COA 45862-8

No. 86150-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ARTHUR WEST,

Appellant,

v.

CHRISTINE GREGOIRE, GOVERNOR, et al.,

Respondent

Appellant's Opening Brief

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I. INTRODUCTION

There is no implied gubernatorial executive privilege grounded in the separation of powers under the Washington State Constitution, and no executive privilege to the Public Records Act ("PRA", chapter 42.56 RCW) that the Trial Court found when it dismissed Arthur West's PRA case against Governor Christine Gregoire. Governor Gregoire's office argued, and the Trial Court concluded, that the gubernatorial executive privilege is grounded in the separation of powers under the Washington State Constitution. But our Constitution differs from those of the federal government and the other states that have found executive privilege.

The Governor argued that the executive privilege is necessary to "protect recommendations, advice, discussions, and deliberations involving the decision-making and policy-making functions for which the Governor is constitutionally responsible." CP 1032. But the Governor did not argue that the office of the Governor had been harmed by the heretofore lack of gubernatorial executive privilege as an exemption to the PRA. Indeed, there has been no harm; our PRA has a lengthy and deliberate list of statutory exemptions, exemptions that already protect the functions of the Governor's office. But the Governor, even while citing these ample statutory protections, asked the Trial Court – and is asking this Court – to graft on to our Constitution an unwritten constitutional

privilege that is unnecessary. "[[W]]e adhere to the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues." Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 322, 174 P.3d (2007) (citations omitted). "If [a constitutional provision] is too restrictive in its terms, that is a matter for the citizens of this state to correct through the amendatory process. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem." State ex rel. O'Connell v. Port of Seattle, 65 Wn.2d 801, 806, 399 P.2d 623 (1965). This Court should decline to find the unwritten implied gubernatorial executive privilege in our Constitution.

But even if this Court finds an executive privilege implied in the separation of powers doctrine in our Constitution, and affirms the Trial Court in that respect, this Court should still overrule the manner in which the Trial Court applied executive privilege to the PRA. The Trial Court did not so much apply executive privilege as an *exception to* the PRA, but as a *trump of* the PRA. The Trial Court's dismissal of Mr. West's action means that when the Governor asserts executive privilege, none of the procedures of the PRA apply. The Governor was not held accountable for taking an unreasonably long time to produce an exemption log and the

records for which she was waiving executive privilege, or for silently withholding records for which she is claiming or could claim executive privilege, and there was no determination of whether the Governor's search for records was reasonable. Finally, as to the records that were responsive to Mr. West's request as having been previously withheld under color of a claim of executive privilege, for which the Governor was no longer asserting executive privilege, but was asserting an enumerated statutory exemption to the Public Records Act – the Trial Court's dismissal of Mr. West's case means that the Governor does not need to bear what would otherwise be her statutory burden of proof to show that the claimed exemptions apply.

Furthermore, by dismissing Mr. West's case as early as the Trial Court did – at a hearing when the Trial Court denied Mr. West's motion for an order to show cause – the Trial Court denied Mr. West the opportunity to test the "three-part test adopted in federal and state cases for assessing presidential and gubernatorial executive privilege" that the Trial Court concluded was "wholly incorporated into the PRA" in defining the gubernatorial executive privilege exemption. This was error, and it was error to adopt the three-part test, contrary to our caselaw and our statutory procedural safeguards in our PRA.

II. ASSIGNMENTS OF ERROR

A. The Trial Court erred in finding an implied constitutional privilege grounded in the doctrine of separation of powers as an exemption to the PRA. *Does "other statute" mean "other law"; is there implied "executive privilege" in Washington's separation of powers?; does the PRA violate the separation of powers doctrine? No.*

B. Alternatively, the Trial Court erred in grafting an unwritten executive privilege onto Washington's Constitution out of necessary implication. *Do the statutory protections already codified in the PRA adequately protect the functioning of the Governor's office? Yes.*

C. Alternatively, the Trial Court erred in applying executive privilege as a trump to the PRA rather than as an exemption. *Did the Trial Court err in dismissing Mr. West's PRA claims upon holding the Governor could claim executive privilege, without reaching the Governor's violations of the PRA?; was there insufficient evidence supporting the Trial Court's findings of facts 2, 3, and 8*[1]*; did the Trial Court err in denying Mr. West the opportunity to "test" the three-part test; did the Trial Court err in adopting the three-part test, which conflicts with the PRA? Yes.*

[1] For full text see Appendix A.

III. STATEMENT OF THE CASE

This case involves a public records request made to defendant and respondent Governor Christine Gregoire, where plaintiff and appellant Arthur West requested specific identifiable public records that had been withheld from other requesters under claim of executive privilege.

Mr. West is no stranger to Public Records Act ("PRA"; chapter 42.56 RCW) litigation; he has filed multiple PRA lawsuits, resulting in precedent-setting cases, including West v. Port of Olympia, 146 Wn. App. 108, 192 P.3d 926 (2008) (limitations on applications of deliberative process exemption to PRA) and West v. Thurston County, 144 Wn. App. 573, 183 P.3d 346 (2008) (retroactive application of amendment to PRA concerning attorney billing invoices for legal services provided to public entities). He has also set precedent outside the PRA; *see, e.g.*, West v. Washington Association of County Officials, 162 Wn. App. 120, 252 P.3d 406 (2011) (WACO was a public agency for purposes of the Open Public Meetings Act) and West v. Secretary of Transportation, 206 F.3d 920 (9th Cir. 2000) (under NEPA, agency could not approve highway interchange construction project using categorical exclusion). Mr. West describes himself as an environmental activist and an advocate for open government. He works to hold government accountable to its citizens.

The public records request at issue here was hand-delivered by Mr. West to Governor Gregoire's office on January 19, 2010. CP 569. His request sought, "under RCW 42.56, for disclosure of all of the records currently being withheld from public disclosure by the office of the Governor under color [of] a claim of executive privilege, from 2007 to present, to include all 35 requested described in the [Evergreen Freedom Foundation] policy letter of January 13, [2010], (attached)." CP 569. The EFF policy highlighter that Mr. West attached to his request stated "Since 2007, Governor Gregoire's office has asserted 'executive privilege' 421 times in response to 35 records requests. This privilege has been cited to withhold records concerning the state's tribal gambling compact, the sale and departure of the Seattle Sonics, the selection and appointment of judges, the state's regulation of marijuana, clemency petitions of death-row inmates, and state employees' public email accounts." CP 560.

On January 25, less than five business days after Mr. West's request, Melynda Campbell of the Governor's office responded to Mr. West's request. CP 602. Her letter estimated that it would take her approximately three to four weeks to retrieve the public request files that had been archived and "review, number and provide any documents that may be released." CP 602. After this initial letter, Mr. West heard nothing more from the Governor's office for eight months.

On September 24, Mr. West filed his complaint,[1] alleging PRA violations, that the Governor "failed to promptly respond or disclose relevant records," and "has wrongfully asserted an executive privilege exemption when none exists under the Public Disclosure Act and no colorable claim of any such exemption can be made under existing precedent for the records at issue, and has failed to produce the requested records in a reasonably timely manner." CP 5. Mr. West sought declaratory rulings that the Governor failed to reasonably disclose public records and that an executive privilege exemption does not apply to the PRA, and requested that the Governor be required to disclose the records and an award of costs and per diem penalties. CP 6. Mr. West, a pro se plaintiff at the time, properly sought no award of attorney fees. Mr. West served the Governor's office with his summons and complaint on September 13, before he filed his lawsuit with the court. CP 566; CP 599.

Now, the Governor's Office maintains that prior to being served with Mr. West's lawsuit, it "produced the records to Mr. West for

[1] This was not the first time that Mr. West attempted to challenge Governor Gregoire's assertion of executive privilege in response to a public records request. Mr. West had filed two earlier lawsuits, West v. Eyman (Thurston County Superior Court Cause No. 10-2-01393-5) and West v. Gregoire (Thurston County Superior Court Cause No. 10-2-00063-9), where he had obtained orders directing the Governor's office to appear and show cause why it should not be found to be in violation of the PR. CP 632-36. However, the claims in both lawsuits were dismissed.

inspection or copying on September 3, 2010." CP 566. Ms. Campbell declared "I informed Mr. West in a letter of that date that the records were available for him to review in-person or copies could be mailed to him once he remitted the copying charges." CP 566; CP 597. However, even though Ms. Campbell wrote, printed, and signed her letter (CP 597) on September 3, it is likely that through some oversight, the letter was not actually mailed to Mr. West; there is no declaration of mailing or record of transmission. Mr. West did not receive any September 3 letter. "Subsequent to the filing of the suit, you know, several months later, they came up with a September 3rd letter. That letter I never received. I never received an email on that date despite the fact that that was the traditional manner that Ms. Campbell communicated with me in previous requests." RP at 8, ll. 4-10 (June 23, 2011).

The letter that Mr. West *did* receive was dated, printed, and signed by Ms. Campbell on September 27. CP 13. It is virtually the same letter that Ms. Campbell wrote, printed, and signed on September 3 (*see, e.g.*, the last paragraph, "Please bear in mind that the office will be closed on Monday, September 6, 2010 for Labor Day and on Tuesday, September 7, 2010, for a temporary layoff day due to state budget cuts," which paragraph was out-of-date in a letter dated September 27). There are two differences between the two letters. One is the copy fee: in the September

27 letter, Ms. Campbell informed Mr. West that the copy fee was $71.10, but in the September 3 letter, the copy fee is $70.80. *Cf.* CP 13 and CP 597. The other difference is in the number of pages: in the September 27 letter, Ms. Campbell informed Mr. West that the number of pages was 474, in the September 3 letter, it is 472. *Cf.* CP 13 and CP 597.

Though the record does not reflect what happened, on the morning of September 27, not having heard from the Governor's office, Mr. West called to find out the status of his public records request. Over the phone, he was informed that public records responsive to his request were available and ready to be picked up. On that same day, September 27, Mr. West visited the office. He paid $71.10 (the copy fee mentioned in the September 27 letter). CP 601. He was given the September 27 letter (CP 13), an exemption log (CP 567; CP 575-95) and 474 pages of responsive records (CP 47-519).

Ms. Campbell also had ready a letter to Mr. West dated September 27 from Ms. Narda Pierce, General Counsel (CP 603-04), which stated "You have requested disclosure of specific pages of documents that were withheld in prior public records requests by other requesters. We have researched our records to determine whether any of these documents have been subsequently released. We determined that documents were released to the original requester subsequent to the initial response in the public

records requests numbered 2007-27, 2009-44 and 2009-48. Therefore, those documents are currently available for your review." CP 603. Even though Ms. Campbell had Ms. Pierce's letter ready, the letter was not given to Mr. West when he visited the office. Instead, Ms. Campbell mailed it to Mr. West on September 29. CP 606; CP 567.

The exemption log that the Governor's office produced to Mr. West on September 27 claimed privileges for 72 records. CP 575-595. Of these records, the Governor's office asserted "Executive Privilege" as the sole claimed exemption for 33 separate records. CP 575-595; CP 610. The other exemptions that the Governor's office asserted for the other records included RCW 42.56.250(2) (applications for public employment) (CP 576-78; CP 582; CP 584; CP 589; CP 594-95); RCW 42.56.280 (deliberative process) (CP 579; CP 582; CP 590; CP 591-94); RCW 5.60.060(2) (attorney-client privilege) (CP 583; 587-88; CP 590; CP 595); 42 USC 405(c)(2)(vii)(1) and/or 5 USC 552(a) (Social Security Number) (CP 586); RCW 42.56.290 (agency party to controversy; work product) (CP 593); and RCW 42.56.270 (financial, commercial and proprietary information) (CP 594). There were 6 separate records where the Governor *did not assert executive privilege at all*, but claimed one or more exemptions to the PRA (RCW 42.56.250(2), 42 USC 405(c)(2)(vii)(1) and/or 5 USC 552(a), RCW 42.56.270, and RCW 42.56.280). CP 584,

586, and 594. Presumably, the Governor had at one point asserted executive privilege as to these 6 records but had later waived executive privilege while asserting some other exemption, since otherwise they would not have been responsive to Mr. West's request.

The records disclosed in the exemption log were divided into two categories: "2008 Public Record Request documents" (CP 575) and "2007 Public Record Request documents" (CP 584). Recall that Mr. West's request sought documents which had previously been withheld from PRA requestors under claim of executive privilege from 2007 on. If there were any such public records requests in 2009 or early 2010 *and* the Governor had not waived the formerly-asserted privilege and produced all responsive previously-withheld documents to Mr. West, then the Governor's office did not disclose those still-withheld records. ("Disclosure" means communicating the existence of the records, either through inclusion in an exemption log or through actual production). Since Mr. West had sought identifiable public records (those which had been withheld previously under claim of executive privilege), if the Governor was still withholding records, that would lead to an inference that the Governor had failed to make a reasonable search.

On March 7, 2011, Mr. West filed a Motion for a Show Cause Order, seeking an order compelling the Governor to appear and show

cause why she should not be "found to be in violation of the Public Records act for failing to produce records in a reasonable time, for failing to produce an exemption log citing to an actual exemption to disclosure recognized under RCW 42.56, and for failing to produce public records in response to plaintiff's request." CP 11-12. The Governor filed a Response, CP 1024-1045, and both sides filed declarations. On May 6, a hearing was held in front of the Honorable Gary R. Tabor, where the matter was continued to June 17 and the parties were allowed to each file a supplemental brief. CP 637.

After both supplemental briefs were filed, Ms. Pierce filed her second declaration. In Ms. Pierce's declaration, she explained that the Governor's office had overlooked hundreds of pages of records that had been withheld by the Governor from public records request responses to Luke Esser, Chairman of the Washington State Republican Party, on the basis of the Governor's assertion of executive privilege, and had neither produced nor disclosed the records to Mr. West. CP 664; *see also* footnote at CP 565. This leads to the inference that the Governor failed to make a reasonable search. The requests made by Mr. Esser were dated late 2007 and early 2008. CP 663. For roughly three hundred of these pages, the Governor chose to waive her assertion of executive privilege,

and the Governor's office produced those records to Mr. West on June 9. CP 64; CP 697; CP 701-997.

For other of the withheld records, the Governor's office chose not to produce them, but disclosed their existence in a second exemption log. CP 667-96. "Exemptions are being asserted as to 93 records, as outlined on the attached exemption log. Of that total, executive privilege is being asserted as an exemption on 67 records, although only as to 15 records is executive privilege the only basis for an exemption." CP 664. There are 26 records for which the Governor was *not* asserting executive privilege (although presumably executive privilege was asserted for those records sometime in the past; otherwise they would not have been responsive).

This second exemption log groups the withheld documents into one category: "2008 Esser Public Record Requests documents." The exemptions are: RCW 42.56.250(2) (applications for public employment) (CP 667-73; CP 691; CP 696); RCW 42.56.250(3) (personal information redacted for state employees) (CP 669; CP 671); RCW 42.56.290 (controversy to which the agency is a party, work product) (CP 672-74; CP 679-89; CP 692-95); RCW 42.56.280 or deliberative process (CP 674-675; CP 677-78; CP 686; CP 688-90; CP 693-96); RCW 5.60.060(2)(a) (attorney-client privilege) (CP 674; CP 679-84; CP 686-89; CP 691-95); and RCW 82.32.330(1)(c) (disclosure of tax information) (CP 676).

As for the 26 records that were disclosed in the exemption log but for which the Governor did not claim executive privilege, the exemptions claimed include RCW 42.56.250(3) (personal information redacted for state employee); RCW 42.56.250(2) (applications for public employment); RCW 42.56.290 (work product); RCW 82.32.330(1)(c) (disclosure of tax information); RCW 5.60.060(2)(a) (attorney-client privilege); and RCW 42.56.280 (deliberative process) CP 669; CP 670; CP 672-74; CP 676; CP 679-88; and CP 690-92.

On June 17, at the hearing on Mr. West's motion for an order to show cause, Mr. West presented argument as to executive privilege and the PRA, and requested an order to show cause. Counsel for the Governor responded in opposition and requested that the motion for order to show cause be denied. The Trial Court stated that it did not find that Mr. West met his burden, and that therefore the State – the Governor – would prevail. The Trial Court dismissed Mr. West's action on the basis that the Governor might assert executive privilege as an exemption to the PRA, and adopted the three-part test suggested by the Governor for assessing gubernatorial executive privilege. CP 998; 1007.

In dismissing Mr. West's case, the Trial Court did not reach the issue of whether the Governor had violated the PRA by failing to produce the records for which the Governor was waiving the claim of executive

privilege in a reasonable time, failing to provide an exemption log in a reasonable time, nor yet whether any other exemptions applied to the records for which the Governor was *not* asserting executive privilege, whether the Governor had made a reasonable search, or whether the Governor was still withholding records. And in dismissing Mr. West's case, the Trial Court did not let Mr. West "test" the three-part test.

Mr. West submitted a proposed order. CP 1001-02. The Governor submitted a proposed order, which the Court signed. CP 1003; CP 1004-09. The order signed by the Court contained, among other Conclusions of Law, "The only issue before the Court is whether the Governor may assert a gubernatorial executive privilege, grounded in the separation of powers under the Washington State Constitution, as an exemption under the PRA." Mr. West moved the Court for reconsideration, which was denied. CP 1022. Mr. West timely appealed to this Court. CP 999-1002.

IV. ARGUMENT

"Our broad PRA exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information." O'Neill v. City of Shoreline, 170 Wn.2d 138, 147 240 P.3d 1149 (2010). In concluding that the Governor may assert executive privilege, grounded in

the separation of powers under the Washington State Constitution, as an exemption under the PRA, the Trial Court denied our citizenry access to a whole class of possibly important government information.

> The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. [RCW 42.56.030]. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 241, 884 P.2d 592 (1994) ("PAWS").

By finding an implied executive privilege to the PRA and applying it as it did, the Trial Court deprived citizens like Mr. West of the means of acquiring information about the workings of our State's chief executive. "The public disclosure act was passed by popular initiative, Laws of 1973, ch. 1, p. 1 (Initiative 276, approved Nov. 7, 1972), and stands for the proposition that *full access* to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society. (Italics ours.) [RCW 42.17A.001(11)]." PAWS, 125 Wn.2d at 250-51. "

A. The Trial Court Erred in Finding An Implied Constitutional Privilege Grounded in the Doctrine of Separation of Powers As an Exemption to the PRA

The Trial Court erred in finding an implied constitutional privilege grounded in the doctrine of separation of powers as an exemption to the PRA. No such implied privilege exists in Washington's Constitution, and there is no statutory executive privilege.

1. There is No Precedent For Interpreting the Words "Other Statute" as Meaning "Other Law"

RCW 42.56.070(1) provides: "Each agency...shall make available for public inspection and copying all public records, unless the record falls within...other statute which exempts or prohibits disclosure of specific information or records." The Governor asserts that "other statute" includes implied, unwritten, constitutional privileges. But Mr. West has found no precedent in Washington for interpreting the words "other statute" as meaning "other law," which interpretation would be necessary in order to include implied, unwritten constitutional privileges within the PRA's ambit. This Court has noted that while an argument -- that *written* constitutional amendments to the federal constitution are "other statutes" within the ambit of the PRA – has "force," it did not so hold or decide. Yakima v. Yakima Herald-Republic, 170 Wn.2d 775, 808, 246 P.3d 768 (2011). Instead, this Court agreed that the phrase "*other laws*" that

appears elsewhere in the PRA (RCW 42.56.904, adopted in 2007) includes the U.S. Constitution, thereby emphasizing the difference in meaning between "statute" and "law" *within* the PRA. Yakima, 170 Wn.2d at 808.

This Court should apply "the judicial doctrine *expressio unius est exclusion alterius*: the expression of one is the exclusion of the other." Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). "Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." Bour v. Johnson, 122 Wn.2d 829, 864 P.2d 380 (1993). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusion alterius* – specific inclusions exclude implication." Washington Natural Gas Co. v. Public Util. Dist. No. 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

The PRA was adopted by initiative in 1972 and has been amended by the legislature many times since then, most recently in 2007. If either the people or the legislature had intended to write "law" instead of "statute" in RCW 42.56.070(1), they have had ample time and opportunity to amend it. Finally, RCW 42.56.070(1) does not allow for implied exemptions to apply. "The rule applies only to those exemptions

explicitly identified in other statutes; its language does not allow a court to imply exemptions but only allows specific exemptions to stand." PAWS, 125 Wn.2d at 261-62.

2. There is No Implied "Executive Privilege" in the Washington Constitution

Assume for the sake of argument that "other statute" in RCW 42.56.070(1) does mean "other law" and includes constitutional provisions. Even still, Washington's Constitution does not contain an implied executive privilege grounded in its separation of powers.

a. The Governor Does Not Have Implied Unwritten Powers

The Governor asked the Trial Court to find an implied unwritten gubernatorial executive privilege. This privilege is nothing less than a power – a power to trump the PRA – but an unwritten power that has never been heretofore delegated by the people to the Governor, nor declared or found by the courts. "Political power in this state inheres in the people, and by constitutional or statutory authority the exercise of this power in behalf of the people is delegated to certain officers. In the exercise of power the officer is controlled by the law theretofore declared. State v. Seattle Gas & Elec. Co., 28 Wash. 488, 495, 68 P. 946 (1902). "Every office under our system of government, from the governor down, is one of delegated powers." Seattle Gas, 28 Wash. at 495. "This court

has always insisted on finding an *enumerated* constitutional or statutory basis for the powers of executive officers...." City of Seattle v. McKenna, 172 Wn.2d 551, 557, 259 P.3d 1087 (2011) (emphasis added).

Washington's Constitution, like Massachusetts's, privileges the freedom of debate for its legislators. *Cf.* Const., Art. II, § 16, *with* Mass. Const. Pt. 1, Art. XXI. "[T]he explicit constitutional grant to the Legislature of a "privilege" as to its deliberations, *see* Art. XXI of the Declaration of Rights of the Massachusetts Constitution, further supports our view that a corresponding privilege in the Executive is not constitutionally required. 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." Babets v. Sec'y of Executive Office of Human Services, 403 Mass. 230, 233, 526 N.E.2d 1261, 1263 (1988). Similarly, if our framers had intended to recognize in our Constitution an executive privilege, they would have.

Moreover, the specific language of Const. Art. III, § 24, expressly mentions public records of the Governor, and implicitly excludes – through omission – any implied executive privilege as to those records. This express mention of the public records of the Governor is unique to our Constitution and has no counterpart in the federal constitution, or in those states that have recognized an implied executive privilege.

b. There is No Implied Executive Privilege in Washington's Separation of Powers

The Governor argues that executive privilege is contained, by necessary implication, in the separation of powers doctrine. But there is no such necessary implication in Washington's Constitution.

While our Constitution, much like the federal constitution, does not contain a formal separation of powers clause, "the very division of our government into different branches has been presumed throughout the 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). Based upon separation of powers concerns, "the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional." Brown v. Owen, 165 Wn.2d 706, 722, 206 P.3d 310 (2009) (internal citations omitted). The Governor's argument is that by passing the PRA, the legislative branch (of which the people, in enacting initiatives, have been held to be a part) is intruding on the province of the Governor in allowing the public to obtain public records, enabling the public to "look beyond" the decisions and actions of the executive branch to the content and substance behind them.

But the separation of powers doctrine recognizes that the *people* of Washington play a fundamental role in Washington's government. "Each of the three departments into which the government is divided are equal, and each department should be held responsible to the people that it represents, and not to the other departments of the government." State ex rel. Reed v. Jones, 6 Wash. 452, 461-62, 34 P. 201 (1893). In enacting the PRA, the people – acting as a part of the legislative branch – created a statutory scheme by which each department *is held responsible to the people that it represents.* It is not the legislature that is enabled by the PRA to "look beyond" the decisions and actions of the executive branch to the content and substance behind them, but the people.

A PRA request by a *person* does not represent any conflict between the separate branches of government; the doctrine of separation of powers is inapplicable here. The same concerns are not present as in the case, for example, where a coordinate branch attempts to compel records via subpoena. Similarly, in North Carolina, "The Public Records Act allows intrusion not by the legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches. Statutes affecting other branches of government do not automatically raise separation of

powers problems." News & Observer Pub. Co., Inc. v. Poole, 330 N.C. 465, 484, 412 S.E.2d 7, 18 (1992).

Finally, any discussion of what might be "necessarily implied" by the balance of powers doctrine must start with a fresh analysis of just what that balance is in Washington. Our Constitution specifically provides that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Const. Art. I § 1. The people reserve the initiative and referendum powers to themselves. Const. Art. II, § 1. And, additionally:

> The framers of the Washington Constitution also provided for democratic checks on all three branches, including the direct election of both houses of the legislature, popular election of judges, and the separate election of all major offices in the executive branch, including the governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and the commissioner of public lands [in addition to the power of popular recall.]

Cornell W. Clayton, Toward A Theory of the Washington Constitution, 37 Gonz. L. Rev. 41, 69 (2002).

"Thus, the balancing of governmental powers in Washington requires a consideration of democratic principles as the democratic checks alter the traditional powers of the executive, legislative, and judicial branches. In essence, the framers created a government based on four, not

three, branches of government." Brian Snure, A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constiution, 67 Wash. L. Rev. 669, 684-85 (1992). "There is another factor not occurring under the old order, where we took account of the executive, the representative body (the Legislature) and the courts. There is now a fourth element; the people reserving the right to assert its will over the legislative department of the government." State v. Meath, 84 Wash. 302, 317-18, 147 P. 11 (1915). "We recognized in [State v. Meath] the role created for the people by amendment 7 was closely akin to that of a fourth branch of government." Fritz v. Gorton, 83 Wn.2d 275, 281, 517 P.2d 911 (1974).

Mr. Snure calls this "fourth branch" the democratic branch. "The democratic branch, however, is recognized only in the state constitution, not the Federal Constitution." Snure, Frequent Recurrence, 67 Wash. L. Rev. at 689. The federal constitution does not provide for initiative or referendum, nor do the people of the United States have the power to democratically elect federal judges or members of the executive branch like the Secretary of State.[2] It was error, therefore, for the Trial Court to

[2] The foregoing and following are intended to serve, briefly, as analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1987), even though it is not clear that a Gunwall analysis is required here. "The following nonexclusive neutral criteria are relevant in determining whether, in a

conclude that Washington's constitution contains an implied executive privilege necessarily implied by the separation of powers doctrine, without considering the fact that the balance of separation of powers in Washington is *different*, because of the vital role of our fourth branch of government. This is *not* an argument that the PRA, because it was enacted via the initiative process, trumps the constitutional separation of powers. Rather, it is an argument that a separation of powers analysis must not ignore the powers and prerogatives of our fourth branch: the people.

There are many overlapping functions within both the Washington and the federal governments. "Legislative control over appropriations, the executive power to veto, and the judicial authority to declare legislative and executive acts unconstitutional, are all examples of direct control by one branch over another." Matter of Salary of Juvenile Dir., 87 Wn.2d 232, 242-43, 552 P.2d 163 (1976) (state and federal citations omitted). The fourth branch in Washington – the people – has direct control over the other branches through direct election of the legislature, popular election of judges, the separate election of major offices in the executive, the power to subject officials (except judges) to popular recall, and through

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given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." Gunwall, 106 Wn.2d at 58.

direct legislation via initiative and referendum. "This overlapping of functions allows for the scheme of checks and balances which, as noted above, evolved side-by-side with and in response to the separation of powers concept." Juvenile Dir., 87 Wn.2d at 242.

Viewed in this light, the constitutional powers of the fourth branch – the people – are vital components of the scheme of checks and balances that has evolved *side-by-side with and in response to the separation of powers concept.* And the PRA is a fundamental tool by which the people may inform themselves so that they can exercise their constitutional powers and check and balance the powers of the other three branches. The reasoning in Fritz v. Gorton is absolutely on point here, though it concerns the constitutional right of free speech rather than the constitutional powers of election, recall, initiative, and referendum:

> We accept as self-evident the suggestion...that the right to receive information is the fundamental counterpart of the right of free speech. The broad protections accorded the speech of public officials, and the criticism of such speech, are essential to ensure 'that debate on public issues should be uninhibited, robust, and wide-open...' The constitutional safeguards which shield and protect the communicator perhaps more importantly also assure the public the right to receive information in an open society. Freedom of speech without the corollary – freedom to receive – would seriously discount the intendment purpose and effect of the first amendment.

Fritz, 83 Wn.2d at 296-97 (internal citations omitted). The people's constitutional power to enact legislation and to elect and recall their officials would be seriously discounted without the freedom to receive the public records that inform them. And the people's freedom to receive public records from the Office of the Governor, absent a statutorially-enumerated exemption, is not a constitutionally-prohibited intrusion upon the essential functions of the Governor's office, but instead is a constitutional check on and balance of the executive branch.

c. The PRA is Not a Separation of Powers Violation

Significantly, the Governor has not argued that the heretofore lack of an executive privilege has damaged the Office of the Governor. "Unlike many other constitutional violations, which directly damage rights retained by the people, the damage caused by a separation of powers violation accrues directly to the branch invaded." Carrick, 125 Wn.2d at 136. "The question to be asked...is whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). "Until and unless such as scheme interferes with [one branch of government's] functioning, no separation-of-powers problem exists." Zylstra, 85 Wn.2d at 749.

> Assuming, *arguendo*, that certain types of state governmental decisions call for advice or opinions that would be controversial or unpopular, the City provides no real evidence that governmental officials would withhold giving advice they believe is necessary and correct, based merely upon the remote possibility that it could some day be produced in litigation. Indeed, the City does not claim that the decisionmaking process has been harmed thus far despite the absence of such a privilege in this state. We conclude that in light of the range of competing policies underlying the deliberative process privilege, its adoption should be left to the General Assembly.

People ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521, 532-33, 705 N.E.2d 48, 53 (1998). Despite the worry of the "chilling effect" on advice and recommendations that the Governor fears attends the absence of executive privilege, the Governor does not claim that the decisionmaking process has been harmed thus far despite the absence of such a privilege in this state. While the Governor has asserted the privilege in the past (as early as 1999; *see* CP 613), the fact is that until the Trial Court concluded it existed, there was no certainty the assertion of the privilege would be upheld. But candid advice to the Governor was not chilled.

This Court should decline to find a separation of powers violation where the Governor had provided no evidence thereof, and this Court should decline to recognize an unwritten implied executive privilege arising out of Washington's separation of powers when Washington's separation of powers with its "fourth" "democratic" branch is markedly

different from the separation of powers in the federal constitution. Indeed, if this Court does recognize an unwritten implied executive privilege applying to the PRA, that would be a violation of the separation of powers doctrine. "[E]very exemption included in the public disclosure act, chapter 42.56 RCW, results from a deliberate weighing of competing interests by the legislature, and it is the legislature's province to amend a statute, not this court's." Soter v. Cowles Pub. Co., 162 Wn.2d 716, 758, 174 P.3d 60 (2007) (Madsen, C.J., concurring). "We must always remember that we are not a super legislature. It is not our role in government to enact legislation or to add provisions or to change provisions in legislation which are otherwise clear." Moran v. State, 88 Wn.2d 867, 875, 568 P.2d 758 (1988).

B. The Trial Court Erred in Implying an Unwritten Executive Privilege in Washington's Constitution When the PRA Already Provides Ample Protection

Alternatively, even if the Court concludes that the doctrine of separation of powers in Washington does require that the functioning of the Governor's office requires protection, it is unnecessary to imply an unwritten executive privilege; the PRA, through its comprehensive and thoughtful set of exemptions, provides ample protection to the Governor. "[[W]]e adhere to the fundamental principle that if a case can be decided on nonconstitutional grounds, an appellate court should refrain from

deciding constitutional issues." Washington State Farm Bureau, 162 Wn.2d at 322. "If [a constitutional provision] is too restrictive in its terms, that is a matter for the citizens of this state to correct through the amendatory process. It is not for this court to engraft an exception where none is expressed in the constitutional provision, no matter how desirable or expedient such an exception might seem." O'Connell, 65 Wn.2d at 806. Here, our statutes already provide for the deliberative process exemption (RCW 42.56.280); a whole set of privileges applicable when an agency is a party to a controversy (RCW 42.56.290), including attorney-client privilege (RCW 5.60.060(2)); work product, and the public officer official confidence privilege (RCW 5.60.060(5)); the state security exemption (RCW 42.56.420); and applications for public employment (RCW 42.56.250(2)). This is a non-exhaustive list; there is no need to graft an implied executive privilege onto our Constitution.

The deliberative process exemption is not equivalent to an exemption for executive privilege, although they are similar. The Governor argued "The Governor has an executive privilege, as the elected officer in whom the Washington Constitution vests the supreme executive power of the state. Wash. Const. art. III, § 2. In this case, the privilege is claimed for specific documents or information communicated to or from the Governor, to protect recommendations, advice, discussions, and

deliberations involving the decision-making and policy-making functions for which the Governor is constitutionally responsible." CP 1032.

These recommendations and deliberations that the Governor seeks to protect are already protected by the deliberative process exemption. "The [deliberative process] exemption is intended to safeguard the free exchange of ideas, recommendations, and opinions prior to decision." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 133, 580 P.2d 246 (1978).

> In order to rely on this [deliberative process] exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions, and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.

PAWS, 125 Wn.2d at 256

The Governor asserted an executive privilege, grounded in constitutional separation of powers, not the common law (here codified at RCW 42.56.280) deliberative process exemption.

> The deliberative process privilege is a 'common sense-common law privilege' that is 'shorn of any constitutional overtones of separation of powers.' On the other hand, the chief executive communications privilege is 'rooted in the constitutional separation of powers principle[] and the President's unique constitutional role.'

Matthew W. Warnock, Stifling Gubernatorial Secrecy: Application of

Executive Privilege to State Executive Officials, 35 Cap. U. L. Rev. 983, 1012 (2007).

The Governor chose to assert an unwritten implied executive privilege instead of the statutory deliberative process exemption because the executive privilege is more expansive than the deliberative process privilege. "[U]nlike the deliberative process privilege, the presidential communications privilege applies to documents in their entirety [that is, non-privileged or non- exempt material need not be produced, including factual material], and covers final and post-decisional materials as well as pre-deliberative ones." In re Sealed Case, 121 F.3d 729, 745 (D.C. Cir. 1997). But the Governor has not provided any justification why this expansive privilege, held to apply to Presidential communications, should apply in the gubernatorial context as well.

There are important differences between the President of the United States and any governor, including Washington's Governor.

> [A] President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment.

United States v. Nixon, 418 U.S. 683, 715, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The same concerns do not apply to the communications and activities of a governor, or not to the same degree.

In arguing that the executive privilege should apply here in Washington, the Governor relies on decisions from other states that have found that their governors may assert executive privilege. However, "[e]ven those states applying the chief executive privilege at the state level have done so only in name. Substantively, the state courts have applied only half-heartedly some form of the deliberative process privilege. The end result is a piecemeal application of the federal law doctrine of executive privilege at the state level." Warnock, Stifling Gubernatorial Secrecy, 35 Cap. U. L. Rev. at 1013.

And since our legislature has already codified in statute those aspects of the federal law doctrine of executive privilege it adjudged to be pertinent, applicable, and necessary for public agencies in Washington (including the governor's office), these state decisions are not helpful. For example, consider Delaware, New Jersey, and Alaska. In those states, their courts applied executive privilege to block disclosure of records related to the governor's consideration of candidates for appointment to public office. *See* Guy v. Judicial Nominating Comm'n, 659 A.2d 777 (Del. Super. 1995); Nero v. Hyland, 76 N.J. 213, 386 A.2d 846 (1978);

Doe v. Alaska Superior Court, Third Judicial Dist., 721 P.2d 617 (Alaska 1986). But Washington already has a statute that exempts such records: "The following employment...information is exempt from public inspection and copying under this chapter:...(2) All applications for public employment, including the names of applicants, resumes, *and other related materials submitted with respect to* an applicant." RCW 42.56.250(2) (emphasis added).

Neither is the state of Maryland helpful. In the case of Hamilton v. Verdow, 287 Md. 544, 414 A.2d 914 (1980), the public record at issue was a report prepared at the governor's request for policy deliberations. It is not clear whether the governor had taken executive action at the time the record was sought, pursuant to a civil lawsuit discovery subpoena to the report's author. Therefore, it is not immediately clear whether – if the report were the subject of a Washington PRA request – whether the deliberative process exemption codified in RCW 42.56.280 would exempt the report from production, or whether the public officer official confidence privilege (RCW 5.60.060(5)) might somehow apply to likewise exempt the report.

Moreover, the court held that the executive privilege in Maryland does not automatically protect factual information, unless the facts were so intertwined with the recommendations made to the governor that they

were impossible to separate, unlike the Presidential executive privilege described in In re Sealed Case, 121 F.3d at 745. Hamilton, 287 Md. at 569-70. Likewise, the deliberative process exemption in Washington does not protect factual information. Hearst, 90 Wn.2d at 133-34. Maryland jurisprudence does not provide any justification for finding an implied executive privilege exemption in Washington when we already have a deliberative process exemption that would likely exempt a report like the one in Maryland from disclosure to the same extent.

Similarly, the public records at issue in Vermont were memoranda exchanged between the governor's office and the Agency for Natural Resources, which were "prepared for the purpose of policy formulation and decision-making regarding Agency matters." Killington, Ltd. v. Lash, 153 Vt. 628, 631, 572 A.2d 1368, 1371 (1990). And the opinion does not make clear if policy had already been formulated or decisions already made. Here is no support for grafting on an implied executive privilege where there is already a deliberative process exemption.

Indeed, looking at the exemption logs in this case and reading the descriptions of the records for which the Governor asserted solely the executive privilege exemption and none other, shows that for any of these records, the Governor could have – at least pre-decision – asserted the deliberative process exemption. *Consider* "Portion of PRR.02....

Governor's Handwritten note on Decision Document." CP 575. If the Governor had not yet already made the "decision" to which this record pertained, the Governor could have asserted the deliberative process exemption under RCW 42.56.280. And further, if the "decision" made by the Governor was *not* to implement whatever was being considered, then the record would have remained exempt, even post-decision. PAWS, 125 Wn.2d at 257. Similarly, for "PRR.08-15....Enrolled Bill Analysis Report/Bill 6032/Contains analysis and comments regarding legislation pending for Governor's signature and recommendation on whether to sign or veto." Here, too, the Governor could have asserted the deliberative process exemption under RCW 42.56.280 *before* deciding to sign the legislation and *afterwards* if she chose to veto. PAWS, 125 Wn.2d at 257.

In asserting executive privilege rather than the deliberative process exemption – especially as to those records pertaining to legislation or policy that is actually implemented – the Governor is essentially saying to the people of Washington that we do not need to know how the sausage was made, even after the sausage has already been cooked and eaten. But "[t]he people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining

informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. The PRA is to be "liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected." RCW 42.56.030. "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550.

"There must be a very good reason to disregard the public mandate of openness in government – a mandate that unquestionably includes public servants' performance of their official public duties." Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 425, 259 P.3d 190 (Madsen, C.J., concurring/dissenting). It is *not* a good reason to graft on an unwritten, implied "executive privilege" simply because it would protect the release of facts (as the deliberative process exemption does not) and because it would protect the release of advice *after* implementation (as the deliberative process exemption does not), without a showing that such expansive protections are necessary to the Governor's office, when the Public Records Act is such a strongly-worded mandate for broad disclosure of public records, declaring that the PRA shall be interpreted deliberately and its exemptions narrowly.

C. The Trial Court Erred in Applying Executive Privilege as A Trump to the PRA Rather Than as an Exemption

Assuming for the sake of argument that the deliberative process exemption and the other statutory exemptions to the PRA do *not* provide sufficient protection for the functioning of the office of the Governor, and that an unwritten constitutional "executive privilege" is indeed a *necessary* implication from the four-part separation of powers in Washington's Constitution, the Trial Court nonetheless erred in applying executive privilege as a trump of the Public Records Act rather than an exemption.

1. The Court Erred in Dismissing Mr. West's Action Without Applying the Procedures of the PRA

The Trial Court dismissed Mr. West's action at the hearing on whether to grant Mr. West's motion for an order to show cause. By the time of this hearing, the Governor had disclosed hundreds of pages of responsive records to Mr. West's request. The Governor disclosed those records in two ways: (1) by disclosing their existence in the two exemption logs; and by (2) actually producing the records to Mr. West. Yet these disclosures were unreasonably late; the Governor had violated the PRA and the violations were apparent at the time of the hearing on Mr. West's motion for an order to show cause. It was error for the Trial Court to dismiss the case at that hearing, applying the "executive privilege" as a trump of the PRA rather than an exemption to the act.

a. The Governor Denied Mr. West the Opportunity to Inspect or Copy

Mr. West personally delivered his public records request to the Governor's office on January 19, 2010. CP 569. While the Governor's office responded promptly, within five business days of the request, Ms. Campbell's letter estimated that it would take her three to four weeks to fulfill Mr. West's request. CP 573. However, Mr. West heard nothing further from the Governor's office for eight months. By failing to follow up with Mr. West with a request for clarification, or with an explanation that the Governor's office was revising its estimate of three to four weeks to fulfill Mr. West's request, the Governor's office *failed to properly respond* to Mr. West. "For practical purposes, the law treats a failure to properly respond as a denial. *See* RCW 42.56.550(2), (4) (formerly RCW 42.17.340) (allowing requester to challenge agency estimate of time it will take to respond and allowing imposition of daily fine for each day requester was denied access to record)." Soter, 162 Wn.2d at 750.

Mr. West's claims (in addition to seeking a declaratory ruling that executive privilege is not a valid exemption contained in the PRA) were properly pled in his complaint: "The Governor failed to promptly respond or disclose relevant records." CP 5. Likewise, the relief he sought was properly prayed for. CP 6. But by dismissing Mr. West's case at the

hearing on his motion for an order to show cause, the Trial Court did not adjudicate Mr. West's claims that the Governor failed to promptly respond or disclose records. The Trial Court's dismissal of Mr. West's case meant that the Trial Court was treating the assertion of executive privilege as a trump over the substantive and procedural requirements of the Public Records Act. The Governor was not held accountable for taking an unreasonably long time to produce the two exemption logs and both sets of records for which she was waiving executive privilege, or for the silent withholding that culminated in the production of the second exemption log and second set of records in April 2011, more than a year after the request.

Moreover, Mr. West believes that there are more responsive records to his request than were disclosed, either by listing in the exemption logs, or by actual production to Mr. West. Recall that Mr. West's public records request, made on January 19, 2010, sought all those records that had been withheld from other requesters under a claim of executive privilege from 2007 on. Yet the only records listed on either exemption log were described as having been responsive to record requests made in 2007 or 2008. If there were even one record request in 2009 or early 2010 to which the Governor's office asserted executive

privilege *and* the records were not produced to Mr. West,[3] then the Governor wrongly withheld those records to Mr. West by not disclosing them in the exemption log, and likely did not conduct a complete search.

Finally, there were records on both exemption logs for which the Governor did not assert executive privilege, but asserted an enumerated exemption to the PRA. Presumably, at one time in the past the Governor had asserted executive privilege for those records, because otherwise they would not have been responsive to Mr. West's request. Mr. West was entitled to a hearing under RCW 42.56.550(1) as to these records (even if the Trial Court did not err in finding an executive privilege or in incorporating the three-part test; the Governor did not assert executive privilege as to these records), where the Governor bears the burden of proof "to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1).

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[3] In the set of records produced to Mr. West on September 27, there is a section of records with Bates stamps indicating that they were responsive to records requests made in 2009. *See, e.g.*, CP 90 ("REITZ, 09-48, PRR.01"). But the pagination is not consistent; for example, between PRR.02 and PRR.04, PRR.03 is missing. *See* CP 91-92. Moreover, on CP 131 ("REITZ, 09-65, PRR.000095"), there is a large redacted section, but no explanation on the exemption log of what the redaction was. *See also* CP 150 ("THOMSEN, 09-86, PRR.000009") for another large redaction. As a public records requestor, Mr. West should not have to engage in this kind of "reverse engineering" to try and deduce what has or has not been produced or disclosed to him.

Though "[a]gencies shall not distinguish among persons requesting records, and such person shall not be required to provide information as to the purpose for the request" (RCW 42.56.080), to Mr. West, an open government advocate and PRA activist, the records for which Governor Gregoire *formerly* claimed executive privilege but was now claiming a statutory exemption would be of interest.

b. There Was Insufficient Evidence Supporting Findings of Fact 2, 3, and 8

The Trial Court found that the Governor informed Mr. West by letter dated September 3 that the records for which executive privilege had been waived were available for inspection or copying, as well as the exemption log, and that Mr. West filed and served his lawsuit without having made arrangements to inspect or copy the records that had been produced on September 3, or the accompanying privilege log. CP 1005, Findings of Fact 2 and 3[5]. There was insufficient evidence supporting these two findings. Mr. West denied receipt of the September 3 letter. RP at 8, ll. 4-10. *See also* CP 12; CP 46; and CP 1016. Moreover, the Governor failed to produce evidence of transmission to Mr. West.

The Trial Court also found that Mr. West's Complaint and Motion for an Order to Show Cause were limited to asking the Trial Court to rule that there was no executive privilege as an exemption under PRA and that

[5] For full text see Appendix A.

a denial of records therefor is a violation of the PRA. There was insufficient evidence for Finding of Fact 8[6]; both the complaint and the motion to show cause asked for findings that the Governor violated the PRA by failing to properly respond, which is treated as a denial.

c. The Trial Court Erred in Denying Mr. West the Opportunity to "Test" the Three-Part Test It Adopted

The Trial Court adopted a three-part test for executive privilege. CP 1007. But by dismissing Mr. West's case at the hearing on the motion for an order to show cause, the Court denied Mr. West the opportunity to "test" the three-part test and to assess the claims of executive privilege.

The three-part test, as set out in the Trial Court's final order, is as follows: "If the Governor asserts executive privilege with specificity, the records are presumed privileged. This presumption can be overcome if the requester demonstrates a particularized need for the records, and the court determines that the need outweighs the constitutional interests in preserving the chief executive's privilege under the principles of separation of powers and the public interests identified in the relevant federal and state cases." CP 1007-08. In arguing that Mr. West's case be dismissed, the Governor stated: "In this case, Mr. West makes no pretense that there is a particularized need or reason for disclosure of the records.

[6] For full text see Appendix A.

Indeed, Mr. West did not request any specific records but simply all records that had been withheld previously on the basis of executive privilege within a certain time period." CP 1043.

The Trial Court dismissed Mr. West's case on the basis for which the Governor argued; the Trial Court concluded as a matter of law, "Mr. West offers no basis to find that the Governor's assertion of privilege was insufficient or that the presumption of privilege should be overcome. Mr. West simply disagrees with any assertion of executive privilege and requested all records for which the privilege had been asserted for a certain time period." CP 1008. But at the time of the hearing on Mr. West's motion for an order to show cause, the Trial Court had not yet concluded that executive privilege existed, and had not yet incorporated the three-part test into the Public Records Act. Furthermore, the PRA states in black and white that "[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request." RCW 42.56.080. It was error and a violation of due process to dismiss Mr. West's case pursuant to a test that heretofore did not exist in Washington law and which conflicts with the PRA, and error and a violation of due process to not give Mr. West the opportunity to "test" the three-part test. Further, even if was not error to apply the test at that juncture, the Governor had

provided records and an exemption log to Mr. West after briefing had closed; Mr. West had no opportunity to demonstrate a "particularized need" for those records without having seen the log.

2. The Trial Court Erred in Adopting the Three-Part Test, Which Conflicts with the PRA

The three-part test, suggested by the Governor and adopted by the Trial Court, conflicts with the PRA and cannot be harmonized with it.

> The statutory scheme [of the PRA] establishes a positive duty to disclose public records unless they fall within the specific exemptions. Whether or not they do so is a function reserved for the judiciary by the act. The court is the proper body to determine the construction and interpretation of statutes. Thus, even when the court's interpretation is contrary to that of the agency charged with carrying out the law, it is ultimately for the court to declare the law and the effect of the statute. There is no violation of the separation of powers theory in this function. It is within an orderly concept of checks and balances and the result of constitutional definition of the role of the judiciary. "Both history and uncontradicted authority make clear that '(i)t is emphatically the province and duty of the judicial department to say what the law is.' (cases cited) even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch." In re Juvenile Director, 87 Wn.2d 232, 241, 552 P.2d 163 (1976).

Hearst Corp., 90 Wn.2d at 130 (internal citations omitted).

Under the three-part test, the first prong is that the Governor must "assert the privilege with specificity as to the nature of the records without, of course, revealing the information that is privileged." CP 1042.

There appears to be nothing objectionable in this prong, so long as the Governor's assertion of the privilege is in compliance with the rest of the PRA, including the "prompt response" requirement of RCW 42.56.530. Indeed, RCW 42.56.530(4) requires that "Denials of requests must be accompanied by a written statement of the specific reasons therefor."

However, the Governor cited to other caselaw indicating that once the Governor – the assertor of executive privilege – has complied with this first prong and asserted the privilege, "the reasons given indicate on their face that the documents fall within the privilege, and the documents are presumptively protected by executive privilege," and "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." CP 1042 (citations omitted). But this conflicts with RCW 42.56.550(1) and (3); the burden of proof is on the agency, judicial review shall be *de novo,* and the court may examine any record *in camera*. Further, "Whether or not [public records fall within specific exemptions] is a function reserved for the judiciary." Hearst Corp., 90 Wn.2d at 130. Leaving interpretation and enforcement of the PRA to those it was designed to regulate "would be the most direct course to its devitalization." Hearst Corp., 90 Wn.2d at 131.

Moving on to the second prong, "Executive privilege having been specifically asserted, the requestor is then required to demonstrate a particular need for the specific documents requested and explain why that need outweighs the qualified privilege." CP 1042. "If no showing is made, the inquiry is at an end, the presumptive privilege applies, and the documents are not subject to *in camera* review." CP 1042-43. But in Washington, "[a]gencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request." RCW 42.56.080. As support for this second prong, the Governor cited to State ex rel. Dann v. Taft, 109 Ohio St. 3d 364, 378, 848 N.Ed.2d 472 (2006). And in Ohio, too, persons shall not be required to give a reason for the request. "We acknowledge that a person invoking the Public Records Act, R.C. 149.43, is not required to demonstrate need or even to state a reason for requesting disclosure of public records pursuant to the act." Dann, 109 Ohio St. 3d at 379.

But here lies an important difference between Ohio and Washington: "However, we reiterate that documents protected by the gubernatorial-communications privilege do not fall within the definition of "public records" for purposes of the act. Ohio Rev. Code 149.43(A)(1)(v) ....For that reason, this decision should not be construed as changing existing precedent." Dann, 109 Ohio St. 3d at 379. In Ohio, "'Public

record' does not mean any of the following....Records the release of which is prohibited by state or federal law." Ohio Rev. Code 149.43(A)(1)(v). In contrast, in Washington, a public record "includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010. The application of the second prong simply cannot be harmonized with Washington's PRA.

As to the third prong, "If a requester has demonstrated a particularized need for the requested records and provided a reasoned explanation why that need outweighs the public interest in maintaining the privilege, the court then makes a determination whether the demonstrated need in fact outweighs the public interest in the privilege." CP 1043. "The Governor should have the opportunity to demonstrate that *in camera* inspection would [compromise] the fundamental interests of the executive branch." CP 1043. However, in Washington, "Most importantly, the courts are charged with carrying out the PRA. We are here to declare the law and effect of the statute; we need provide no deference to an agency's interpretation of the PRA. Furthermore, when there is the possibility of a conflict between the PRA and other acts, the PRA governs." O'Neill, 170 Wn.2d at 149. Finally, the Governor adds, "In conducting the balancing, a

court may uphold or reject the claim of privilege in its entirety, or in part." CP 1043, *citing* to Dann, 109 Ohio St. 3d at 379. This is an example of the piecemeal application of the federal executive privilege at the state level; the federal executive privilege (the privilege that the Governor ostensibly achieved with the Trial Court's ruling) "applies to documents in their entirety." *See* CP 1058, *citing* In re Sealed Case, 121 F.3d at 745-46; *cf.* Warnock, Stifling Gubernatorial Secrecy, 35 Cap. U. L. Rev. at 1013.

Since in the event of a conflict between the PRA and other acts, the PRA governs (RCW 42.56.030), this Court should entirely reject the three-part test, even if this Court recognizes the executive privilege.

D. Mr. West Requests Attorney Fees

Below, Mr. West was representing himself pro se and properly did not request an award of attorney fees under the PRA in his complaint. Now Mr. West is represented by counsel, and the time is ripe for him to request attorney fees here on appeal, pursuant to RCW 42.56.550(4) and RAP 18.1. He does so, in addition to requesting an award of his costs.

E. Mr. West Requests Remand

Mr. West requests that this Court find that the Trial Court erred in adopting the unwritten, implied executive privilege as an exemption to the Public Records Act, in adopting the three-part test, in its application of the three-part test to Mr. West, in its findings of fact 2, 3, and 8, and that the

Trial Court erred in dismissing Mr. West's complaint, since even if there was no error in the application of executive privilege, that certain of Mr. West's claims survive that application. Accordingly, Mr. West requests that this Court remand his case to the Trial Court for adjudication of his claims and the award of fees, costs, and an appropriate per diem penalty.

V. CONCLUSION

There is no "executive privilege" PRA exemption in Washington. Our Constitution doesn't have one, nor is it necessary to imply one out of our four-part separation of powers, because our PRA's statutory exemptions provide ample protection for the Governor. But even if there is such a privilege here, the Trial Court erred in dismissing Mr. West's suit because the Governor violated the PRA by failing to respond as required by law, silently withholding records, and failing to disclose records and produce a complete exemption log until after briefing had concluded. If the Governor is allowed to evade the requirements of the PRA and silently withhold records for many months in the absence of a valid privilege log – even while asserting executive privilege – dangerous precedent will be set.

RESPECTFULLY submitted this 3rd day of February, 2012.

CUSHMAN LAW OFFICES, P.S.

By: Stephanie M R Bird

Stephanie M. R. Bird, WSBA # 36859
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on February 3rd, 2012, I caused to be served a true and correct copy of the preceding document on the party listed below via:

VIA ELECTRONIC MAIL

Attorneys for Respondent Christine Gregoire
Christina Beusch
Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98501
christinab@atg.wa.gov

Jennifer Harkins, Legal Assistant

Appendix A

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EXPEDITE
Hearing is Set:
Date: June 23, 2011
Time: 1:30 pm
Hon. Judge Gary R. Tabor

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

ARTHUR WEST,

Plaintiff,

v.

CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF WASHINGTON; STATE OF WASHINGTON,

Defendants.

NO. 10-2-02121-1

~~[PROPOSED]~~ FINAL ORDER DENYING PLAINTIFF'S MOTION TO SHOW CAUSE AND DISMISSING CASE WITH PREJUDICE

THIS MATTER came before the Court on June 17, 2011, on the Plaintiff's Motion to Show Cause. Plaintiff ARTHUR WEST appeared pro se, and the STATE OF WASHINGTON and CHRISTINE GREGOIRE, Governor of the State of Washington (Governor), were represented by CHRISTINA BEUSCH, Deputy Attorney General.

The Court has heard and considered the arguments of the parties, reviewed and considered (1) Plaintiff's Motion to Show Cause; (2) Plaintiff's Declaration (dated April 7, 2011); (3) Plaintiff's Brief (dated April 18, 2011); (4) Defendant's Response to Plaintiff's Motion to Show Cause (dated May 4, 2011); (5) Declaration of Melynda Campbell and attached Exhibits A through H; (6) Declaration of Narda Pierce, and attached Exhibit I; (7) Plaintiff's Supplemental Memorandum (filed June 2, 2011); (8) Defendant's Supplemental

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Brief (dated June 7, 2011); (9) Second Declaration of Narda Pierce and attached Exhibit J; and (10) the pleadings and records filed in this case.

NOW THEREFORE, the Court enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER:

FINDINGS OF FACT

1. Plaintiff, Arthur West submitted a public records request, dated January 19, 2010, to the Governor requesting "all of the records being withheld from public disclosure by the office of the Governor under color a [sic] claim of executive privilege, from 2007 to present . . . ." Campbell Declaration ¶ 4.
2. In a letter, dated September 3, 2011, the office of the Governor informed Mr. West that those records for which executive privilege had been waived were available for inspection or copying. Campbell Declaration ¶ 8. A privilege log was prepared and made available to Mr. West for those records for which executive privilege continues to be asserted. Campbell Declaration ¶ 7.
3. Mr. West served this lawsuit on September 13, 2011, and filed it September 24, 2011, without having made arrangements to inspect or copy the records that had been produced on September 3, 2011, or the accompanying privilege log. Campbell Declaration ¶ 9. Mr. West did not pick up copies of the records and the privilege log until September 27, 2011. Campbell Declaration ¶ 10.
4. During the pendency of the case, the office of the Governor identified additional records for which executive privilege was asserted during the time period in Mr. West's request. Campbell Declaration ¶ 6, n.1; Pierce Second Declaration ¶ 4.
5. The Governor waived executive privilege for some of these additional records and produced them to Mr. West. Pierce Second Declaration ¶ 5. The Governor continues to assert executive privilege for the remaining additional records, and a

second privilege log was prepared and provided to Mr. West. Pierce Second Declaration ¶ 6.

6. The records that are the subject of this case are memoranda or communications with senior advisors and senior executive staff to or from the Governor or prepared specifically for the Governor's consideration. Pierce Declaration ¶ 10; Pierce Second Declaration ¶ 3. The exemption logs identify each record by date, author and recipient. In addition, for each record where executive privilege is being asserted, the log describes the subject matter of each record and the context in which the privilege is asserted. Campbell Declaration ¶ 7, Exhibit C; Pierce Second Declaration ¶ 6, Exhibit J.

7. Narda Pierce, Legal Counsel to the Governor, reviewed all of the records produced to, and withheld from, Mr. West. She discussed the subject matter in the records with the Governor's advisors as necessary. She consulted with the Governor and prepared the determinations regarding waiver or assertion of executive privilege. Pierce Declaration ¶¶ 6-10; Pierce Second Declaration ¶¶ 5, 7.

8. Mr. West's Complaint and Motion to Show Cause ask this Court to rule that a gubernatorial executive privilege is not an exemption under Washington's Public Records Act, Ch. 42.56 RCW (PRA), and that a denial of records based on executive privilege is a violation of the PRA as a matter of law entitling Mr. West to penalties.

9. The Governor asks this Court to rule that gubernatorial executive privilege, grounded in the separation of powers under the Washington State Constitution, is an exemption under the PRA, and that the assertion of executive privilege is not a denial of a record in violation of the PRA.

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CONCLUSIONS OF LAW

1. The only issue before the Court is whether the Governor may assert a gubernatorial executive privilege, grounded in the separation of powers under the Washington State Constitution, as an exemption under the PRA.
2. As a matter of law, the Governor may assert executive privilege, grounded in the separation of powers under the Washington State Constitution, as an exemption under the PRA.
3. Constitutional privileges are incorporated as exemptions to the PRA through the operation of RCW 42.56.070(1), the "other statute" provision.
4. Because executive privilege is a constitutional privilege, it constitutes an exemption under RCW 42.56.070(1).
5. A legislative enactment is not required for an exemption to be recognized through the "other statute" provision. If it were, however, RCW 43.06.010, which specifically recognizes the Governor's constitutional and general powers and duties, would satisfy that requirement.
6. The constitutional basis of the gubernatorial executive privilege and public interests supporting that privilege are analogous to those recognized by the United States Supreme Court and federal courts for presidential privilege, and recognized by other state courts for gubernatorial privilege. As such, the three-part test adopted in federal and state cases for assessing presidential and gubernatorial executive privilege is wholly incorporated into the PRA in defining the exemption.
7. If the Governor asserts executive privilege with specificity, the records are presumed privileged. This presumption can be overcome if the requester demonstrates a particularized need for the records, and the court determines that the need outweighs the constitutional interests in preserving the chief executive's

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privilege under the principles of separation of powers and the public interests identified in the relevant federal and state cases.

8. In this case, each record for which executive privilege was asserted, including those for which the privilege was waived, were individually reviewed and assessed by the Governor's Legal Counsel. Recommendations were provided to the Governor, upon which determinations of privilege and waiver were made based on the subject matter and nature of the records. The records were memoranda and communications between the Governor and her senior advisors and senior staff or prepared for consideration by the Governor in the exercise of her constitutional powers as the chief executive officer of the state.

9. Mr. West offered no basis to find that the Governor's assertion of privilege was insufficient or that the presumption of privilege should be overcome. Mr. West simply disagrees with any assertion of executive privilege and requested all records for which the privilege had been asserted for a certain time period.

10. The Governor has not denied Mr. West the opportunity to inspect or copy a public record in violation of the Public Records Act, Ch. 42.56 RCW. Plaintiff Arthur West is not entitled to penalties or any other relief under the Public Records Act, Ch. 42.56 RCW.

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ORDER

Therefore, IT IS HEREBY ORDERED that:

a. Plaintiff's Motion to Show Cause is denied;

b. Plaintiff's Complaint is dismissed with prejudice; and

c. Each party is to bear its own costs and fees.

DONE in open court this 23 day of June, 2011

JUDGE GARY R. TABOR

Presented by:

Christina Beusch
Deputy Attorney General
Attorney for Defendant

Approved as to Form:

Arthur West
Plaintiff, Pro Se

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To: Jennifer Harkins; christinab@atg.wa.gov; Stephanie Bird
Cc: roses@atg.wa.gov
Subject: RE: West v. Gregoire, Supreme Cause no. 86150-1

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Cc: roses@atg.wa.gov
Subject: West v. Gregoire, Supreme Cause no. 86150-1

Dear Clerk of the Court,

Attached is Appellant's opening brief. The original document will follow via legal messenger.

Best regards,

Jennifer Harkins
Legal Assistant to Stephanie M. R. Bird
Cushman Law Offices, P.S.
924 Capitol Way S.
Olympia, WA 98501
T: 206-812-3144

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