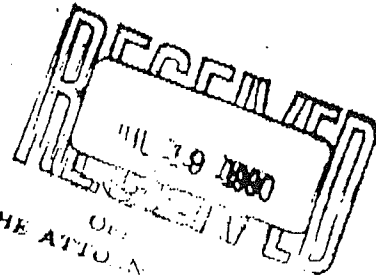




STATE OF MARYLAND  
OFFICE OF THE GOVERNOR

WILLIAM DONALD SCHAEFER  
GOVERNOR

July 17, 1990



Mr. Anthony J. Verdecchia  
Legislative Auditor  
State Office Building  
301 West Preston Street  
Baltimore MD 21201

Dear Mr. Verdecchia:

I am responding, with no little dismay, to your letter of July 5, 1990, in which you requested the Administration's "official position regarding the Legislative Auditor's access to...the reports, working papers and other information regarding the agency internal control review program that was instituted about a year ago."

As you have been told repeatedly over the course of the past year, the Administration's position is, and always has been, that those documents constitute confidential executive communications of an advisory or deliberative nature between and among officials of the Executive Branch; thus, under the Constitution of Maryland, they are subject to Executive Privilege and are protected from disclosure to the Legislative Branch for the reasons enunciated by the Court of Appeals in Hamilton v. Verdow, 287 Md. 544 (1980).

Verdow involved a request by litigants for access to a confidential report and recommendations submitted to Governor Mandel, at his request, by a member of his staff, regarding deficiencies in Maryland's juvenile justice, criminal justice and mental health systems, and potential future executive action to remedy or minimize those deficiencies. When private litigants sought access to the report and its recommendations, both Acting Governor Lee and Governor Hughes asserted Executive Privilege, citing the important need for gubernatorial advisors to continue to be able to receive and give candid advice without concerns about broader disclosure. In holding that the doctrine of Executive Privilege was part of the Constitutional law of this State, the Verdow Court pointed out:

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JUL 17 1990

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Mr. Anthony J. Vardecchia  
July 17, 1990  
Page Two

"The necessity for some protection from disclosure clearly extends to confidential advisory and deliberative communications between officials and those who assist them in formulating and deciding upon future governmental action. A fundamental part of the decisional process is the analysis of different options and alternatives. Advisory communications, from a subordinate to a governmental officer, which examine and analyze these choices, are often essential to this process. The making of candid communications by the subordinate may well be hampered if their contents are expected to become public knowledge." Id., 287 Md. at 558.

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"[I]t is clear that the doctrine of executive privilege also has a basis in the constitutional separation of powers principle. As recently observed by the Supreme Court in United States v. Nixon, [418 U.S. 683, 705, (1974)], 'the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties'. and later [id. at 708]: 'The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.'" Id., 287 Md. at 562.

In 1981 the Attorney General was asked if a legislative committee could require the Governor or an executive agency to provide it with copies of budget requests and recommendations that had been prepared at the Governor's request. The Attorney General advised a member of the House of Delegates, in a published opinion, that "[a]lthough the Verdow case concerned disclosure to opposing litigants pursuant to judicial compulsion, there can be no doubt that the privilege also applies, for the same reasons, to disclosures to or on demand of the Legislative Branch." 66 Opinions of the Attorney General 98, 101 (1981). Thereupon, the Attorney General concluded that, "notwithstanding the broad authority of the General Assembly to inquire into the State's fiscal affairs, budget recommendations that have been requested by and submitted to the Governor in confidence by various executive agencies are subject to Executive Privilege and, as such, are privileged from

Mr. Anthony J. Verdecchia  
July 17, 1990  
Page Three

disclosure to the General Assembly," 66 Op. Atty. Gen. at 103 & 104. This conclusion applies equally to the internal control reports and recommendations you continue to seek.

The Constitution of Maryland expressly vests the executive power of the State in the Governor, and mandates the Governor to "take care that the Laws are faithfully executed," Article III, Sections 3 and 9. In exercising that executive power and meeting that executive responsibility, the Governor obviously must seek advisory and deliberative communications from cabinet officials and other subordinates in formulating and deciding upon future governmental action. Thus it is generally recognized that some form of "executive privilege" is a necessary concomitant to executive power. This is no less true in the Governor's internal control program than it was in either the mental health systems assessment or the budget requests context. As in those processes, a fundamental part of the internal control decisional process is the analysis of different options and alternatives, and the making of candid communications by the subordinates involved might well be hampered if their contents were expected to be shared beyond the Governor and those serving him.

Against this background, Deputy Attorney General Judson P. Garrett, Jr., speaking for the Office of the Attorney General, has consistently advised this Administration, you, and the Joint Budget and Audit Committee that the records of the internal control program's advisory and deliberative communications are presumptively protected from disclosure by Executive Privilege. Moreover, precisely because it is a creature of the Constitution itself, Executive Privilege does not yield to any act of the Legislature, including the statute which gives you your broad - but not limitless - authority.

Moreover, it is my clear recollection that when you brought this matter before the Joint Budget and Audit Committee last summer an overwhelming majority of the committee indicated, after hearing your objections, Mr. Garrett's analysis of the Executive Privilege, and my explanation of the policy reasons for the program and its confidentiality, that they strongly supported both this innovative and worthwhile program and the confidentiality which common sense dictates is essential to a candid and meaningful assessment of one's own weaknesses. Thus, I truly am dismayed that you have continued to "beat this dead horse to death."

Mr. Anthony J. Verdecchia  
July 17, 1990  
Page Four

Nevertheless, in a spirit of cooperation and with the hope of bringing some finality to this matter, I have taken the time to respond to your inquiry in detail, and I am authorized to represent that Deputy Attorney General Garrett fully concurs in the legal analysis set forth herein. Absent advise to the contrary from the Attorney General or an adverse decision from the Court of Appeals, this Administration intends to continue asserting Executive Privilege with respect to these documents.

Therefore, I am assuming that this matter is concluded. However, if you have any further questions, please contact the Governor directly as he will be handling this matter from this point forward.

Very truly yours,

*Mary Ann Saar*

Mary Ann Saar  
Director of Operations

cc: The President of the Senate  
The Speaker of the House  
William Ratchford