



4.23.15

Commentary

The Public Affairs Research Council of Louisiana

Louisiana needs a champion for open government

Serious problems with the public records law and the deliberative process privilege must be fixed

The Public Affairs Research Council of Louisiana calls upon the next governor of Louisiana to assert policies and practices for greater transparency in government and to set an example as a champion of accountability and citizen access to public documents and open meetings.

In particular, PAR urges the next governor to adopt a more narrow definition and application of the deliberative process privilege and to prevent the privilege from being claimed inappropriately throughout state and local government. A list of this and other PAR recommendations is provided below. A *Special Report* on the deliberative process privilege is attached after the commentary.

Celebrating progress

On the occasion of the organization's 65th anniversary celebration, PAR is emphasizing its core mission by marking the progress made and the shortcomings that need to be corrected. Founded in 1950, PAR's work in its earliest days was simply to detail the activities of an opaque governmental and legislative process and educate the public about the secretive decisions, bills and fiscal shenanigans of the time. This approach was considered heretical and unpopular by state authorities but was instrumental in leading a reluctant state government toward higher standards of efficiency and responsibility.

Clearly the state has improved its performance over these many years. Louisiana has sound fundamental laws for public records and open meetings. Fiscal and budgeting matters in particular have become more transparent, especially with the adoption over time of PAR recommendations such as consensus revenue forecasting, debt limits and the establishment of a legislative fiscal office and legislative auditor.

Louisiana's Legislature by and large over time has tried to keep state and local government agencies moving in the right direction toward a more open society. The Legislature's web site tracks and archives bills and hearings in a timely manner and is one of the best of its kind in the country.

At the start of the Jindal administration, new advances in transparency resulted in better disclosures of public officials' business finances and contracting interests. Easily accessible information on government contractors and other public activities were established on state web sites. The state required more thorough disclosure of lobbying activities and placed limits on wining and dining of legislators. These moves were very positive.

Major problems have erupted

But the state suffers from too many exemptions to the open governance statutes, particularly in the governor's records law, and the application of those laws is sometimes faulty. Also, the state's transparency standards have not kept up with uses of new communication technologies. History has shown, both in Louisiana and across the nation, that advocates of public transparency must repeatedly fight to prevent new methods of government secrecy from taking hold and subverting laws for open records and open meetings.

We should be particularly concerned when governments attempt to control the flow of information to avoid a genuine public discussion and to steer the public debate on policy issues. We must identify erosions of public access and remedy them assertively. We must not accept an environment in which the law applies only to the things that government leaders and bureaucrats arbitrarily say they apply to.

History has shown that some elected and appointed officials and public employees, if allowed to do so, will shroud information, documentation and the decision-making process to hide problems, prevent embarrassment and preclude policy options. Except for security and privacy concerns, government information and factual evidence in an open society belongs to the public debate, not just to the debate behind closed doors. Ultimately this is a discussion about democracy, not about the privileges of government employees.

PAR urges the next governor to be a champion for transparency, to set a superior example for all state and local governments and boards and commissions and to adopt a number of policy positions and practices.

PAR recommendations

- The governor should declare that the state shall follow only a narrow interpretation of the deliberative process privilege. In the current governor's records law, the definition of the deliberative process privilege is open to an interpretation that is too broad and has been abused. If kept as a very limited exemption, the privilege may have an appropriate role to play in the governor's records law. But the definition should be better tailored to a more limited interpretation and should be among the more restrictive interpretations compared with statutory and judicial guidance observed in other states.

By and large, court rulings on these issues across the country would generally fall in line with the restrictions described here:

- Just because a record is part of a deliberative process does not mean it is privileged or that it can use the exemption. For example, virtually everything the Legislature does is part of a deliberative process, but we would not want lawmakers' deliberations, hearings, debates, bills and amendments closed from public view. Similarly, state and local agencies should not be allowed to hide information from the public only for the reason that a decision-making process was involved. Decision-making and the deliberative process is ubiquitous in government, and so the deliberative process privilege can be invoked for most any document if the privilege is too broadly asserted and abused.

- When properly claimed, the privilege protects opinions, suggestions, arguments and non-final recommendations. This restriction applies even to the governor. The privilege should not apply to factual information and investigations, even if those facts are used in decision-making. (An opinion or recommendation to the governor that cites facts from a document might be privileged, but not the records or the facts themselves.)

- The privileged records must be pre-decisional. In short, if a document is factual, is a typical government regulatory form or represents a final decision, it very likely should not be privileged. And even when a document might qualify for the privilege, the need for discovery on behalf of the public interest might outweigh the government's need for disclosure.

- Reports and studies commissioned with private consultants and paid with public money should be made available to the public and should not be subject to public records exemptions, including the deliberative process privilege. These types of documents already are public records under current law. But the law has not been observed completely and faithfully and so the correct standard must be reinforced. In particular we must prevent the deliberative process privilege from being extended to these types of records. Exceptions might include homeland security concerns and specific figures within reports that would compromise the state's negotiating position with regard to, for example, a potential sale of public assets or contracts for privatizations. Even in circumstances of state business negotiations, the studies should be released and only the most critical compromising data should be redacted. And even in those cases, the full studies should be released without delay after the decisions are made. Without this transparency, government officials can shroud evidence and information that run contrary to their policy positions and can control and distort information to mislead the public.

- The provision in the governor's records law that allows a six-month exclusion of agency budgetary recommendations sent to the governor should be greatly limited or repealed. Whatever its intended purpose, this provision shrouds vital budget developments and has resulted in less transparency for the convenience of the agencies. This exemption is particularly indefensible once the governor has reviewed them, made a decision and submitted an executive budget.

- The governor should direct that documents and communications be preserved for archiving and eventually those archives should be available to the public. (The current governor is maintaining its records, according to the governor's chief counsel.) Louisiana law allows the destruction of government documents after three years. This law should be changed with regard to the records of a state governor, whose activities have a profound bearing on public welfare and are likely to change the course of history. Shielded records of the governor's office should eventually and routinely become part of the public record, except where appropriate to protect privacy rights, security and executive privilege, narrowly defined. A governor or former governor ought to have the right to challenge the release of old records based on privacy or other fundamental exemptions.

- State agencies outside the office of the governor should follow state law and cease relying on the alleged deliberative process privilege to deny the release of records and they should not label or destroy documents they presume are exempt under the purported privilege. Immediately upon taking office, the next governor should direct his agency heads to cease declaring the deliberative process privilege. The only Louisiana law currently that recognizes a deliberative process privilege is for the governor alone, not even for his staff.

- When agencies deny a release of public records, they should follow the law by citing specifically which state exemptions in the law give the agency the right to deny access. Agencies must cite law and not just court cases (particularly not dicta from court cases that are not ruling on public records questions) when justifying an exemption for a records release. (For more details on this problem as it relates to the deliberative process privilege, see the Special Report following this commentary.)

- The governor should instruct his government agencies to do as the law demands and err on the side of public disclosure when questions arise about public access to records.
- The state should observe methods – commonly used elsewhere – to work with the court system to weigh arguments initially in disputes over government document requests. (Some states have additional third-party institutions.) The practice of indexing disputed documents or other expedited measures could perhaps curtail legal costs. The system should not be expensive for a citizen.

New initiatives for new times

- State and local governments need clearer guidelines regarding the disclosure and archiving of digital communications. At a minimum, an opinion or further guidance from the attorney general could provide a set of standards for agencies and public officials to follow regarding emails, government use of personal email accounts, text messages, twitter, Facebook and other new forms of communication. The attorney general already has provided valuable guidance on issues related to digital communications and open meetings. Lawyers in the attorney general’s office should be called upon for their expertise and information on these issues. The legislative governmental affairs committees should embark on special hearings and a study of the matter to identify best practices and improve Louisiana’s law as appropriate.
- The state should embark on a more ambitious plan to create open data platforms. Open data does not equal open government but can contribute to open government. Not all government data needs to be placed on a readily accessible platform, especially where there is no public demand for it. And privacy is a significant factor. But thoughtfully planned projects to provide useful government data -- in ways that are easy to find, downloadable, timely and re-usable without restrictions – can benefit both the private sector and government itself. Entrepreneurs can utilize information for new services and digital applications. In states where open data platforms have been established, the sharing of information across agencies and jurisdictions has helped break down bureaucratic walls and make government more efficient.

This open data project can be guided by the recommendations and counsel of the National Association of State Chief Information Officers, which has a mature approach to this issue. The governor should elevate the role and responsibility of the state chief information officer and call upon agency technology heads and records custodians to develop a plan for Louisiana to become a leading state for open data platforms that are useful and promote open governance.

- State government should create a Public Records Request Database. The database would track record requests including how long the response took and if any exemptions were cited. Greater transparency is often the cure for improving public sector performance by providing greater accountability. This applies no less to the public records process itself.
- The state should examine whether courts and state agencies are charging excessive fees for public documents and steps should be taken to prevent abuses. Louisiana’s courts and other public entities should not use the open records process as a cash cow.
- The governor and his family should be protected from disclosures that would compromise their security. These exceptions can include information that might reveal patterns and methods of security measures. Homeland security also should be taken into account.

Special Report

A PAR analysis of the deliberative process privilege in Louisiana

Louisiana is experiencing an unfortunate trend toward less government transparency in its public records. In order to secure an improved national image and to provide its citizens with an environment of open governance, this recent trend must be reversed. Specifically, change is needed in the way government presently complies with the law, and the law itself must be changed to expressly provide for greater transparency.

A reversal of this statewide problem must be led by the next governor, who will set an example that is followed by state executive branch agencies, including those constitutionally independent of the governor such as post-secondary education boards and agencies. The governor also sets an example for other statewide elected officials, boards and commissions and local governments. The current governor set strong examples with regard to financial disclosures of public officials, easily accessible state contracting information and regulation of lobbying activities.

However, in recent years, various agencies under the governor or influenced by the governor have chosen to hide information by asserting an excessively broad justification to keep public documents from the public, even putting citizens in the position of having to spend private dollars and hire attorneys in order to gain access to records.

An unfortunate trend

A central problem is the government's frequent, inappropriate and loose assertion of the so-called "deliberative process privilege". This privilege, where allowed, would be an exception to the otherwise general rule that all public documents and records are open to the public. This method of shielding public access to records has become more common among state agencies, leading to protracted disputes. The use of the alleged privilege has seeped to the level of local governments as well. The broad assertion of the deliberative process privilege is a new and troubling theme in Louisiana. Its abuse hides public information by daring the public to spend money to hire lawyers to ask the courts to order the release of public information.

We have seen the effects of this bureaucratic strategy for concealing public business on the federal level, and its occurrence in Louisiana is cause for real concern. The federal courts often recognize a limited application of the deliberative process privilege for federal agencies that assert the exemption, and this exemption can be warranted in very limited circumstances and with proper oversight and public safeguards. But federal agencies have tried to make frequent and expansive use of the privilege, so much so that the U.S. Department of Justice has encouraged agencies to take more careful and constrained measure of the exemption before invoking it.

The condition of public access to federal records is notoriously poor, with requests routinely denied or delayed for years. And yet that federal government way of doing things is being brought to Louisiana. Governments that conceal public documents can hide operations, control information and deny access that would contribute to a full and balanced public policy debate. Louisiana's open records standards should not mimic the federal government's standards of routine and prolonged resistance to public access.

In a revealing episode in 2012, the governor's lawyers succeeded in encouraging the Louisiana State University System to hide records from the public related to the conversion of public hospitals to private services. Even though the LSU System's contracted lawyer advised that the university probably had a weak legal argument in asserting the privilege and that the records were innocuous, a rationale was offered that the LSU System was unlikely to get sued for the failure to release the records anyway. Therefore, it was reasoned that invoking the deliberative process privilege was a safe route to keep the documents secret and posed little risk of ending up in the courts. In this example, we unfortunately saw evidence of a direct effort by the governor's office to encourage and proliferate an abuse of the deliberative process privilege across state government -- even beyond executive branch administrative agencies. Seemingly lost or ignored in this controversy was the public duty incumbent on such officials to inform citizens about the business of state government.

A controversial exemption

At the core of an open society are laws that prevent the shielding of public documents, require open meetings by public bodies and provide disclosures to deter favoritism and conflicts of interest. Louisiana has a good foundation of such laws in place already. These provisions were put in the state constitution and in statute to ensure that the business of the people is done for the benefit of the people. The laws are meant to increase citizens' level of confidence that government will act in the best interests of the people and not just for those well connected.

State law provides specific instructions to government agencies on the preservation and release of documents, including timelines for responding to public records requests and the conditions for certain exemptions. Each exemption in the statutes has been proposed, publicly debated and voted upon by the Legislature.

Exceptions to the public records law deserve special scrutiny. The deliberative process privilege is a controversial but fundamentally reasonable concept that, if applied on a very limited basis with integrity and an oversight process, can help strike a balance between the public's right to know versus the justification for top executive officials to conduct private communications when debating and formulating policy decisions. The essential idea of the deliberative process privilege is that top-level decision-makers will arrive at better quality decisions if they have some measure of freedom to discuss and argue alternative approaches to policy questions candidly amongst each other without the world listening in to that deliberative process.

In places and circumstances where the privilege is allowed, the deliberative process privilege is often seen as a fair justification for not disclosing certain correspondence and documents. It should apply only to records of deliberations in the pre-decisional phase of policymaking. As commonly seen by various courts and legal observers around the nation, this privilege does not and should not apply to factual material or records of actual decisions. Further, it is a qualified and balanced privilege that should be overturned upon review if sufficient need is shown that the public right to know outweighs the benefit that the privilege might afford the decision-making process.

Even among legal experts there is room for disagreement about the appropriate extent of the privilege and which kinds of government decision-making warrant its use. Critics of the exemption say the public needs to understand how decisions are made and therefore should not be blocked from seeing the decision-making

process in any stage of deliberation. In some states, policymaking memos and draft documents can be kept hidden only until the policy decision is made, at which time they become publicly accessible records. Some states require release of documents after a number of years. Still other states provide permanent protection from disclosure for limited types of records used in the pre-decisional process.

Whatever the system, a case can be made that a complete loss of the deliberative process privilege could stifle creativity and inhibit healthy confrontation among top policymakers, resulting in less successful and less well-formulated public policy. At the same time, a sweeping and unchecked use of this privilege would provide public officials a convenient excuse to shield most anything they choose.

Court views

The privilege has been debated in court cases in many states. It is recognized by the courts as part of the U.S. Freedom of Information Act although the term does not specifically appear in the federal law. Many states have modeled their open records law on the U.S. law, and so many court cases in other states have been affected by jurisprudence on the federal law. In state court cases outside of Louisiana, the deliberative process privilege at times has been denied because the privilege was not specifically granted in law and at other times the privilege has been recognized by the courts even where state laws do not specifically name the concept.

When justified, the privilege in other states is often found to exist as a constitutional mandate for the separation of executive branch powers from other branches. In fact, the privilege has origins in common law. The right of privacy, particularly of private-sector citizens, and the right to petition the government are among the rights in the Louisiana Constitution that could supersede the right to the public's access to open records. The concept of executive privilege is intended to preserve the separation of powers between branches of government and could also be used to prevent the release of documents. These exemptions should be used only when justified by the most fundamental observance of these rights.

The Louisiana courts have not made rulings on the governor's records law because before 2009, there was no access to the vast majority of governor's records and so there were few if any protracted disputes. So what would happen if the 2009 governor's records law (RS 44:5), which contains the deliberative process privilege, were repealed? The Louisiana Supreme Court has recognized a constitutional basis for the legislative branch speech and debate clause and it also has recognized a constitutional inherent powers privilege for the judicial branch. So the court likely would also recognize inherent powers of the executive branch.

The deliberative process privilege comes to Louisiana

The first and only occurrence of the term in Louisiana statutes came in 2009 with the passage of a Senate bill backed by the governor and presented to the legislative committees by the governor's executive counsel. The bill made significant changes to the law regarding records of the office of the governor. Prior to 2009, except for documents pertaining to money or financial transactions, records in the custody of the governor's office were exempt from Louisiana's public records law. They were simply not public records and there was no prohibition against disposal of records at any time.

The new law generally makes the governor's records public unless certain exemptions or privileges apply. These exceptions include materials that could compromise the security of the governor or his family as well as communications between the governor and a spouse or children. The law also exempts "intra-office

communications of the governor and his internal staff," which is defined as the chief of staff, executive counsel, director of policy and employees under their immediate supervision. And, for the first time, the law put up to a six-month freeze on public access to records with budgetary advice provided to the governor by his outside agencies.

Based only on these exceptions, the new law would appear to make all other business communications in and out of the governor's office public documents. Correspondence to and from the governor or his staff with legislators, state department officials, commission members, citizens, the media, contributors and local and federal government officials, all are presumably records now accessible to the public.

This part of the 2009 law represents a dramatic change from the previous law's exclusion of all governor's records except money matters. It has the potential to allow the public far greater access to governor's office records than prior law. PAR's review of public records requests and subsequent responses from the governor's office provided evidence that the 2009 law did indeed result in document releases that would not have happened previously under routine circumstances. (Gov. Blanco voluntarily released many governor's office records after Hurricane Katrina.)

But the new law also allowed an exemption for records "relating to the deliberative process of the governor." The exemption makes no specific mention of staff; the legislative history for the Act makes it clear the exemption is available only to the governor individually and not members of his staff. So the key question became: How broadly will the governor apply this privilege to the documents of his office? Most of the open records exemptions in state law are specific, but here a very subjective exemption had been added to the law. A broad or irresponsible interpretation could include a lot of material. The concern expressed by the law's critics is that the new statute has opened the governor's office records with one hand and closed it with the other hand by introducing a broad deliberative process privilege.

False and misleading justification

The 2009 law has thrust the deliberative process privilege into a Louisiana legal environment that had rarely encountered the concept in state courts. There is no case history of it that is related directly to open records disputes. As a result, there is a giant void in the Louisiana court's guidance on how the privilege should be interpreted.

Two Louisiana appellate court cases mentioning the privilege both address the Legislative Auditor's access to executive agency documents. One was a dispute between the auditor and the Public Service Commission and the other was between the auditor and the state insurance department. These cases were not disputes about open records law or the deliberative process privilege. In both cases, the rulings were decided on other grounds.

The lack of judicial guidance has not stopped state and local agencies in Louisiana from invoking the privilege to deny access to documents and also citing one or both of the court cases above that the agencies allege are in their favor. The case most routinely cited is a Louisiana First Circuit Court of Appeal ruling in 2004 known as *Kyle versus Louisiana Public Service Commission*. This was a separation of powers dispute between Legislative Auditor Dan Kyle, who was in the Legislative branch, and the state utility commission, which is constitutional board within the executive branch. The case was not started by an open records request and was not decided based on open records law. The state Public Records Act is not mentioned. In fact, the ruling

addressed an arcane procedural matter in the case, in which Kyle was seeking PSC records in his role as auditor to determine if the agency was following proper financial and ethical practices.

In their conclusion, the appeals court judges waxed into a discussion of the principle of the deliberative process privilege that had no definitive bearing on their specific ruling. (This issue apparently arose from the "separation of powers" provisions in Article II of the Louisiana Constitution.) They noted that the privilege as recognized in other jurisdictions protects "confidential intra-agency advisory opinions disclosure of which would be injurious to the consultative functions of the government." The reference is basically a suggestion that somewhere and in some circumstances the privilege might exist.

The Appeals Court in the *Kyle* case concluded the trial court erred by not ruling the plaintiff (auditor) failed to follow the proper legal procedure and so the entire proceeding must be dismissed. Thus, the entire appeals court decision dealing with the deliberative process privilege is what courts call "dictum" - or simply a comment which cannot be relied upon for future decisions. (Unusually, the letter of legal advice to the LSU System President recognizes this comment to be dicta, yet the agency asserted the privilege anyway.)

Taken out of context, this remark in the *Kyle versus PSC* case might suggest that a broad inherent exemption for deliberative processes exists in Louisiana, even if not recognized in statute. However, the Louisiana Constitution specifically states that "no person shall be denied the right to . . . examine public documents, except in cases established by law." (See LA. CONST. Art. 12 § 3 1974.) Further, because the Legislature has seen fit to make specific exceptions to the otherwise broad constitutional mandate for openness and transparency, state courts should not seek to expand upon the Legislature's limited exemptions or recognize new exceptions that are not specifically enacted.

This part of the *Kyle versus PSC* case was brought up during discussions leading to the 2009 governor's records bill and since then has been used repeatedly by government agencies to deny records in Louisiana. The agencies have interpreted the *Kyle* language more broadly than warranted by the court ruling, assuming the language has *any* effect at all. This method of evasion is especially inappropriate when coming from agencies outside the governor's office because they are by law supposed to cite specific statutory exemptions, and not just court cases, when they deny public access to records. There is no statute to back them up. Although they have a clear directive under the law to err on the side of public access and not secrecy, they have come to rely upon language in one state appellate court decision, not relevant to the holding, to shield many documents from the public. Such a newly enacted and untested "privilege" for the governor alone should have been implemented conservatively and in a limited manner so as to do the least harm to the right of the public to access records of government.

Harm to the public trust and Louisiana's reputation

The situation has declined rapidly and Louisiana's reputation is soon to follow. Agencies are freely using the deliberative process privilege in an unchecked manner to withhold records, even though the only mention of the privilege in Louisiana law is for the governor only. Correspondence and documents, as they are prepared in various state agencies, are being labeled as confidential via the deliberative process privilege, possibly providing a regular housekeeping measure to later keep potentially large amounts of both routine and critical information secret. Agencies are disregarding clear statutes that mandate disclosure and are denying records that are not even high-level executive decision-making matters. These are the early signs of a dysfunctional open records system, something our state cannot afford.

State agencies are abusing the concept of the privilege in a very fundamental way. Stop and consider how much activity, records, meetings, board and panel votes, conversation and debate go into the deliberations of government. For example, regulatory commissions and the Legislature hold public meetings, revise bills or rules, take votes and debate changes in policy. All of this is deliberative – but that doesn't mean the records associated with those activities are or should be privileged.

Take the Legislature, for example. If we were to label all deliberative activity as a privileged secret, we could simply declare all bills, amendments, meeting minutes and just about everything that goes into making a law as off limits to the public. This would be an absurd and devastating twist on the application of the deliberative process privilege. And yet we are seeing a very similar practice among state and educational agencies in Louisiana. Simply because something is part of a deliberative process does not mean it is privileged. Such a privilege should extend only to certain and limited circumstances and documents.

If this trend is allowed to continue, Louisiana soon will be letting government bureaucracies, both state and local, monitor themselves as to decisions about public access. Minor bureaucrats will be dubbing documents as off-limits to the public. All a government agency will need to do is label a document or type into an email subject line the words “deliberative process privilege” and then dare anyone who thinks otherwise to sue. Documents presumed by an agency to be exempt from the records law might be destroyed at will, with no plan for archiving. The public might never know such records existed even though the documents might have played a significant role in public agency actions. Delays and frustrations in obtaining public documents will inevitably lead to lower levels of public confidence and trust in government leaders.

Oversight

This new emphasis on the deliberative process privilege has not come with a corresponding practice of properly justifying whether the records in question deserve the privilege. For the federal government and for some states that recognize at least some limited deliberative process privilege, a procedure takes place to protect and to balance the interests of both the government executives and the public's right to know. For example, the government agency can provide the requestor or the court with an index of the documents in question and offer reasons why the documents should be concealed. (The Louisiana Legislature has at times used a similar process in addressing information requests.) The court can make decisions based on that review. If a deeper look is required, the court can review the actual documents privately in chambers.

The important point here is that if Louisiana government agencies intend to invoke the deliberative process privilege, then they must accept some form of independent oversight to check when that discretion might be being abused. An expedited third-party review, whether by court or other neutral party, would help keep the balance between the legitimate goals of the deliberative process exception and the countervailing goal of keeping government open and transparent.

Final points

Louisiana has a good foundation of sunshine laws and Louisiana's Legislature by and large over time has tried to keep our state and local government agencies moving in the right direction toward a more open society. Yet history has shown that advocates of public transparency must repeatedly fight to prevent new methods of government secrecy from taking hold and subverting laws for open records and open meetings.

Governments should not attempt to control the flow of information to avoid public scrutiny or to attempt to steer the public debate on policy issues. We must identify erosions of public access and remedy them assertively. We must not accept an environment in which the law applies only to the things that government leaders and bureaucrats say they apply to. Ultimately this is a discussion about democracy, not about the privileges of government employees.

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