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SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

CHRISTINE O. GREGOIRE, in her official capacity as Governor of the State of Washington,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

The issue in this case is whether the governor of the State of Washington may claim a qualified executive privilege, grounded in the separation of powers under the Washington Constitution, as an exemption under the Public Records Act (PRA), RCW 42.56.

Federal and state courts across the country have recognized a constitutionally-based qualified executive privilege inhering in the president and in state governors. Like the parallel privileges enjoyed by the legislative and judicial branches, this qualified executive privilege rests on the separation of powers among three co-equal branches of government, and the need for each branch to have sufficient space to carry out its constitutional functions and duties. The privilege serves a public interest in the effective discharge of a governor's constitutional duties by ensuring open and frank discussions and deliberations in executive decisionmaking and policymaking.

Consistent with case law, the governor does not assert any absolute right to determine which documents fall within the privilege. Rather, a claim of executive privilege should be assessed using the three-part test established as part of the privilege by the United States Supreme Court and in subsequent state court decisions. That test establishes appropriate presumptions and balancing to ensure that the governor's considered

assertion of executive privilege is given the deference appropriate to the constitutional officer vested with the "supreme executive power of this state," Const. art. III, § 2, while also recognizing that specific circumstances may arise in which justice requires that the privilege be limited or rejected as to particular documents.

The governor is not challenging the constitutionality of the PRA or seeking immunity from it. She has responded to Mr. West's records request consistent with the requirements of the Act, claimed a constitutional privilege recognized in federal and state courts across the country, and willingly submitted the matter to the courts for determination. The governor asks this Court to hold that a constitutionally-based qualified gubernatorial executive privilege exists in Washington and is incorporated into the PRA as an "other statute" under RCW 42.56.070(1).

The ancillary issues raised by Mr. West either have no basis in law or fact or were not preserved by him for appeal, and he should not now be permitted to return to the superior court to litigate those issues.

II. STATEMENT OF ISSUES

1. Whether the governor of the State of Washington may claim a qualified executive privilege, grounded in the separation of powers under the Washington Constitution, as an exemption from mandatory production under the Public Records Act under the "other statute"

exemption of RCW 42.56.070(1).

2. Whether a challenge to the governor's assertion of qualified executive privilege should be evaluated using the three-part test established as part of the privilege by the United States Supreme Court, as other state courts have done.

3. The governor having asserted executive privilege with specificity, whether Mr. West has preserved any other issues for appellate review.

III. STATEMENT OF THE CASE

The Proceedings

On September 13, 2010, Mr. West delivered to the governor's office a complaint asserting that executive privilege cannot be claimed as an exemption under the PRA. CP 3, 566, 569. He served his complaint without having reviewed or arranged to review or copy the records and privilege log that had been produced in response to his public records request. CP 566. Mr. West did not inspect the records and privilege log until September 27, 2010, which was more than three weeks after he was notified they were available, two weeks after he served his complaint, and three days after he filed it with the court.[1] CP 566-67, 1005. The

[1] Mr. West now asserts he never received the September 3, 2010 letter. Brief at 8. As discussed more fully in the Argument, Section C, of this Brief, that assertion is not credible.

complaint contains no allegations regarding any of the records that were produced or listed on the exemption log. CP 3-6. The complaint contains allegations regarding the Secretary of State and "WSAC", presumably the Washington Association of Counties, that have no apparent relevance to Mr. West's request. CP 5, 6. The complaint seeks a ruling that the executive privilege exemption does not apply to the PRA, that generally records requested should be disclosed, and that costs and penalties should be awarded. CP 6.

When Mr. West personally paid for and picked up a copy of the records from the governor's office on September 27, 2010, he received an exemption log for those records that were withheld or redacted. CP 566-67, 575, 601. Narda Pierce, Counsel to the Governor, had prepared a letter with additional explanation of the executive privilege exemption that was to be provided to Mr. West with the exemption log. CP 567, 603-04, 610. Mr. West did not receive a copy of that letter when he picked up the records, so the letter was mailed to him September 29, 2010. CP 567, 606.

On March 7, 2011, Mr. West filed a motion to show cause, without briefing. CP at 11. Six weeks later, on April 20, 2011, he filed briefing and noted the matter for a hearing. CP 520. A response memorandum, declarations, and exhibits were filed on behalf of the governor. CP 1024-45, 564-606, 607-31. At the hearing on May 6, 2011, Mr. West requested

a continuance, and the matter was set over. Docket # 29. Both parties then filed supplemental briefing. CP 639, 1046. The merits hearing was held on June 17, 2011, and on June 23, 2011, the superior court signed a Final Order Denying Plaintiff's Motion to Show Cause and Dismissing Case with Prejudice ("Order"). CP 1004-09.

In summary, the Court ruled that as a matter of law the governor may assert an executive privilege, grounded in the separation of powers of the Washington Constitution, as an exemption to the PRA. CP 1007. The superior court further ruled that, in light of the governor's specific assertions of the privilege, Mr. West had presented no basis to overcome the presumption of the privilege. CP 1008. The superior court determined that there was no other issue to be decided, that the governor had not denied Mr. West the opportunity to inspect or copy a public record in violation of the PRA, and that Mr. West was not entitled to penalties or any other relief. CP 1007, 1008.

The Request and the Records

Mr. West's request asked for "all of the records currently being withheld from public disclosure by the office of the Governor under color a [sic] claim of executive privilege, from 2007 to present, to include all 35 requested described [sic] in the EFF policy letter of January 13, 2009, (attached)". CP 565, 569. Melynda Campbell, Legal Affairs Coordinator

and Assistant to Counsel to the Governor, responded to Mr. West within five business days, informing him that records would have to be retrieved from archives and reviewed, and providing an estimated date when she thought responsive records could be produced. CP 565, 573.

Ms. Pierce, as Counsel to the Governor, personally reviewed each record retrieved by Ms. Campbell in response to Mr. West's request. CP 566, 608. Among her many responsibilities, Ms. Pierce was charged with closely reviewing each record to make determinations and recommendations to the governor on whether any record or portion of a record is exempt under the PRA, including whether any privilege applies. CP 607, 608. Each record requested by Mr. West had previously been withheld based on an assertion of executive privilege. Because the privilege may be waived, however, it was incumbent upon Ms. Pierce to review the records in order to make recommendations regarding waiver. CP 608-09. The assertion of the privilege can depend on circumstances that might not be readily apparent from the record and in certain instances were not known to Ms. Pierce. CP 609-10, 664-65. Consequently, she consulted with the governor's policy advisors who were knowledgeable about the issues discussed in the records in order to formulate her recommendations. CP 609-10. In addition, in order to make sure her determinations and recommendations were consistent throughout, she

completed her entire review of the records before they were produced to Mr. West. CP 609.

Mr. West was informed by letter dated September 3, 2010, that 472 of 703 pages of records were available for inspection or copying, and it instructed him how to arrange to inspect the records or pay for a copy to be mailed. CP 566, 597. The letter indicated that some records would be withheld based on privilege. *Id.* An exemption log was prepared that identifies each document withheld or redacted by page number, date, author, and recipient. CP 566, 575, 610. The log also contains a description of the substance of each document and, in light of that description, the privilege or exemption that applies. *Id.*

Ms. Pierce also prepared a letter to Mr. West explaining in further detail the nature and application of executive privilege. CP 567, 603, 610. In the end there were thirty-three (33) unique records subject only to a claim of executive privilege withheld, and they are memoranda or other communications with senior policy advisors and senior executive staff sent to or from the governor or prepared specifically for the governor's consideration. CP 610. Based upon an individualized review of the documents, it was determined that the governor would assert privilege consistent with her role and responsibility as the chief officer of the executive branch of government. CP 610-11.

The governor's office discovered additional responsive records in April 2011. CP 565. Melynda Campbell, assistant to Ms. Pierce, generally was responsible for processing public records requests. CP 564. When Ms. Campbell originally collected records responsive to Mr. West's request, she forgot to include records that might have been withheld in installments responding to multiple, broad requests made by Luke Esser on behalf of the Washington State Republican Party (the "Esser requests"). CP 565, 662-63. The governor's office had provided approximately 40,000 pages of records in installments in response to those requests. CP 565, 663. Some of the installments included exemption logs that identified certain records that were being redacted or withheld based on executive privilege. CP 565, 663-64. Because of the enormity of the Esser requests, other staff not normally assigned to respond to public records requests had been assigned to assemble and review those records. CP 663-64.

These additional records had been subject to a claim of executive privilege and other exemptions and, therefore, were exempt from production under the PRA. CP 664. However, Ms. Pierce once again conducted a thorough review, as described above, of all the additional records in order to make determinations regarding exemptions and recommendations to the governor regarding possible waiver of executive

privilege. CP 664-65. As a result of Ms. Pierce's review, the privilege was waived as to some records, additional records were produced to Mr. West, and a detailed second exemption log was provided to him. CP 664-65, 667.[2] Of the records withheld, fifteen (15) were subject only to a claim of executive privilege. CP 664.

IV. ARGUMENT

A. Executive Privilege For Gubernatorial Communications Is Grounded In The Constitutional Separation of Powers

The principle of separation of powers was incorporated into the Washington State Constitution in 1889. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Like the United States Constitution and numerous state constitutions, the principle is inherent in the structure of government the Washington Constitution established:

> One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other. Washington's constitution, much like the federal constitution, does not contain a formal separation of powers clause. Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citations and footnote omitted). *Accord Brown v. Owen*, 165 Wn.2d 706, 718, 206

[2] Mr. West apparently filed all of the records he received from the governor and designated them as Clerk's Papers at CP 47-519, 700-997.

P.3d 310 (2009).

The principle of separation of powers has been described as "the dominant principle of the American political system." *In re Salary of Juvenile Dir.*, 87 Wn.2d 232, 240, 552 P.2d 163 (1976), quoting Gordon S. Wood, *The Creation of the American Republic, 1776-1737*, at 449 (Norton Library ed. 1969). It is reflected in the structure of the federal government and of every state in the nation.[3] Separation of powers creates a "clear division of functions among each branch of government," recognizing that "each branch of government has its own appropriate sphere of activity." *Hale*, 165 Wn.2d at 504. "It ensures that the fundamental functions of each branch remain inviolate" by strongly limiting the power of one branch to interfere with the exercise of another branch's functions, while allowing the branches of government to remain "partially entwined in order to maintain an effective system of checks and balances, as well as an effective government." *Id.* (citation and internal quotes omitted). When one branch invades the constitutional province of another branch, the damage accrues to the branch invaded. *Id.*, citing *Carrick*, 125 Wn.2d at 136.

Accordingly, as a matter of separation of powers, each branch of government must have some internal space to ponder its business free from

[3] Although state-by-state variation is another hallmark of our nation's governmental structure, all states have established a system of three co-equal branches of government, with functionally distinct duties.

invasion by the other branches. To carry out the judicial function, judges must be free to deliberate and conference in confidence with each other and with their clerks and staff. *See, e.g.*, *Beuhler v. Small*, 115 Wn. App. 914, 919-20, 64 P.3d 78 (2003) (judges' notes are not public; "[d]isclosure of such notes would intrude upon a judge's subjective thoughts and deliberations and would actively discourage the judge from giving advance thought to a particular sentence"); *In re Certain Complaints*, 783 F.2d 1488, 1519-20 (11th Cir. 1986) ("Judges, like Presidents, depend upon open and candid discourse with colleagues and staff to promote the effective discharge of their duties. . . . Confidentiality helps protect judges' independent reasoning from improper outside influences [and] safeguards legitimate privacy interests of both judges and litigants."), *cert. denied sub nom. Hastings v. Godbold*, 477 U.S. 904, 106 S. Ct. 3273, 91 L. Ed. 2d 563 (1986). This Court presumably would reject an attempt by the legislature to require the justices' conference following oral argument to be conducted in public, just as it would reject any proposed application of the PRA that would require judges' notes and draft opinions to be retained and made publicly available upon request.

Similarly, legislators must be free to talk candidly and confidentially among themselves and with staff in caucuses and offices. *See Gravel v. United States*, 408 U.S. 606, 616-17, 92 S. Ct. 2614, 33 L. Ed. 2d 583

(1972) (legislative privilege includes legislative staff when performing core legislative functions, because legislators cannot perform their numerous and complex legislative responsibilities without assistance from those who act on their behalf). In *Brown v. Owen*, 165 Wn.2d at 718-727, this Court applied the separation of powers as a constitutional limit on courts' power to interfere in the internal proceedings of the Legislature.[4]

The same constitutional principle that protects the confidentiality of judicial deliberations and internal legislative communications from interference by the other branches of government also supports a qualified executive privilege for the governor as she communicates with her advisors and staff. In a separation of powers analysis, it is the governor who is the constitutional officer vested with supreme executive power under Const. art. III, § 2, and it is the governor who is vested with constitutional stature coequal with the judicial and legislative branches.[5]

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[4] Mr. West observes that the Washington Constitution establishes a legislative privilege, but not an executive privilege. Brief at 20. Article II, § 17 of the state Constitution is functionally identical to the Speech or Debate Clause of the federal Constitution and, as such, is a product of 17th century history: King Charles I's seizure of legislative papers of members of Parliament in an effort to prosecute them for speeches and reports critical of the Crown. *See* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1130 (1973). Significantly, the legislative privilege recognized in *Brown* rests on separation of powers and is substantially broader than the privilege in article II, § 17. In any event, the presence of article II, § 17 does not demonstrate the absence of a judicial deliberation privilege or a qualified executive privilege.

[5] Mr. West suggests that because article III, § 24 expressly directs that the governor "keep the public records, books, and papers relating to" her office "at the seat of government", but does not provide that those records may be privileged, that a gubernatorial executive privilege cannot exist. Brief at 20. This section of the constitution merely directs

To be clear, such privileges are not "powers" of government, but an immunity of one branch of government from the powers of another branch. The privileges are not coercive powers one branch of government wields against another, but rather defensive shields that flow from the separation of powers and the autonomy of each branch within its sphere.[6]

No appellate court in Washington has yet recognized executive privilege.[7] However, the fact that this case raises issues of first impression says nothing about how those issues should be decided. After all, as explained below, it was not until 180 years after George Washington first asserted a presidential executive privilege that the United States Supreme Court decided, as a matter of first impression, that a qualified presidential executive privilege is grounded in the separation of powers implied in the tripartite structure of government established in the United States Constitution. Even a significant constitutional issue must await the proper case to be considered.

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where the governor and other elected executive officials must maintain their official papers and not which of those papers may be privileged. The fact that the constitution provides such a specific directive may be in recognition of the authority elected executive officials may exercise over the papers relating to their respective offices.

[6] Accordingly, Mr. West's discussion of enumerated powers and implied powers misses the mark. Brief at 19-20.

[7] In 2006, a superior court ruled that executive privilege exists in Washington, resting its ruling explicitly on the separation of powers in the state constitution. *Washington State Farm Bureau Fed'n v. Gregoire*, Snohomish Cy. Superior Ct. No. 05-2-10166-9, Court's Oral Decision (Jan. 13, 2006). On direct appeal, this Court found it unnecessary to address the privilege after it resolved the case in favor of the state. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 298 n.20, 174 P.3d 1142 (2007).

The governor's assertion of a qualified executive privilege rooted in the constitution is neither novel nor exceptional. Prior Washington governors have claimed the privilege in response to records requests. CP 611, 613-31. And, as explained below, both federal and state courts across the country have recognized a qualified executive privilege rooted in the constitutional separation of powers.

Consistent with those federal and state cases, the governor has asserted executive privilege only for specific documents or information communicated to or from the governor or prepared for the governor's consideration by her advisors and staff for use by the governor in making decisions and carrying out her constitutional functions and duties, or that contain comments, questions, or directions from the governor to her senior policy staff regarding those decisions and functions. CP 575-95, 610, 667-96. Those documents include or reflect recommendations, advice, discussions, or deliberations involving the decisionmaking and policymaking functions for which the governor is constitutionally responsible. *Id.*

1. Presidential Executive Privilege Is "Inextricably Rooted In The Separation Of Powers Under The Constitution"

A qualified privilege to maintain the confidentiality of communications to or from the president long has been recognized. President George Washington refused to provide documents to Congress on

several occasions, asserting a separation of powers rationale under which the president could withhold material to protect the public interest. In response to a request from Congress, he explained:

> [I]t is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

Soucie v. David, 448 F.2d 1067, 1082 (D.C. Cir. 1971) (Wilkie, J., concurring) (citation omitted). Virtually every president since Washington has exercised some form of what is now referred to as executive privilege. *See* Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 Minn. L. Rev. 1069, 1070 (1999).

As early as 1807, Chief Justice John Marshall had occasion to address presidential executive privilege. Sitting as a trial judge in *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (14,694), Marshall ordered President Thomas Jefferson to produce a letter subpoenaed in the treason trial of Vice President Aaron Burr. Marshall specifically acknowledged separation of powers concerns, cautioning that where the president has "sufficient motives" for refusing to produce a particular paper to a court, "the occasion for demanding it ought, in such a case, be very strong, and to be fully shown to the court before its production could be insisted on." *Id.* at 191-92.

Archibald Cox, the first special prosecutor appointed to investigate the Watergate scandal involving the Nixon presidency, identified two primary reasons supporting executive privilege:

> (1) to encourage aides and colleagues to give completely candid advice by reducing the risk that they will be subject to public disclosure, criticism and reprisals; (2) to give the President or other officer the freedom "to think out loud," which enables him to test ideas and debate policy and personalities uninhibited by the danger that his tentative but rejected thoughts will become subjects of public discussion.

Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1410 (1974). These same reasons were identified in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), in which the Court held unanimously that executive privilege for the president is rooted in the constitutional separation of powers, and these reasons have been reaffirmed in numerous state court decisions recognizing a parallel executive privilege for governors.

In *Nixon*, the president argued for an executive privilege that was absolute, subject solely to his discretion. The Court rejected his argument, but recognized that a qualified executive privilege for communications to and from the president is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. As Professor Cox noted, there was "nothing startling or even very novel" in the Court's recognition of a

qualified executive privilege, 122 U. Pa. L. Rev. at 1408, but it is significant that the Court, for the first time, explicitly grounded the privilege in the constitutional separation of powers.

The Court in *Nixon* summarized the President's interest in confidentiality of conversations and correspondence:

> A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Nixon, 418 U.S. at 708. While acknowledging that "[t]he President's need for complete candor and objectivity from advisors calls for great deference from the courts," the Court also recognized that the president's "broad, undifferentiated claim of public interest" in confidentiality may conflict with other values including, particularly, "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 706-07. The Court concluded that when the President claims only a "generalized interest in confidentiality" as the basis for asserting privilege as to subpoenaed materials sought for use in a criminal trial, that claim cannot prevail over "the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a

pending criminal trial." *Id.* at 713.[8]

The Court explained that, in the case before it, it was balancing only the conflict between a "generalized interest in confidentiality" and "the constitutional need for relevant evidence in criminal trials." *Nixon*, 418 U.S. at 712 n.19. It left open the question whether some interest other than the need for evidence in a criminal trial could overcome the qualified executive privilege it had recognized, and established a three-part test to be used in making that assessment.[9]

2. State Courts Have Grounded Gubernatorial Executive Privilege In The Constitutional Separation Of Powers

Like the Supreme Court, state courts addressing a governor's claim of privilege have held consistently that there is a qualified executive privilege for gubernatorial communications rooted in state constitutional separation of powers.

In *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (Md. 1980), for example, the Maryland Court of Appeals recognized a constitutionally-based executive privilege as part of Maryland law.[10] A plaintiff in a civil case subpoenaed a confidential report prepared for and at the order of the

[8] The Court described this need for evidence in criminal prosecutions as necessary to "[t]he very integrity of the judicial system and public confidence in the system," and to "ensure that justice is done." *Nixon*, 418 U.S. at 709.

[9] That three-part test is discussed in Section B below.

[10] The Court of Appeals is Maryland's highest court. *See* *http://www.courts.state.md.us/coappeals/* (last visited Mar. 6, 2012).

governor, who asserted executive privilege to protect the report from discovery and in camera review. Referencing prior cases and the principles underlying the constitutional separation of powers, the court observed that "the Governor bears the same relation to this State as does the President to the United States" and "generally the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President." *Id.* at 556. The court held that a qualified executive privilege exists in Maryland for communications to and from the governor, concluding (1) there is a public interest in protecting the confidentiality of candid intragovernmental advisory or deliberative communications, as articulated by Chief Justice Marshall in *Burr*, by Professor Cox in his law review article, and in subsequent federal and state cases; and (2) that the privilege is derived from constitutional separation of powers, as explained in *Nixon*. *Id.* at 556-62. The constitutional principle of separation of powers limits the judiciary's reach into "the conclusions, acts, or decisions of a coordinate branch of government made within its own sphere of authority." *Id.* at 556.

In *Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368 (Vt. 1990), the Vermont Supreme Court recognized the existence of a gubernatorial executive privilege in that state. State agency heads asserted executive privilege as an exemption under the Vermont Access to Public Records

statute for communications made directly to or from the governor's office. *Id.* at 633 n.3. The court noted that "[f]ederal and state courts have been emphatic and nearly unanimous in supporting the existence of some species of executive privilege for presidents and governors who seek to maintain the privacy of documents relating to the formulation of policy." *Id.* at 635. Quoting *Nixon*, the court described the privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers." *Id.* at 636. It held that "[b]oth the constitutional and common-law roots of the privilege strongly require its recognition in Vermont." *Id.*

The court in *Killington* commented on the imprecise language sometimes used to describe the privilege. It responded to that imprecision by carefully describing the constitutionally-based executive privilege it recognized as covering "communications to or from or reports intended for the governor," and it distinguished executive privilege from the attorney work-product exception, the deliberative process privilege, the predecisional privilege, and other similar privileges and exemptions found in public disclosure statutes. *Killington*, 153 Vt. at 633 n.3. The court explained that executive privilege "protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security." *Id.* at 636, quoting *Nero v. Hyland*, 76 N.J. 213, 225-26, 386 A.2d 846, 853 (1978).

In *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 848 N.E.2d 472 (2006) (*Dann* I), a state senator filed public records requests for certain weekly reports prepared for the governor.[11] The Ohio Supreme Court recognized a qualified executive privilege protecting communications to or from the governor that were made "for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking." *Id.* at 377. The court discussed the rationale set forth in *Nixon* and held it applies with equal force to the chief executive of a state: "Recognition of a qualified gubernatorial-communications privilege advances the same interests advanced by the analogous presidential privilege, including the 'public interest in candid, objective, and even blunt or harsh opinions' in executive decisionmaking." *Id.* at 376, quoting *Nixon,* 418 U.S. at 708. Like the Court in *Nixon*, the Ohio Supreme Court held that the privilege is grounded in the separation of powers. *Id.* at 375-76.[12]

In *Nero v. Hyland*, 76 N.J. 213, 386 A.2d 846 (1978), an unsuccessful applicant for gubernatorial appointment filed a public records

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[11] As in Washington, Ohio's Public Records Act is "construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records." *Dann* I, 109 Ohio St. 3d at 368 (citations and internal quotes omitted).

[12] The Ohio Supreme Court explained that executive privilege is for the benefit of the public, not the individual holding the office of governor:

> The people of Ohio have a public interest in ensuring that their governor can operate in a frank, open, and candid environment in which information and conflicting ideas, thoughts, and opinions may be vigorously presented to the governor without concern that unwanted consequences will follow from public dissemination.

Dann I, 109 Ohio St. 3d at 376-77.

request for a copy of an investigative report regarding the applicant prepared for the governor. The New Jersey Supreme Court upheld the governor's refusal to provide the report:

> [T]he Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function. This power is analogous to the qualified constitutionally-based privilege of the President, which is "fundamental to the operation of government and inextricably rooted in the separation of powers . . . ."

Id. at 225, quoting *Nixon*, 418 U.S. at 708. The court also held that a qualified privilege serves a "vital public interest" in effective executive decisionmaking by "promoting the effective discharge of these constitutional duties while ensuring that, in appropriate circumstances, disclosure of the privileged material will be forthcoming." *Id.* at 226.

In *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska 1986), as part of discovery in a defamation case, an unsuccessful applicant for gubernatorial appointment sought production of the governor's appointment file, which included letters from private citizens regarding the potential appointment. The governor claimed executive privilege. The Alaska Supreme Court held there is such a privilege:

> [O]ther state courts have held that a governor, in the discharge of official duties, is entitled to an executive privilege analogous to the President's. We agree with this view and conclude that the public policy rationale upon which the Supreme Court relied in *United States v. Nixon* is equally applicable to our state government.

Id. at 623. The court declined to extend the privilege to unsolicited letters from members of the public, but it readily applied the privilege to internal communications to and from the governor, relying in part on Professor Cox's articulation of the reasons underlying the privilege (to encourage aides and colleagues to give candid advice, and to allow the President or governor "to think out loud"). *Id.* at 624-25. The privilege rests on the separation of powers under the Alaska Constitution.[13]

In *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. Ct.), *appeal dismissed*, 670 A.2d 1338 (Del. 1995), a plaintiff invoked the Delaware Freedom of Information Act to compel the governor to disclose records concerning prospective nominees for a vacancy on the Delaware Supreme Court.[14] The court found that state courts "have been nearly unanimous in holding that a governor, in the discharge of official duties, is entitled to an executive privilege," which serves a "vital public interest . . . in the effective discharge of a governor's constitutional duties." *Id.*, 659 A.2d at 783. The court found a qualified executive privilege in Delaware, rooted in the state constitutional separation of powers. *Id.* at 782.

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[13] *See Capital Info. Group v. Office of the Governor*, 923 P.2d 29, 35 (Alaska 1996) ("In deciding *Doe*, we first noted that exceptions to the public records statute's disclosure requirements are to be narrowly construed. We then adopted the executive privilege as a privilege required under the Alaska Constitution's Separation of Powers Doctrine . . . ." (citation omitted)).

[14] Like Washington's Public Records Act, the Delaware Act serves the policy that "public entities, as instruments of government, should not have the power to decide what is good for the public to know." *Guy*, 659 A.2d at 780.

In *Nixon*, the Supreme Court found a qualified executive privilege for communications to and from the president. It appears that every state court asked to recognize a parallel qualified executive privilege for communications to and from the governor of a state has done so. All of these courts have grounded the privilege in the constitutional separation of powers that is fundamental to our form of government. Precisely the same constitutional principles apply in Washington. Precisely the same public interest in proper functioning of each branch of government is present in Washington. Precisely the same reasons that have justified the recognition of executive privilege in other states justify the recognition of executive privilege in Washington. This Court should declare that there exists in Washington a qualified executive privilege that protects documents or information communicated to or from the governor or prepared at the governor's direction or for her consideration involving the decisionmaking and policymaking functions for which the governor is constitutionally responsible.

3. State Court Decisions Recognizing Gubernatorial Executive Privilege Are Sound Precedent For This Court

The state court decisions discussed in the prior section are consistent in one fundamental respect: when addressing a governor's assertion of executive privilege, each one held that there is a qualified

executive privilege rooted in state constitutional separation of powers. They all reached the same conclusion, despite differences in state constitutions and, where applicable, state public disclosure statutes.

a. This Court's Constitutional Interpretation Is Not Controlled By Legislative Policy

Mr. West argues that there can be no public interest justification for executive privilege in Washington because the PRA has established a strong public policy of transparency. Brief at 36-37. The governor does not dispute the strong public interest in open government reflected in the PRA; she subscribes to and affirms that interest. But the PRA has never attempted to make transparency absolute. The legislature has enacted scores of exemptions from mandatory production. Some of these exemptions are based on traditional areas of privacy, such as attorney-client privilege, while others reflect more modern concerns, like protecting against identity theft or access to computer codes. As discussed below, the "other statutes" provision in RCW 42.56.070(1) allows for additional exemptions. It makes sense that the legislature would begin with a strong presumption of public access to records and then balance that presumption by enacting exemptions that reflect other important policy and legal interests.

More fundamentally, the Court should not rely on statements of

legislative intent to define the existence and scope of constitutional privileges. If it is accepted that the courts or the legislature require some confidentiality to preserve their constitutional spheres of responsibility from interference by the other branches, it also should be accepted that the governor has the same requirement, resting on the same constitutional separation of powers justification.

b. Existing Public Records Exemptions Do Not Adequately Substitute For A Qualified Executive Privilege

Mr. West argues that the PRA sufficiently accommodates sensitive deliberations, citing RCW 42.56.280 (preliminary drafts, etc.), RCW 5.60.060(2)(a) and RCW 42.56.290 (attorney-client communications and work product), and RCW 42.56.420 (terrorism and state security). Brief at 29-30. Had the governor found those exemptions sufficient to protect the documents at issue here, she would have relied on those exemptions, and this case would not be before this Court. The governor reasonably determined the exemptions in the PRA were not sufficient to provide the confidentiality necessary to carry out her constitutional duties as chief executive of the state.

As one example of insufficiency, this Court has stated that the exemption for preliminary drafts, notes, recommendations, and intra-agency memorandums in RCW 42.56.280 ends when a final policy

decision is made. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994) (*PAWS*) (once policies or recommendations are implemented, the exemption no longer applies).[15] Because a major statewide policy decision routinely involves iterative and cumulative decisions, multiple parties, extended discussions and negotiations, and repeated compromise, it often is exceedingly difficult to determine when a major statewide policy decision has been implemented so as to apply RCW 42.56.280. On what date have negotiations concluded regarding the fate of the Alaska Way Viaduct? On what date was the governor's policy determination implemented regarding the form and desirability of legislation addressing medical marijuana—or any legislation that addresses a subject with successive bills over several legislative sessions?[16] Even if the date of a final decision could be determined, the public interest in allowing the governor to receive candid recommendations and advice does not uniformly cease on that date; public disclosure may markedly interfere with the governor's ability to undertake

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[15] As originally understood by this Court, the exemption ceases to apply only to advice and recommendations actually implemented as policy. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978). The parameters of the exemption as delineated in *PAWS* may be unintended, since the Court allowed the "pink sheets" related to unfunded grant proposals to remain subject to the exemption, and since a bright line cutoff of protection for all pre-decisional deliberative communications is not supported by the policies animating the exemption.

[16] By way of example, on January 16, 2012, legislators introduced Senate Bill 6265 to address subject areas affected by the governor's veto of certain provisions in 2011 medical marijuana legislation.

the additional negotiation and compromise that may be necessary to fully implement the decision.[17]

c. Each State Court Decision Recognizing Executive Privilege Grounded The Privilege In State Constitutional Separation Of Powers

Mr. West asserts that some of the states recognizing a gubernatorial executive privilege have done so in name only by applying some form of deliberative process privilege. Brief at 33-35. However, as shown above, each of those states explicitly grounded gubernatorial executive privilege in state constitutional separation of powers.[18] This is the case even in states, such as Washington, where there is no express

[17] The exemption in RCW 42.56.280, as construed by this Court, would prove similarly inadequate to protect judicial deliberations if the PRA were applied to the courts. Law clerk memos, bench memos, draft opinions, and judges' notes regarding a decision or ruling would have to be produced upon request as soon as the decision or ruling is issued, despite the potential harm to the judicial decision-making process.

[18] "[T]he Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function. This power is analogous to the qualified constitutionally-based privilege of the President, which is fundamental to the operation of government and inextricably rooted in the separation of powers." *Nero*, 76 N.J. 225 (internal quotes omitted).

"In light of the reasons underlying the privilege, and considering the express separation of powers provision in Article 8 of the Maryland Declaration of Rights, we do recognize as part of the law of this State the doctrine of executive privilege essentially as set forth in the above-cited cases." *Hamilton*, 287 Md. at 562.

"Both the constitutional and common-law roots of the privilege strongly require its recognition in Vermont." *Killington*, 153 Vt. at 636.

"The constitutional basis for the executive privilege stems from the doctrine of separation of powers." *Guy*, 659 A.2d at 782.

"The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government. The gubernatorial-communications privilege protects the public by allowing the state's chief executive the freedom that is required to make decisions." *Dann* I, 109 Ohio St. 3d at 376 (footnote omitted).

separation of powers provision in the constitution.[19] Moreover, in states such as Maryland and Vermont, where the constitution contains an express separation of powers provision, the states' supreme courts relied on federal separation of powers analysis, finding it persuasive in interpreting their state constitutional provisions, even though the federal constitution contains no express separation of powers provision. *See Hamilton*, 287 Md. at 556-62; *Killington*, 153 Vt. at 632-37.

d. The Fact That Washington's Constitution Reserves Certain Powers To The People Does Not Alter The Separation Of Powers Analysis

Mr. West argues that because the constitution reserves to the people certain powers over the three branches of government, the people constitute a fourth branch of government whose interests must be weighed in determining whether any other branch holds a privilege over certain communications. Brief at 23-27. The powers to which he refers are the power to elect and recall state officials and petition for initiative and referendum. *Id.* These powers are not unique to the people of

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[19] For example, the Ohio Supreme Court described separation of powers as "fundamental to our democratic form of government" and "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of government." *Dann* I, 109 Ohio St.3d at 376. *See also Guy*, 659 A.2d at 785 n.5 (separation of powers "is fundamental to our constitutional law"), citing *Opinion of the Justices*, 380 A.2d 109, 113 (Del. 1977). Compare these decisions to *Carrick*, 125 Wn.2d at 134-35, describing separation of powers as a "fundamental principle" of the American constitutional system, explaining that "the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine."

Washington and exist to varying degrees in the other states that have recognized a gubernatorial executive privilege.[20]

As discussed more fully below, a qualified executive privilege does take into account the people's interest in having a governor who is accountable to them and the other branches of government, but it balances that interest with the public interest in having the governor effectively perform her constitutional role. Neither the people's right to petition for initiative and referendum, nor the fact that the PRA was originally adopted through the initiative process, elevates a requester's statutory right to records above other constitutional principles.[21] Whether adopted through the initiative process or the legislature, statutes must operate consistent with the

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[20] It is commonly known that all states elect legislative and executive branch state officials. Thirty-nine states hold some form of election of some or all of their judicial positions, including Maryland and Ohio. American Judicature Society at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= and http://www.ajs.org/selection/index.asp (last visited Mar. 4, 2012). The power to recall a state official exists in nineteen states, including Alaska and New Jersey. National Conference of State Legislatures at http://www.ncsl.org/legislatures-elections/elections/recall-of-state-officials.aspx#List_of_States_with_Process (last visited Mar. 4, 2012). In twenty-seven states the people have some form of the power of initiative or referendum, including Alaska, Maryland, and Ohio. National Conference of State Legislatures at http://www.ncsl.org/legislatures-elections/elections/chart-of-the-initiative-states.aspx (last visited Mar. 4, 2012); Initiative and Referendum Institute at http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Mar. 4, 2012).

[21] The PRA was enacted originally as an initiative that addressed both campaign disclosure and public records. *See* Laws of 1973, ch. 1 (Initiative Measure No. 276). However, much of the Act's intent language was not part of the initiative—it was added subsequently by the Legislature. The language in RCW 42.56.030 ("The people of this state do not yield their sovereignty to the agencies that serve them . . . .") was added in Laws of 1992, ch.139, § 2. Even if the original Public Disclosure Act had some special character by virtue of having been adopted by initiative, that gloss has diminished over time. The PRA has been amended regularly and repeatedly over its 40-year history, and in 2005 was entirely recodified. *See* Laws of 2005, ch. 274

Washington Constitution. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). The people do not act as a separate branch of government when exercising the initiative power:

> [W]hen the people pass an initiative, they exercise legislative power that is coextensive with that of the legislature. A law passed by initiative is no less a law than one enacted by the legislature. Nor is it more.

Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 290-291, 174 P.3d 1142 (2007).

Likewise, the power of the legislative branch to compel the disclosure of executive branch records to the public is no greater than its power to compel disclosure to itself. *Soucie*, 448 F.2d at 1072 n.9. The power of the legislative branch to override a qualified executive privilege held by the governor and grounded in state constitutional separation of powers thus is no greater when legislating for public disclosure than for disclosure to itself.

Finally, it should be noted that the language of the PRA itself does not reveal any specific intent by the people or the legislature to make the governor individually subject to the disclosure provisions of the Act. The governor is referenced only six times in RCW 42.56. Five of those references are in RCW 42.56.140, addressing gubernatorial appointments to the public records exemption accountability committee. The other reference is in a specific exemption for private financial and proprietary

information for certain records that may be held by the "office of the governor." RCW 42.56.270(12)(a)(2). Even the PRA's definition of "agency," in RCW 42.56.070(1), does not explicitly mention the governor.

The absence of specific statutory language subjecting the governor to the PRA is significant.[22] Just as the PRA can be understood to acknowledge a judicial privilege against compelled public disclosure, it can be understood to acknowledge a qualified gubernatorial executive privilege against compelled public disclosure. Deference to both privileges rests on the same constitutional principle: separation of powers and respect for the constitutional prerogatives of coequal branches of government.

e. Mr. West References Cases That Do Not Address A Gubernatorial Executive Privilege

In support of his various arguments Mr. West cites certain cases from other states to suggest that they did not adopt a gubernatorial executive privilege. Brief at 20, 22-23, 28. However, none of those decisions addressed a governor's claim of executive privilege.

In *Babets v. Sec'y of Exec. Office of Human Servs.*, 403 Mass. 230, 526 N.E.2d 1261 (1988), the court rejected the assertion of a "governmental privilege" by an agency head who sought to avoid

[22] In *City of Federal Way v. Koenig*, 167 Wn.2d 341, 345-48, 217 P.3d 1172 (2009), the court reaffirmed that the PRA does not include the courts within the definition of "agency," even when that term is informed by reading the Act as a whole. By the same logic and analysis, neither does the Act include the governor within the definition of "agency" or evidence a specific legislative intent to make the governor subject to the Act.

producing documents relating to the adoption of administrative regulations. No communication to or from the governor was at issue in that case, the governor was not a party, and the court did not address whether the governor may assert any type of executive privilege.

In *News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), a newspaper sought records related to the investigation of alleged improprieties of a university basketball team. The records were requested from a commission appointed by the president of the University of North Carolina system of higher education. The governor was not involved. The court rejected a feeble proposal by the commission to infer a "preliminary draft" exception to the state public disclosure statute under a separation of powers theory. But the commission did not cite or rely on the state constitution in the trial court, and it cited no controlling authority to the appellate court. Not surprisingly, the court refused to infer the requested exemption. *Id.* at 484.

In *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48, 235 Ill. Dec. 435 (1998), the city sought to avoid producing documents related to unapproved future projects. The city did not invoke separation of powers (or any constitutional basis) for its asserted privilege, instead asking the court to adopt a broad common law deliberative process privilege to exempt from discovery "all 'deliberative' communications

regarding any proposed expansion or alteration to the airport or airport layout plan, no matter how trivial or routine." *Id.* at 532. Distinguishing cases such as *Nixon* and *Hamilton* on that basis, the court held the adoption of such a broad evidentiary privilege for municipalities should be left to the legislature. *Id.* at 531-33.

Moreover, *Birkett* did not foreclose a properly asserted constitutional privilege in Illinois. In *Thomas v. Page*, 361 Ill. App. 3d 484, 837 N.E.2d 483, 297 Ill. Dec. 400 (2005), the court of appeals distinguished *Birkett* and articulated a judicial deliberative privilege implicitly grounded in separation of powers: "[T]he judiciary, as a co-equal branch of government, supreme within its own assigned area of constitutional duties, is being asked to exercise its inherent authority to protect the integrity of its own decision-making process." *Id.*, 361 Ill. App. 3d at 491. Relying in part on *Nixon*, the court explained, "[I]n order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public at a later date." *Id.* at 490.

Mr. West has identified no state case rejecting a claim of gubernatorial executive privilege grounded in separation of powers. As observed in *Guy*, 659 A.2d at 783, state courts "have been nearly unanimous" in holding that a governor may assert a constitutionally-based

executive privilege that serves a "vital public interest . . . in the effective discharge of a governor's constitutional duties."

B. Constitutional Executive Privilege Grounded In The Separation Of Powers Should Be Recognized As An "Other Statute" Under RCW 42.56.070(1)

Mr. West argues that the PRA permits only statutory exemptions and not exemptions existing in "other law" such as an implied qualified executive privilege resting on the principle of constitutional separation of powers. Brief at 17-18.

Undeniably, the PRA is a mandate for liberal disclosure of public records, but the Act itself explicitly exempts from production records falling within an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). In asserting a qualified executive privilege, the governor is relying on that statute and contending it must be understood as including constitutional privileges. Mr. West's argument fails to give effect to constitutional privileges and the subordination of statutes to the constitution. A constitutional privilege must be given effect, even if it is implied from the constitution rather than explicit.[23]

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[23] The superior court concluded RCW 43.06.010 constitutes an "other statute" allowing the constitutional privilege to be incorporated under RCW 42.56.070(1), even though it ruled that no other statute need be cited. CP 1007. The superior court's conclusion is consistent with this Court's recognition that RCW 2.04.190 "acknowledges" the constitutional power of the Court to adopt rules for court pleading,

Mr. West cites no case that precludes the incorporation of constitutional privileges under RCW 42.56.070(1). This Court already has interpreted RCW 42.56.070(1) to incorporate not just state statutes, as in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (incorporating RCW 5.60.060(2)(a)), but also court rules, *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 912, 25 P.3d 426 (2001), and federal statutes and federal regulations, *Ameriquest Mortg. Co. v. Office of the Atty. Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010).

In recent decisions, this Court seems to indicate its readiness to acknowledge constitutional privileges under RCW 42.56.070(1). In *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010), for example, the Court recognized constitutional limits on public disclosure under the PRA, even though the Act does not include a specific exemption for the protection of constitutional rights or the recognition of constitutional privileges. Referencing both federal and state constitutions, the court stated, "There is no specific exemption under the PRA that mentions the protection of an individual's constitutional fair trial rights, but courts have an independent obligation to secure such rights." *Id.* at

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practice, and procedure (even though the statute purports to grant that power). *O'Connor,* 143 Wn.2d at 909-910. In like manner, the Legislature "acknowledges" the constitutional powers of the governor in RCW 43.06.010: "*In addition to those prescribed by the Constitution*, the governor may exercise the powers and perform the duties prescribed in this and the following sections . . . ." (Emphasis added.)

595. The court did not find that disclosure of the disputed records would have violated the criminal defendant's fair trial rights, but the court set forth the constitutional analysis to be applied, signaling its readiness to order the records withheld from disclosure if a constitutional violation would have resulted. *Id.* at 595-96.

Even more recently, in *Yakima Cnty. v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), the Court twice commented on the intersection of the PRA and constitutional constraints. In rejecting the argument that use of a second superior court judge to review criminal defense funding request documents changed them from judicial documents to administrative documents subject to the PRA, the Court agreed with the trial court: "In the end, quite simply it's a matter of separation of powers wherein the judiciary has the authority over the conduct and administration of criminal cases." *Id.* at 795.

Later in the opinion, the Court addressed the criminal defendant's argument that public disclosure of certain records is prohibited under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and that those constitutional provisions are incorporated as exemptions under the "other statute" provision in RCW 42.56.070(1). *Id.* at 808. The Court responded that "[w]hile this argument has force, we need not decide that issue here" because another statute authorized appropriate redaction of the

records and incorporated pertinent constitutional protections. *Id.*

Under these cases, the absence of an explicit provision in the Washington Constitution that grants executive privilege is not dispositive. Requiring statutory approval of a constitutional privilege would impermissibly allow a statute to supersede the constitution. *See Garner v. Cherberg*, 111 Wn.2d 811, 765 P.2d 1284 (1988).[24] Where a constitutional privilege exists, it does so without any need of statutory permission, and may constitute an exemption under the PRA even if not implemented through an explicit statutory exemption. *See Seattle Times*, 170 Wn.2d at 595.

This conclusion is consistent with other courts' recognition that since statutes are subordinate to constitutions, it would be nonsensical to refuse to recognize constitutional exemptions from public disclosure statutes. Interpreting Delaware's Freedom of Information Act, for example, the court held that an exemption for "records specifically exempted from public disclosure by statute" incorporated the constitutionally-based executive privilege. *Guy*, 659 A.2d at 782-83. The

[24] In *Garner*, a committee of the Washington State Senate sought to subpoena records of the Commission on Judicial Conduct. In quashing the subpoena, this Court explained that a constitutional confidentially requirement is "impervious to legislative or judicial change, and it must be implemented except as overriding Federal due process requirements compel us to do otherwise." *Garner*, 111 Wn.2d at 822, quoting *Owen v. Mann*, 105 Ill.2d 525, 535, 475 N.E.2d 886, 86 Ill. Dec. 507 (1985). The Court explicitly cautioned against reducing "constitutionally based confidentiality interests to a statutory level." *Id.*

court observed that "it would be incongruous to hold that the General Assembly intended a statutory exemption but not an exemption based upon the constitution to be sufficient to preclude disclosure." *Id. See also Nixon*, 418 U.S. at 705 n.16 (rejecting special prosecutor's argument that executive privilege should not be recognized absent an express provision in the United States Constitution). Moreover, each of the state court decisions cited above that recognized gubernatorial executive privilege has done so in the absence of an express provision in the respective state constitution.[25]

This case is not about the constitutionality of the PRA. It is not necessary to read the PRA in conflict with the constitution when the Act itself recognizes and respects other laws that govern disclosure. In *Ameriquest*, this Court recognized that a preemption analysis was unnecessary because the "other statute" provision in RCW 42.56.070(1) accommodated the federal exemptions that otherwise would conflict with the PRA. *Ameriquest*, 170 Wn.2d at 439-40. The same principle allows the Court to avoid creating any doubt as to the Act's constitutionality by recognizing that constitutional exemptions and privileges also are

[25] An objection to implied constitutional privileges, if accepted, would implicate other implied privileges. For example, as noted above, the Washington Constitution provides no explicit privilege protecting the confidentiality of judicial deliberations and judges' notes, even though such a privilege is recognized as necessary to the judicial function. *See, e.g., Beuhler*, 115 Wn. App. at 919-20; *In re Certain Complaints*, 783 F.2d at 1519-20; *Thomas*, 361 Ill. App. 3d at 490-91.

incorporated in RCW 42.56.070(1).

The PRA is not absolute—it explicitly recognizes that many categories of public records and information should not be produced automatically upon request.[26] The governor is not challenging the validity of the Act or seeking to set it aside. Rather, the governor asserts a qualified constitutional privilege that has been recognized across the country and contends that privilege should be recognized as an exemption under the "other statute" provision of the PRA. This Court should hold that a qualified gubernatorial executive privilege constitutes an exemption to the Public Records Act, incorporated through RCW 42.56.070(1).

1. The Three-Part Test Articulated In The Cases Is Part Of The Qualified Executive Privilege

The governor is asserting a qualified executive privilege, not an absolute privilege. The privilege is qualified because its application is subject to judicial review and it can be limited where the court determines there is a demonstrated, particularized need for access to specific documents that outweighs the constitutional and public interests in maintaining the privilege. That determination is made using a three-part

[26] Mr. West quotes *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974), regarding the "fundamental" character of the public's right to receive information. Brief at 26. That case addressed the right to receive information generally as a necessary counterpart of the First Amendment right to free speech; it did not hold that the First Amendment grants a right to receive *all* information held by any particular source, including government. Indeed, *Fritz* acknowledged constitutional limitations, holding that the challenged section of the campaign disclosure law did "not sweep so broadly as to be constitutionally impermissible." *Fritz*, 83 Wn.2d at 299.

test established by the U.S. Supreme Court as part of the privilege. *See In re Sealed Case*, 121 F.3d 729, 744-46 (D.C. Cir. 1997) (explaining contours of the privilege). Every state court that has recognized a parallel gubernatorial executive privilege resting on state constitutional separation of powers has adopted the three-part test as part of the privilege. *See Doe*, 721 P.2d at 626; *Guy*, 659 A.2d at 782-85; *Hamilton,* 287 Md. at 562-67; *Wilson v. Brown*, 404 N.J. Super. 557, 574-81, 962 A.2d 1122 (App. Div. 2009); *Dann* I, 109 Ohio St. 3d at 377-79; *Killington*, 153 Vt. at 637-41. The test is applied as follows.

Step One. In response to a request for records, the governor must assert the privilege with some degree of specificity, identifying the records for which the privilege is asserted and briefly explaining why each record falls within the privilege (without, of course, revealing the information that is privileged). *See Doe*, 721 P.2d at 626; *Dann* I, 109 Ohio St. 3d at 378. If the reasons given indicate on their face that the records fall within the privilege, the records are presumptively protected by executive privilege. *Hamilton*, 287 Md. at 563-64, citing *Nixon*, 418 U.S. at 708, 713-14; *Dann* I, 109 Ohio St. 3d at 378. Because in camera review intrudes on the governor's executive powers, implicating separation of powers concerns, a court should refrain from in camera review unless there is a specific reason supporting such review. *Hamilton*,

287 Md. at 566, citing *Nixon*, 418 U.S. at 713-14; *Wilson*, 404 N.J. Super. at 574.

Step Two. The requester can overcome the presumption by demonstrating a particular need for the specific documents requested and providing a reasoned explanation why that need outweighs the constitutional and public interests served by executive privilege. *Doe*, 721 P.2d at 626; *Dann* I, 109 Ohio St. 3d at 378; *Killington*, 153 Vt. at 639; *Guy*, 659 A.2d at 785. If no such showing is made, the inquiry is at an end, the presumption has not been overcome, and the documents are not subject to in camera review. *Doe*, 721 P.2d at 626; *Hamilton*, 287 Md. at 563-64, citing *Nixon*, 418 U.S. at 713-14; *Dann* I, 109 Ohio St. 3d at 379; *Killington*, 153 Vt. at 639; *Guy*, 659 A.2d at 785; *Wilson*, 404 N.J. Super at 574.[27]

The requirement that a requester demonstrate a particularized need is derived from the constitutional underpinnings of the executive privilege. A person who seeks the court's assistance to obtain documents for which

[27] Courts have found showings of particularized need sufficient to move to step three of the test in two circumstances: (1) in criminal cases, where "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts," such that the legitimate need of disclosure outweighs a generalized claim of public interest in the confidentiality of gubernatorial communications, *Guy*, 659 A.2d at 785, quoting *Nixon*, 418 U.S. at 709; *accord Hamilton*, 287 Md. at 563-64; and (2) in some civil cases, notably cases alleging governmental wrongdoing where the information sought is essential evidence, *Hamilton*, 287 Md. at 563-64; *Killington*, 153 Vt. at 638. A vaguely defined specter of misconduct is insufficient, as is a general assertion of a need for full disclosure of the basis for governmental decisionmaking. *Wilson*, 404 N.J. Super. at 579, citing *Nero*, 76 N.J. at 216-17.

the governor has asserted executive privilege is asking one branch of government, the courts, to compel a co-equal branch, the governor, to yield power constitutionally granted to the executive. Respect for the governor's independent constitutional role deserves judicial respect for a properly asserted executive privilege.

Step Three. If the court finds the requester has demonstrated a specific, particularized need for the documents that could outweigh the constitutional and public interests served by executive privilege, the court then should determine (1) whether the demonstrated need in fact outweighs the constitutional and public interest in the privilege; and (2) if so, which portions of the documents should be produced and whether conditions should be imposed on the use of the documents. *In re Sealed Case*, 121 F.3d at 742; *Killington*, 153 Vt. at 637-39; *Dann* I, 109 Ohio St. 3d at 378-79. In making this determination, the court may review the records in camera. *Doe*, 721 P.2d at 626; *Hamilton*, 287 Md. at 567.[28]

In *Killington*, 153 Vt. at 638-39, the court rejected the argument that the three-part test should not be used when records are requested under the Vermont Access to Public Records statute, which (like our PRA)

[28] In *Killington*, a public records case, the court explained that in camera inspection may not amount to full disclosure, but in a given case, it can irrevocably sacrifice the interest sought to be protected by exercise of executive privilege, even if the court decides that the interest in confidentiality outweighs the need for disclosure. *Killington*, 153 Vt. at 639-40, citing *Hamilton*, 287 Md. at 566. The governor should have the opportunity to demonstrate that in camera inspection would compromise the fundamental interests of the executive branch. *Killington*, 153 Vt. at 640.

places the burden of demonstrating an exemption on the agency asserting the exemption:.

> The function and meaning of the privilege would be markedly altered if necessity for the information were to be presumed and the burden of overcoming the presumption of necessity were to be placed on the claimant of the privilege. The requirement that a person seeking disclosure first demonstrate need before obtaining the right to in camera inspection by the court is an essential part of the privilege itself, not a corollary procedure annexed to the privilege.

Id. at 639. *Accord Guy*, 659 A.2d at 785.

2. The Three-Part Test Is Consistent With The PRA

As explained above, the three-part test is not an adjunct to executive privilege—it is an essential part of the privilege, grounded in separation of powers and judicial respect for a coequal branch of government, and it is the means through which the privilege is limited to accommodate competing constitutional interests. As this Court recognized in *Ameriquest*, when an exemption is incorporated into the PRA, it is incorporated in its entirety, even though some element of the exemption may displace some express requirement of the PRA. *Ameriquest*, 170 Wn.2d at 435-36 (federal rule that prohibited "third party" from publicly disclosing protected information did not permit state agency to apply redaction requirement in RCW 42.56.210, when the federal rule was incorporated as a PRA exemption under the "other statute" provision in RCW 42.56.070(1)). Even so, the three-part test

applied to a gubernatorial executive privilege claim is consistent with the PRA's essential procedural requirements.

The first step of the three-part test imposes similar requirements. As explained above, the governor bears the burden of properly asserting the privilege. She must make it clear she is asserting that privilege, identify the records for which the privilege is asserted, and explain why each record falls within the privilege. While a presumption attaches to a claim of executive privilege, that presumption can be overcome. It is true that a requester claiming the privilege has been improperly asserted must do more than file an action and summarily claim a violation. But, as explained above, that extra requirement is justified by the constitutional interest in having courts respect the governor's independent constitutional role as a co-equal branch in our system of divided government.

In steps two and three of the test, the requester is not challenging whether the privilege was properly asserted for the records at issue; rather, the requester is seeking production of records *even though* they are protected by the privilege. No conflict with the PRA results from requiring the requester to demonstrate a particular need for documents protected by executive privilege, because that burden is applied only after the applicability of the privilege has been conceded or established. The burden properly falls on the requester who is seeking to convince the court

that documents protected by executive privilege nevertheless should be produced.

The PRA authorizes but does not mandate in camera review. RCW 42.56.550(3). No conflict with the PRA arises from asking a court, as a matter of judicial restraint in respect of constitutional separation of powers, to delay in camera review until it is necessary and appropriate. Where the governor has properly asserted executive privilege, the court is giving appropriate respect to a co-equal branch of government by declining to conduct in camera review unless the requester demonstrates countervailing need and interests sufficient to justify review.

3. The Three Part Test Does Not Shield The Governor From Public Accountability

Judicial recognition of a qualified executive privilege does not shield the governor's *actions* from public view—it protects recommendations, advice, discussions, and deliberations where confidentiality is necessary to ensure the integrity of the governor's decisionmaking and policymaking. Its purpose is to allow effective decisionmaking and policymaking by preserving the governor's access to candid advice, multiple perspectives and recommendations, and frank discussion. *See* Cox, 122 U. Pa. L. Rev. at 1410; *Nixon*, 418 U.S. at 708; *Dann* I, 109 Ohio St. 3d at 376-77; *Doe*, 721 P.2d at 624-25. And, as in

Nixon and the state cases that follow it, the privilege does not bar a court, upon a proper showing, from ordering the production of documents alleged to reflect unlawful conduct by the governor or her staff. *See Hamilton*, 287 Md. at 563-64; *Killington*, 153 Vt. at 638.

Moreover, the PRA is not the only means of ensuring accountability to the public. While it is an important means, it should be recognized that the governor is not an official working out of the public view, whose actions and decisions may be publicly known only because of the PRA. Indeed, no state officer has higher public visibility and more direct accountability to voters than the governor. The governor remains accountable to the electorate for the decisions and policies she makes—or does not make.

C. The Governor Having Asserted Executive Privilege With Specificity, There Is No Other Issue Preserved For Appellate Review

The governor made the requisite showing to establish that the withheld records and information are presumptively protected by executive privilege. In responding to Mr. West, the governor explicitly asserted executive privilege as the basis for withholding or redacting documents and information that were not provided. Both exemption logs describe the nature of the records and provide the context and reason for the claim of the exemption. CP 575-95, 667-96. The Counsel to the

Governor summarized the careful, diligent process used to reassess each requested document to determine whether the privilege should continue to be asserted. CP at 607-10, 664-65. Mr. West's objection in essence is simply that he or the trial court should reweigh the careful analysis and policy judgments that the governor and her counsel have made. The trial court correctly determined that Mr. West's general objections did not overcome the showing the governor made that the claims of executive privilege were specific and limited to communications made to, from, or for the consideration of the governor in the exercise of her constitutional role as the chief executive officer.

The only issue that Mr. West properly raised below is whether there exists a gubernatorial executive privilege as an exemption to the PRA. Indeed, Mr. West filed this case knowing only that certain records would be denied to him but not having arranged to inspect or copy the records or the exemption log.[29] He filed the case without having retrieved a single requested record. Mr. West's briefing filed on April 20, 2011,

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[29] Mr. West now asserts he never received the September 3, 2010, notification letter sent to his mailing address by Ms. Campbell. Brief at 8. He is asking the Court to accept that just two to three weeks after Ms. Campbell sent her letter, he just happened to serve and file a lawsuit alleging the governor wrongfully asserted executive privilege as an exemption to his request under the PRA without any knowledge that records and exemption log were ready for inspection or copying. Moreover, again without any prompting or knowledge that records were available, he telephoned and/or appeared at the Governor's officer on September 27, 2011, to pick up said records. There is no reason to believe that Mr. West did not receive the letter and his actions imply that in fact he did. The superior court could reasonably and properly rely on Ms. Campbell's declaration, the letter itself, and Mr. West's actions to find that Mr. West was notified.

and June 2, 2011, address solely the legal issue of whether the privilege exists in Washington. He asked for a declaratory ruling that Washington does not recognize executive privilege as an exemption to the PRA, for the production of all records being withheld on that basis, and sanctions.

Once it is finally determined by this Court that as a matter of law a gubernatorial executive privilege may be asserted as an exemption to the PRA, there is no basis on which Mr. West's case should continue. There is no basis for a penalty, unless there has been a denial of right to inspect or copy a record in violation of the PRA. *See Sanders v. State*, 169 Wn.2d 827, 860, 240 P.3d 120 (2010). The fact that the privilege was waived and records produced after the lawsuit does not constitute a denial and entitlement to penalties. *Id.* at 849-50. Even if Mr. West made a claim about the sufficiency of the exemption logs, that is not a basis for a penalty where records are in fact exempt. *Id.* He received exemption logs with the records he requested. The timing in providing an exemption log may affect the running of the statute of limitations, but is not a denial of a right to inspect or copy a record and a basis for a penalty. *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 540-41, 199 P.3d 393 (2009).

Mr. West is now grasping at theories to manufacture a case on which he can argue he is entitled to penalties and fees, but that is not the

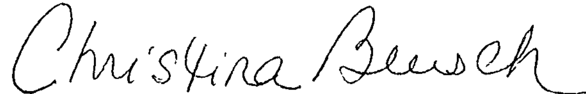
case that he brought and presented to the trial court. Should this Court affirm the trial court's legal ruling on the existence of executive privilege, Mr. West should not be allowed to return to the trial court on remand to make arguments he did not make previously and to engage in a meaningless, but undoubtedly burdensome, fishing expedition.

V. CONCLUSION

The Court should affirm the trial court's final order and deny Mr. West's requests for a remand, penalties, attorney fees and costs.

RESPECTFULLY SUBMITTED this 7th day of March, 2012.

ROBERT M. MCKENNA
Attorney General



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SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST, Appellant, v. CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date, I have caused to be served on the parties listed below a copy of the Brief of Respondent and this Certificate of Service.

Parties Served:

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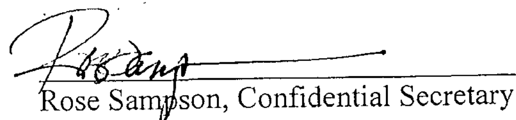
Signed this 7th day of March, 2012 in Olympia, Washington.



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