Callaghan: An open government ruling 14 years in the making

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I wasn't as shocked as some last week when the state Supreme Court found that governors have a constitutional exemption from disclosing certain documents to the public. Since I'd been denied records by a former governor who cited executive privilege, a decision backed up by a past attorney general, I assumed there was a strong likelihood the court would side with those who felt executive privilege existed.

What was disturbing though, was the court's refusal to narrow the privilege. One reading of the majority opinion in Freedom Foundation v. Gregoire raises a fear that the court might have made the executive privilege in Washington state broader than anywhere else.

My trip down this path began in 1999 when then-Gov. Gary Locke was complaining that he'd been duped when he signed the law creating what we now know as minicasinos. The law, passed two years earlier, had led to an explosion of commercial casinos that were drawing protests across the state and causing politicians to run for cover.

"That legislation was presented to the legislators and to our office as more housekeeping," Locke said. "It has clearly gone well beyond what anyone ever conceived or thought would happen."

How was the bill presented to Locke? I asked for the letters, phone messages and other information in his files, especially the staff report on the bill. That report was released, but with the good stuff blacked out. Locke's attorney, Everett Billingslea, cited an exemption in the Public Disclosure Act for internal staff opinions and recommendations, plus "all other applicable exemptions and privileges."

I asked then-Attorney General Christine Gregoire to review the denial. I argued that the deliberative process exemption expired once a decision was made, especially if the recommendations were relied upon by the governor.

Executive privilege? State law contained no such privilege. It wasn't mentioned in the state constitution and the concept had never been argued before the state Supreme Court.

But it was at the heart of the opinion released four months later by Assistant Attorney General Jeffrey Lane, who concluded that Locke was legally allowed to black out much of the staff report. The courts would likely find that a governor, like the president, needed candid advice from staff, Lane concluded. Such advice would be muted if public disclosure was likely.

Justices split on privilege

Based on advice from our lawyers, The News Tribune did not pursue litigation. But Locke then did something interesting. He directed a senior staffer to call and answer all of my questions about what was beneath those black markings.

Rather than being a housekeeping bill, the interview revealed, the staff report called the bill "a threshold decision on the direction of gambling in Washington state," one that would require "a quantum leap in the level of regulation." Locke should veto the bill, the report suggested.

He didn't. And the release of the information, if not the document itself, showed that Locke was being deceptive about what he knew about the minicasino bill and when he knew it, which is exactly why I pursued it in the first place.

But at least the privilege claimed by Locke was limited to communications with close advisers. Justice Mary Fairhurst's majority opinion last week said it applies to communications authored by or "solicited and received" by the governor or aides.

Does this limit the privileged to communications conducted within the government as Lane concluded back in 1999? Or does it say the governor could shield communications from outside -- such as recommendations from lobbyists or interest groups -- as long as the opinions were "solicited and received" by the governor or even by his or her aides?

Three of the eight justices in the majority wanted the privilege tightened with clear rules for how it would apply and how it could be overridden by the courts. They did not prevail, leaving us to await the next case, and suffer the expenditure of more time and more cost, to get more guidance from the court.

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