C. Circuit outlined the broad parameters of a deliberative process definition and its purpose. The Louisiana First Circuit swiftly concluded that “our review of the cases leaves no doubt” that the commission can claim a deliberative process privilege.<sup>116</sup> But there is doubt.

Unsatisfying for its lack of discussion, *Kyle* merely delineates the starting point of a discussion of deliberative process in Louisiana. *Kyle*, borrowing from *NLRB v. Sears*,<sup>117</sup> includes within the privilege those “confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of government.”<sup>118</sup> From *Coastal States Gas Corp. v. U.S. Department of Energy*,<sup>119</sup> *Kyle* borrows a definition of the privilege extending to documents “reflecting *advisory opinions, recommendations, and deliberations* comprising part of a *process by which governmental decisions and policies are formulated*, as well as other subjective documents that reflect the personal opinions of the writer *prior to the agency’s adoption of a policy*.”<sup>120</sup> The drafters of Act 495 obviously had *Kyle* in mind.<sup>121</sup>

Act 495 defines deliberative process as “the process by which decisions and policies are formulated,” a definition lifted directly from *Kyle*.<sup>122</sup> Records of this sort, according to Act 495, contain “pre-decisional advice, opinions, deliberations, or recommendations”—a summarization of the general definitions cited in *Kyle*. Even though a clear connection can be drawn between the language in *Kyle* and Act 495’s definition of

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implications *Upjohn* may have on Louisiana’s view of the deliberative process privilege. See also *Taxation with Representation Fund v. IRS*, 646 F.2d 666 (D.C. Cir. 1981) (citing *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980)).

115. 646 F.2d at 677. The quoted portion itself is merely a combination of language from *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), and *Coastal States Gas*, 617 F.2d 854.

116. *Kyle*, 878 So. 2d at 659.

117. 421 U.S. 132.

118. *Kyle*, 878 So. 2d at 659.

119. *Coastal States Gas*, 617 F.2d at 862.

120. *Id.* (emphasis added). The italicized portions are reflected in the language of Louisiana Revised Statutes section 44:5.

121. *Senate Hearing*, *supra* note 4 (statement of Jimmy Faircloth, Jr.). Faircloth cited *Kyle* for the proposition that the governor’s office already had a court-established deliberative process privilege and one recognized generally within the state Constitution: “I would be very happy for the minutes of this meeting to reflect that the purpose of [Act 495] is to put the statutory privilege on the same plane with the constitutional privilege.” *Id.*

122. LA. REV. STAT. ANN. § 44:5(D)(1) (Supp. 2010).

deliberative process, this is only one piece of the deliberative process puzzle. The statute's similarities crack open the door just enough for courts to be tempted to use federal FOIA jurisprudence to interpret the provisions of Act 495. But the question remains whether the door been opened wide enough to let in the whole body of FOIA jurisprudence—dealing with additional federal deliberative process concepts like waiver and segregation<sup>123</sup>—or just those cases that lend a hand to determine the general nature of deliberative process.

Either way, *Kyle* is an imperfect vehicle to import an entire body of deliberative process doctrine into Louisiana law. The *Kyle* court never discussed the definition it pasted onto the end of its decision. Instead the court described the passage—bits of which later found their way into Section 44:5—as “instructive” and “an excellent discussion,” after conceding it had found nothing “controlling” on the issue of deliberative process.<sup>124</sup> This is not an instance, then, of a legislature codifying established case law. Despite the governor's executive counsel assertions in legislative testimony that the governor's office already has a constitutional privilege,<sup>125</sup> no Louisiana court had established that privilege before *Kyle*, and *Kyle* itself fell short of doing so.

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123. When an agency does more than simply adopt the findings of a report, but instead makes reference to that report or memoranda in its dealings with the public, it is deemed to have waived the deliberative process privilege. *Nat'l Council of La Raza v. U.S. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir. 2005); *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 678 (D.C. Cir. 1981); see also *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 70 (D.C. Cir. 1974) (noting that disclosure is required “where a decision-maker has referred to an intra-agency memorandum as a *basis* for his decision,” because “once adopted as a rationale for a decision, the memorandum becomes part of the public record” (emphasis added)). Additionally, courts will require factual material to be segregated from deliberative process material and disclosed unless that factual material would either itself reveal deliberations process or unless the factual material is so “inexorably intertwined” with deliberative material that segregation is not possible. *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

124. *Kyle v. La. Pub. Serv. Comm'n*, 878 So. 2d 650, 659 (La. Ct. App. 1st 2004).

125. *Senate Hearing*, *supra* note 4 (statement of Jimmy Faircloth, Jr.); see also *Public Records in the Office of the Governor*, *supra* note 4 (“Under the Louisiana Constitution, each branch of government has a privilege that protects its deliberative process.”). Unlike the executive branch, however, the Louisiana Supreme Court *has* clearly recognized a judicial branch privilege, based on separation of powers doctrine. *Bester v. La. Sup. Ct. Comm. on Bar Admissions*, 779 So. 2d 715 (La. 2001). The Louisiana First Circuit Court of Appeal recognized a legislative privilege against disclosure of records that would interfere when legislators were acting “within the legislative sphere.” *Copsey v. Baer*, 593 So. 2d 685, 689 (La. Ct. App. 1st 1991).

Moreover, if *Kyle* did establish a deliberative process privilege for the executive branch of government, the court did not say from where that privilege derived or to whom that privilege applies. The relevant portion of the case contains no discussion of the state Constitution or prior state jurisprudence. Instead, the court quoted from cases defining the purpose of deliberative process under federal law.<sup>126</sup> *Kyle* extended the privilege to the Public Service Commission, a separately elected state commission, in the context of an audit by the Legislative Auditor.<sup>127</sup> The Legislative Auditor sought the emails under the power of its authorizing statute, not public records law.<sup>128</sup> The first circuit had already found that the Legislative Auditor exceeded the scope of that authority, so the court had no need to discuss deliberative process.<sup>129</sup> The most that one may conclude is that in *Kyle* the first circuit endorsed, in dicta, what it described as an “instructive” definition of deliberative process, but it established nothing regarding the scope, proper application, or invocation of that privilege.

Because it is doubtful what *Kyle* actually established, the original question remains: what will be the scope of the Louisiana governor’s deliberative process privilege in Section 44:5? As *Kyle* offers little guidance, the definition in the new statute itself has to be the starting point. Put shortly, if a record has or will be used by the governor to make a decision or formulate a policy, and if that record amounts to pre-decisional advice, opinion, deliberation, or a recommendation, then it is exempted from disclosure.<sup>130</sup> The definition points to a body of case law, both federal and state. The Louisiana Legislature, though, gave no further hint as to its preference of the many approaches found in that jurisprudence. Clearly, Louisiana courts are free to operate from a blank slate. Although FOIA approaches can be helpful, they are by no means controlling.<sup>131</sup>

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126. *Kyle*, 878 So. 2d at 659.

127. *Id.* at 652.

128. *Id.*

129. *Id.* at 655–56 (interpreting LA. REV. STAT. ANN. § 24:522(C) (2007), the statute that empowers the Legislative Auditor).

130. LA. REV. STAT. ANN. § 44:5 (Supp. 2010).

131. *Capital City Press v. E. Baton Rouge Metro. Council*, 696 So. 2d 562, 567–68 (La. 1997) (noting that although FOIA and 34 other states might disallow the disclosure of public job applications, Louisiana public records law contained no such exemption, so the other jurisprudence was not helpful).

2. *Once the Decision Is Made, the Pre-Decisional Protection Should End*

Louisiana courts are free to, and should, reject FOIA precedent and approaches when to do so would contradict well-established principles of Louisiana public records law.<sup>132</sup> Federal FOIA jurisprudence instructs that if a document is pre-decisional, generated to help in the "give-and-take" of policymaking, then it may forever be withheld, barring some waiver by the custodian.<sup>133</sup> In the federal context, only a record reflecting a final decision or one generated after the decision is made—a "post-decisional" document—must be released.<sup>134</sup> But some states have expressly rejected this approach, deciding instead to allow the deliberative process privilege to shield material only up until that moment that a decision is made.<sup>135</sup> Unlike FOIA, those states' laws say that once a decision is made, then the pre-decisional, deliberative material that helped inform that decision must be disclosed.<sup>136</sup>

A Connecticut statute allows the government to withhold "preliminary drafts or notes" as long as the custodian determines that the public interest in withholding those documents outweighs the public interest in disclosure.<sup>137</sup> In *Wilson v. Freedom of Information Commission*, the Connecticut Supreme Court held this exemption applied to "advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions are formulated."<sup>138</sup> A year after the decision, the Connecticut General Assembly effectively overruled *Wilson*, amending the statute to require the disclosure of intra-agency memoranda, letters, advisory opinions, and recommendations that comprise "part of the process by which governmental decisions are formulated," unless that record is "subject to revision prior to submission to or discussion among the members of such agency."<sup>139</sup> In effect, the Connecticut General Assembly broke with federal pre-decisional precedent. That a record was prepared before the decision was made is not, on its

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132. *See id.*

133. *May v. U.S. Dep't of the Air Force*, 777 F.2d 1012, 1014-15 (5th Cir. 1985).

134. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 869 (D.C. Cir. 1980).

135. *See, e.g.*, CONN. GEN. STAT. ANN. § 1-210(e)(1) (West, Westlaw through July 2010 Spec. Sess.).

136. *See, e.g., id.*

137. CONN. GEN. STAT. ANN. § 1-210(b)(1).

138. 435 A.2d 353, 359 (Conn. 1980).

139. CONN. GEN. STAT. ANN. § 1-210(e)(1).

own, enough to qualify that record for an exemption. Instead, the pre-decisional record is exempt only if it had been subject to revision prior to that decision.<sup>140</sup>

Florida public records law produces a similar outcome.<sup>141</sup> Although rough drafts, notes, or dictations would not be public records, intra-agency communications between employees, “even though not a part of an agency’s later, formal public product,” are still public records when they “supply the final evidence of knowledge obtained in connection with the transaction of official business.”<sup>142</sup>

The language of Section 44:5 does not prohibit an interpretation of deliberative process similar to that in Connecticut and Florida and should, therefore, be adopted in Louisiana. This approach is both consistent with *Kyle* and the general spirit of public records doctrine in this state. Although *Kyle* adopted a general definition and purpose of “deliberative process” from federal FOIA cases, it stopped short of adopting FOIA’s definition of “pre-decisional.”<sup>143</sup> Louisiana courts are required to interpret the exemptions in public records law strictly, erring on the side of disclosure.<sup>144</sup> Section 44:5 leaves open the pre-decisional question and, because courts must adopt an interpretation that leads to more disclosure, rather than less,<sup>145</sup> that question must be answered by adopting a pre-decisional definition similar to Connecticut and Florida. Barring further legislative guidance then, Louisiana courts

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140. *Id.*

141. *See Shelvin v. Byron, Harless, Schaffer, Reid & Assocs.*, 379 So. 2d 633 (Fla. 1980).

142. *Id.* Massachusetts has also declined to adopt the federal principle that pre-decisional documents are protected even after the decision has been made. *See MASS. GEN. LAWS ANN.* ch. 4, § 7 (West, Westlaw through ch. 380 of 2010 2d Ann. Sess.) (exempting intra-agency memoranda or letters relating to policy positions being developed by the agency, but not if those documents are “reasonably completed factual studies or reports on which the development of such policy positions has been or may be based”).

143. *Kyle v. La. Pub. Serv. Comm’n*, 878 So. 2d 650, 659 (La. Ct. App. 1st 2004).

144. *Title Research Corp. v. Rausch*, 450 So. 2d 933, 936 (La. 1984) (“The right of the public to have access to the public records is a fundamental right, and is guaranteed by the constitution. The provision of the constitution must be construed liberally in favor of free and unrestricted access to the records, and that access can be denied only when a law, *specifically and unequivocally*, provides otherwise. Whenever there is doubt as to whether the public has the right of access to certain records, the doubt *must* be resolved in favor of the public’s right to see. To allow otherwise would be an improper and arbitrary restriction on the public’s constitutional rights.” (emphasis added) (citing LA. CONST. art. XII, § 3)).

145. *Id.*

should allow a governor to claim the deliberative process privilege only while a decision is pending.

*3. Only the Governor May Claim the Privilege—and Only Over Documents That Were at One Time in His Custody*

The last issue under this deliberative process privilege analysis is whether anyone other than the governor can claim the privilege. Related to this issue is whether the governor can use his privilege against disclosure to block the disclosure of materials he has yet to use in his deliberative process. In other words, who can wield the privilege and over which documents?

An illustration is in order. Suppose that a state agency has prepared a report as part of its usual duties. In response to a public records request seeking the report, the agency claims that the report is being retained for use by the governor and is therefore exempt from disclosure. The statute makes clear that the record must be disclosed.<sup>146</sup> Only the governor may claim the deliberative process privilege, and he may only claim that privilege over records that have at one time been in his custody.<sup>147</sup> Section 44:5 makes clear that “agenc[ies], office[s], or department[s] transferred or placed within the office of the governor” cannot claim the deliberative process privilege.<sup>148</sup> Many executive agencies, offices, and departments of government, however, are not placed under the office of the governor.<sup>149</sup> Whether the record in question originated in an agency within the governor’s office or an executive agency outside the governor’s office, only the governor may claim the privilege. If the legislature denied agencies inside the governor’s office the ability to claim a deliberative process privilege, then it

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146. LA. REV. STAT. ANN. § 44:5(A) (Supp. 2010).

147. This reading is informed by the phrase “records having been used . . . by the governor.” *Id.*

148. The only provision of Section 44:5 that does apply to agencies underneath the governor confers a six-month privilege on records “limited to pre-decisional advice and recommendations to the governor concerning budgeting in the custody of any agency or department headed by an unclassified gubernatorial appointee.” *Id.* § 44:5(B)(2). These agencies include the Division of Administration, the Governor’s Office of Homeland Security and Emergency Preparedness, the Office of Rural Development, and the Coastal Protection and Restoration Authority. *See id.* §§ 36:4–4.1.

149. Executive agencies not under the office of the governor include the Department of Insurance, the Department of State, the Department of Justice, the Department of Agriculture, the Department of the Treasury, the Department of Transportation and Development, the Department of Health and Hospitals, and the Department of Economic Development. *Id.* § 36:4(A).

could not have intended that agencies outside the governor's office would be able to claim the same privilege.

Assume now that it is the governor who claims a privilege over the hypothetical agency report. The governor may claim that, because Section 44:5(A) exempts records "having been used, being in use, possessed, or retained for use by the governor . . . relating to the deliberative process of the governor," the report—though not yet sent to him—was being "retained for use by the governor." It is instructive, though, that the previous version of the Section 44:5 protected records "having been used, being in use, or *prepared*, possessed, or retained for use by *or on behalf of* the governor."<sup>150</sup> Act 495, when originally introduced as Senate Bill 278, retained this language.<sup>151</sup> The final bill as passed by the legislature, however, did not contain the "prepared" or "or on behalf of" phrases.<sup>152</sup> The legislature clearly intended to limit what type of records could be subject to the deliberative process. In other words, the intent was not to allow documents to be withheld merely because they are *prepared for* the governor or because those records are retained on his *behalf*. These deletions mean then that no one outside the governor's office can prepare a record, then later claim that record was actually prepared for or on behalf of the governor. The governor must have used, be currently using, or have possession of a record to claim the deliberative process privilege.<sup>153</sup>

It would be inconsistent with the purpose of the deliberative process privilege to allow a governor to assert the privilege over agency documents with which he has yet to come into contact. The privilege is designed to protect pre-decisional advice and recommendations that have played a part in the deliberations of the governor's office. To allow a governor to claim that a record was being "retained by" an agency for the governor's future use is effectively a license for the governor to claim a privilege over every requested agency document on the theory that the record could conceivably, one day, play a part in the governor's decision-making process. This "I was just about to use that" privilege is clearly not what the legislature intended.

Instead, when the legislature amended Section 44:5 to remove the "or on behalf of the governor" language, that evinced a clear legislative intent that "retained for use by" the governor meant the

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150. *Id.* § 44:5(A) (Supp. 2009) (amended 2009) (emphasis added).

151. S.B. 278, 2009 Leg., Reg. Sess. (as introduced, Apr. 27, 2009).

152. Act. No. 495, 2009 La. Acts 3026.

153. Budget records falling within the six-month privilege are, of course, the exception to this analysis.

governor's office must physically possess the documents. Further, because the purpose of the deliberative process privilege is to protect the thought processes and deliberations of the governor and his staff, a governor claiming the privilege must have some level of control over the documents. A governor cannot have utilized records as part of his deliberative process if he has never laid eyes on them. Therefore, to allow an agency to use the deliberative process privilege to withhold information that it has not turned over to the governor would be counter to both the purpose of the deliberative process privilege and the legislative intent behind Section 44:5.

There are other limitations. If a record has bearing on an agency decision, but someone other than the governor made that decision, then neither the governor nor the agency should be allowed to claim the privilege. Also, the statute characterizes those documents subject to the deliberative process privilege as only those relating to the "usual course of the duties and business" of the governor's office.<sup>154</sup> This provision would therefore not extend the privilege to the governor's records that relate to something outside his job as chief executive.<sup>155</sup>

### *B. The New Budgetary Privilege: Shutting the Old "Back Door"*

The deliberative process privilege is not the only privilege discussed in Section 44:5. This section also contains a privilege against disclosure of budget documents, a privilege "limited to pre-decisional advice and recommendations to the governor."<sup>156</sup> This budgetary privilege expires six months after the document was "prepared."<sup>157</sup> A search of the other 49 states' public records laws turns up no other statute with a similar provision, though a few states, by statute, protect very specific categories of budgetary information.<sup>158</sup> Critics of Act 495 expressed concern that a large

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154. LA. REV. STAT. ANN. § 44:5(A) (Supp. 2010).

155. See generally *Herald Ass'n v. Dean*, 816 A.2d 469 (Vt. 2002).

156. LA. REV. STAT. ANN. § 44:5(B)(2).

157. *Id.*

158. See, e.g., UTAH CODE ANN. § 63G-2-305(29) (West, Westlaw through 2010 General Sess.) (exempting from disclosure a governor's budget recommendations, proposals, and "policy statements, that if disclosed would reveal the governor's contemplated policies or contemplated courses of action before the governor has implemented or rejected those policies or courses of action or made them public"). But see OKLA. STAT. ANN. tit. 51, § 24A.9 (2008) ("Prior to taking action, including making a recommendation or issuing a report, a public official may keep confidential his or her personal notes and personally created materials other than departmental budget requests of a public body

body of records related to the state's annual budget process could be shielded from disclosure.<sup>159</sup> Budget documents once required to be disclosed through the old law's "back door," i.e., records that deal with budget concerns and are *not* in the governor's custody, can now be withheld under the new law. The practical effect of this new budgetary privilege is that records might now be withheld until past the time in which they serve a useful purpose in public debate, but state agencies and departments will still have to release factual information used in the formulation of budget advice or recommendations to the governor.

Importantly, Section 44:5 applies this privilege to documents in the *custody* of an agency or department "headed by an unclassified gubernatorial appointee."<sup>160</sup> If the record is in the custody of departments or agencies headed by a statewide elected official, like the lieutenant governor, secretary of state, or insurance commissioner, that record could not be withheld under the budgetary privilege. But records housed in agencies such as the Division of Administration, Department of Health and Hospitals, and the Department of Transportation and Development could enjoy the privilege.<sup>161</sup>

The statute seems to suggest a line between agencies that can invoke the budgetary privilege and those that cannot; however, because of the way the budget is put together each year, the line is actually not that clear. This is because the Division of Administration, which *can* claim the privilege, eventually has "custody" over every state department and agency's budget proposal information before formulating them into an overall proposed budget for the governor to present to the legislature.<sup>162</sup>

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prepared as an aid to memory or research leading to the adoption of a public policy or the implementation of a public project." (emphasis added)).

159. *PAR Says Public Records Bill Would Stifle Open Government*, *supra* note 7.

160. LA. REV. STAT. ANN. § 44:5(B)(2) (Supp. 2010).

161. *Id.*

162. Agencies and departments must submit their budget requests to the governor's office no later than November 15, "on the forms and in the manner prescribed and accompanied by such other data as may be required, together with such additional information as the governor may request." *Id.* § 39:33(A); see also *Performance-Based Budgeting Timeline*, OFF. PLAN. & BUDGET, <http://doa.louisiana.gov/OPB/pbb/PBB%20Annual%20Timeline.pdf> (last visited Dec. 16, 2010). The Division of Administration requires agencies to send by November 1 capital outlay budget requests to the Office of Facility Planning and Control (part of the Division of Administration), as well as operating budget requests to the Office of Planning and Budget (also part of the Division of Administration), the Legislative Fiscal Office, the House Fiscal Division, Senate

So in effect, the budgetary privilege could be interpreted to extend to all budget-related pre-decisional advice and recommendations to the governor, regardless of which department or agency generated that record—as all such records would simultaneously be in the custody of a protected agency, the Division of Administration.<sup>163</sup>

Every November, an agency sends its budget request to the Division of Administration.<sup>164</sup> If the request contains “advice” or “recommendations,” it is subject to a six-month privilege that protects that document from disclosure until around the beginning of May. That record, then, is potentially open to disclosure for only one month before the budget is finally adopted; open to disclosure only after months of hearings have already been held; and open to disclosure, frankly, only after the revelation of its contents comes too late to make much of an impact on public discussion.

Aside from the timing element, the budgetary privilege provision in the statute also raises the issue of what types of records can qualify for the privilege. The legislature saw fit to include in Section 44:5 the curious phrase “a record *limited to pre-decisional advice and recommendations to the governor*”

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Fiscal Services, and the Office of the Legislative Auditor. LA. REV. STAT. ANN. § 39:33(A).

163. The Division of Administration begins in November to collect those various agency budget requests—along with supporting documents that might be characterized as containing “advice” or “recommendations.” See LA. REV. STAT. ANN. § 39:30(A) (2005) (“The governor shall have in continuous process of preparation and revision a tentative budget for the next year in the light of direct studies of the operation, plans, and needs of budget units and of the yields of existing and prospective sources of revenue. Upon receipt of the budget requests from the budget units the governor shall cause to be made such further inquiries and investigations, and such revisions of his tentative budget, as he may warrant.”); *id.* § 39:32 (dictating that budget requests may include estimated costs of professional contracts, the number of expected employees and their salaries, as well as a “current statement of the agency’s mission and its goals, objectives, performance indicators, and activities, as well as a detailed plan of its operations”); *Performance-Based Budgeting Timeline*, *supra* note 162. The governor must present his proposed budget to the legislature no later than 45 days before the beginning of each regular session. LA. REV. STAT. ANN. §§ 39:37(A), :51(A) (2005 & Supp. 2010). The governor’s capital outlay proposal must be submitted to the legislature by March 1 of each year. *Id.* § 24:662(B) (2007). The beginning of regular sessions alternates between late-March and late-April each year. LA. CONST. art III, § 2(A)(3)(a). On October 2, 2010, Louisiana voters approved a constitutional amendment to move the beginning of regular sessions from the end of the month to the beginning of the month. Act No. 537, 2009 La. Acts 3559. The governor introduces his proposed budget in final form in either mid-February or mid-March each year. Regular sessions end in mid-to-late June each year. LA. CONST. art III, § 2(A)(3)(a).

164. *Performance-Based Budgeting Timeline*, *supra* note 162.

concerning budgeting.”<sup>165</sup> Notably, the legislature did not exempt records that *include* or *amount to* pre-decisional advice. A more literal reading of the statute suggests that for the governor to be able to claim a privilege on a record, the record itself must contain nothing but pre-decisional advice or recommendations concerning the budget. This would lead to odd results, however, as budgets are primarily factual in nature—line item A should be funded by X dollars next year. A budget recommendation that contained no factual information would be practically useless.

The reading that makes the most sense is that the legislature appears to have included its own severability provision; a record concerning budget matters must be disclosed except for those portions that contain pre-decisional advice or recommendations to the governor. A requester would be allowed to see that line item A was proposed for X dollars—the factual information—but would not be allowed to see *why* the agency came to that recommendation. Agencies and departments must disclose budget-related documents, then, but only after excising any advice or recommendations directed to the governor—thus “limiting” the privilege to pre-decisional material. When an agency uses factual information to compile a budget proposal, it cannot withhold that factual information. The budget numbers themselves are factual in nature and must be disclosed. Only advice or recommendations can be withheld—and for only six months from the date the document is prepared. In addition, the agency cannot withhold the document on the claim that the release of purely factual information sheds light on the deliberative process. Had the legislature intended this result, it would have had no reason to enact the six-month privilege provision in the first place—the deliberative process exemption on its own would have sufficed.

To be clear, the new budgetary privilege will not completely shut down debate over annual state budgets. The budget proposal—the line item recommendations containing the bare facts—will remain open and subject to months of hearings and debates. But critics are right in that, even if in a moderate way, this new privilege will close records that have been open to disclosure for generations. Reporters have routinely mined these budget requests and accompanying recommendations for stories that shed light on the state’s budget.<sup>166</sup> Those recommendations may now be privileged from disclosure. And it seems incongruous and counter to sound public policy that the state’s budget—a \$30 billion

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165. LA. REV. STAT. ANN. § 44:5(B)(2) (Supp. 2010) (emphasis added).

166. *House Hearing*, *supra* note 83 (statement by Carl Redman, executive editor of the *Baton Rouge Advocate*).

document with wide-ranging affects—will be subject to lower scrutiny than the average city or parish government budget.<sup>167</sup> Even if the six-month time limit and severability element mitigate its effects, the new budgetary privilege will result in a less transparent state government than before.

*C. The Intra-Office Exemption—the Old Blanket Exemption in Disguise*

Unlike the two privileges already discussed, the intra-office exemption included in Section 44:5 generated little discussion in committee hearings. It may seem like an innocuous addition to the statute. Although protecting the intra-office communications of the governor is not as new or novel sounding as the other statutory additions, it is still an important provision and one the legislature should consider revisiting, because as applied it effectively revives the supposedly extinct custody-based exemption for the governor.

The intra-office communications exemption is simple enough. Records constituting intra-office communications are protected from disclosure.<sup>168</sup> The exemption is limited to those communications between and among the governor and the governor's chief of staff, executive counsel, director of policy, and those persons' staffs.<sup>169</sup> However, those agencies placed within the office of the governor are explicitly excluded from being able to assert the intra-office exception. Therefore, communications sent by those agencies to the governor's office do not qualify as "intra-office" communications.<sup>170</sup>

The intra-office communication exemption does not differ much from the old custody-based blanket exemption. Under the old law, if a record stayed at all times inside the governor's office then it was exempt from disclosure.<sup>171</sup> Once it strayed—in other words, if that document was ever in the custody of someone outside the governor's office—it was subject to disclosure under the public records law.<sup>172</sup> Now, to the same effect, if a record both originates inside the governor's office and is destined for someone also inside the governor's office, it is by definition an "intra-office

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167. *Bartels v. Roussel*, 303 So. 2d 833 (La. Ct. App. 1st 1974) (holding that the mayor-president of East Baton Rouge Parish could not withhold departmental budget requests, even though the mayor had yet to provide the city-parish council with his final proposed budget).

168. LA. REV. STAT. ANN. § 44:5(A).

169. *Id.* § 44:5(D)(2).

170. *Id.*

171. *Id.* § 44:5 (Supp. 2009) (amended 2009).

172. *Id.*

communication.”<sup>173</sup> Broadly speaking, then, the new “intra-office communication” exemption is quite similar to the old custody-based blanket exemption.<sup>174</sup>

Admittedly, the intra-office communications protection does not have exactly the same effect as the old blanket exemption—when a private citizen communicates with the governor’s office, for example, that communication is not intra-office. Under the old law, the very fact that a document was in the governor’s custody placed that document off-limits to a requester.<sup>175</sup> But other aspects of Act 495 might now allow the governor to withhold the communication—for example, if it contained deliberative process material.<sup>176</sup> If a special interest group sent the governor a study that the governor consulted to formulate a new policy, then the governor could have a claim of deliberative process privilege from releasing that document to the public.<sup>177</sup> On the other hand, if a lobbyist suggested a friend to serve on a board or commission, that suggestion could either be considered advice (“it would be a good idea to name Mr. So-and-so”), or merely factual information (“Mr. So-and-so is a candidate for this position”). This latter category of communication—merely factual information communicated by someone outside of the governor’s office—would constitute the only type of record that will be newly available compared to what would have been available under the old custody-based exemption. The intra-office communication exemption, then, is in effect a custody-based exemption dressed up in content-based clothing. Getting rid of the old custody-based exemption was supposed to have been the major thrust behind the new law.

If the legislature indeed intended to open up more records to view, it could narrow the intra-office exemption to a true content-based exemption in the way other states do or eliminate the intra-office communication exception altogether. Texas, for example, exempts intra-office communications only when a privilege against their release could be asserted in a judicial proceeding—adopting the FOIA Exemption 5 approach.<sup>178</sup> Michigan makes it clear that

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173. *Id.* § 44:5(D)(2) (Supp. 2010).

174. *Id.* § 44:5(B) (“The provisions of this Section shall not apply to any agency transferred or placed within the office of the governor.”).

175. *Id.* § 44:5 (Supp. 2009) (amended 2009).

176. *Id.* § 44:5(A) (Supp. 2010).

177. *Id.* § 44:5(D)(3) (“Records ‘relating to the deliberative process of the governor’ means all forms of pre-decisional advice, opinions, deliberations, or recommendations made for the purpose of assisting the governor in the usual course of the duties and business of his office.”).

178. See, for example, TEX. GOV’T CODE ANN. § 552.111 (West 2004), which exempts “interagency or intraagency memoranda or letters that would not

intra-office communications are only protected when they would improperly disclose the agency's deliberative process, not when they contain factual material or serve as evidence of a final decision.<sup>179</sup> An amendment along similar lines in Louisiana would strike a better balance between the efficient functioning of an office and the public's right to know.

The best solution, however, would be to eliminate the intra-office communication protection altogether. The deliberative process exemption would still serve to protect candor inside the governor's office and, presumably, improve the quality of decisions in that office. The attorney-client privilege and work product privilege that exist elsewhere in the law already protect communications between the governor and his executive counsel.<sup>180</sup> Eliminating the intra-office communications protection has the advantage of simplifying Section 44:5 to avoid the potential overlap between intra-office communication assertions and claims of deliberative process privilege—like the Mr. So-and-so example above. Without a change, however, the intra-office communications exemption will effectively operate as the old custody-based blanket exemption. When combined with the other new statutory exemptions, some of which reach records in the custody of those outside the governor's office, the public will be entitled to view fewer documents than under the old law. This is just what critics feared.<sup>181</sup> To make matters worse, someone requesting a record from the governor must not only battle new exemptions like the intra-office communication exemption, they must do so without a formalized indexing requirement that in other jurisdictions serves to give requesters a meaningful opportunity to make their case that a record must be disclosed.

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be available by law to a party in litigation with the agency." This is similar to FOIA's exemption 5. Wyoming has an almost identical provision. WYO. STAT. ANN. § 16-4-203(b)(v) (West 2007).

179. MICH. COMP. LAWS ANN. § 15.243(1)(m) (West Supp. 2010) (exempting "communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action").

180. See LA. CODE EVID. ANN. art. 506 (2006) (attorney-client privilege); LA. CODE CIV. PROC. ANN. art. 1424 (Supp. 2010) (work product doctrine).

181. *Records Bill Would Thwart Transparency, PAR Says*, PUB. AFF. RES. COUNCIL OF LA. (May 5, 2009), <http://www.la-par.org/article.cfm?id=262&cateid=2> ("Vague language . . . combined with other nuances of SB 278, could result in more records being off-limits to the public than current law allows.").

*D. Louisiana Courts Should Require a Vaughn-Like Index*

In Louisiana, the custodian bears the burden of proving the requested material is not a public record.<sup>182</sup> If a custodian believes a record is exempt, he is required to notify the requester, in writing, of the reasons behind that belief, referencing his “basis under the law.”<sup>183</sup> The parties have a right to a contradictory hearing,<sup>184</sup> at which each has a “meaningful opportunity” to debate the claim of privilege.<sup>185</sup> The public body must describe the nature of the documents and the asserted exemption, and it must do so for each document, not for the records as a whole.<sup>186</sup> Though Revised Statutes section 44:35 allows the court to conduct an *in camera* review of the material in question,<sup>187</sup> there is no *Vaughn* index equivalent required in Louisiana law. Still, Louisiana courts have generally endorsed the idea of a detailed index as a method for trial courts to handle the work of sorting through disputed documents—most recently in *In re A Matter Under Investigation*.<sup>188</sup>

The Louisiana Supreme Court in *In re A Matter Under Investigation* addressed whether the attorney general had to release its investigative file of a case involving a health care worker whom a grand jury refused to indict in connection with Hurricane Katrina-related deaths.<sup>189</sup> Public records law exempts from disclosure criminal investigative documents when further criminal

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182. LA. REV. STAT. ANN. § 44:35 (2007); *Landis v. Moreau*, 779 So. 2d 691, 696 (La. 2001); *Elliot v. Taylor*, 614 So. 2d 126, 128 (La. Ct. App. 4th 1993).

183. LA. REV. STAT. ANN. § 44:32(D) (requiring that the written response must be sent within three days of the request).

184. See *id.* § 44:35(B) (requiring that in a suit filed to disclose records, “[t]he court shall determine the matter de novo and the burden is on the custodian to sustain his action. The court may view the documents in controversy in camera before reaching a decision.”).

185. *Cormier v. In re Pub. Records Request of DiGiulio*, 553 So. 2d 806, 807 (La. 1989); *Connella v. Johnson*, 345 So. 2d 498, 501 (La. 1977); *Skamangas v. Stockton*, 867 So. 2d 1009, 1017 (La. Ct. App. 2d 2004) (noting that the law requires more than a judicial acceptance of a general assertion of a privilege); *Elliot*, 614 So. 2d at 129 (“The public record doctrine requires more than a judicial acceptance of an assertion of privilege by the prosecution; there must be an opportunity for cross-examination and presentation of evidence to contradict the claim of privilege.”).

186. *Skamangas*, 867 So. 2d at 1017.

187. *In camera* review allows the judge, at his discretion, to view the documents in private and in confidence before deciding whether the documents in question were improperly withheld. *Id.* at 1016–17.

188. 15 So. 3d 972 (La. 2009).

189. *Id.* at 976.

litigation is “reasonably anticipated.”<sup>190</sup> This case is instructive because “reasonably anticipated” is similar to “deliberative process”—both are subjective exemptions in a sea of otherwise specific, objective exemptions found in other areas of public records law.<sup>191</sup> The court remanded the case for a determination of whether further prosecution of the health care worker was indeed reasonably anticipated.

In a separate concurrence, Justice Knoll suggested that the trial court, when reviewing the records in question, should: (1) require from the attorney general a detailed, certified index of the records in question, including a general description of the substance of each record; (2) conduct an *in camera* review of the records to ensure the descriptions in the index were adequate; (3) make any needed redactions of the index; and (4) give the parties time to address each specific record in the index.<sup>192</sup> The judge could then release the documents un-redacted, release the documents with his own redactions, or allow the documents to be withheld.<sup>193</sup>

Justice Knoll’s factors delineate the most efficient procedure for courts tasked with determining whether a governor has made a proper claim of privilege. Records that may contain pre-decisional and deliberative material are often numerous, lengthy, and technical in nature and may contain a mixture of factual material and opinion.<sup>194</sup> A detailed index would save courts from being swamped by incomprehensible piles of paper by giving the court a navigational guide. Both the parties and the court have a compelling need for a detailed index as determinations must be made on a case-by-case basis.<sup>195</sup> The index increases judicial

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190. LA. REV. STAT. ANN. § 44:3(A)(1) (2007).

191. See *id.* § 44:4.1(B)(24)–(35) (West, Westlaw through 2010 Reg. Sess.), which includes birth and death certificates, taxpayer records, fishing licenses, juvenile court records, and adoption records. This is just one example of several lists of specific, objective exemptions contained in public records law and throughout the body of Louisiana law.

192. Justice Knoll, who dissented on other grounds, found that the index in question was improper, in part, because it lacked systematic pagination, did not identify the sender of individual documents, and left “no way to tell what was in the correspondence file, and whether that file contained subpoenas, memoranda or other like material.” *In re A Matter Under Investigation*, 15 So. 3d at 1001–02 n.3 (Knoll, J., dissenting). Justice Knoll developed these factors from a similar list in *Skamangas*, 867 So. 2d at 1017.

193. *In re A Matter Under Investigation*, 15 So. 3d at 1001–02.

194. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982) (“The concern in *Vaughn* was that unassisted court examination might be prohibitively burdensome.”).

195. *Kyle v. La. Pub. Serv. Comm’n*, 878 So. 2d 650, 658–59 (La. Ct. App. 1st 2004) (noting that *Upjohn* established that “applications of privilege . . . should be determined on a case-by-case basis”).

efficiency, allowing the court to cut short what could otherwise be a burdensome *in camera* review.<sup>196</sup> Because a contested record request involving the governor is likely to be politically charged and expensive to litigate, requiring an index would go a long way to make sure the requester has a meaningful opportunity to cross-examine at a contradictory hearing.<sup>197</sup>

Aside from the likely bulk and technical nature of documents sought, a detailed index requirement would also help courts navigate the often subjective nature of the new privileges in Section 44:5. Louisiana public records law presumes all records of government are open to inspection unless the government can prove that they clearly fall within a statutory exemption.<sup>198</sup> Figuring out whether a record fits within that exemption, though, has proven an opaque determination, even in federal courts operating with a full body of jurisprudence.<sup>199</sup> Unlike other states,<sup>200</sup> Louisiana has no independent reviewing commission to sort through requests. This was never a problem before because, unlike some states, Louisiana's public records law was populated mainly by objective exemptions.<sup>201</sup> With the addition of this subjective exemption, however, custodians should not be allowed to withhold a document without that document being subject to necessary scrutiny. Justice Knoll's concurrence in *In re A Matter Under Investigation* provides a good outline of what sort of information custodians should include in such an index.<sup>202</sup> Although a *Vaughn*-like index might not be necessary in all public

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196. *In re A Matter Under Investigation*, 15 So. 3d at 1001–02.

197. *Id.*

198. *Bartels v. Roussel*, 303 So. 2d 833, 838 (La. Ct. App. 1st 1974) (“[S]tatutes providing for examination of public records must be liberally interpreted so as to extend rather than restrict access to public records. Lastly, and more importantly, we believe that the wording of our statute indicates legislative intent to make all public records open to the public.”).

199. 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5680, at 139–40 (1992) (“[T]he deliberative process privilege perpetuates the difficult distinction between ‘fact’ and ‘conclusion’ or ‘opinion’ that has generated so much futile litigation in code pleading and the rules governing testimony of witnesses.”).

200. See, e.g., CONN. GEN. STAT. ANN. § 1-205 (West 2007) (providing for the Freedom of Information Commission, a five-member body empowered to enforce Connecticut's public records law and having the power to demand the production of the records at issue); MASS. GEN. LAWS ANN. ch. 66, § 10(b) (West, Westlaw through ch. 380 of 2010 2d Ann. Sess.) (Massachusetts's Supervisor of Public Records); N.J. STAT. ANN. § 47:1A-7 (West 2004) (New Jersey's Government Records Council).

201. See generally REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 45.

202. *In re A Matter Under Investigation*, 15 So. 3d at 1001–02.

records cases, the new subjective determinations in Act 495, along with the need to lessen the burden on the parties and the court, require that a governor provide a detailed index when deciding to exert his privilege to contest a request.

*E. The Legislature Should Open Up the Governor's Past Schedule to Scrutiny*

Although the privileges in Section 44:5 give some level of protection to documents used by the governor to make decisions, the statute's exemption for the governor's schedule removes from public view entirely those persons who contribute to the governor's decisions. Allowing a governor, even a popular governor, to meet in secret with whomever he wishes—with no worry about having to be accountable for that meeting—is bad public policy, counter to the spirit of the rest of Louisiana public records law. As such, the legislature should amend the statute to permit the governor to withhold only his future schedule.

Louisiana is the only state in the country that specifically, by statute, allows the governor to refuse to disclose his schedule.<sup>203</sup> The legislative history of Act 495 makes obvious the legislature's intent to allow the governor to withhold both his future and past schedule.<sup>204</sup> The governor's *future* schedule is presumably already exempt from disclosure by virtue of an existing provision of Louisiana public records law that permits the withholding of information that bears on security plans.<sup>205</sup> In the handful of states where courts have addressed the issue of the governor's *past* schedule, the results hinge around the court's interpretation of deliberative process.<sup>206</sup> In Vermont, a newspaper sought then-Governor Howard Dean's past daily calendar in order to compare the time Dean spent campaigning for President with the time spent on gubernatorial duties.<sup>207</sup> Dean attempted to invoke a broad

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203. See generally REPORTERS COMM. FOR FREEDOM OF THE PRESS, *supra* note 45.

204. Senate Amendment No. 1597 of the 2009 Regular Session would have made the governor's schedule a public record seven days after the scheduled event took place. That amendment failed 6–33 in the State Senate on May 20, 2009.

205. LA. REV. STAT. ANN. § 44:3(A)(3) (2007) (exempting the disclosure of “[r]ecords containing security procedure”).

206. Compare *Herald Ass'n v. Dean*, 816 A.2d 469 (Vt. 1995), with *Times Mirror Co. v. Super. Ct.*, 813 P.2d 240 (Cal. 1991) (holding that the governor's past appointment books, calendars, and schedules are exempt under the deliberative process provision of the California public records statute), and *Courier-Journal v. Jones*, 895 S.W.2d 6, 10 (Ky. Ct. App. 1995).

207. *Herald*, 816 A.2d at 471.

executive privilege, but the Vermont Supreme Court disagreed, saying portions of the calendar showing activities related to Dean's presidential campaign were not related enough to gubernatorial policy-making or deliberations to qualify for a privilege.<sup>208</sup>

Louisiana governors, however, will not have to prove that some portions of their schedule qualify for deliberative process protection. The statute is clear—the Louisiana governor's schedule is none of the public's business.<sup>209</sup> Although other states have withheld a governor's schedule based on that schedule's supposed propensity to shed too much light on the governor's internal deliberative process,<sup>210</sup> this reasoning is flawed. The purpose of the deliberative process privilege is about protecting the *substance* of pre-decisional discussions, i.e., *what* was said; it is not about protecting the identity of those persons involved in pre-decisional discussions, i.e., *who* participated in the discussion.<sup>211</sup> Indeed, a

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208. *Id.* at 476 (remanded for a determination of whether other portions of the governor's schedule were sufficiently related to his deliberative process as governor to qualify for a privilege); *see also Times Mirror*, 813 P.2d at 251 (holding that the governor's past appointment books, calendars, and schedules are exempt under the catch-all deliberative process provision of California public records statute but not under a provision allowing him to withhold "correspondence"). Additionally, *see Jones*, 895 S.W.2d at 7–8, where after characterizing all open records appeals by the media as "fishing expedition[s] upon which to base some speculative publication," the court cited *Times Mirror* to support its holding that the governor's past schedule is a statutorily exempt preliminary draft, stating that "while the raw material . . . is factual, its essence is deliberative."

209. Of course, if the governor takes a Louisiana State Police helicopter to get to his meeting destination, he must release that helicopter travel log, showing the date and location of the trip, within seven days. LA. REV. STAT. ANN. § 44:5(E) (Supp. 2010). Governor Jindal complied with just such a request for a news story about his frequent helicopter trips to attend church services across the state. State police released the travel log, but the governor's office verified to the newspaper the purpose of the trips. Marsha Shuler, *Jindal Visits Churches Across State*, ADVOCATE (Baton Rouge, La.), Aug. 30, 2009, at 1A. Section 44:5 does not appear to require the governor to explain the purpose behind the trips. However, a governor is always free to share information, even if protected under Revised Statutes section 44:5.

210. *See Herald*, 816 A.2d at 476 (remanding the case for a determination of whether other portions of the governor's schedule were sufficiently related to his deliberative process as governor to qualify for a privilege); *see also Times Mirror*, 813 P.2d at 251.

211. *See Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 816 F.2d 1114, 1119 (9th Cir. 1988) ("[T]he scope of the deliberative process privilege should not turn on whether we label the contents of a document 'factual' as opposed to 'deliberative.' A legal standard that ties our judgment solely to the type of information allegedly secreted in a document transforms our inquiry into a semantics debate that ignores that the ultimate objective of exemption 5 is to

*Vaughn* index requires the agency to disclose on the index the identity of the author of a document.<sup>212</sup> It is contradictory to require the disclosure of the author of a document—before determining whether that document constitutes the deliberative process—but to not require the disclosure of the name of a person who may have offered the governor oral advice or recommendations. Granted, the required disclosure of the author in the *Vaughn* index context is designed to give the opposing court and party an idea of the nature of the document.<sup>213</sup> But if disclosure in the *Vaughn* index context has been deemed not to go so far as to disclose the internal, possibly protected nature of the document in question—and therefore crossing the line into the substance of the deliberative process—then disclosing the identity of those with whom the governor meets should also not cross that line.

Legislators in committee hearings seemed to worry that if the public could find out with whom the governor had been meeting, then the public would be confused.<sup>214</sup> This paternalistic attitude runs counter to public's right to know.<sup>215</sup> Additionally, as one author has noted, because those in power generally seek to keep secrets out of self-interest, the arguments in favor of secrecy should be viewed skeptically.<sup>216</sup>

safeguard the deliberative process of agencies, not the paperwork generated in the course of that process." (citation omitted)).

212. *Arthur Andersen & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982); see also *In re A Matter Under Investigation*, 15 So. 3d 972 (La. 2009).

213. *Vaughn v. Rosen*, 484 F.2d 820, 824 (D.C. Cir. 1973) ("This lack of knowledge of the party seeking disclosure seriously distorts the traditional adversarial nature of our legal system's form of dispute resolution.").

214. "Just because I'm meeting with someone and they have an agenda doesn't mean they influenced me. . . . It's easy for the public to go down that road." *Senate Hearing*, *supra* note 4 (statement by state Senator Mike Walsworth, member of the committee) (arguing that even though officials may meet with people who have a known agenda, the meeting may still be private in nature, not dealing with public business).

215. *Id.* (statement by Carl Redman, executive editor of the *Baton Rouge Advocate*) ("With our [state's] checkered history, knowing who's meeting with the governor goes to transparency. . . . What is the public purpose served by hiding that?").

216. Wetlaufer, *supra* note 18, at 886 ("[T]here is a strong association between secrecy and bad acts. Not that secrecy always entails a bad act, but that bad acts always seek out secrecy. . . . [S]ecrecy operates to alienate—to create subjective distance between—the secret keeper and the one from whom the secret is kept. In the public sphere, such alienation between the governed and the governors tends toward hierarchy and away from democracy and citizen sovereignty." (footnote omitted)).

Absent a change in this statutory language, however, future Louisiana governors will be able to meet in secret with whomever they wish.<sup>217</sup> Why might a lobbyist submit any written communication offering her advice to the governor on an issue, running the risk the communication be made public, when a face-to-face meeting could be held in complete anonymity? It is important to remember that although a current governor may be popular, this statute will apply to all governors who, given Louisiana's history, just might include some scoundrels.

#### *F. The Governor Must Archive All Records*

Historically speaking, the old blanket exemption meant that the governor's office had no clear obligation to preserve its records.<sup>218</sup> But the enactment of Act 495, requiring the governor's compliance with public records law,<sup>219</sup> raises interesting questions. What must happen to those previously disposable documents, and who gets to decide whether a document is preserved or destroyed?

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217. The issue of what a governor has been doing with his time came up recently in South Carolina. Gina Smith & John O'Connor, *Sanford's Office Couldn't Locate Missing Governor*, STATE (Columbia, S.C.), July 14, 2009, available at <http://www.thestate.com/2009/07/14/862957/sanfords-office-couldnt-locate.html>. It took a public records request to get emails between the governor and his staff for the media to tell the story about the strange behavior of South Carolina Governor Mark Sanford, who later admitted to travelling to South America to carry on an extramarital affair. In Louisiana, under the current version of Section 44:5, those emails would likely be protected as intra-office communications and possibly, if they dealt with the governor's whereabouts, could be protected as scheduling information as well. However, an argument could be made that trips to South America not involving trade missions might constitute an activity not involved with the "usual course of the duties and business" of the governor. LA. REV. STAT. ANN. § 44:5(A) (Supp. 2010).

218. *House Hearing*, *supra* note 83 (statement of David Woolridge, attorney for the Louisiana Press Association) (saying that past governors could simply shred records or toss them into the garbage can). Governors and state officials are required by statute to transfer to State Archives records or "associated historical materials" when the official leaves office, though the statute further exempts records deemed by that official to be "essential for the continued efficient operation of the relevant governmental office" and "demonstrably personal and private papers." LA. REV. STAT. ANN. § 44:417(A) (2007).

219. LA. REV. STAT. ANN. § 44:36(A) ("All persons and public bodies having custody . . . of any public record . . . shall exercise diligence and care in preserving the public record for the period . . . of time specified . . . in formal records retention schedules. . . . However, in all instances in which a formal retention schedule has not been executed, such public records shall be preserved and maintained for a period of at least three years from the date on which the public record was made.").

Generally, Louisiana public records must be preserved according to a “records retention schedule” developed by the state archivist.<sup>220</sup> In the absence of a schedule, records must be kept at least three years.<sup>221</sup> State Archives recommends to departments drafting records retention plans that the department keep certain documents forever and transfer them to State Archives.<sup>222</sup> Those archive documents include administrative correspondence, memoranda, and emails that reflect the organization of the office; its “pattern of action and decision-making”; its policies and procedures; and records that “serve to substantiate the accountability of the office.”<sup>223</sup> State Archives recommends destroying after three years only correspondence that is “obviously routine” and involves no agency decision.<sup>224</sup> State Archives even recommends that working papers, studies, preliminary drafts, and interim reports that result in a final report be kept one year by the department, with the final report resulting from those documents being transferred to State Archives.<sup>225</sup> When filling out the standard records retention form, agencies can suggest which specific records may be confidential and what provision of law makes it so.<sup>226</sup>

The retention requirements and suggestions may appear to conflict with the provisions of Act 495. This incongruence makes sense—State Archives developed these procedures before anything like the deliberative process privilege existed in Louisiana public records law.<sup>227</sup> A recommendation to retain forever those documents that reflect decision-making would not have been counter to public records law as it existed before the summer of 2009, but now that recommendation seems to directly conflict with the deliberative process privilege’s protection of the decision-making process.

To illustrate this new contradiction, consider the decision of an agency head made after consulting a series of studies and

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220. *Id.* State Archives is a division of the Louisiana Secretary of State’s office. The Louisiana Secretary of State is a statewide elected official, not appointed by the governor.

221. *Id.*

222. La. Secretary of State, Advice on the Disposition of Selected Records (on file with author).

223. *Id.*

224. *Id.*

225. *Id.*

226. LA. REV. STAT. ANN. § 44:405(A)(3) (2007); *see also* State Archives Form SS ARC 932 (2007), available at [http://www.sos.louisiana.gov/Portals/0/archives/forms/arc-932\\_new\\_sample.pdf](http://www.sos.louisiana.gov/Portals/0/archives/forms/arc-932_new_sample.pdf).

227. Indeed, State Archives treats “deliberative process” information as particularly important to preserve. La. Secretary of State, *supra* note 222.

recommendations made by in-house experts. Under State Archives' recommendations, the agency should archive that background information, as it would "serve to substantiate the accountability of the office" or because it would reflect the "pattern of decision-making" in that agency.<sup>228</sup> But the same study or recommendation used by a governor to inform his decision to issue an executive order would seem to be offered some protection under the deliberative process privilege. But just because a governor might not have to hand over that information to a requester does not mean that the governor would not have to comply with archive requirements.

However, that seems to have been the position of then-Executive Counsel to the Governor, Jimmy Faircloth Jr., when he testified in front of the House Committee on House and Governmental Affairs in support of Act 495. Regarding archive requirements, Faircloth said that the governor's records would be designated as either exempted by deliberative process or not, and those not exempted would be archived.<sup>229</sup> It is conceded that for a governor to archive any records at all is indeed a historic shift in the direction of transparency.<sup>230</sup> But the governor's office should not be given the authority to, in effect, assert the deliberative process privilege before someone has requested a record and before a court has been given an opportunity to make the final determination. Requiring the archiving of potentially confidential information already takes place in other areas of government. Even government records that contain information indisputably confidential are still retained by State Archives for a period of time, with a notation that they may contain confidential information.<sup>231</sup> Additionally, because deliberative process is such a subjective test, allowing a governor to make his own judgment presents an obvious conflict of interest.<sup>232</sup>

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228. *Id.*

229. *House Hearing, supra* note 83 (Faircloth testimony).

230. During testimony, archivist Tara Laver bemoaned the loss of records of colorful Louisiana governors like Governor Edwin Edwards. The study of history would have been better served had those records been archived, Laver said. *Id.* (Laver testimony).

231. *See, e.g.,* Div. of Admin., Records Retention Schedule for Office of Group Benefits (on file with author) (noting that "legal files" likely to contain attorney-client privileged information are maintained by State Archives for 10 years after they are no longer active, with a notation that the files "may contain confidential information"). Other examples of documents containing confidential information, but still retained by state archives for a period of time, include employee W-2 forms and computer security information.

232. Wetlaufer, *supra* note 18, at 892-93 ("[E]xecutive secrecy operates to disempower citizens by depriving them of the information that they may need in

The governor's office has yet to finalize its retention schedule. But when it does, that retention schedule should account for the archiving of all records in the governor's office, whether the records may contain information a court might later determine constituted privileged information. A system of two separate files—one to archive, one to withhold from archives—should not exist under Louisiana public records law.

The problem with such a system is that it would allow a governor to make an independent determination of what constitutes privileged information. The basic premise of Louisiana public records doctrine is that all records generated by the government are public records unless they fall squarely within a statutory exemption. Especially with a broad, subjective exemption like the deliberative process privilege, it is vital that all documents be archived with sufficient detail to allow a requester to identify their nature and the specific exemption being asserted.<sup>233</sup> With an *in camera* review mechanism already in place—and with the possibility that courts could further impose a *Vaughn*-like index requirement—courts should be making final determinations, not the governor's office.

Requiring all records to be archived for posterity would still allow the governor's office to claim a privilege when, if ever, someone sought to have those documents released. Indeed, the current archive system allows for agencies to label a record as containing potentially confidential information.<sup>234</sup> If a request is made, the governor's office would still have a chance to assert a privilege.

Another issue involving archiving the governor's records is how long those records must be retained. California requires governors to archive materials when leaving office, but certain

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order to effectively promote their interests. . . . Additionally, the establishment of the general deliberative privilege will operate to diminish the sense of accountability under which executive officials do their business. That diminished sense of accountability may increase the likelihood that the official will act in a way that is sloppy or incompetent, that he will confuse his own self-interest (or that of a particular constituency) with the interests of the public, or that he will engage in various kinds of bad acts with which he would not want to be publicly associated.”).

233. State Archives already suggests that documents serving to illuminate the decision-making process of that agency should be retained, not discarded. Although only the governor's office can claim a privilege over such documents, labeling the documents as part of the deliberative process is possible, and advisable, under current State Archive policies. La. Secretary of State, *supra* note 222.

234. *Id.*

records can be withheld from public view for 50 years or, if the governor is still alive after 50 years, upon that governor's death.<sup>235</sup> The Vermont Supreme Court endorsed an agreement between Governor Howard Dean and the Vermont Secretary of State that placed a 10-year limit on the release of archived information Dean deemed as privileged.<sup>236</sup> One court has noted that as more time passes, the more likely that a privilege against disclosure serves no real purpose.<sup>237</sup>

In Louisiana, the State Senate shot down an amendment that would have required records subject to the deliberative process privilege and intra-office communications exemption to be archived and subject to disclosure 10 years from the day the document was generated.<sup>238</sup> This could suggest that the Senate did not intend to require the governor to archive information he deems privileged or that State Archives would later work out the appropriate time horizon for release. The defeat could merely signal that the Senate found the measure unnecessary and duplicative of already-existing and applicable archive requirements. Either way, the defeat of the amendment means the legislature has given no statutory direction to the governor regarding archival requirements. Absent specific direction, the more general statutory archival requirements should apply. The governor must archive *all* records but is free to label as confidential those that may constitute deliberative process material and then assert a privilege if the record is later requested.<sup>239</sup>

Archive requirements, the governor's schedule, an intra-office exemption, and new privileges—Section 44:5 is the result of an ambitious attempt to completely rework an important area of public records law. But the potentially inconsistent interpretations and the introduction of a new subjective test like the deliberative process privilege risk turning an attempt to promote transparency into a shield against healthy government disclosure. Given a government's natural inclination against openness, regardless of what individual holds the reins of power, Louisiana legislators should consider Section 44:5 as a work in progress. In the

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235. CAL. GOV. CODE § 6268 (West 2008).

236. *Judicial Watch, Inc. v. State*, 892 A.2d 191 (Vt. 2005).

237. See *United States v. Ahmad*, 499 F.2d 851, 855 (3d Cir. 1974), a case dealing with executive privilege and state secrets, where the court noted that "[t]he passage of time has a profound effect upon such matters, and that which is of utmost sensitivity one day may fade into nothing more than interesting history within weeks or months."

238. Senate Floor Amendment No. 1576, 2009 Leg., Reg. Sess. (La. May 20, 2009).

239. La. Secretary of State, *supra* note 222.

meantime, while the relative newness of many of Section 44:5's provisions are the cause of some of its critics' consternation—e.g., the subjective deliberative process privilege—that same newness also frees Louisiana courts to fashion some of the solutions presented here and hold fast to Louisiana's traditional, laudable, and constitutionally recognized policy of open government.

## V. CONCLUSION

Though for the last 60 years the law shielded the Louisiana governor from the public records fray, if recent history is a good indication, another battle over the governor's public records is inevitable. For the first time, the governor is required to join the public records fight—even if armed with a statute that allows the governor to bring a gun to a knife fight. Unless the legislature changes the rules, courts will have to step in to referee in a manner most protective of the public's right to know. When they do so, courts should keep in mind the history of strict construction given to assertions of exemptions under public records law.

Courts are free to, and should, adopt a definition of deliberative process that protects communications only *before* the governor makes a decision. Courts need to implement procedures to ensure that those seeking records will be given a meaningful opportunity to dispute the governor's assertion of a privilege. Further, courts should not allow anyone other than the governor to claim the deliberative process privilege. In addition, although the legislature likely intended to allow the governor to withhold both past and future scheduling information, public policy is better served by a legislative amendment to open up past scheduling information. Courts must strictly adhere to the six-month budgetary privilege provision by requiring that when the governor seeks to withhold budgetary information, those records be "limited to" pre-decisional advice and not merely factual material or conclusions. Finally, the governor should be required to submit records to State Archives in a way that will preserve for history the inner workings of the state's most powerful position.

Overall, the legislature needs to revisit the possible ramifications of Act 495. A good start would be to adopt Representative Wayne Waddel's suggestion to convene a committee to study the new law's impact.<sup>240</sup> In the long run, a government overly concerned with covering its tracks and

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240. See H.R. 127, 2009 Leg., Reg. Sess. (La. 2009), which would have led to a study of the "impact and effect" of Revised Statutes section 44:5. The resolution died after failing to make it to a House floor vote.

shielding its internal practices from public view will fail the public. That government will ultimately falter, not because the public found out too much about what goes on behind closed doors, but because the public found out too late to force the government to change direction.<sup>241</sup> A self-governing democracy can thrive only when given its direction by a well-informed citizenry.

*Kevin M. Blanchard\**

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241. *See supra* note 232.

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