

CONSTITUTIONAL LAW — EXECUTIVE PRIVILEGE — GENERAL ASSEMBLY — BUDGETARY ADMINISTRATION — PUBLIC INFORMATION ACT — AGENCY RECOMMENDATIONS TO GOVERNOR PRIVILEGED FROM DISCLOSURE TO GENERAL ASSEMBLY.

December 31, 1981

The Honorable James R. Dietrich
Maryland House of Delegates

Earlier this year, you requested our opinion on whether a fiscal committee of the General Assembly may require the Governor or an executive agency to provide it with copies of documents that, at the Governor's request, had been prepared by that agency to set forth its recommendations and advice to the Governor relative to the preparation of his annual Budget.

We previously advised you that, in our view, advice reflected in budget documents requested by and submitted in confidence to the Governor by executive agencies is privileged from disclosure under the judicially recognized and constitutionally based doctrine of Executive Privilege. We noted, however, that this privilege does not ordinarily protect purely factual material — as distinguished from advice — if such factual material is not itself of a confidential nature and can be exercised without disclosure of the related advice.¹

¹ Your specific inquiry related to a legislative request for documents that had been submitted to the Governor by various executive agencies to identify possible reductions of 4, 7, and 9% in their respective MARRCs (Maximum Agency Request Ceilings) for the budget for the 1982 Fiscal Year. Such documents, we must assume, are largely — if not exclusively — advisory in nature; they clearly are intended and designed to serve as deliberative materials, consisting of confidential recommendations and advice to the Governor to assist him in deciding the appropriate levels of expenditures for various items in the Budget. Whatever underlying factual materials these documents might contain are, we suspect, likely to be so inextricably interwoven with the advice given as to be beyond practicable extraction. Of course, as indicated below, to the extent that such documents do contain purely factual information that is not itself confidential and that is not inseparably interwoven with advisory materials, such factual information would not ordinarily be protected by Executive Privilege.

This Opinion explains the reasons for and basis of our earlier advice to you.

I

The Executive Budget Amendment

Under the Executive Budget Amendment, Article III, §52 of the Maryland Constitution, the Governor has the annual responsibility to propose to the General Assembly, for the next ensuing fiscal year, a "complete plan of proposed expenditures and estimated revenues", to be embodied in the Budget and reflected in the Budget Bill [§52(3) and (5)]. With certain exceptions, the General Assembly may only alter the Budget Bill by striking or reducing its items [§52(6)]. In preparing the Budget, the Governor is directed to request from the various agencies "such itemized estimates and other information, in such form and at such times[,] as he shall direct" [§52(11)]. However, with certain exceptions, the Governor has broad power to "revise all estimates" [§52(12)].

In the course of its consideration of the Budget Bill, the General Assembly enjoys a broad power of inquiry. In this regard, §52(7) provides:

"The Governor and such representatives of the executive departments, boards, officers and commissions of the State expending or applying for State's moneys, as have been designated by the Governor for this purpose, shall have the right, and when requested by either House of the General Assembly, it shall be their duty to appear and be heard with respect to any Budget Bill during the consideration thereof, and to answer inquiries relative thereto."

It cannot be doubted that this express power to make inquiries relative to the Budget Bill authorizes the General Assembly to comprehensively examine the State's fiscal affairs.

Nevertheless, the Executive Budget Amendment makes a clear distinction between the Governor's executive responsibility to prepare and submit the Budget and the General Assembly's legislative power to act on the Budget Bill by striking or reducing its items. The General Assembly's ad

power of inquiry under §52(7) obviously relates to its legislative power to strike or reduce. In our view, however, this power of inquiry does not necessarily extend to the executive responsibility of the Governor under §52(11) so as to entitle the General Assembly to demand and receive any and all documents that the Governor might request from executive agencies under that section.

Moreover, although the Budget Amendment generally prevails over inconsistent provisions of the Constitution [§52(14)], we believe that the exercise of the General Assembly's powers in its consideration of the Budget is nevertheless subject to the constitutionally based doctrine of Executive Privilege.

II

The Doctrine of Executive Privilege

The doctrine of Executive Privilege was recently recognized by the Court of Appeals in the case of *Hamilton v. Verdow*, 287 Md. 544 (1980). In that case, the Court concluded that confidential executive communications of an advisory or deliberative nature are presumptively privileged from disclosure in a judicial proceeding. *Id.*, 287 Md. at 563. Furthermore, even though factual materials are not ordinarily covered by the privilege, they nevertheless may be privileged where they: (i) "underlie] and [are] intertwined with opinions and advice"; (ii) are "obtained upon promises or understandings of confidentiality"; or (iii) cannot be disclosed without "imping[ing] on the deliberative process". *Id.* 287 Md. at 564-65. The privilege is for the benefit of the public, not governmental officials, and, generally speaking, the privilege is not absolute. *Id.*, 287 Md. at 563.²

As indicated in *Verdow*, the doctrine of Executive Privilege is based on both: (i) the need for frank advice and confidential deliberations within the Executive Branch; and (ii) the

² As the privilege is regarded as being for the benefit of the public, there is some question as to whether—and by whom—it can be waived. *Verdow*, 287 Md. at 570 n. 10. For purposes of this Opinion, we must assume that the confidential nature of the communications in question has been preserved and has not been waived.

separation of powers provisions of Article 8 of the Declaration of Rights. According to the Court of Appeals:

"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.

In addition:

"[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.

Although 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. Thus, for example, the Court itself noted that, because the doctrine has "roots in the constitutional doctrine of separation of powers, a similar privilege extends to the judicial and legislative branches as well". *Id.*, 287 Md. at 553 n. 3.³

³ Even before the Court's decision in *Verdow*, this Office had advised that legislative communications are privileged from disclosure to another branch by virtue of the express speech and debate privilege and "may also be privileged under an analogy to the judicially recognized doctrine of ex-

For these reasons, we believe that budget recommendations submitted in confidence to the Governor, at his request, would be presumptively privileged as confidential executive communications of an advisory nature.

III

Analysis

In the light of the separation of powers—especially as embodied in the Budget process itself—and in light of the Governor's clear need for frank advice in discharging his constitutional responsibility to prepare the Budget and the Budget Bill, it is our view that the broad power of the General Assembly to inquire into the State's fiscal affairs does not overcome the presumptive privilege. Thus, as a general matter, advisory communications made to the Governor in the course of exercising his constitutional responsibility to prepare an annual Budget will be subject to Executive Privilege and protected from disclosure.

As indicated in *Verdon*, however, a limited exception may exist to the extent that those communications contain purely factual materials that are not themselves of a confidential nature and that can be severed from the advisory and deliberative materials without "imping[ing] on the deliberative process". *Id.*, 287 Md. at 654-65. Such purely factual materials would not ordinarily be protected by the privilege.

We also note that, while the General Assembly may be denied access to communications protected by the doctrine of Executive Privilege, it is, of course, free to ask the various executive agencies similar—if not precisely the same—questions that had been posed by the Governor. That is, although the General Assembly may not require an agency to repeat what that agency told the Governor regarding a certain matter, the General Assembly nevertheless may ask the agency to respond to the General Assembly's own independent request for information and advice on precisely the same matter.

executive privilege". Letter from Stephen H. Sachs, Attorney General to F. Carvel Payne, Director, Department of Legislative Reference (February 11, 1980)(confidentiality of bill drafting files).

In addition to the General Assembly's power under §52(7) to inquire into the State's fiscal affairs, the General Assembly, as a legislative body, also has inherent power to conduct investigations, and this power—which may be conferred on a legislative committee—includes the subpoena power. 63 *Opinions of the Attorney General* 453-54 (1978). Again, however, it cannot be doubted that the exercise of this inherent power is subject to the doctrine of Executive Privilege to the same extent as is the exercise of the General Assembly's express constitutional power to inquire into the State's fiscal affairs.

We also recognize that the Public Information Act [Article 76A, §§1 through 5] has been amended to permit the General Assembly, as a "governmental agency", to require the disclosure of public records [Article 76A, §1(h)]. Nevertheless, the Act's broad right of public access to public records does not extend either: (i) to public records that are "privileged or confidential by law" [Article 76A, §3(a)(iv)]; or (ii) to "[i]nteragency or intraagency memorandums or letters which would not be available by law to a private party in litigation with [an] agency", if disclosure of such materials "would be contrary to the public interest" [Article 76A, §3(b)(v)]. We have previously said that §3(a)(iv) of the Act incorporates as exclusions under the Act those privileges that are otherwise recognized in a judicial proceeding. *See* Letter from Stephen H. Sachs, Attorney General, to F. Carvel Payne, Director, Department of Legislative Reference (February 11, 1980) (citing *Moberly v. Herboldshemer*, 276 Md. 211, 226 (1975)). This would, of course, include Executive Privilege. Moreover, the additional exception provided for in §3(b)(v) of the Act has been recognized as itself specifically incorporating—indeed, as being a statutory embodiment of—the doctrine of Executive Privilege. *See generally* 2 O'Reilly, *Federal Information Disclosure* §§15.02 and 15.03 (1979).

IV

Conclusion

In summary, it is our opinion 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 disclosure to the General Assembly.

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COUNTIES

CHARTER COUNTIES - COUNTY OFFICERS - "QUADRENNIAL ELECTIONS" AMENDMENT - SPECIAL ELECTIONS - POWER OF COUNTY TO PROVIDE FOR SPECIAL ELECTIONS TO FILL VACANCIES.

October 23, 1981

The Honorable Frank B. Pesci, Jr.

The Honorable Timothy F. Maloney

Maryland House of Delegates

This is in response to your request for our opinion on the authority of the Prince George's County Council to enact legislation providing for special elections to fill vacancies on the County Council or in the office of County Executive. Under current provisions in the County Charter, the Council is authorized to enact such legislation "when permitted by the Constitution of the State".

For the reasons given below, it is our opinion that the Maryland Constitution currently permits a charter county to provide for these special elections in its charter. Moreover, we think that the General Assembly has granted to the charter counties of this State sufficient legislative authority to carry out, by local legislation, a general directive in the charter to provide for such special elections.

I

The County Charter

The Charter for Prince George's County currently contains the following provisions on the filling of vacancies on the County Council and in the office of County Executive:

Section 309: "... Any member appointed to fill a vacancy shall meet the same qualifications and residence requirements as the previous members; provided that *when permitted by the Constitution of the State*, the Council shall provide by law for the conduct of special elections to fill vacancies on the Council that occur during the first two years of a term." (Emphasis added.)