

State high court rules governor has executive privilege, with caveats

Washington state's Supreme Court says the governor can claim an "executive privilege" as a reason to withhold documents from the public.

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The Associated Press

Washington state's governor is allowed to claim "executive privilege" as a reason to withhold documents from the public even though that exemption isn't among the hundreds listed in state law, the state Supreme Court ruled Thursday.

In an 8-1 decision, justices said the governor's office has an inherent privilege as a result of the constitutional separation of powers.

"The executive communications privilege plays a critical part in preserving the integrity of the executive branch," wrote Justice Mary Fairhurst in the majority opinion. "Courts have widely recognized that the chief executive must have access to candid advice in order to explore policy alternatives and reach appropriate decisions."

Justices did provide some qualifications in their decision, saying the privilege applies only to communications made to inform policy choices, although it is largely left up to the governor's office to privately interpret what documents would fall into that category. The court also said a person requesting public records can argue that the need for the material outweighs the public interests served by protecting the communication.

"The privilege does not exist to shroud all conversations involving the governor in secrecy and place them beyond the reach of public scrutiny," Fairhurst wrote.

In the only dissenting opinion, Justice James Johnson said the majority ruling essentially amended the state constitution and a voter-approved initiative that established public-disclosure law decades ago.

"The majority ignores our state's constitution, statutes, and populist tradition and does great damage to over 120 years of open government in Washington," Johnson wrote. "It is not alarmist to say that this decision could place a shroud of secrecy over much government conduct, unless changed by a wiser court, electorate, or legislature."

The administration of former Gov. Chris Gregoire cited executive privilege as a reason to keep documents on hundreds of occasions. The Freedom Foundation, a libertarian think tank, first brought its lawsuit on the issue after Gregoire's office used that reasoning to withhold records related to the Alaskan Way Viaduct replacement, medical marijuana and criminal pardons.

An attorney for the Freedom Foundation had argued that executive privilege isn't a legitimate exemption and that the governor was using it to keep a broad range of documents secret. The court disagreed.

State law has long emphasized the value of disclosure and says the laws should be liberally construed to favor transparency.

“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know,” state law says. “The people insist on remaining informed so that they may maintain control over the instruments that they have created.”

Johnson said he agreed that the governor must have access to candid advice but notes that state law already has hundreds of protections, including exemptions for things like preliminary drafts, notes and recommendations in which opinions are expressed or policies are formulated.

Johnson also disputed that the governor's office would need as much secrecy as the president of the United States, which deals with issues such as war and national security.

And Johnson said concerned citizens will now have to bring difficult and expensive lawsuits in order to get a closer look at the state government.

“This ruling likely will not destroy our democracy, but it will affect its legitimacy in the eyes of the citizens of this state which is a start in that direction,” Johnson wrote.

Current Gov. Jay Inslee has said he does not intend to exercise the executive-privilege exemption unless it was explicitly provided by the Legislature or a vote of the people.

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