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Dukakis Loser In Sjc Ruling
Doris Sue Wong, Globe Staff

The Supreme Judicial Court yesterday rejected a claim of executive privilege by Gov. Michael S. Dukakis and other administration officials to justify withholding agency documents related to the development of Massachusetts' 1986 regulation on foster care placements.

In a decision with potentially far-reaching implications, the state high court also unanimously declined a request by attorneys representing administration officials to create the privilege, saying it was a public policy matter better left to the Legislature to decide. Dukakis, in Worcester to campaign for the presidency, said, "If that's the ruling of the Supreme Judicial Court, we will obviously comply."

The 40 documents ordered released date back to 1985 and include memorandums among Human Services Secretary Philip Johnston and Dukakis and other executive branch staff, drafts of the new regulation, and handwritten notes prepared by Dukakis before announcement of the new policy.

The documents are being sought by for Donald Babets and David Jean, both of Roxbury, to prepare for a suit the two men have filed against Johnston and Social Services Commissioner Marie E. Matava over the placement policy. Dukakis also was named originally as a defendant in the case, but his name was dropped after a judge ruled that he could not be sued for actions he takes as governor.

The suit alleges that the new foster care policy is unconstitutional because it discriminates against persons who are gay or lesbian and single by setting up guidelines that make it nearly impossible for them to become foster parents.

The Dukakis administration adopted the new policy after it was publicly disclosed that Babets and Jean, who were approved by the Department of Social Services as foster parents, are gay. The state removed two young children from the couple's home following the disclosure.

"This is a very wide-ranging and important decision," said Anthony M. Doniger, lead attorney for Babets and Jean. "It is a very clear and unambiguous decision. It says there is no executive privilege.

"To me, the importance of this decision is not just to this case, but a number of other cases pending. But also in a more general case, it is important to democracy, to openness and accountability in government.

"The other interesting thing about this opinion is that the court is saying there is no special protection for the governor. Some people thought they would create a limited protection for the governor, and they even declined to do that."

Johnston, while saying he, too, intended to comply with the court order, said the ruling does not necessarily mean that administration officials will automatically turn over documents in other cases where executive privilege has been invoked.

Kenneth Schwartz, an attorney who serves as chief of staff to Johnston, said, "I think there is little doubt there are implications beyond this case. I think there is little doubt this is a significant precedent, and it has the potential to have a chilling effect on the candor and openness of public officials when they discuss important matters.

"I think the administration at the highest levels will continue to invite and encourage different viewpoints. But individual officials and subordinates) may feel much less free to express their opinions when they know their writings can be aired on the front page of the newspaper within a short time. It's a detriment to the public interest."

Schwartz said it was too early to say whether a bill creating executive privilege would be introduced in the Legislature.

A spokesman for the Department of Social Services referred inquiries to Johnston's office.

Chief Justice Edward F. Hennessey, author of the court's opinion, said Superior Court Judge James P. Lynch Jr., who originally ordered the foster care documents released but stayed the order until a higher court could decide the issue of executive privilege, "correctly ruled that there presently exists no privilege of the type the defendants assert."

Hennessey said the doctrine of separation of powers under the state constitution does not inherently give rise to the executive privilege that had been claimed.

"Had the framers of our government's structure intended to recognize in our Constitution an executive privilege, it is reasonable to expect that they would expressly have created one," Hennessey said.

The high court, Hennessey said, has the power to create new privileges but historically has been reluctant to do so, in the belief it is a task usually better suited to the Legislature.

"We have been especially reluctant to create new privileges on the basis of speculation or conjecture as to the harms which may result from our failure to do so," he said.

The argument by administration officials that lack of executive privilege would chill executive branch discussions on proposed policy, the court said, is "speculative in light of the long history of the commonwealth and the lack of any showing of real harm that has accrued from the absence of the privilege. This contrasts with the plaintiffs' specific and demonstrable need for the requested documents in order to prosecute their action for the vindication of their constitutional and statutory rights, allegedly violated by the defendants."

Doniger said he believes the high court decision is also significant in noting that, under the Freedom of Information Act, documents involving executive branch deliberations on proposed policies are subject to public disclosure once a policy has been adopted.

Conflicting interpretations of the act in past months have led to a stalemate among state officials on the release of certain documents, including those being sought by The Boston Globe concerning Bridgewater State Hospital and by the Worcester Telegram & Gazette concerning the siting of a state prison in New Braintree.

James W. Igoe, supervisor of public records in the Secretary of State's Office, taking a view of the law similar to the court's, has ordered release of documents. However, administration officials, backed by Attorney General James Shannon, have refused to turn over the documents on the ground that documents involving executive branch deliberations were perpetually protected from disclosure under the law.

Stephen Roche, director of public records, in a prepared statement for Igoe, said, "The decision expressly upholds my interpretation of the exemption to the disclosure requirements of the public records law . . . The interpretation by the court allows decision-makers to deliberate without fear of interference by special interests, but provides for public scrutiny of the deliberations once the decision is reached. Today's decision resolves good-faith legal differences among state agencies."

Other court cases that could be affected by the SJC ruling include a suit filed by residents of New Braintree to force administration officials to release documents involving the decision to locate a new prison in the town on a 782-acre plot of land purchased by two developers, one of whom is an acquaintance of and political contributor to Dukakis. The attorney representing the town could not be reached for comment yesterday.

Another case that could be affected is a suit filed against administration and Bridgewater State Hospital officials in connection with conditions in the hospital, where several patients have died under questionable circumstances in recent years.

Roderick MacLeish Jr., an attorney who brought the Bridgewater suit, said as a result of the SJC ruling he was considering reviving his request for "volumes of materials" that was blocked by claims of executive privilege.

"This is great news," MacLeish said. "This is very reassuring news. So often the government hides behind the shield of government privilege. For anybody handling cases against the government, particularly regarding the quality of care in institutions, this is an invaluable tool.

"So it's a very helpful decision and a very unusual decision. Most courts have recognized the existence of government privilege. As a result, I think we will see a shift of cases into state courts, because this ruling now makes it easier to get information from the government in state courts than federal courts."

Executive privilege has been recognized by federal courts and by at least four state supreme courts. In total, Doniger said, about a quarter of the states have created the privilege either through court rulings or by state law.