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No. 86150-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

ARTHUR WEST,

Appellant,

v.

CHRISTINE GREGOIRE, GOVERNOR, et al.,

Respondent

Appellant's Reply Brief

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ORIGINAL

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I. INTRODUCTION

There is no implied gubernatorial executive privilege grounded in the separation of powers under the Washington 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. Rather, there are written, valid statutes that sufficiently protect the Governor's interest in confidentiality.

II. 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). By asserting an unwritten version of "executive privilege," as an exemption under the PRA, the Governor denied our citizenry access to a whole class of possibly important government information, as did the Trial Court.

A. The Constitutional Separation of Powers Doctrine Does not Require the Executive Privilege Here Urged

The constitutional separation of powers doctrine, in Washington, does not require the unwritten executive privilege here urged by the Governor; the "executive privilege" is not necessary for the Governor's office to function properly. In Washington, "The validity of this doctrine

does not depend on the branches of government being hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government." Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

Mr. West does not disagree that the four branches of Washington's government are entitled to a measure of confidentiality from each other. But Mr. West does disagree with the Governor arguing for *implying* a broad, unwritten executive privilege to the PRA when the PRA specifically requires statutory exemptions, when the PRA already protects Washington's executive with express, written codifications of the various components that together make up "executive privilege." *See*, *e.g.*, 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)).

And in Washington, the governor's powers and privileges are specifically delegated. "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).

The Governor argues that there is a difference between privileges or immunities and powers, and that "Mr. West's discussion of enumerated and implied powers misses the mark." Response Brief at 13, n. 6. But there is no difference for this purpose. In United States v. Nixon, 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Supreme Court made no distinction, observing that "[c]ertain powers and privileges flow from the nature of enumerated powers." The Supreme Court further held that it had authority to "interpret claims with respect to powers alleged to derive from enumerated powers." Nixon, 418 U.S. at 704. These "powers" were the powers of executive privilege. Likewise, the Governor is here arguing that there is an unwritten executive privilege derived from the admittedly unenumerated doctrine of separation of powers that serves as an unwritten exemption to the PRA. For this analysis, there is no

difference between privileges and powers, and Mr. West's argument that the Governor's powers must be delegated is not to be discounted.

This Court should not find an unwritten executive privilege as the Governor urges, but instead should look to the statutes *already* written by our legislature and enacted by our executive, including the statute codifying the deliberative process exemption to the PRA. "Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action." RCW 42.56.280. The purpose of this exemption is to permit "frank and uninhibited discussion during the decision-making process." West v. Port of Olympia, 146 Wn. App. 108, 116, 192 P.3d 926 (2008), *quoting* Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

This statute – RCW 42.56.280 – protects precisely the concerns raised by the Governor in seeking an implied 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). *See also*:

> A president and those who assist him must be free to explore alternatives 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.

Nixon, 418 U.S. at 708. There is no need to graft on an implied, unwritten privilege when our PRA already amply protects the Governor.

B. Other States' Caselaw Supports Mr. West's Argument that there is No Need to Imply an Unwritten Executive Privilege

The states whose courts have found an executive privilege have different laws and constitutions from Washington's, and do not support the Governor's request for implying an unwritten executive privilege here.

For example, in the Maryland case of Hamilton v. Verdow, 287 Md. 544, 414 A.2d 914 (1980), the Maryland Court of Appeals considered whether the federal rules of evidence – incorporating as they do "State law" on privilege – exempt from discovery and in camera inspection an investigative report compiled in confidence for the Governor of Maryland on the basis of executive privilege. The Maryland Court found that they did, and that executive privilege was part of the "common law of evidence" and also has "a basis in the constitutional separation of powers principle." Hamilton, 287 Md. at 562. But in Washington, the PRA

specifically requires exemptions found within the PRA or in other *statutes*, not other "law." RCW 42.56.070(1).

And in Vermont, in the case of Killington, Ltd. v. Lash, 153 Vt. 628, 572 A.2d 1368 (1990), the Vermont Court found that a Vermont statute, specifically citing the "common law deliberative process privilege as it applies to the general assembly and the executive branch agencies of the state of Vermont," brought common-law privileges with their established burdens into the law. Killington, 153 Vt. at 639, *citing* Vt. Stat. Ann. tit. 1, § 317. Here, Washington's legislature wrote RCW 42.56.280, our executive enacted it, and our judiciary interpreted it. Our statutory version of the "executive privilege," that is, the deliberative process exemption, does not bring the established burdens of the common-law executive privilege into our law.

In Ohio, the case of State ex rel. Dann v. Taft, 109 Ohio St. 3d 364, 848 N.Ed.2d 472 (2006), found 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)." Dann, 109 Ohio St. 3d at 379. In contrast, any public record here that is exempted from production by statute is still a public record – albeit an exempt one. RCW 42.56.010.

In New Jersey, in the case of Nero v. Hyland, 76 N.J. 213, 386 A.2d 846 (1978), the records at issue were held by the court to not be public records under the "Right to Know Law," but were public records under the common law. Under New Jersey's common law, the requestor had to show a requisite interest in the records to be entitled to disclosure. The court balanced the interests of the requestor and the confidential informants named in the records, and found an interest in confidentiality that outweighed that the requestor. Thereafter, in dicta, the New Jersey court found executive privilege to apply. This analysis is not helpful.

In Alaska, as in Maryland, the relevant statute referred to "state law," not *statute* as in Washington. Doe v. Alaska Superior Court, Third Judicial Dist., 721 P.2d 617, 621 (Alaska 1986), *citing* AS 09.25.120. Then, in a later case, the Court explained that under Alaska law, deliberative process privilege and executive privilege were synonymous. Capital Info. Group v. State, Office of Governor, 923 P.2d 29, 33-34 (Alaska 1996). Not only does Alaska's public records law – with its emphasis on "law" rather than "statute" – differ from Washington's, but Alaska's equation of deliberative process privilege and executive privilege provides support for Mr. West's argument here that the statutory deliberative process exemption (and other exemptions) sufficiently protect

the Governor and that there is no need to imply an unwritten executive privilege.

Finally, in Delaware, courts had already recognized a common law "governmental privilege" extending to the Attorney General, and so the court in Guy v. Judicial Nominating Comm'n, 659 A.2d 777 (Del. Super. 1995) recognized a similar privilege extending to the governor. Guy, 659 A.2d at 784-85. There is no such "governmental privilege" in Washington. "Indeed, the Legislature's response to our decision in [In re Request of Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986)] establishes that the Public Records Act contains no general 'vital governmental functions' exemption." Progressive Animal Welfare Soc. v. Univ. of Washington, 125 Wn.2d 243, 258, 884 P.2d 592 (1994) ("PAWS").

The above cases are not "sound precedent," that is, they are not persuasive authority, for this Court to imply an unnecessary executive privilege. Turning then to states that did not adopt an executive privilege (whether gubernatorial or not), the reasoning in their courts is instructive. In Massachusetts, the Court looked to the explicit constitutional grant of a deliberative privilege to the legislature, and the lack thereof for the executive, when deciding not to recognize an implied constitutional executive privilege. Babets v. Sec'y of Executive Office of Human Services, 403 Mass. 230, 233, 526 N.E.2d 1261 (1988). Similarly,

Washington has an explicit constitutional grant of a deliberative privilege for our legislature, and none for the executive.

In North Carolina, the court noted "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 (1992). In Washington, there is no need to imply an unwritten executive privilege to protect the Governor from the people out of a separation of powers concern where there are sufficient statutory protections.

And finally, as in Illinois, the Governor has cited no harm that has arisen from the heretofore lack of an unwritten executive privilege. Absent specific harm, the Illinois Court left the adoption of a deliberative process privilege to the General Assembly. People ex rel. Birkett v. City of Chicago, 184 Ill. 2d 521, 532-33, 705 N.E.2d 48 (1998). This Court should conclude that our legislature has already adopted a deliberative process privilege in RCW 42.56.280 that protects the Governor, and should leave the adoption of further protection to the legislature as well.

C. This Court Should Recognize the Codification of Executive Privilege in Washington State

The deliberative process exemption is not equivalent to an exemption for executive privilege, although they are similar. "Executive privilege" also encompasses state security concerns (*see*, *e.g.*, RCW 42.56.420) as well as applications for public employment (*c.f.* RCW 42.56.250(2), Guy, 659 A.2d 777, and Nero, 76 N.J. 213), etc. The deliberative process exemption is but the codification of one part of "executive privilege," the portion that protects the confidential deliberations of all state agencies, not merely the executive branch or the Governor alone. This Court should recognize the deliberative process privilege as part of the codification of executive privilege in this state, written by the legislature, and decline to find an unwritten expansive "executive privilege" exemption that actually conflicts with the PRA.

"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." Response at 25. Actually, Mr. West was arguing that the "executive privilege" for which the Governor was advocating is *too* broad and overreaching. The executive privilege found by the Trial Court will apply to records even after they are implemented into policy, will protect records in their entirety

with no provision for release of non-exempt factual material, and will shift the statutory burden to the requestor to demonstrate a need for the records. This is unnecessary and exceeds what the legislature already codified in the deliberative process exemption of RCW 42.56.280.

In arguing for an unwritten "executive privilege," the Governor is saying that it is *necessarily implied* from the doctrine of separation of powers, and that the Governor cannot do her job unless she possesses an "executive privilege" unlimited in extent (also covering otherwise non-exempt factual material) or duration (the "executive privilege" extends past the implementation of any record into policy). "The rule of constitutional interpretation announced in McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, that that which was reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it.' Marshall v. Gordon, 243 U.S. 521, 537, 37 S.Ct. 448, 61 L.Ed. 881 (1917)." Nixon, 418 U.S. at 706 n. 16. This is the Governor's argument.

However, the brand of executive privilege that the Governor wants is *not* necessary and is not implied by the delegated powers granted to our Governor (including by RCW 43.060.010; *see* Response Brief at 35, n. 23) nor yet by the doctrine of separation of powers. The Governor can

exercise her granted powers while protected by the statutory exemptions of the PRA, including the deliberative process exemption, and has shown no need for the unnecessary and excessive protections provided by an unwritten executive privilege that conflicts with the PRA. *See*, *e.g.*, Birkett, 184 Ill. 2d at 532-33.

The Governor is also arguing that the implied executive privilege deserves greater deference than written statutes enacted by this State in accordance with our Constitution: the entire statutory scheme of our Public Records Act. "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." Response Brief at 35. But the Governor does not cite authority in support of this argument, just like the respondent in Garner v. Cherberg. "Respondent argues that the fundamental principles of governmental authority vest the Legislature with the constitutional power to conduct inquiries. Nonetheless, respondent cites no authority for the argument that this constitutionally implicit subpoena power overrides existing, valid, statutory enactments." Garner v. Cherberg, 111 Wn.2d 811, 816-17, 765 P.2d 1284 (1988).

The PRA was enacted in accordance with our Constitution by the people and amended by the legislature. It is a valid, existing, statutory

enactment. The Governor cites no authority for the proposition that a constitutionally implicit "executive privilege" should override the PRA, including the PRA's requirement that "the act establishes an affirmative duty to disclose public records unless the records fall within *specific statutory exemptions or prohibitions*." Spokane Police Guild v. Washington State Liquor Control Bd., 112 Wn.2d 30, 36, 769 P.2d 283 (1989) (italics in original); PAWS, 125 Wn.2d at 258.

Furthermore, our legislature has written, our executive has enacted, and our judiciary has interpreted the deliberative process exemption, which protects *precisely* the same records that the Governor seeks to protect by claiming "executive privilege," though not to the same extent (the deliberative process exemption requires production of non-exempt factual material) and not for the same duration (the deliberative process exemption requires disclosure of records after implemented into policy).

The first president to claim some version of the executive privilege was President Washington. Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 Minn. L. Rev. 1069, 1070. Our deliberative process exemption at RCW 42.56.280 is a portion of our legislature's codification of the executive privilege. In drafting those statutes our legislature knew what it was doing. "We presume that the legislature is aware of long-standing legal principles." In re Det. of

Hawkins, 169 Wn.2d 796, 802, 238 P.3d 1175 (2010). The deliberative process exemption protects the same records that the Governor seeks to protect by claiming "executive privilege;" "A statute which is clearly designed as a substitute for the prior common law must be given effect." State ex rel. Madden v. Pub. Util. Dist. No. 1 of Douglas County, 83 Wn.2d 219, 221, 517 P2d 585 (1973).

The Governor argues that the deliberative process exemption is insufficient and does not protect the functioning of the Governor's office. But, again, the Governor has cited no actual harm. *See* Birkett, 184 Ill. 2d 521. Indeed, even the parade of horribles analysis and slippery slope argument that the Governor musters are not very frightening:

> 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 [the deliberative process exemption] ends when a final policy decision is made. Because a major statewide policy decision routinely involves iterative and cumulative decisions, multiple parties, extended discussions and negotiations, it is often exceedingly difficult to determine when a major statewide policy decision has been implemented so as to apply RCW 42.56.280.
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> *****
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> 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 the additional negotiation and compromise that may be necessary to fully implement the decision.

Response Brief at 27-28 (internal citation omitted). These appear to be, frankly, fairly reasonable arguments that the Governor could be making to a court engaging in *in camera* review of records that the Governor claims are protected by the deliberative process exemption because a policy decision is not yet fully implemented. They are not arguments for finding an unwritten expansive "executive privilege."

Our legislature adjudged, that given Washington's Constitution, government, existing statutes, and our caselaw, that RCW 42.56.280 is the appropriate codification and clarification in Washington of the portion of "executive privilege" that protects deliberations. (Similarly, the Supreme Court adopted Federal Rule of Civil Procedure (Fed.R.Civ.P.) 26(b)(3), which codified and clarified the rule on discoverability of an attorney's notes reflecting witness statements. Soter, 162 Wn.2d at 735.)

Even if the Governor were correct in arguing that the deliberative process exemption is insufficient, it would be up to the legislature to amend RCW 42.56.280.[1] "[E]very exemption included in the public

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[1] The issue before this Court 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." Response Brief at 1. Mr. West is not asking this Court to decide whether the Governor may claim executive privilege in response to an order from the judicial branch for the production of material evidence or claim the privilege in response

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).

D. The Reservation of Powers to the People in Washington's Constitution Alters the Separation of Powers Analysis

The analysis of separation of powers must be different in Washington than under the federal constitution or under any of the other state constitutions. The powers reserved to the people by our Constitution are more extensive than in other states and this Court has specifically recognized that the role played by Washington's people is akin to that of a fourth branch. Fritz v. Gorton, 83 Wn.2d 275, 281, 517 P.2d 911 (1974).

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to a witness summons from the legislative branch or an order compelling the production of evidence (*see* Cox, *Executive Privilege*, 122 U. Pa. L. Rev. at 1385). Nor does Mr. West venture to predict what would happen in such a case; but, especially if such a case arose after a decision from this Court here, it is possible that a future court might conclude that this Court's analysis here is "not limited to public record requests." *See, e.g.*, Soter, 162 Wn.2d at 740. The basis for that conclusion might be that our legislature "may not compel by statute disclosure of information which it would not be entitled to receive directly upon request." Soucie v. David, 448 F.2d 1067, 1083 (D.C. Cir. 1971).

In Washington, our people passed the PRA, and subsequent amendments by the legislature and interpretations by the courts have only served to emphasize the great importance of open government and access to public records in this State. The provisions of the PRA are necessary and proper for preserving a four-part separation of powers in Washington – a separation of powers that includes the powers of the people. The "executive privilege" that the Governor seeks here is excessive and would unbalance that four-part separation of powers and would tilt the balance towards the executive branch. Indeed, the Governor seems to even argue that the PRA does not apply to the Office of the Governor (*see* Response Brief at 31). But the Governor's Answer in this case specifically admitted "the Public Records Act applies to the Office of the Governor." CP 8.

E. This Court Should Not Find an Implied, Unwritten "Executive Privilege" that Conflicts with the PRA

Mr. West urges this Court to not graft on an unwritten, unnecessary "executive privilege" that actually is in conflict with the PRA. Assume for the sake of argument that the "executive privilege" for which the Governor is advocating is a written statute. Not only would the "executive privilege" actually overlap with and encompass[2] an exemption

[2] "We do not now decide whether a statute outside of RCW [42.56] "conflicts" with the Public Records Act if the other statute merely

within the Act – the deliberative process exemption at RCW 42.56.280 – but the three-part test that the Governor argues is part and parcel of executive privilege explicitly conflicts with the PRA. Instead, this Court should recognize that the existing statutes including the deliberative process exemption (RCW 42.56.280); the public officer official confidence privilege (RCW 5.60.060(5)); the state security exemption (RCW 42.56.420); and the exemptions for applications for public employment (RCW 42.56.250(2)) together comprise Washington's codification of "executive privilege"

Such a recognition will be in harmony with the PRA – a constitutionally valid statutory scheme that explicitly requires *statutory* exemptions. "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070. Every exemption heretofore applied to the PRA has been statutory, including exemptions found in our Civil Rules, adopted under a statute, RCW 2.04.190, acknowledging the power of this Court to promulgate all court rules

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overlaps with or encompasses an exemption within the Act." PAWS, 125 Wn.2d at 243, n. 10.

(O'Connor v. Washington State Dept. of Soc. & Health Services, 143 Wn.2d 895, 909-10, 25 P.3d 426 (2001)), well as federal statutes (Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen., 170 Wn.2d 418, 439-40, 241 P.3d 1245 (2010).

> In fact, the Public Records Act contains no general exemptions. It provides only: specific *statutory exemptions* from disclosure for those particular categories of public records most capable of causing substantial government if they are disclosed. These statutory exemptions were carefully drawn and have subsequently been changed and added to by the Legislature as it deemed necessary. Rosier, 105 Wn.2d at 621 (Andersen, J., dissenting in part, concurring in part) [abrogated by statute as stated in PAWS, 125 Wn.2d at 259].

PAWS, 125 Wn.2d at 258. There are ample statutory exemptions that already codify and clarify "executive privilege" in Washington.

In fact, this Court has signaled that constitutional protections would not qualify as statutory exemptions under the PRA. For example, in the case of Seattle Times Co. v. Serko, 170 Wn.2d 581, 243 P.3d 919 (2010), the constitutional right at issue was a defendant's right to a fair trial. Seattle Times, 170 Wn.2d at 596. The trial court judge, Judge Serko, ordered that the records in question be sealed, relying on RCW 42.56.540 ("The examination of any specific public record may be enjoined if...the superior court...finds that such examination...would substantially and irreparably damage any person, or would substantially

and irreparably damage vital government functions") to incorporate the constitutional right to a fair trial and provide a basis for enjoining the examination of the records. This Court held, "the order relies on RCW 42.56.540, but this statute does not provide a stand-alone exemption to production under the PRA. It 'is simply an injunction statute. It is a *procedural* provision which allows a superior court to enjoin the release of *specific* public records if they fall within *specific* exemptions found elsewhere in the Act.' PAWS, 125 Wn.2d at 257." Seattle Times, 170 Wn.2d at 596. The constitutional right to a fair trial did not qualify as a "specific exemption." Neither should an unwritten implied "executive privilege," especially where our Legislature has already codified and clarified "executive privilege" in Washington.

F. The Three-Part Test Adopted by the Trial Court Conflicts With the Public Records Act

The three-part test adopted by the Trial Court – and advocated by the Governor as being a necessary component of the unwritten "executive privilege" – conflicts with the Public Records Act. For example, the three part test requires the requestor to demonstrate a particularized need for the records. CP 1007-08. But the PRA states "[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. Further, the Governor ignores the fact that unlike in Ohio, where the court found that the three-part test did not conflict with Ohio's public records law that similarly provides that a requestor need not provide information as to the purpose for the request, our statute classifies public records as "public," even if an exemption applies. If an exemption applies, a record still is public and still must be *disclosed* (as in an exemption log), though not produced. Sanders v. State, 169 Wn.2d 827, 836, 240 P.3d 120 (2010), *contra* Dann, 109 Ohio St. 3d at 379.

Likewise, under the three-part test, "a court should refrain from *in camera* review unless there is a specific reason supporting such review." CP 1042. 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, this Court has already found that there "is no violation of the separation of powers theory in this function [of declaring whether or not a public record falls within specific exemptions, that is, of conducting *in camera* review]." Hearst Corp., 90 Wn.2d at 130. 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 unwritten, implied "executive privilege."

G. Mr. West Has Preserved All His Issues For Review

The Governor argues that "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." Response Brief at 48. This is correct. 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.

But the Governor also argues that Mr. West did not preserve his issues on appeal and that he did not properly raise issues in his Complaint. This is incorrect. First, the Governor errs in arguing that Mr. West received the September 3 letter and errs in stating that Mr. West "now asserts" he never received the letter. Mr. West argued before the Trial Court that he never received the 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)), in response to *a new argument that the Governor was making*. The Governor did not, in her Answer, make the affirmative defense that her office notified Mr. West by letter prior to the filing of the lawsuit that records were ready for his inspection. CP 7-9.

But even assuming, *arguendo*, that the Governor's Office did mail the September 3 letter[3] to Mr. West before he filed his lawsuit, there are still multiple violations of the PRA. The Governor's Office did nothing for 8 months after informing Mr. West that a response would be ready in 3-4 weeks. This was improper. "[T]he remedial provisions of the PRA are triggered when an agency fails to properly disclose and produce records, and any intervening disclosure serves only to stop the clock on daily penalties, rather than to eviscerate the remedial provisions altogether." Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 727, 261 P.3d 119 (2011). Next, in May, a year and a half after Mr. West made his public records request and at least eight months after Mr. West filed his lawsuit, the Governor's office released a second exemption log and a new set of records. This was silent withholding, and it is a violation of the PRA. PAWS, 125 Wn.2d at 269-71. Further, as explained in Mr. West's opening brief, Mr. West believes

[33] Ms. Campbell must have written the September 3 letter on that date, and printed it and signed it and kept a copy in her records, but through some oversight, did not actually transmit it to Mr. West. There is no declaration or certification of transmittal. Then, on September 27, after Mr. West called to ask about his records request, it is quite clear that Ms. Campbell opened up the computer file of her September 3 letter, updated *part* of it (the part about the number of records and the cost, as well as the date of the letter), but neglected to update other paragraphs, and printed and signed the new letter, which she then gave to Mr. West when he arrived at the office to inspect the records he was told were available on the phone. *Cf.* CP 597 and CP 13.

that there are other responsive records that are still being silently withheld. Brief at 41, n. 3. And even if this silent withholding is inadvertent or accidental, that is still a violation. "An agency's compliance with the Public Records Act is only as reliable as the weakest link in the chain. If any agency employee along the line fails to comply, the agency's response will be incomplete, if not illegal." PAWS, 125 Wn.2d at 269.

By dismissing Mr. West's case upon a finding that the Governor can claim "executive privilege", at the show cause hearing, the Trial Court erred in applying executive privilege as a trump of rather than as an exemption to the PRA. Essentially, merely upon a claim of executive privilege (according to the Trial Court's application), the Governor does not need to timely disclose records – that is, to timely disclose their existence in an exemption log – and there is no penalty for the silent withholding of records. Mr. West preserved all these issues for review by this Court. See CP 12 ("The Office of the Governor has failed to produce the records in a reasonable time (over 8 months)"), CP 46 (the same), CP 661 ("This declaration is filed in good faith to clarify the scope of the issues that will need to be resolved in addition to the central issue of Executive Privilege"), and CP 698 ("the number and scope of the silently withheld records"). Simply arguing – as the Governor did – that the only

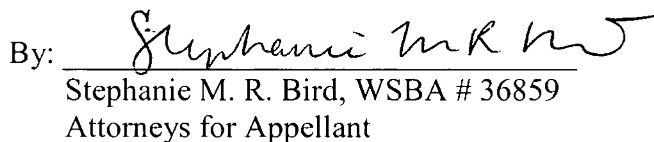
issue is whether the Governor may assert "executive privilege" in response to a PRA request does not make it so.

III. CONCLUSION

There is no "executive privilege" PRA exemption in Washington except for the codifications thereof by our Legislature, which 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 9th day of April, 2012.

CUSHMAN LAW OFFICES, P.S.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on April 9th, 2012, I caused to be served a true and correct copy of the preceding document on the party listed below via:

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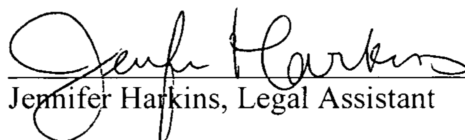

Jennifer Harkins, Legal Assistant