

## Support grows for public disclosure constitutional amendment

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On October 17, the State Supreme Court created a Grand Canyon sized loophole in Washington's public records law by granting the Office of Governor (at the request of former Governor Gregoire) an exemption from public disclosure based on a President Nixon-styled executive privilege.

Although the Court decision has now provided the Governor's Office the freedom to utilize a Colonel Jessep response to public records requests ("You can't handle the truth"), Governor Inslee has made it clear he will not claim executive privilege "unless it was explicitly provided by the Legislature or a vote of the people."

Based on his previous statements concerning executive privilege it is possible that Governor Inslee would entertain support for a constitutional amendment addressing the Court ruling though he hasn't publicly indicated one way or another yet.

Among those calling for constitutional reform is former Attorney General Rob McKenna.

McKenna wrote:

"This is a troubling ruling. Even if the court is right that there is an implied separation-of-powers argument for an exemption, the court ruling as it stands now allows a 'qualified privilege' that isn't very qualified at all. The practical effect will be that, instead of it being incumbent upon the governor's office to prove why a document can be withheld under a specific exemption from the Public Records Act, the requestor of the documents will have to take the expensive route of going to court to prove a need for the documents. That's backwards, and it's damaging to the public's right to know . . .

Regardless of the legalities, the practical path forward is clear: we need a state constitutional amendment to fix this ruling and make clear once again that the people have not given up the right to know about how government decisions are made. State constitutional amendments must originate in the state legislature, which means we need leaders from both parties to step up and protect the people's right to know. After that, the matter would go to the voters – and it's obvious the people would overwhelmingly approve this change."

Based on the comments of Sen. Pam Roach (R) and Rep. Gerry Pollet (D), lawmakers may soon have a chance to consider a constitutional amendment. Both Sen. Roach and Rep. Pollet have promised to introduce proposals to fix the Court's ruling.

As noted by Dave Roland, General Counsel for the Freedom Foundation (the group that brought the lawsuit against Governor Gregoire for claiming executive privilege):

"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."

So what type of language should lawmakers consider for a constitutional amendment? Here is one suggestion that is being discussed by open government advocates:

"Article I, Section 36 - GOVERNMENT TRANSPARENCY

The people of this state do not yield their sovereignty to the officers or agencies that serve them. The people, in delegating authority, do not give their public servants any power or privilege 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 over the offices and instruments that they have created. All laws providing for citizen access to public records and meetings shall be liberally construed to favor the citizens' interest in government transparency;

any exemptions from disclosure must be adopted by the legislature or the people themselves and must be narrowly construed to promote this public policy and to ensure that the public interest in government transparency will be fully protected. This provision supersedes any other claim of privilege purporting to exempt the people's right to know."

As we've recommended in our Policy Guide for Washington State:

"The Public Records Act was passed to keep the people of Washington informed about the decisions state officials make in their name. The intent section of the Public Records Act is clear:

'The people of this state do not yield their sovereignty to the agencies that serve them. 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 over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.'

Still, over time a long list of exemptions has been enacted, increasing secrecy in government and weakening citizens' ability to see important public information. The intent of the Public Records Act should be added to the state constitution and a higher vote threshold adopted for enacting new exemptions."

Along with adding the preamble of the state's public records law to the constitution the amendment should make clear that no elected officials or public entity is exempt from the people's right to know.

Perhaps the first opportunity for this debate to occur will be on November 21. The agenda for the Senate Government Operations Committee notes that the members will hold a "discussion of executive privilege and the Freedom Foundation v. Gregoire case."