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STATE OF WASHINGTON

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NO. 78637-2

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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION,
WASHINGTON STATE GRANGE, NATIONAL FEDERATION
OF INDEPENDENT BUSINESS, BUILDING INDUSTRY
ASSOCIATION OF WASHINGTON, EVERGREEN FREEDOM
FOUNDATION, WASHINGTON ASSOCIATION OF REALTORS,
and STEVE NEIGHBORS,

Respondents/Cross-Appellants,

v.

CHRISTINE O. GREGOIRE, Governor of the State of Washington;
STATE EXPENDITURE LIMIT COMMITTEE; and
STATE OF WASHINGTON,

Appellants/Cross-Respondents.

**STATE'S REPLY TO AMICI CURIAE WASHINGTON
COALITION FOR OPEN GOVERNMENT AND AMERICAN
LEGISLATIVE EXCHANGE COUNCIL**

ROB MCKENNA
Attorney General

Maureen Hart, WSBA 7831
Solicitor General

Jeffrey T. Even, WSBA 20367
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
360-586-0728

*Attorneys For Appellants/
Cross Respondents*

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The State submits this brief in response to the *Amici Curiae* brief submitted on behalf of the Washington Coalition for Open Government and the American Legislative Exchange Council (WCOG and ALEC).

I. ARGUMENT

A. This Is Not A Public Records Case

WCOG and ALEC correctly state in the first sentence of their argument that “This is not a public records case.” WCOG and ALEC Br. at 3. Nonetheless, their brief consists entirely of a discussion of the very body of law that they concede at the outset is irrelevant and not before the Court—the Public Records Act.

It is well settled in Washington that this Court will not consider issues raised only by *amici*. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 304 n.4, 103 P.3d 753 (2004); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003). This Court should accordingly leave for a later day *amici*'s plea for an analysis addressing the application of the Public Records Act to materials covered by the legislative or executive privileges.

B. Even If The Construction Of The Public Records Act Were At Issue In This Case, *Amici*'s Arguments Concerning It Are Mistaken

Given that no request pursuant to the Public Disclosure Act is at issue in this case, Appellants' response will be brief. The legislative and

executive privileges are constitutionally grounded, not rooted in statutory exemptions from public disclosure. *See* State's Reply Br. and Resp. to Cross-Appeal at 32-50 (discussing the legislative privilege, rooted in article II, section 17 of the state constitution); *see also id.* at 50-54 (discussing the executive privilege grounded in the constitutional separation of powers). The superiority of constitutional limitations to statutory provisions is axiomatic. Accordingly, there can be no serious contention that the Public Records Act prevails over the legislative or executive privileges that the constitution affords legislators, the governor, and their staffs.

Amici similarly err in suggesting that the principle that exemptions stated under the Public Records Act are read narrowly somehow enlightens the construction that this Court affords the constitution. The principle that exemptions under the Act are read narrowly derives from the provisions of the Act itself. RCW 42.56.030. *Amici* cite no authority for the notion that it has any bearing upon the constitution.

Moreover, even if this case concerned the Public Records Act, the Act independently embraces the focused privileges at issue in this case. The Act contains exceptions where the legislature has found an important public policy purpose in doing so. Among these exceptions, the legislature has recognized that it would make little sense to require

disclosure of records through the vehicle of a public records request when the records would be privileged from production under the rules of civil discovery. “Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.” RCW 42.56.290.¹ *Amici* are therefore wrong when they assert that Respondents could have received the documents at issue simply by requesting them under the Public Records Act, rather than through discovery.

Amici, like the respondents themselves, similarly overlook the limited scope of the Public Records Act as it applies to legislative records. Legislative records subject to the Public Records Act are limited to committee files and other records of public hearings and written testimony, as well as certain records of the legislature’s own budgetary and financial transactions. RCW 42.17.020(41) (incorporating by reference RCW 40.14.100; made applicable to the Public Records Act by RCW 42.56.010). The legislative materials at issue in this case are not “public records” within this statutory definition.

¹ The Public Records Act was recodified in 2005 into a separate chapter in RCW 42. Laws of 2005, ch. 274.

Additionally, the Public Records Act exempts from disclosure records that are exempted from disclosure pursuant to an “other statute.” RCW 42.56.070(1). Given that the constitution is superior to any statute, including the Public Records Act, it is unnecessary to consider whether the constitution might operate as an “other statute” for this purpose. Nevertheless, the legislature’s choice to include the “other statute” exemption indicates that the Public Records Act is not intended to trump evidentiary privileges. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (holding that attorney-client privilege applies to requests for public records).

Amici’s effort to distinguish *Hangartner* is based upon an argument for a narrow construction of the legislative and executive privileges (which arguments have already been rebutted elsewhere²), rather than upon any contention that the Public Records Act somehow trumps constitutional principles. *Amici* present no argument that a constitutional privilege somehow deserves less respect under the Public

² See State’s Reply Br. and Resp. to Cross-Appeal at 32-50 (legislative privilege); *id.* at 50-54 (executive privilege); see also Br. of *Amicus* Nat’l Conf. of State Legislators, *passim*, and Br. of *Amicus* Nat’l Governors’ Ass’n, *passim*.

Records Act than does a statutory privilege, and imagination admits of none.³

The privileges at issue are, nonetheless, reflected in another statute not discussed by *Amici*. The legislature has provided that, “A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.” RCW 5.60.060(5).

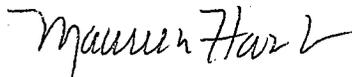
³ *Amici* also err in stating that the State claimed before the trial court that the executive privilege was “coextensive with the deliberative process privilege, a concept arising from the [Public Records Act].” WCOG and ALEC *Amici* Br. at 8. The passage they quote from the record states exactly the opposite. In the course of the discovery conference that preceded Respondents’ Motion to Compel Production, counsel for the State explained via email, “I want to be sure to clarify that the executive privilege is more than the cited statute.” CP 1650 (referring to RCW 42.56.280).

II. CONCLUSION

For these reasons, and for those reasons elaborated upon in the State's other briefs, this Court should reverse the decision of the Snohomish County Superior Court as to the State's original appeal, and affirm that court's decision with regard to Respondents' cross-appeal.

RESPECTFULLY SUBMITTED this 8th day of November, 2006.

ROB MCKENNA
Attorney General



Maureen Hart, WSBA 7831
Solicitor General



Jeffrey T. Even, WSBA 20367
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504-0100
360-586-0728

*Attorneys For Appellants/
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