

# In Our View: Information in Shadows

## Ruling allowing governor to keep secrets flies in face of open government

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In a state that long has valued sunshine laws, the state Supreme Court recently created some shadows and darkness. By supporting the right of the governor to claim executive privilege as a reason to withhold documents from the public, justices unduly expanded the clout of the state's executive branch and provided it with unnecessary power.

Washington state law states that, "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. The people insist on remaining informed so that they may maintain control of the instruments that they have created."

Still, in an 8-1 ruling, the Supreme Court sided with the state in the case of Freedom Foundation v. Gregoire. While in office from 2005 until early this year, Gov. Chris Gregoire cited executive privilege hundreds of times as a reason to keep documents from being subject to the state's Public Records Act. The Freedom Foundation, a libertarian think tank, first brought a lawsuit after Gregoire's office used that tactic to withhold records relating to the Alaskan Way Viaduct project in Seattle, medical marijuana, and Columbia River salmon.

Justices were convinced by arguments that the governor should be able to keep secret notes about the decision-making process. "The executive communications privilege plays a critical part in preserving the integrity of the executive branch," Justice Mary Fairhurst wrote 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."

The reasoning is that advisers to the governor might be less willing to put forth their opinions if they believed those opinions would wind up in notes that could then be accessed by the public. Citing U.S. v. Nixon, a 1974 U.S. Supreme Court ruling, the state justices said that in order to override a governor's claim of executive privilege, a citizen will have to present to a court a "particular need" for the information. The state would then argue the reason for nondisclosure, and the court would determine whose need was more important. While the 1974 ruling went against President Richard Nixon, it established the parameters between the public's "right to know" and the public's "need to know."

As for state justices, we'll make it simple for them -- the public has a right to know. Unlike cases involving the president of the United States, situations involving the governor will not deal with acts of war or issues of national security. As Justice Jim Johnson wrote in the dissenting opinion for Freedom Foundation v. Gregoire, "As a result of the majority's opinion, the governor is much freer to operate in the dark." Five justices ruled that executive privilege is inherent, while three said it complies with the law if the court strictly limits it. Johnson countered with, "The majority ignores our state's constitution, statutes, and populist tradition and does great damage to over 120 years of open government in Washington." He noted that state law already includes exemptions for items such as preliminary drafts, notes, or recommendations from staff members.

Current Gov. Jay Inslee has not invoked executive privilege in keeping information from the public, and has said that he will not do so unless the exemption is explicitly approved by the Legislature or a vote of the people. We don't think that will happen. Instead, we urge the Legislature or the people to follow Johnson's suggestion.

"It is not alarmist to say that this decision could place a shroud of secrecy over much government conduct," the justice wrote, "unless changed by a wiser court, electorate, or legislature."

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