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*Block an Investigation? Bar Would Be High, Experts Say*

*By Sam Roberts*

New York's Legislature has wide latitude to investigate state affairs using its subpoena powers, particularly if the lawmakers define their mission as seeking a systemic solution to a recurring gap in the law, a number of legal experts and historians said yesterday.

But, those experts said, if the State Senate subpoenas members of Gov. Eliot Spitzer's staff and they resist, there is not a great deal of precedent for resolving a potential constitutional showdown. "There are relatively few occasions when the Legislature has taken on the governor directly," said Robert B. Ward, the author of "New York State Government," a primer just published by the Rockefeller Institute of Government in Albany.

Broadly speaking, claims of executive privilege have generally been upheld only when the executive could make a compelling case that disclosures of confidential information would harm the public interest, not merely that the official would be embarrassed.

In 2004, Gov. George E. Pataki's administration refused to comply with a legislative committee's subpoena of documents involving a controversial contract to develop property along the Erie Canal.

After Assemblyman Richard L. Brodsky, a Westchester Democrat, raised questions about the contract, Mr. Spitzer, who was the attorney general at the time, investigated. Documents relating to the contract were turned over to Mr. Spitzer, but were not made available to Mr. Brodsky or the public. Mr. Spitzer found no criminal wrongdoing but delivered

a scathing indictment of favoritism and ethical lapses in how the contract was awarded.

Mr. Brodsky then subpoenaed the documents. Mr. Pataki's lawyers argued that disclosure would have a chilling effect on "candid, objective and even blunt or harsh opinions" from his staff and would paralyze the executive branch. But a State Supreme Court justice in Albany rejected that claim.

"Inasmuch as government is the people's business, it necessarily follows that its operation should at all times be open to public view," Justice Joseph R. Cannizzaro wrote.

The Pataki administration dropped a promised appeal, insisting that the principle of executive privilege remained undiminished.

In other cases involving claims of executive privilege, the courts generally have found that a "public interest privilege" exists that justifies confidentiality in cases in which disclosure would be harmful not to the executive, but to the public.

That privilege is not considered absolute, experts said. The courts have described it less as a badge of immunity in office than as a means to aid in the effective functioning of government.

"The law of New York is not categorical or clear about how it would resolve this type of dispute," said Professor Stephen E. Gottlieb of Albany Law School.

Robert J. Freeman, executive director of the state's Committee on Open Government, said that when people file requests for documents under the state Freedom of Information Law, the Court of Appeals has indicated that the burden is on the executive to show that that release would be harmful to the public.

But he said that in cases involving subpoenas or discovery proceedings, the governor and his staff

might have the right to keep certain internal deliberations confidential.

“I have always believed that privilege involved the ability of the executive to withhold records when it could be demonstrated that, on balance, disclosure would be detrimental to the public interest,” Mr. Freeman said.

A report this week by Attorney General Andrew M. Cuomo concluded that Mr. Spitzer’s staff had misused the State Police to gather information about State Senator Joseph L. Bruno’s use of state vehicles on trips that included both political and legislative events. Mr. Bruno, the Senate majority leader, is the state’s most powerful Republican.

Mr. Spitzer has maintained that he was misled by staff members, two of whom submitted sworn statements to the attorney general’s office but refused to be interviewed by his investigators. Mr. Bruno all but said yesterday that the Senate would pursue its own investigation, adding: “We can subpoena the governor, anybody.”

But Christine Anderson, the governor’s press secretary, insisted that the Senate “lacks the constitutional authority to conduct investigatory hearings into the internal operations of the governor’s office.”

To which John E. McArdle, Mr. Bruno’s spokesman, suggested that the governor’s office must have something to hide. “The fact that they’re refusing to testify speaks volumes,” he said.