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Guest: Constitutional amendment would ensure access to governor's public records

After the state Supreme Court's ruling allowed the governor to claim executive privilege from sharing public records, Washington should pass a constitutional amendment protecting access, writes guest columnist Dave Roland.

By Dave Roland

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THE Washington Constitution identifies the people themselves as the ultimate political power in this state. Four decades ago, the people used that political power to ensure citizens' access to public records, allowing us to gather information necessary to wisely exercise control over our government officials.

But when citizens sought public records from former Gov. Chris Gregoire, which would provide insight into her decisions about criminal pardons, tribal gaming agreements, the Sonics, Alaskan Way Viaduct replacement proposals, judicial appointments and medical marijuana regulations, Gregoire decided this information was not good for the people to know.

She refused to produce the requested documents, claiming that citizens cannot require a governor to divulge records that might reveal how he or she makes decisions or with whom the governor discussed those decisions.

On Oct. 17, the Washington Supreme Court agreed with Gregoire, determining that simply by creating the office of governor, the people obligated the courts to protect the governor and his or her advisers against citizens' requests for public records. The majority opinion hypothesized that a citizen might overcome this "executive privilege" by proving to a judge's satisfaction some "particularized need for the materials," but it is clear that this court-created privilege effectively gives the governor's office a "Get Out of Transparency Free Card."

The court's endorsement of a privilege to which the Washington Constitution makes absolutely no reference is a disheartening rejection of the people's demand for government transparency, but it is not the end of the story.

While the state Supreme Court was considering this case, a wide array of newspapers, public-interest organizations and ordinary citizens throughout the state joined in a call to keep the governor's office accountable to the people.

This outcry impacted the political debate last year, prompting both parties' gubernatorial candidates to promise that, if elected, they would not invoke executive privilege to conceal public records.

Fortunately, Gov. Jay Inslee has already announced that he will honor his campaign promise. But the people's right to keep their governor's office transparent and accountable demands a sturdier foundation than politicians' promises.

As Justice Jim Johnson noted in his dissenting opinion, "No nation or state ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin only because the means of publicity had not been secured."

The preamble to the state's Public Records Act emphasizes, Washingtonians have reserved to themselves — and not to their public servants — "the right to decide what is good for the people to know and what is not good for them to know."

Because the state Supreme Court has determined that gubernatorial secrecy is built into the state constitution, only a constitutional amendment can reverse the damage the court's majority did to the cause of open government. This would require two-thirds of each legislative house to agree on an amendment that would then be sent to the people for ratification by a majority vote at the next general election in November 2014.

At a time when so many issues divide legislators along party lines, the ideal of government transparency offers a nonpartisan issue around which legislators can join forces for the common good.

In the coming months, the Legislature should work together and give the people a chance to vote on a constitutional amendment ensuring access to public records.

Dave Roland is general counsel for the Freedom Foundation, a libertarian think tank in Olympia. The Freedom Foundation was the plaintiff in Freedom Foundation v. Gregoire.