

No. 78637-2  
(Snohomish County Superior Court No. 05-2-10166-9)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON STATE FARM BUREAU FEDERATION,  
WASHINGTON STATE GRANGE, NATIONAL FEDERATION  
OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION,  
WASHINGTON ASSOCIATION OF REALTORS,  
and STEVE NEIGHBORS,

Respondents,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington;  
STATE EXPENDITURE LIMIT COMMITTEE; an agency of the State of  
Washington; and STATE OF WASHINGTON,

Appellants.

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**RESPONDENTS' ANSWERS TO *AMICI CURIAE* WASHINGTON  
COALITION FOR OPEN GOVERNMENT, AMERICAN  
LEGISLATIVE EXCHANGE COUNCIL, NATIONAL GOVERNORS'  
ASSOCIATION, AND NATIONAL CONFERENCE OF STATE  
LEGISLATURES**

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In the interest of economy and convenience, Respondents have consolidated herein their answers to all *amicus* arguments regarding legislative and executive privilege.

## I.

### **ANSWER TO THE WASHINGTON COALITION FOR OPEN GOVERNMENT AND THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL**

The arguments of *amici* Washington Coalition for Open Government (WCOG) and American Legislative Exchange Council (ALEC) are well considered and thoroughly grounded in Washington law. Respondents only wish to emphasize a few points.

First, *amici's* observation that the Speech and Debate Clause “addresses only information which is *per se* publicly available . . . by constitutional decree,” Am Br. of WCOG/ALEC at 7 (citing WASH. CONST. art. II, § 11), is correct by the constitution’s plain terms, and naturally leads to the conclusion that the clause provides legislators only with immunity from suit, not an evidentiary privilege.

Second, in enacting the Public Records Act, chapter 42.56 RCW, both the people and the legislature of this state have declared and affirmed a policy of open government. *See* Am. Br. of WCOG/ALEC at 4 (quoting RCW 42.56.030). As noted throughout *amici's* brief, a decision to create the expansive privileges claimed by the State here would utterly contravene

this policy, as well as the constitutional mandate assigning such policy decisions to the legislature. *See Moran v. State*, 88 Wn.2d 867, 875, 568 P.2d 758 (1977) (“We must always remember that we are not a super legislature. It is not our role in government to enact legislation or to add provisions or to change provisions in legislation which are otherwise clear.”). Moreover, by removing this policy decision from the legislature, this Court would actually denigrate the separation of powers by encroaching on the legislature’s prerogatives while also reducing democratic accountability in government. Instead, this Court should adhere to its proper constitutional role by maintaining its longstanding reticence to determine such policy questions by judicial fiat. *See State v. Maxon*, 110 Wn.2d 564, 566, 756 P.2d 1297 (1988).

Third, to the extent that the State still claims a deliberative process privilege separate from an executive or legislative privilege,<sup>1</sup> *see In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997) (distinguishing between presidential and deliberative process privileges), *amici* correctly note that this privilege arises from, and is thus controlled by the PRA in this state. *See Am. Br. of WCOG/ALEC* at 8-9 (observing that factual material and material underlying finalized decisions are subject to disclosure under PRA); *see also Resp’t Open. Br.* at 69-73.

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<sup>1</sup> The State did not discuss such a privilege in their briefing to this Court.

The PRA similarly counsels against any effort to create common law executive or legislative privileges, as an analysis of *Senear v. The Daily Journal-American* reveals. 97 Wn.2d 148, 641 P.2d 1180 (1982). In creating a common law qualified reporters' privilege, the *Senear* court expressly acknowledged that it was acting in the face of complete legislative silence on the issue. *See id.* at 151. Here, however, both the people and the legislature have spoken through the PRA, and spoken in favor of open government.<sup>2</sup> *See* RCW 42.17.010(11)<sup>3</sup> (“ . . . full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.”); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978) (“The Washington public disclosure act is a strongly-worded mandate for broad disclosure of public records.”). In addition, the *Senear* court correctly observed that the Court's common law power is effective only to the extent that it is not “inconsistent with the constitution and laws . . . of the State of Washington.” *See* 97 Wn.2d at 152. But here, again, the Public Records Act expressly proclaims

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<sup>2</sup> As Respondents have noted previously, the “public officer” privilege contained in RCW 5.60.060(5) is not to the contrary. This privilege has been interpreted to extend only to confidential communications to police officers and other similar officials. *See, e.g., State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002); *State v. Jones*, 96 Wn. App. 369, 979 P.2d 898 (1999).

<sup>3</sup> Codifying Laws of 1973, ch. 1, § 1 (Initiative Measure No. 276, approved Nov. 7, 1972) as amended.

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.

RCW 42.56.030. Given this ringing declaration, creating the claimed privileges would be wholly inconsistent with the PRA and thus beyond the scope of the Court's common law power.

Finally, while this is not a public records case, *amici* correctly note that a decision to judicially create the claimed privileges, on whatever grounds, will almost certainly alter the fundamental public policy of this state as set forth in the PRA. *See* Am. Br. of WCOG/ALEC at 9-10. The Court should accordingly refrain from creating these privileges.

## II.

### **ANSWERS TO THE NATIONAL GOVERNORS ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LEGISLATURES**

Lying in sharp contrast to the brief of WCOG/ALEC are the briefs filed by *amici* National Governors Association (NGA) and National Conference of State Legislatures (NCSL). These briefs are beset by many of the flaws that plagued the State's briefing on this issue: conflating immunity from suit with evidentiary privilege; almost exclusive reliance on

policy arguments<sup>4</sup> and case law from other jurisdictions<sup>5</sup>; and a desire to eliminate the restrictions placed on the privileges by the trial court,<sup>6</sup> even though these restrictions were not appealed by any party and are thus not before the Court. Respondents' reply to the State addresses these issues thoroughly, *see* Resp't Rep. Br. at 10-25; accordingly, Respondents will largely limit their replies here to issues not covered in earlier briefing.

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<sup>4</sup> It bears repeating that these policies, while perhaps laudable and even constitutionally supported (though not constitutionally mandated), are for the legislature to weigh and act upon, not this Court. *Senear*, cited by the NGA for the opposite proposition, is inapposite here, as demonstrated *supra* at 3.

<sup>5</sup> Of the twenty-seven cases cited by NGA, only three are Washington cases. *See* Am. Br. of NGO at ii-iv. Of the thirteen cases cited by NCSL, only two are Washington cases. *See* Am. Br. of NCSL at iii.

<sup>6</sup> Specifically, the NGA and NCSL both seek to extend executive and legislative privilege to purely factual material, *see* Am. Br. of NGA at 9-10, Am. Br. of NCSL at 18-19, directly contrary to the ruling of the trial court, *see* Trans. (Jan. 13, 2006) at 4, 7. The NCSL also seeks to extend legislative privilege to unsolicited materials such as citizen letters or lobbyist communications, *see* Am. Br. of NCSL at 18-19, also directly contrary to the ruling of the trial court, *see* Trans. (Jan. 13, 2006) at 4.

Beyond the fact that these requests are not properly before the Court, *see* Resp't Rep. Br. at 21-22 (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993)), they also ignore fundamental principles of privilege law. First, like attorney-client privilege, executive and legislative privilege are based on the premise that they encourage open and honest *communication* within certain relationships. To that end, attorney-client "privilege extends only to protect communications *and not the underlying facts.*" *Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 194-95, 691 P.2d 564 (1984) (emphasis added) (discussing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). The reasoning underlying this distinction applies with equal force to any privilege the Court might create here.

Moreover, unsolicited materials inherently fall outside of the scope of the relationships sought to be promoted by the claimed privileges. Extending privilege to such communications would therefore do nothing to foster those relationships. It is also unlikely that such unsolicited communications are made confidentially, and "[c]onfidentiality is a necessary factor in establishing a testimonial privilege." *State v. Martin*, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999).

**A. Executive Privilege**

At the outset, it is telling to note what the NGA does not assert in its brief. It does not assert that the governor is entitled to an absolute, gubernatorial “legislative privilege” of the type urged by the State, *see* App. Rep. Br. at 49-51, or any other absolute privilege for that matter. Indeed, it concedes precisely the opposite. *See* Am. Br. of NGA at 10-11. Given that the NGA’s *raison d’etre* is the aggrandizement of gubernatorial power, the Court should take heed of these omissions and concessions.

Moreover, beyond the flaws noted above and repetition of the canard that the offices of governor and president are truly analogous, *see* Am. Br. of NGA at 5-8, the NGA presents a rather credible case for the contours of an executive privilege should this Court decide to create such a privilege. Particularly instructive are the teachings of the NGA’s most relied upon authority, *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

In *Sealed Case*, the D.C. Circuit engaged in a thorough analysis of the scope and nature of the presidential privilege. *See id.* at 742-57. The court emphasized that the presidential privilege is qualified, even in a civil trial, *see id.* at 744 (citing *Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir. 1977)), and is subject to *in camera* review upon a proper showing of need. *See id.* at 744-45, 751; *but see id.* at 743 n.12 (citing *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), for the proposition

that claims of privilege for military or state secrets are likely close to absolute). More importantly, the court observed that courts must ensure that the privilege is “carefully circumscribed,” *id.* at 752, lest they “expand[] to a large swath of the executive branch a privilege that is bottomed on a recognition of the unique role of the President.” *Id.* The court accordingly concluded that “the privilege *should not extend to staff outside the White House* in executive branch agencies.” *Id.* (emphasis added).

Applied here, this reasoning would circumscribe the scope of an executive privilege to the governor’s senior staff and preclude its application to lower-level communications such as those admitted by the trial court in this case. Given this state’s demonstrated, broad commitment to open government, and the purported privilege’s grounding in the “unique position” of the chief executive, Am. Br. of NGA at 5, such narrow circumscription is appropriate.

#### **B. Legislative Privilege**

Unlike the NGA’s brief, the brief of *amicus* NCSL is flawed throughout. Beyond the problems already noted, *supra* at 4-5, the NCSL dismisses as meaningless textual differences between the Washington Speech and Debate Clause and those of other jurisdictions. *See* Am Br. of NCSL at 6, 9. Indeed, the NCSL urges that any legislative privilege must

be absolute, based on little more than the fact that the Supreme Court has created an absolute privilege under the federal constitution. *See* Am. Br. of NCSL at 16. However, “ordinary rules of textual and constitutional interpretation, as well as the logic of federalism, require that meaning be given to the differences in language between the Washington and United States Constitutions . . . .” *Manufactured Housing Cmty’s of Washington v. State*, 142 Wn.2d 347, 358, 13 P.3d 183 (2000). Given that nothing in the text or history of the Washington Speech and Debate Clause supports the creation of an evidentiary privilege of any sort, this principle demands, at the very least, that any privilege created by this Court be a narrow, qualified one.

The NCSL also attempts to make a historical argument in support of its position. To bolster this argument, the NCSL quotes from the journal of the Wisconsin constitutional convention. *See* Am. Br. of NCSL at 14. However, this source was almost certainly unknown to the ratifiers of the Washington Constitution, and therefore could not have affected its meaning.<sup>7</sup> *See Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997) (constitution is to be interpreted in accordance with original understanding of ratifying public). The NCSL also fails to recognize the

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<sup>7</sup> Moreover, even if the entire populace of this state had been aware of the passage relied upon by *amicus*, this still would not establish the existence of an evidentiary privilege under the Washington Speech and Debate Clause, given that such a privilege was unheard of in American jurisprudence at that time. *See* Resp’t Rep. Br. at 14-17.

motivating purpose behind the historical protections for legislative speech and debate – harassment and intimidation by the executive. Conversely, one of the NCSL’s most relied upon authorities expressly recognizes this history, and accordingly reasons that speech and debate protections should be applied narrowly in suits brought by private citizens. *See* Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1113, 1171-77 (1973).

The NCSL also claims that the Public Records Act cannot provide a basis for limiting legislative privilege, because the privilege provides individual legislators with constitutional protection for their legislative activities. *See* Am. Br. of NCSL at 18-19. While Respondents obviously reject the premise that the Speech and Debate Clause provides legislators with any evidentiary privilege whatsoever, they agree that the protection it does provide – *i.e.*, immunity from suit – is individual in nature, not institutional. Acknowledgment of this places *amicus* in a bind, however. Specifically, if the legislature cannot institutionally waive the Speech and Debate Clause’s protections, neither can it institutionally assert those protections. No individual legislator has asserted legislative privilege in this case.

Moreover, recognition of the individual nature of the Speech and Debate Clause's protection drastically curtails the scope of any privilege this Court might create. An individual privilege can only extend logically to the holder of the privilege and those staffers over whom the holder has individual control, and not to institutional staff such as committee and caucus staff. As Respondents have noted previously, *see* Resp't Rep. Br. at 23, is difficult to determine who would be empowered to invoke or waive a privilege that encompassed such institutional staff. What if one legislator wished to withhold a committee document and another wished to produce it? Whose wishes would prevail? And on what grounds? It is nearly impossible to apply such an expansive privilege in a principled manner

Finally, the NCSL would have this Court discard *in camera* inspection of allegedly privileged documents based upon the inadvertent production of "one privileged e-mail message." *See* Am. Br. of NCSL at 17. Respondents have previously addressed the utility and appropriateness of *in camera* review should the Court create the claimed privileges. *See* Resp't Rep. Br. at 24-25. It bears repeating, however, that the communications revealed in this case demonstrate the peril that lies in abject deference to assertions of privilege made by the political branches. Many of the communications produced as a result of *in camera* review in this case fell well outside the scope of any reasonable assertion of

legislative or executive privilege. *See, e.g.*, CP 316, 318; *see generally* CP 311-57. *In camera* review provides a efficient and proven method to prevent such abuses.

### III.

#### CONCLUSION

Openness in government is a fundamental public policy in this state, and the judiciary plays a vital role in sustaining that policy. Despite the pleas of the State and supporting *amici* to the contrary, nothing in the constitution, statutes, or common law of this state justifies eviscerating that policy here. Accordingly, Respondents request that this Court reverse the decision of the trial court to create legislative and executive privileges.

RESPECTFULLY submitted this 15th day of November, 2006.

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## DECLARATION OF SERVICE

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen Stephens & Klinge LLP in Bellevue, Washington.

On November 15, 2006, a true and correct copy of Respondents' Answers to *Amici Curiae* Washington Coalition For Open Government, American Legislative Exchange Council, National Governors' Association, and National Conference of State Legislatures was either transmitted via e-mail or facsimile and placed in an envelope, which envelope with postage thereon fully prepaid was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington, addressed to the following persons:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 15<sup>th</sup> day of November, 2006 at Bellevue, Washington.

*Linda Hall*

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Linda Hall