

(From Dave Rens, reporter w/the Daily Press)

The federal FOIA has a broad deliberative process exemption, but generally states, except for Virginia, are silent on this.

This seems mainly to fall to state courts, weighing the executive privilege issue. The guidance here is suggestive.

Alaska's Supreme Court recognized a limited "executive" or "deliberative process" privilege but describes the records at issue as involving advice, opinions and recommendations, in order to protect the deliberative and mental processes of decision-makers. 721 P.2d at 623. The Court in *CIG vs. Office of the Governor*, 923 P.2d 29 calls for a balancing test, to weigh the public right to know, in ordering permission to review budget documents.

The Delaware Supreme Court in *Figg v DDOT* ruled that there is no deliberative process exemption and that executive privilege applies only to the governor.

Massachusetts Supreme Judicial Court ruled that there is no executive privilege exemption and that the statute echoing federal FOIA's broad exemption for drafts and inter- intra-agency deliberative papers does not apply once a decision has been reached – in other words, after an action, you can get all the paperwork leading up to it, including any embarrassing deliberative stuff.

*Babets v. Secretary of Executive Office of Human Services*, 403 Mass. at 230, 526 N.E.2d 1261 (1988) (declining to create a "governmental" or "executive" privilege); *District Attorney for Norfolk v. Flatley*, 419 Mass. 507, 646 N.E.2d 127 (1995). The exemption for "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency" ends where the deliberative process is complete and the policy decided upon. Thereafter, the documents upon which it was based become public. *Babets*, supra, 403 Mass. 237, note 8.

Here's what statutes and state constitutions hold:

California All executives' records, as defined under Section 6252(e), are subject to the CPRA. Under the Constitutional Sunshine Amendment, "the writings of public officials and agencies" are open to public scrutiny. Cal. Const. Art. 1, § 3(b)(1).

Colorado

All records that are "for use in the exercise of functions required or authorized by law or administrative rule or involving the expenditure of public funds" are covered by the Act.

Delaware

The records of all functions of the executive branch are subject to the Act. See 29 Del. C. § 10002(e) (defining "public business").

Georgia

Records of the executive of public offices and departments fall under the definition of public records. See O.C.G.A. § 50-18-70(a).

Maine

All documents used in the transaction of public business are subject to its FOIA, and while it has working paper exemptions for college faculty and administrative committees and for specially-formed advisory committees, it does not specify an exemption for the governor, or municipal chief executives or school superintendents or for the presidents of colleges themselves.

Utah

GRAMA does not exempt any executive branch records from its scope, although it does restrict access to specific categories of records. For example, access is restricted to "records of the governor's office, including budget recommendations, legislative 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." Utah Code Ann. § 63G-2-305(29).

Exemptions similar to Virginia.

Louisiana

Records in the custody or control of the Governor and which are used in the discharge of his duties are exempt. La. Rev. Stat. Ann. § 44:5. This exemption extends to records of the Inspector General's Office, which is part of the Office of the Governor. Op. Att'y Gen. 92-128. Records of other executives are not exempt.

Mississippi

Records of a "public body" are covered. This does not include appointed or elected public officials or their employees. See Att'y Gen. May 15, 1984 to Griffith construing § 25-61-3(a).