

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 23, 2012, 4:25 pm
BY RONALD R. CARPENTER
CLERK



RECEIVED BY E-MAIL

NO. 86384-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION, a Washington nonprofit corporation,

Appellant,

v.

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

Respondent.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

ALAN D. COPSEY
Deputy Solicitor General
WSBA No. 23305
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9018

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT	6
	A. Executive Privilege For Gubernatorial Communications Is Grounded In The Constitutional Separation of Powers	6
	1. Presidential Executive Privilege Is “Inextricably Rooted In The Separation Of Powers Under The Constitution”.....	11
	2. State Courts Have Grounded Gubernatorial Executive Privilege In The Constitutional Separation Of Powers	15
	3. State Court Decisions Recognizing Gubernatorial Executive Privilege Are Sound Precedent For This Court.....	22
	a. This Court’s Constitutional Interpretation Is Not Controlled By Legislative Policy.....	23
	b. Existing Public Records Exemptions Do Not Adequately Substitute For A Qualified Executive Privilege	24
	c. Each State Court Decision Recognizing Executive Privilege Grounded The Privilege In State Constitutional Separation Of Powers	26
	d. This Court’s Recognition Of Executive Privilege Does Not Depend On Public Records Statutes In Other States	27
	e. This Is A Case Of First Impression.....	28

f.	Freedom Foundation Relies On Cases That Do Not Address A Gubernatorial Privilege	29
B.	Constitutional Executive Privilege Grounded In The Separation Of Powers Should Be Recognized As An “Other Statute” Under RCW 42.56.070(1)	31
1.	The Three-Part Test Articulated In The Cases Is Part Of The Qualified Executive Privilege	38
2.	The Governor Properly Asserted Executive Privilege For The Documents At Issue	42
3.	The Three-Part Test Is Consistent With The Public Records Act	42
C.	Constitutional Executive Privilege Grounded In The Separation Of Powers Does Not Shield The Governor From Public Accountability Or Accountability To Other Branches Of Government	45
D.	The Court Should Not Adopt Freedom Foundation’s Proposed Constraints On Executive Privilege	48
V.	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000)	47
<i>Ameriquest Mortg. Co. v. Office of the Atty. Gen.</i> , 170 Wn.2d 418, 241 P.3d 1245 (2010).....	33, 37, 43
<i>Babets v. Sec’y of Exec. Office of Human Servs.</i> , 403 Mass. 230, 526 N.E.2d 1261 (1988).....	29
<i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	33
<i>Beuhler v. Small</i> , 115 Wn. App. 914, 64 P.3d 78 (2003).....	8, 37
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	7, 9
<i>Capital Info. Group v. Office of the Governor</i> , 923 P.2d 29 (Alaska 1996)	20
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	7, 27
<i>City of Federal Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	48
<i>Corporacion Insular de Seguros v. Garcia</i> , 876 F.2d 254 (1989).....	21
<i>Doe v. Alaska Superior Court</i> , 721 P.2d 617 (Alaska 1986).....	20, 38-41
<i>Fritz v. Gorton</i> , 83 Wn.2d 275, 517 P.2d 911 (1974).....	37

<i>Garner v. Cherberg</i> , 111 Wn.2d 811, 765 P.2d 1284 (1988).....	35
<i>Gravel v. United States</i> , 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972).....	9
<i>Guy v. Judicial Nominating Comm'n</i> , 659 A.2d 777 (Del. Super. Ct.), <i>appeal dismissed</i> , 670 A.2d 1338 (Del. 1995).....	20-21, 26-27, 31, 36, 38, 40
<i>Hale v. Wellpinit Sch. Dist. No. 49</i> , 165 Wn.2d 494, 198 P.3d 1021 (2009).....	6-8, 29
<i>Hamilton v. Verdow</i> , 287 Md. 544, 414 A.2d 914 (Md. 1980).....	16, 26-27, 30, 38-41, 46
<i>Hangartner v. City of Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004).....	33
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	25
<i>Hobley v. Chicago Police Commander Berge</i> , 445 F. Supp. 990 (N.D. Ill. 2006).....	21
<i>In re Attorney General of the United States</i> , 596 F.2d 58 (2d Cir.), <i>cert denied</i> , 444 U.S. 903 (1979).....	21
<i>In re Certain Complaints</i> , 783 F.2d 1488 (11th Cir. 1986), <i>cert. denied sub nom.</i> <i>Hastings v. Godbold</i> , 477 U.S. 904, 106 S. Ct. 3273, 91 L. Ed. 2d 563 (1986).....	8, 37
<i>In re Salary of Juvenile Dir.</i> , 87 Wn.2d 232, 552 P.2d 163 (1976)	7
<i>In re Sealed Case</i> , 121 F.3d 729 (D.C. Cir. 1997)	38-39, 41
<i>Killington, Ltd. v. Lash</i> , 153 Vt. 628, 572 A.2d 1368 (Vt. 1990).....	17-18, 26-27, 38, 40-42, 46

<i>Livingston v. Cedeno</i> , 164 Wn.2d 46, 186 P.3d 1055 (2008).....	33
<i>Nero v. Hyland</i> , 76 N.J. 213, 386 A.2d 846 (1978)	19, 26
<i>News & Observer Pub. Co., Inc. v. Poole</i> , 330 N.C. 465, 412 S.E.2d 7 (1992).....	29, 30
<i>O'Connor v. Washington State Dep't of Soc. & Health Servs.</i> , 143 Wn.2d 895, 25 P.3d 426 (2001).....	33
<i>People ex rel. Birkett v. City of Chicago</i> , 184 Ill.2d 521, 705 N.E.2d 48, 235 Ill. Dec. 435 (1998).....	30, 31
<i>Progressive Animal Welfare Soc'y v. Univ. of Washington</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	24-25, 33
<i>Rental Hous. Ass'n of Puget Sound v. City of Des Moines</i> , 165 Wn.2d 525, 199 P.3d 393 (2009).....	33
<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	33-34, 36
<i>Soucie v. David</i> , 448 F.2d 1067 (D.C. Cir. 1971).....	12, 47
<i>State ex rel. Dann v. Taft</i> , 109 Ohio St. 3d 364, 848 N.E.2d 472 (2006)	18-19, 26-27, 38-41, 45
<i>State ex rel. Dann v. Taft</i> , 110 Ohio St. 3d 252, 853 N.E.2d 263 (2006)	39
<i>Thomas v. Page</i> , 361 Ill. App. 3d 484, 837 N.E.2d 483, 297 Ill. Dec. 400 (2005)	30, 37
<i>United States v. Burr</i> , 25 F. Cas. 187 (C.C.D. Va. 1807) (14,694)	12, 13, 16

<i>United States v. Nixon</i> , 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).....	6, 13-15, 17-18, 21, 30-31, 36, 45-46
<i>Washington State Farm Bureau Fed'n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	47
<i>Wilson v. Brown</i> , 404 N.J. Super. 557, 962 A.2d 1122 (App. Div. 2009)	38-40
<i>Yakima Cnty. v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	34-35

Constitutional Provisions

Const. art. II	47
Const. art. II, § 17	9
Const. art. III, § 2.....	2, 10

Statutes

Laws of 1973, ch. 1.....	46
Laws of 1987, ch. 403, § 3.....	46
Laws of 1992, ch.139, § 2.....	46
Laws of 2005, ch. 274.....	47
RCW 2.04.190	32
RCW 5.60.060(2)(a)	24
RCW 42.17.330	33
RCW 42.56	<i>passim</i>
RCW 42.56.030	46

RCW 42.56.070(1).....	2, 5, 23, 31-33, 35, 37-38, 48, 50
RCW 42.56.140	48
RCW 42.56.210(3).....	43
RCW 42.56.270(12)(a)(2).....	48
RCW 42.56.280	24- 26
RCW 42.56.290	24
RCW 42.56.420	24
RCW 42.56.550(1).....	43
RCW 42.56.550(3).....	43, 45
RCW 43.06.010	32

Other

Abraham D. Sofaer, <i>Executive Privilege: An Historical Note</i> , 75 Colum. L. Rev. 1318 (1975).....	12
Archibald Cox, <i>Executive Privilege</i> , 122 U. Pa. L. Rev. 1383 (1974).....	13, 14, 16, 45
Gordon S. Wood, <i>The Creation of the American Republic, 1776-1787</i> , (Norton Library ed. 1969).....	7
Mark J. Rozell, <i>Executive Privilege and the Modern Presidents: In Nixon's Shadow</i> , 83 Minn. L. Rev. 1069 (1999)	12
Robert J. Reinstein & Harvey A. Silverglate, <i>Legislative Privilege and the Separation of Powers</i> , 86 Harv. L. Rev. 1113 (1973).....	9

I. INTRODUCTION

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

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

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

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

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

II. STATEMENT OF ISSUES

1. Whether the governor of the State of Washington may claim a qualified executive privilege, grounded in the separation of powers under the Washington Constitution, as an exemption from mandatory production under the Public Records Act under the “other statute” exemption of RCW 42.56.070(1).

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

3. Whether the governor properly asserted qualified executive privilege for the records at issue in this case.

III. STATEMENT OF THE CASE

In April 2010, Freedom Foundation filed a public records request for eleven specific records the governor's office had withheld under a claim of executive privilege in response to other public records requests, and for copies of those other requests. CP at 233 (FOF ¶ 1); CP at 53. Within five business days, the governor's office produced some of the requested documents and provided an estimate of the time required to review the remaining documents for possible release. CP at 233 (FOF ¶ 2); CP at 55-64.

Instead of simply reasserting executive privilege for the remaining records, however, the governor's general counsel reviewed and reevaluated each document to determine whether, because of the passage of time or change in circumstance, the prior claim of executive privilege could be waived. CP at 234 (FOF ¶ 3); CP at 20-21. Of the eleven targeted documents, the governor produced five documents in their

entirety, produced a sixth document with the governor's handwritten note redacted under a continuing claim of executive privilege, and withheld five documents under a continuing claim of executive privilege. CP at 234 (FOF ¶ 5); CP at 21-27; CP at 51; CP at 66-74.¹

The production was accompanied by a privilege log identifying each document for which executive privilege was claimed, providing the date, author, recipient(s), a brief description of the document, and the basis for claiming executive privilege. CP at 234 (FOF ¶ 4); CP at 69. The privilege log was supplemented by a letter from the governor's general counsel further explaining the basis for claiming executive privilege for each document that was withheld or redacted. CP at 234 (FOF ¶ 4); CP at 66-68. Production was complete on August 25, 2010. CP at 234 (FOF ¶ 4); CP at 51.

As explained in the letter and the privilege log, each privileged document is a communication between the governor and an executive policy advisor to the governor or a member of the governor's executive

¹ Although only those six records are at issue in this public records action, Freedom Foundation, relying on trial counsel's declaration, suggests the governor has asserted executive privilege hundreds of times and must be reined in. Brief at 2-3. The suggestion is misleading for two reasons. First, it does not account for duplicate responses, where the same document was requested multiple times (like the documents in the present case). Second, it does not provide context; the governor's office estimates that during the four-year period referenced in trial counsel's declaration, the governor produced over 80,000 pages in response to public records requests, along with tens of thousands of emails produced in electronic format. Placed in proper context, the governor's assertion of the privilege has been quite restrained.

staff, and each document contains advice, recommendations, discussion, or instructions relating to decision-making or policy-making functions within the governor's constitutional responsibilities, disclosure of which could interfere with the governor's ability to fulfill her duties with regard to ongoing matters and inhibit the candor with which her advisors and staff provide information and advice. The documents addressed three ongoing matters: the Columbia River Biological Opinion issued pursuant to the federal Endangered Species Act, the Alaska Way Viaduct and Seawall, and proposed medical marijuana legislation.

In April 2011, Freedom Foundation filed a PRA action in superior court to compel production of the withheld records and redacted information. CP at 6-9. On cross motions for summary judgment, the superior court ruled (1) the governor possesses a qualified executive privilege grounded in separation of powers under the Washington Constitution; (2) the constitutional privilege operates as an exemption under the "other statute" provision in RCW 42.56.070(1)²; and (3) a challenge to the governor's assertion of constitutional executive privilege should be analyzed using the three-part test established as part of the

² RCW 42.56.070(1) provides in pertinent part, "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 [9] of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records."

privilege in *United States v. Nixon*, 418 U.S. 683, 707-13, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and adopted by other federal and state courts. CP at 235-36 (COL ¶¶ 1-6). After additional briefing, the superior court applied that three-part test and ruled (4) the governor properly asserted executive privilege for the documents at issue, establishing a presumption that Freedom Foundation did not attempt to overcome; and (5) the records, therefore, were exempt from production under the PRA, and there was no denial of records in violation of the PRA. CP at 236-38 (COL ¶¶ 7-13).

Freedom Foundation timely petitioned for direct review. CP at 240-41. The governor agreed the issues warrant direct review.

IV. ARGUMENT

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

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

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among three departments—the legislative, the executive, and the judicial—and that each is separate from the other. Washington’s constitution, much like the federal constitution, does not contain a formal separation of powers

clause. Nonetheless, the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.

Carrick v. Locke, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994) (citations and footnote omitted). *Accord Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009).

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

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

invades the constitutional province of another branch, the damage accrues to the branch invaded. *Id.*, citing *Carrick*, 125 Wn.2d at 136.

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

and made publicly available upon request.

Similarly, legislators must be free to talk candidly and confidentially among themselves and with staff in caucuses and offices. *See Gravel v. United States*, 408 U.S. 606, 616-17, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) (legislative privilege includes legislative staff when performing core legislative functions, because legislators cannot perform their numerous and complex legislative responsibilities without assistance from those who act on their behalf). In *Brown v. Owen*, 165 Wn.2d at 718-727, this Court applied the separation of powers as a constitutional limit on courts' power to interfere in the internal proceedings of the Legislature.⁴

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

⁴ Freedom Foundation observes that the Washington Constitution establishes a legislative privilege, but not an executive privilege. Brief at 36. Article II, § 17 of the state Constitution is functionally identical to the Speech or Debate Clause of the federal Constitution and, as such, is a product of 17th century history: King Charles I's seizure of legislative papers of members of Parliament in an effort to prosecute them for speeches and reports critical of the Crown. *See* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, 1130 (1973). Significantly, the legislative privilege recognized in *Brown* rests on separation of powers and is substantially broader than the privilege in article II, § 17. In any event, the presence of article II, § 17 does not demonstrate the absence of a judicial deliberation privilege or a qualified executive privilege.

III, § 2, and it is the governor who is vested with constitutional stature coequal with the judicial and legislative branches.

To be clear, such privileges are not “powers” of government, but an immunity of one branch of government from the powers of another branch. The privileges are not coercive powers one branch of government wields against another, but rather defensive shields that flow from the separation of powers and the autonomy of each branch within its sphere.⁵

Freedom Foundation correctly notes that no appellate court in Washington has yet recognized executive privilege.⁶ However, the fact that this case raises issues of first impression says nothing about how those issues should be decided. After all, as explained below, it was not until 180 years after George Washington first asserted a presidential executive privilege that the United States Supreme Court decided, as a matter of first impression, that a qualified presidential executive privilege is grounded in the separation of powers implied in the tripartite structure of government established in the United States Constitution. Even a significant constitutional issue must await the proper case to be considered.

⁵ Accordingly, Freedom Foundation’s discussion of enumerated powers, common law powers, and implied powers misses the mark. Brief at 15-18.

⁶ In 2006, a superior court ruled that executive privilege exists in Washington, resting its ruling explicitly on the separation of powers in the state constitution. *Washington State Farm Bureau Fed’n v. Gregoire*, Snohomish Cy. Superior Ct. No. 05-2-10166-9, Court’s Oral Decision (Jan. 13, 2006). On direct appeal, this Court found it unnecessary to address the privilege after it resolved the case in favor of the state. *Washington State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 298 n.20, 174 P.3d 1142 (2007).

The governor's assertion of a qualified executive privilege rooted in the constitution is neither novel nor exceptional. Prior Washington governors have claimed the privilege in response to records requests. CP at 27 (¶ 25). And, as explained below, both federal and state courts across the country have recognized a qualified executive privilege rooted in the constitutional separation of powers.

Consistent with those federal and state cases, the governor has asserted executive privilege only for specific documents or information communicated to or from the governor—documents that were prepared for the governor by her advisors and staff for use by the governor in making decisions and carrying out her constitutional functions and duties, or that contain comments, questions, or directions from the governor to her senior policy staff regarding those decisions and functions. CP at 22-27 (¶¶ 10-20, 24). Those documents include or reflect recommendations, advice, discussions, or deliberations involving the decisionmaking and policymaking functions for which the governor is constitutionally responsible. *Id.*

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

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

several occasions, asserting a separation of powers rationale under which the president could withhold material to protect the public interest.⁷ In response to a request from Congress, he explained:

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

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

As early as 1807, Chief Justice John Marshall had occasion to address presidential executive privilege. Sitting as a trial judge in *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (14,694), Marshall ordered President Thomas Jefferson to produce a letter subpoenaed in the treason trial of Vice President Aaron Burr. Marshall specifically acknowledged

⁷ In 1792, for example, President Washington convened his cabinet to discuss whether the public interest would be harmed by producing papers requested by a committee of the House of Representatives; concluding there would be no harm, Washington released the papers. See Abraham D. Sofaer, *Executive Privilege: An Historical Note*, 75 Colum. L. Rev. 1318, 1318 (1975). In 1794, Washington withheld both internal and external diplomatic correspondence requested by the Senate, asserting confidentiality was in the public interest. *Id.* at 1319-21. In 1796, Washington refused to provide records relating to treaty negotiations, requested by the House of Representatives, asserting the House had no proper function that would justify the request. *Id.* at 1318-19.

separation of powers concerns, cautioning that where the president has “sufficient motives” for refusing to produce a particular paper to a court, “the occasion for demanding it ought, in such a case, be very strong, and to be fully shown to the court before its production could be insisted on.” *Id.* at 191-92.

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

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

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

In *Nixon*, the president argued for an executive privilege that was absolute, subject solely to his discretion. The Court rejected his argument, but recognized that a qualified executive privilege for communications to

and from the president is “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.” *Nixon*, 418 U.S. at 708. As Professor Cox noted, there was “nothing startling or even very novel” in the Court’s recognition of a qualified executive privilege, 122 U. Pa. L. Rev. at 1408, but it is significant that the Court, for the first time, explicitly grounded the privilege in the constitutional separation of powers.

Freedom Foundation describes the Court in *Nixon* as having “carefully limited its holding to balancing the President’s general interest in confidentiality with the fair administration of justice.” Brief at 24. This description is misleading. The Court summarized the President’s interest in confidentiality of conversations and correspondence:

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

Nixon, 418 U.S. at 708. While acknowledging that “[t]he President’s need for complete candor and objectivity from advisors calls for great deference from the courts,” the Court also recognized that the president’s “broad, undifferentiated claim of public interest” in confidentiality may conflict

with other values including, particularly, “the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions.” *Id.* at 706-07. The Court concluded that when the President claims only a “generalized interest in confidentiality” as the basis for asserting privilege as to subpoenaed materials sought for use in a criminal trial, that claim cannot prevail over “the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.” *Id.* at 713.⁸

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

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

Like the Supreme Court, state courts addressing a governor’s claim

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

⁹ That three-part test is discussed below, at pages 38-45.

of privilege have held consistently that there is a qualified executive privilege for gubernatorial communications rooted in state constitutional separation of powers.

In *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (Md. 1980), for example, the Maryland Court of Appeals recognized a constitutionally-based executive privilege as part of Maryland law.¹⁰ A plaintiff in a civil case subpoenaed a confidential report prepared for and at the order of the governor, who asserted executive privilege to protect the report from discovery and in camera review. Referencing prior cases and the principles underlying the constitutional separation of powers, the court observed that “the Governor bears the same relation to this State as does the President to the United States” and “generally the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President.” *Id.* at 556. The court held that a qualified executive privilege exists in Maryland for communications to and from the governor, concluding (1) there is a public interest in protecting the confidentiality of candid intragovernmental advisory or deliberative communications, as articulated by Chief Justice Marshall in *Burr*, by Professor Cox in his law review article, and in subsequent federal and state cases; and (2) that the privilege is derived from constitutional

¹⁰ The Court of Appeals is Maryland’s highest court. See <http://www.courts.state.md.us/coappeals/> (last visited Jan. 21, 2012).

separation of powers, as explained in *Nixon*. *Id.* at 556-62. The constitutional principle of separation of powers limits the judiciary's reach into "the conclusions, acts, or decisions of a coordinate branch of government made within its own sphere of authority." *Id.* at 556.

In *Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368 (Vt. 1990), the Vermont Supreme Court recognized the existence of a gubernatorial executive privilege in that state. State agency heads asserted executive privilege as an exemption under the Vermont Access to Public Records statute for communications made directly to or from the governor's office. *Id.* at 633 n.3. The court noted that "[f]ederal and state courts have been emphatic and nearly unanimous in supporting the existence of some species of executive privilege for presidents and governors who seek to maintain the privacy of documents relating to the formulation of policy." *Id.* at 635. Quoting *Nixon*, the court described the privilege as "fundamental to the operation of Government and inextricably rooted in the separation of powers." *Id.* at 636. It held that "[b]oth the constitutional and common-law roots of the privilege strongly require its recognition in Vermont." *Id.*

The court in *Killington* commented on the imprecise language sometimes used to describe the privilege. It responded to that imprecision by carefully describing the constitutionally-based executive privilege it recognized as covering "communications to or from or reports intended for

the governor,” and it distinguished executive privilege from the attorney work-product exception, the deliberative process privilege, the predecisional privilege, and other similar privileges and exemptions found in public disclosure statutes. *Killington*, 153 Vt. at 633 n.3. The court explained that executive privilege “protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security.” *Id.* at 636, quoting *Nero v. Hyland*, 76 N.J. 213, 225-26, 386 A.2d 846, 853 (1978).

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

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

executive decisionmaking.” *Id.* at 376, quoting *Nixon*, 418 U.S. at 708. Like the Court in *Nixon*, the Ohio Supreme Court held that the privilege is grounded in the separation of powers. *Id.* at 375-76.¹²

In *Nero v. Hyland*, 76 N.J. 213, 386 A.2d 846 (1978), an unsuccessful applicant for gubernatorial appointment filed a public records request for a copy of an investigative report regarding the applicant prepared for the governor. The New Jersey Supreme Court upheld the governor’s refusal to provide the report:

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

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

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

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

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

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

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

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

In *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777 (Del. Super. Ct.), *appeal dismissed*, 670 A.2d 1338 (Del. 1995), a plaintiff invoked the

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

Delaware Freedom of Information Act to compel the governor to disclose records concerning prospective nominees for a vacancy on the Delaware Supreme Court.¹⁴ The court found that state courts “have been nearly unanimous in holding that a governor, in the discharge of official duties, is entitled to an executive privilege,” which serves a “vital public interest . . . in the effective discharge of a governor’s constitutional duties.” *Id.*, 659 A.2d at 783. The court found a qualified executive privilege in Delaware, rooted in the state constitutional separation of powers. *Id.* at 782.

In *Nixon*, the Supreme Court found a qualified executive privilege for communications to and from the president. It appears that every state court asked to recognize a parallel qualified executive privilege for communications to and from the governor of a state has done so.¹⁵ All of these courts have grounded the privilege in the constitutional separation of

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

¹⁵ See pages 29-31, below, explaining that the three state cases Freedom Foundation advances in opposition do not involve gubernatorial executive privilege. Freedom Foundation also cites three federal cases for the proposition that executive privilege should be applied only to the president, and no one else. Brief at 25 n.6. As Freedom Foundation admits, two of those cases do not address executive privilege. *Id.* Those two cases refused to extend to any other government official the finality rule that allows the president to quash a subpoena duces tecum without first being held in contempt. *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254 (1989); *In re Attorney General of the United States*, 596 F.2d 58 (2d Cir.), *cert denied*, 444 U.S. 903 (1979). In the third case, a federal magistrate judge rejected a former governor’s attempt to assert executive privilege, because the magistrate found no federal authority for extending the privilege beyond the president. *Hobley v. Chicago Police Commander Berge*, 445 F. Supp. 990, 998 (N.D. Ill. 2006). No Illinois court appears to have addressed a governor’s claim of executive privilege under the state constitution.

powers that is fundamental to our form of government. Precisely the same constitutional principles apply in Washington. Precisely the same public interest in proper functioning of each branch of government is present in Washington. Precisely the same reasons that have justified the recognition of executive privilege in other states justify the recognition of executive privilege in Washington. This Court should declare that there exists in Washington a qualified executive privilege that protects documents or information communicated to or from the governor or prepared at the governor's direction or for her consideration involving the decisionmaking and policymaking functions for which the governor is constitutionally responsible.

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

The state court decisions discussed in the prior section are consistent in one fundamental respect: when addressing a governor's assertion of executive privilege, each one held that there is a qualified executive privilege rooted in state constitutional separation of powers. They all reached the same conclusion, despite differences in state constitutions and, where applicable, state public disclosure statutes. Rather than acknowledging the consistency of these decisions, Freedom Foundation seeks to discount each decision by finding some immaterial

difference between that state and Washington.

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

Freedom Foundation argues first 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 32. The governor does not dispute the strong public interest in open government reflected in the PRA; she subscribes to and affirms that interest. But the PRA has never attempted to make transparency absolute. The legislature has enacted scores of exemptions from mandatory production. Some of these exemptions are based on traditional areas of privacy, such as attorney-client privilege, while others reflect more modern concerns, like protecting against identity theft or access to computer codes. As discussed below, the "other statutes" provision in RCW 42.56.070(1) opens the door even wider for exemptions.

More fundamentally, the Court should not rely on statements of legislative intent to define the existence and scope of constitutional privileges. If it is accepted that the courts or the legislature require some confidentiality to preserve their constitutional spheres of responsibility from interference by the other branches, it also should be accepted that the governor has the same requirement, resting on the same constitutional

separation of powers justification. To allow the legislative branch to statutorily constrain a constitutional privilege held by another branch of government violates separation of powers, and it matters not whether the statute attempts to constrain judicial deliberations or executive privilege.

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

Freedom Foundation argues that the PRA sufficiently accommodates sensitive deliberations, citing RCW 42.56.280 (preliminary drafts, etc.), RCW 5.60.060(2)(a) and RCW 42.56.290 (attorney-client communications and work product), and RCW 42.56.420 (terrorism and state security). Brief at 32-33. Had the governor found those exemptions sufficient to protect the documents at issue here, she would have relied on those exemptions, and this case would not be before this Court. The governor reasonably determined the exemptions in the PRA were not sufficient to provide the confidentiality necessary to carry out her constitutional duties as chief executive of the state. CP at 18-28;

As one example of insufficiency, this Court has held that the exemption for preliminary drafts, notes, recommendations, and intra-agency memorandums in RCW 42.56.280 ends when a final policy decision is made. *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994) (*PAWS*) (once

policies or recommendations are implemented, the exemption no longer applies).¹⁶ Because a major statewide policy decision routinely involves iterative and cumulative decisions, multiple parties, extended discussions and negotiations, and repeated compromise, it often is exceedingly difficult to determine when a major statewide policy decision has been implemented so as to apply RCW 42.56.280. On what date have negotiations concluded regarding the fate of the Alaska Way Viaduct? On what date was the governor's policy determination implemented regarding the form and desirability of legislation addressing medical marijuana—or any legislation that addresses a subject with successive bills over several legislative sessions?¹⁷ 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

¹⁶ As originally understood by this Court, the exemption ceases to apply only to advice and recommendations actually implemented as policy. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978). The parameters of the exemption as delineated in *PAWS* may be unintended, since the Court allowed the “pink sheets” related to unfunded grant proposals to remain subject to the exemption, and since a bright line cutoff of protection for all pre-decisional deliberative communications is not supported by the policies animating the exemption.

¹⁷ By way of example, on January 16, 2012, legislators introduced Senate Bill 6265 to address subject areas affected by the governor's veto of certain provisions in 2011 medical marijuana legislation.

implement the decision.¹⁸

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

Freedom Foundation asserts that five of the six states recognizing a gubernatorial executive privilege relied on common law to do so. Brief at 33-34. The Foundation is correct that five decisions discussed common law in addition to separation of powers. However, as shown above, each of those states explicitly grounded gubernatorial executive privilege in state constitutional separation of powers.¹⁹

The Foundation also argues that some states have express separation of powers provisions in their constitutions, while Washington

¹⁸ The exemption in RCW 42.56.280, as construed by this Court, would prove similarly inadequate to protect judicial deliberations if the PRA were applied to the courts. Law clerk memos, bench memos, draft opinions, and judges' notes regarding a decision or ruling would have to be produced upon request as soon as the decision or ruling is issued, despite the potential harm to the judicial decision-making process.

¹⁹ "[T]he Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function. This power is analogous to the qualified constitutionally-based privilege of the President, which is fundamental to the operation of government and inextricably rooted in the separation of powers." *Nero*, 76 N.J. 225 (internal quotes omitted).

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

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

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

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

does not. Brief at 34. This argument is a red herring. For example, while the Maryland and Vermont constitutions both contain an express separation of powers provision, both states' supreme courts relied on federal separation of powers analysis, finding it persuasive in interpreting their state constitutional provisions, even though the federal Constitution contains no express separation of powers provision. *See Hamilton*, 287 Md. at 556-62; *Killington*, 153 Vt. at 632-37. Where state constitutions lack an express separation of powers provision, as in Washington, the courts uniformly have found separation of powers to be incorporated in the constitutional structure of state government.²⁰

d. This Court's Recognition Of Executive Privilege Does Not Depend On Public Records Statutes In Other States

The Foundation attempts to distinguish three state court decisions by arguing that they statutorily exempt from disclosure records covered by a common law privilege. Brief at 34. The argument is irrelevant since the governor is asserting a constitutional privilege.

²⁰ For example, the Ohio Supreme Court described separation of powers as "fundamental to our democratic form of government" and "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of government." *Dann I*, 109 Ohio St.3d at 376. *See also Guy*, 659 A.2d at 785 n.5 (separation of powers "is fundamental to our constitutional law"), citing *Opinion of the Justices*, 380 A.2d 109, 113 (Del. 1977). Compare these decisions to *Carrick*, 125 Wn.2d at 134-35, describing separation of powers as a "fundamental principle" of the American constitutional system, explaining that "the very division of our government into different branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine."

Similarly, it is irrelevant whether documents covered by executive privilege are considered “public records” under other states’ statutes. Brief at 34-35. Neither party has disputed that the requested records in this case are “public records” as defined in the PRA.

e. This Is A Case Of First Impression

Freedom Foundation points out that Washington courts have never held the governor to be in a position analogous to the president, and it seeks to distinguish other state court decisions on that basis. Brief at 34-35. This is a case of first impression. This Court has not addressed the issue of executive privilege, and so it has not had an opportunity to determine whether there is such an analogy to be made.

Moreover, it is not necessary that the governor occupy a position that is functionally identical to that of the president, or that the governor have such broad powers as the president, because the State of Washington is not functionally identical to the United States and does not have the national powers that the federal government wields. Because the issue involves the relationship between the three branches of government in Washington, it is enough that our constitution vests the governor with the supreme executive power of the state. This Court already has held that the separation of powers incorporated in the Washington Constitution protects fundamental functions of each branch from invasion by the other

branches. *See, e.g., Hale*, 165 Wn.2d at 504. The question now is whether the governor's position with respect to the other branches of state government is sufficiently analogous to the president's position in the national government to apply the analysis used in federal courts.

f. Freedom Foundation Relies On Cases That Do Not Address A Gubernatorial Privilege

Freedom Foundation's final attempt to discredit the state court decisions recognizing gubernatorial executive privilege is to suggest that three other state courts declined to do so. Brief at 35-38. None of those three decisions addressed a governor's claim of executive privilege.

In *Babets v. Sec'y of Exec. Office of Human Servs.*, 403 Mass. 230, 526 N.E.2d 1261 (1988), the court rejected the assertion of a "governmental privilege" by an agency head who sought to avoid producing documents relating to the adoption of administrative regulations. No communication to or from the governor was at issue in that case, the governor was not a party, and the court did not address whether the governor may assert any type of executive privilege.

In *News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), a newspaper sought records related to the investigation of alleged improprieties of a university basketball team. The records were requested from a commission appointed by the president of the University

of North Carolina system of higher education. The governor was not involved. The court rejected a feeble proposal by the commission to infer a “preliminary draft” exception to the state public disclosure statute under a separation of powers theory. But the commission did not cite or rely on the state constitution in the trial court, and it cited no controlling authority to the appellate court. Not surprisingly, the court refused to infer the requested exemption. *Id.* at 484.

In *People ex rel. Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48, 235 Ill. Dec. 435 (1998), the city sought to avoid producing documents related to unapproved future projects. The city did not invoke separation of powers (or any constitutional basis) for its asserted privilege, instead asking the court to adopt a broad common law deliberative process privilege to exempt from discovery “all ‘deliberative’ communications regarding any proposed expansion or alteration to the airport or airport layout plan, no matter how trivial or routine.” *Id.* at 532. Distinguishing cases such as *Nixon* and *Hamilton* on that basis, the court held the adoption of such a broad evidentiary privilege for municipalities should be left to the legislature. *Id.* at 531-33.

Moreover, *Birkett* did not foreclose a properly asserted constitutional privilege in Illinois. In *Thomas v. Page*, 361 Ill. App. 3d 484, 837 N.E.2d 483, 297 Ill. Dec. 400 (2005), the court of appeals

distinguished *Birkett* and articulated a judicial deliberative privilege implicitly grounded in separation of powers: “[T]he judiciary, as a co-equal branch of government, supreme within its own assigned area of constitutional duties, is being asked to exercise its inherent authority to protect the integrity of its own decision-making process.” *Id.*, 361 Ill. App. 3d at 491. Relying in part on *Nixon*, the court explained, “[I]n order to protect the effectiveness of the judicial decision-making process, judges cannot be burdened with a suspicion that their deliberations and communications might be made public at a later date.” *Id.* at 490.

Freedom Foundation has identified no state case rejecting a claim of gubernatorial executive privilege grounded in separation of powers. As observed in *Guy*, 659 A.2d at 783, state courts “have been nearly unanimous” in holding that a governor may assert a constitutionally-based executive privilege that serves a “vital public interest . . . in the effective discharge of a governor’s constitutional duties.”

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

Freedom Foundation argues that the PRA permits only statutory exemptions, that statutory exemptions must be narrowly construed, and that an implied qualified executive privilege resting on an implied constitutional separation of powers cannot be recognized as an exemption

under the PRA. Brief at 10-15.

Undeniably, the PRA is a mandate for liberal disclosure of public records, but the Act itself explicitly exempts from production records falling within an “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). In asserting a qualified executive privilege, the governor is relying on that statute and contending it must be understood as including constitutional privileges. Freedom Foundation insists the governor must go further and cite not only RCW 42.56.070(1), but also some other section of the Revised Code of Washington. Brief at 13-14. That 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.²¹

None of the cases Freedom Foundation cites precludes the incorporation of constitutional privileges under RCW 42.56.070(1). This Court already has interpreted RCW 42.56.070(1) to incorporate not just

²¹ The superior court concluded RCW 43.06.010 constitutes an “other statute” allowing the constitutional privilege to be incorporated under RCW 42.56.070(1), even though it ruled that no other statute need be cited. CP at 235-36 (COL ¶¶ 2-3). The superior court’s conclusion is consistent with this Court’s recognition that RCW 2.04.190 “acknowledges” the constitutional power of the Court to adopt rules for court pleading, practice, and procedure (even though the statute purports to grant that power). *O’Connor*, 143 Wn.2d at 909-10. In like manner, the Legislature “acknowledges” the constitutional powers of the governor in RCW 43.06.010: “*In addition to those prescribed by the Constitution, the governor may exercise the powers and perform the duties prescribed in this and the following sections . . .*” (Emphasis added.)

state statutes, as in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004) (incorporating RCW 5.60.060(2)(a)), but also court rules, *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 912, 25 P.3d 426 (2001), and federal statutes and federal regulations, *Ameriquest Mortg. Co. v. Office of the Atty. Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010). In the relevant portion of *PAWS*, this Court relied on an earlier version of the “other statute” provision to reject former RCW 42.17.330 as an independent exemption. *PAWS*, 125 Wn.2d at 264-65. The Court did not rule out constitutional exemptions, but it found no compelling support for recognizing a First Amendment academic freedom exemption for the documents at issue. *Id.* The other decisions cited by the Foundation simply repeated the statutory language without analysis. *See Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009); *Livingston v. Cedeno*, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 209, 189 P.3d 139 (2008).

In recent decisions, this Court seems to indicate its readiness to acknowledge constitutional privileges under RCW 42.56.070(1). In *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 243 P.3d 919 (2010), the Court recognized that there are constitutional limits on public disclosure under the PRA, even though the Act does not include a specific exemption

for the protection of constitutional rights or the recognition of constitutional privileges. Referencing both federal and state constitutions, the court stated, “There is no specific exemption under the PRA that mentions the protection of an individual’s constitutional fair trial rights, but courts have an independent obligation to secure such rights.” *Id.* at 595. The court did not find that disclosure of the disputed records would have violated the criminal defendant’s fair trial rights, but the court set forth the constitutional analysis to be applied, signaling its readiness to order the records withheld from disclosure if a constitutional violation would have resulted. *Id.* at 595-96.

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

Later in the opinion, the Court addressed the criminal defendant’s argument that public disclosure of certain records is prohibited under the

Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and that those constitutional provisions are incorporated as exemptions under the “other statute” provision in RCW 42.56.070(1). *Id.* at 808. The Court responded that “[w]hile this argument has force, we need not decide that issue here” because another statute authorized appropriate redaction of the records and incorporated pertinent constitutional protections. *Id.*

Under these cases, the absence of an explicit provision in the Washington Constitution that grants executive privilege is not dispositive. Requiring statutory approval of a constitutional privilege would impermissibly allow a statute to supersede the Constitution. *See Garner v. Cherberg*, 111 Wn.2d 811, 765 P.2d 1284 (1988).²² Where a constitutional privilege exists, it does so without any need of statutory permission, and may constitute an exemption under the PRA even if not

²² In *Garner*, a committee of the Washington State Senate sought to subpoena records of the Commission on Judicial Conduct. In quashing the subpoena, this Court explained that a constitutional confidentiality requirement is “impervious to legislative or judicial change, and it must be implemented except as overriding Federal due process requirements compel us to do otherwise.” *Garner*, 111 Wn.2d at 822, quoting *Owen v. Mann*, 105 Ill.2d 525, 535, 475 N.E.2d 886, 86 Ill. Dec. 507 (1985). The Court explicitly cautioned against reducing “constitutionally based confidentiality interests to a statutory level.” *Id.*

Freedom Foundation quotes *Garner* for the premise that any implied constitutional power asserted by the governor must conform to “valid, statutory enactments.” Brief at 17-18. That is not what this Court said in *Garner*. In the same paragraph from which the Foundation selectively quoted, the Court made it clear it was addressing only one branch of government, and not the separation of powers:

Respondent would like to raise this conflict to a constitutional separation of powers clash. In point of fact, the only clash in this case is between the majority of the Legislature and the will of a majority of the Committee on Rules.
Garner, 111 Wn.2d at 820.

implemented through an explicit statutory exemption. *See Seattle Times*, 170 Wn.2d at 595.

This conclusion is consistent with other courts' recognition that since statutes are subordinate to constitutions, it would be nonsensical to refuse to recognize constitutional exemptions from public disclosure statutes. Interpreting Delaware's Freedom of Information Act, for example, the court held that an exemption for "records specifically exempted from public disclosure by statute" incorporated the constitutionally-based executive privilege. *Guy*, 659 A.2d at 782-83. The court observed that "it would be incongruous to hold that the General Assembly intended a statutory exemption but not an exemption based upon the constitution to be sufficient to preclude disclosure." *Id.* *See also Nixon*, 418 U.S. at 705 n.16 (rejecting special prosecutor's argument that executive privilege should not be recognized absent an express provision in the United States Constitution). Moreover, each of the state court decisions cited above that recognized gubernatorial executive privilege has done so in the absence of an express provision in the respective state constitution.²³

²³ Freedom Foundation's objection to implied constitutional privileges, if accepted, would implicate other implied privileges. For example, as noted above, the Washington Constitution provides no explicit privilege protecting the confidentiality of judicial deliberations and judges' notes, even though such a privilege is recognized as

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

The PRA is not absolute—it explicitly recognizes that many categories of public records and information should not be produced automatically upon request.²⁴ The governor is not challenging the validity of the Act or seeking to set it aside. Rather, the governor asserts a qualified constitutional privilege that has been recognized across the country and contends that privilege should be recognized as an exemption under the

necessary to the judicial function. *See, e.g., Beuhler*, 115 Wn. App. at 919-20; *In re Certain Complaints*, 783 F.2d at 1519-1520; *Thomas*, 361 Ill. App. 3d at 490-91.

²⁴ Freedom Foundation quotes *Fritz v. Gorton*, 83 Wn.2d 275, 517 P.2d 911 (1974), regarding the “fundamental” character of the public’s right to receive information. Brief at 19-20. That case addressed the right to receive information generally as a necessary counterpart of the First Amendment right to free speech; it did not hold that the First Amendment grants a right to receive *all* information held by any particular source, including government. Indeed, *Fritz* acknowledged constitutional limitations, holding that the challenged section of the campaign disclosure law did “not sweep so broadly as to be constitutionally impermissible.” *Fritz*, 83 Wn.2d at 299.

“other statute” provision of the PRA. This Court should hold that a qualified gubernatorial executive privilege constitutes an exemption to the Public Records Act, incorporated through RCW 42.56.070(1).

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

The governor is asserting a qualified executive privilege, not an absolute privilege. The privilege is qualified because its application is subject to judicial review and it can be limited where the court determines there is a demonstrated, particularized need for access to specific documents that outweighs the constitutional and public interests in maintaining the privilege. That determination is made using a three-part test established by the U.S. Supreme Court as part of the privilege. *See In re Sealed Case*, 121 F.3d 729, 744-46 (D.C. Cir. 1997) (explaining contours of the privilege).²⁵ Every state court that has recognized a parallel gubernatorial executive privilege resting on state constitutional separation of powers has adopted the three-part test as part of the privilege. *See Doe*, 721 P.2d at 626; *Guy*, 659 A.2d at 782-85; *Hamilton*, 287 Md. at 562-67; *Wilson v. Brown*, 404 N.J. Super. 557, 574-81, 962 A.2d 1122 (App. Div. 2009); *Dann I*, 109 Ohio St. 3d at 377-79; *Killington*, 153 Vt. at 637-41. The test is applied as follows.

²⁵ Freedom Foundation repeatedly—and wrongly—characterizes the three-part test as having been “created” by the trial court in this case. Brief at 1, 39-47.

Step One. In response to a request for records, the governor must assert the privilege with some degree of specificity, identifying the records for which the privilege is asserted and briefly explaining why each record falls within the privilege (without, of course, revealing the information that is privileged). *See Doe*, 721 P.2d at 626; *Dann I*, 109 Ohio St. 3d at 378. If the reasons given indicate on their face that the records fall within the privilege, the records are presumptively protected by executive privilege. *Hamilton*, 287 Md. at 563-64, citing *Nixon*, 418 U.S. at 708, 713-14; *Dann I*, 109 Ohio St. 3d at 378. Because in camera review intrudes on the governor's executive powers, implicating separation of powers concerns, a court should refrain from in camera review unless there is a specific reason supporting such review. *Hamilton*, 287 Md. at 566, citing *Nixon*, 418 U.S. at 713-14; *Wilson*, 404 N.J. Super. at 574.²⁶

Step Two. The requester can overcome the presumption by demonstrating a particular need for the specific documents requested and providing a reasoned explanation why that need outweighs the constitutional and public interests served by executive privilege. *Doe*, 721

²⁶ For example, if a court has reason to doubt that the documents for which the governor claimed executive privilege really fall within the privilege, the court may review the documents in camera to resolve that doubt. *See, e.g., State ex rel. Dann v. Taft*, 110 Ohio St. 3d 252, 853 N.E.2d 263 (2006) (*Dann II*). If the court were to determine the privilege was not properly claimed, the governor should be given opportunity to properly claim the privilege or claim an alternative exemption if one is available. *In re Sealed Case*, 121 F.3d at 744-45; *Wilson*, 404 N.J. Super. at 574-75.

P.2d at 626; *Dann I*, 109 Ohio St. 3d at 378; *Killington*, 153 Vt. at 639; *Guy*, 659 A.2d at 785. If no such showing is made, the inquiry is at an end, the presumption has not been overcome, and the documents are not subject to in camera review. *Doe*, 721 P.2d at 626; *Hamilton*, 287 Md. at 563-64, citing *Nixon*, 418 U.S. at 713-14; *Dann I*, 109 Ohio St. 3d at 379; *Killington*, 153 Vt. at 639; *Guy*, 659 A.2d at 785; *Wilson*, 404 N.J. Super at 574.²⁷

The requirement that a requester demonstrate a particularized need is derived from the constitutional underpinnings of the executive privilege. A person who seeks the court's assistance to obtain documents for which the governor has asserted executive privilege is asking one branch of government, the courts, to compel a co-equal branch, the governor, to yield power constitutionally granted to the executive. Respect for the governor's independent constitutional role deserves judicial respect for a properly asserted executive privilege.

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

Step Three. If the court finds the requester has demonstrated a specific, particularized need for the documents that could outweigh the constitutional and public interests served by executive privilege, the court then should determine (1) whether the demonstrated need in fact outweighs the constitutional and public interest in the privilege; and (2) if so, which portions of the documents should be produced and whether conditions should be imposed on the use of the documents. *In re Sealed Case*, 121 F.3d at 742; *Killington*, 153 Vt. at 637-39; *Dann I*, 109 Ohio St. 3d at 378-79. In making this determination, the court may review the records in camera. *Doe*, 721 P.2d at 626; *Hamilton*, 287 Md. at 567.²⁸

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

The function and meaning of the privilege would be markedly altered if necessity for the information were to be presumed and the burden of overcoming the presumption of necessity were to be placed on the claimant of the privilege.

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

The requirement that a person seeking disclosure first demonstrate need before obtaining the right to in camera inspection by the court is an essential part of the privilege itself, not a corollary procedure annexed to the privilege.

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

2. The Governor Properly Asserted Executive Privilege For The Documents At Issue

Here, the governor made the requisite showing to establish that the withheld records and information are presumptively protected by executive privilege. In responding to Freedom Foundation, the governor explicitly asserted executive privilege as the basis for withholding or redacting documents and information that were not provided, and explained the reason each document fell within the privilege. CP at 66-69. The governor's general counsel summarized the careful, diligent process used to reassess each requested document to determine whether the privilege should continue to be asserted. CP at 18-28 (¶¶ 6-9, 23-24). There has been no suggestion that the documents are not as described, that they fall outside the privilege, or that they are being withheld to conceal misconduct. Instead of proceeding through the three-part test, however, Freedom Foundation filed a PRA action against the governor.

3. The Three-Part Test Is Consistent With The Public Records Act

As explained above, the three-part test is not an adjunct to executive privilege—it is an essential part of the privilege, grounded in

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

Even so, the three-part test applied to a gubernatorial executive privilege claim is consistent with almost all of the PRA’s general procedural requirements. The PRA requires an agency to identify the exemption on which it relies to withhold requested records. RCW 42.56.210(3). If challenged, the agency bears the burden of demonstrating that the records fall within the claimed exemption. RCW 42.56.550(1). Courts do not defer to an agency’s determination as to the scope of an exemption, but review claims of exemption de novo. RCW 42.56.550(3).

The first step of the three-part test imposes similar requirements. As explained above, the governor bears the burden of properly asserting

the privilege. She must make it clear she is asserting that privilege, identify the records for which the privilege is asserted, and explain why each record falls within the privilege. While a presumption attaches to a claim of executive privilege, that presumption can be overcome. It is true that a requester claiming the privilege has been improperly asserted must do more than file an action and summarily claim a violation (as is permitted under the PRA). But, as explained above, that extra burden on the requester is justified by the constitutional interest in having courts respect the Governor's independent constitutional role as a co-equal branch in our system of divided government.²⁹

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

²⁹ The requester need not demonstrate any particularized need for the documents at issue in order to make a showing that executive privilege was not properly asserted.

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

C. Constitutional Executive Privilege Grounded In The Separation Of Powers Does Not Shield The Governor From Public Accountability Or Accountability To Other Branches Of Government

Judicial recognition of a qualified executive privilege does not shield the governor from public accountability, and that is neither its purpose nor its effect. Its purpose is to allow effective decisionmaking and policymaking by preserving the governor's access to candid advice, multiple perspectives and recommendations, and frank discussion. *See Cox*, 122 U. Pa. L. Rev. at 1410; *Nixon*, 418 U.S. at 708; *Dann I*, 109 Ohio St. 3d at 376-77; *Doe*, 721 P.2d at 624-25.

Freedom Foundation's accountability argument seems to assume the PRA is the only means of ensuring accountability to the public. While it is an important means, it should be recognized that the governor is not

some “faceless bureaucrat” working out of the public view, whose actions and decisions may be publicly known only because of the PRA. Indeed, no state officer has higher public visibility and more direct accountability to voters than the governor. The governor remains accountable to the electorate for the decisions and policies she makes—or does not make.

Executive privilege, as claimed by the governor, does not shield *actions* from public view—it protects recommendations, advice, discussions, and deliberations where confidentiality is necessary to ensure the integrity of the governor’s decisionmaking and policymaking. And, as in *Nixon* and the state cases that follow it, the privilege does not bar a court, upon a proper showing, from ordering the production of documents alleged to reflect unlawful conduct by the governor or her staff. *See Hamilton*, 287 Md. at 563-64; *Killington*, 153 Vt. at 638.

The PRA was enacted originally as an initiative that addressed both campaign disclosure and public records. *See* Laws of 1973, ch. 1 (Initiative Measure No. 276). However, the “other statute” provision—as well as much of the Act’s intent language quoted by Freedom Foundation—was not part of the initiative—it was added subsequently by the Legislature.³⁰ Whether adopted through the initiative process or the Legislature, statutes must

³⁰ The “other statute” provision was added initially in Laws of 1987, ch. 403, § 3 (amending former RCW 42.17.260(1)). The language in RCW 42.56.030 (“The people of this state do not yield their sovereignty to the agencies that serve them”) was added in Laws of 1992, ch. 139, § 2.

operate consistent with the Washington Constitution. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000). As this Court explained in *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007), the people do not act as a separate branch of government when exercising the initiative power:

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

Id. at 290-91.³¹

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

Finally, it should be noted that the language of the PRA itself does not reveal any specific legislative intent to make the governor individually

³¹ Even if the original Public Disclosure Act had some special character by virtue of having been adopted by initiative, that gloss has diminished over time. The PRA has been amended regularly and repeatedly over its 40-year history, and in 2005 was entirely recodified. *See* Laws of 2005, ch. 274. As it now exists, the PRA is much more a product of the legislature than of the initiative process. Unambiguously, the PRA is a statute, enacted in the exercise of legislative power under article II of the Washington Constitution, and subject to constitutional limits including separation of powers.

subject to the disclosure provisions of the Act. The governor is referenced only six times in RCW 42.56. Five of those references are in RCW 42.56.140, addressing gubernatorial appointments to the public records exemption accountability committee. The other reference is in a specific exemption for private financial and proprietary information for certain records that may be held by the “office of the governor.” RCW 42.56.270(12)(a)(2). Even the PRA’s definition of “agency,” in RCW 42.56.070(1), does not explicitly mention the governor.

The absence of specific statutory language subjecting the governor to the PRA is significant.³² Just as the PRA can be understood to acknowledge a judicial privilege against compelled public disclosure, it can be understood to acknowledge a qualified gubernatorial executive privilege against compelled public disclosure. Legislative deference to both privileges rests on the same constitutional principle: separation of powers and respect for the constitutional prerogatives of coequal branches of government.

D. The Court Should Not Adopt Freedom Foundation’s Proposed Constraints On Executive Privilege

Freedom Foundation asks the Court, if it recognizes executive privilege as an exemption under the PRA, to impose narrow constraints on

³² In *City of Federal Way v. Koenig*, 167 Wn.2d 341, 345-48, 217 P.3d 1172 (2009), the court reaffirmed that the PRA does not include the courts within the definition of “agency,” even when that term is informed by reading the Act as a whole. By the same logic and analysis, neither does the Act include the governor within the definition of “agency” or evidence a specific legislative intent to make the governor subject to the Act.

the privilege. Brief at 38-39. Doing so is unnecessary to decide the case before the Court. All of the documents at issue in this case are communications between the governor and her closest advisors—each an executive policy advisor to the governor. CP at 23-26 (¶¶ 14-20). These documents are well within the privilege as it has been recognized in other courts. Defining the outer boundaries of the privilege should wait for future cases with appropriate facts.

V. CONCLUSION

The Court should hold, as a matter of law, that the governor possesses a qualified executive privilege, grounded in the separation of powers in the Washington Constitution, that protects the confidentiality of information and documents that are communicated to or from the governor or prepared for the governor and that contain or reference recommendations, advice, discussions, or deliberations involving the decisionmaking and policymaking functions for which the governor is constitutionally responsible. The Court should recognize that the three-part test established by the United States Supreme Court and adopted uniformly by other states is also grounded in the separation of powers and is an essential part of the privilege, not a corollary procedure annexed to the privilege.

As to the requested records at issue in this case, the Court should affirm the trial court and hold (1) that the governor properly asserted

executive privilege for those records; (2) that Freedom Foundation was given an opportunity to demonstrate a basis for overcoming the privilege and did not do so; (3) that the documents at issue therefore are covered by constitutional executive privilege; (4) that because the privilege is incorporated as an "other statute" under RCW 42.56.070(1), the documents at issue are exempt from the mandatory production requirement in the Public Records Act; and (5) that Freedom Foundation's requests for fees and costs are denied.

RESPECTFULLY SUBMITTED this 23rd day of January, 2012.

ROBERT M. MCKENNA
Attorney General



ALAN D. COPSEY
Deputy Solicitor General

WSBA No. 23305
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9018

NO. 86384-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION, a
Washington nonprofit corporation,

Appellant,

v.

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

Respondent.

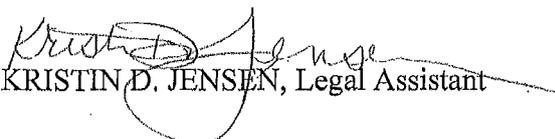
CERTIFICATE OF
SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I served a copy of the Brief of Respondent, via electronic mail per agreement of the parties, upon the following:

Michael J. Reitz
mreitz@myfreedomfoundation.org
Freedom Foundation
2403 Pacific Avenue SE
Olympia, WA 98501

Michele Earl-Hubbard
michele@alliedlawgroup.com
Chris Roslaniec
chris@alliedlawgroup.com
Allied Law Group
2200 Sixth Ave, Suite 770
Seattle, WA 98121

RESPECTFULLY SUBMITTED this 23rd day of January, 2012.


KRISTIN D. JENSEN, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, January 23, 2012 4:26 PM
To: 'Jensen, Kristin (ATG)'
Cc: Mike Reitz; Michele@alliedlawgroup.com; chris@alliedlawgroup.com; Copsey, Alan (ATG)
Subject: RE: 86384-9, Freedom Foundation v. Gregoire, Brief of Respondent

Received 1/23/12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jensen, Kristin (ATG) [<mailto:KristinJ@ATG.WA.GOV>]
Sent: Monday, January 23, 2012 4:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mike Reitz; Michele@alliedlawgroup.com; chris@alliedlawgroup.com; Copsey, Alan (ATG)
Subject: 86384-9, Freedom Foundation v. Gregoire, Brief of Respondent

Sent on behalf of Alan D. Copsey, Deputy Solicitor General, WSBA #23305

Attached for filing in the above referenced matter, please find the Brief of Respondent.

<<Brief of Respondent.pdf>>

Respectfully,

Kristin

KRISTIN D. JENSEN
Office of the Attorney General
Solicitor General's Office
(360) 753-4111
kristinj@atg.wa.gov



Please save paper by printing only when necessary.