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STATE OF WASHINGTON
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NO. 78637-2

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

SUPREME COURT OF THE STATE OF WASHINGTON

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 O. GREGOIRE, Governor of the State of Washington,
STATE EXPENDITURE LIMIT COMMITTEE; and STATE OF
WASHINGTON,

Appellants.

AMICI CURIAE BRIEF OF THE WASHINGTON COALITION FOR
OPEN GOVERNMENT AND THE AMERICAN LEGISLATIVE
EXCHANGE COUNCIL

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I. IDENTITY OF *AMICI*

The Washington Coalition for Open Government, a Washington nonprofit organization, is an independent, nonpartisan organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of the public's business.

The American Legislative Exchange Council is the nation's largest nonpartisan individual membership association of state legislators. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve economic liberty. It is also generally concerned with matters of government transparency, legislative accountability and governmental structure.

II. INTEREST OF *AMICI*

The interest of *Amici* in this case stems from the public's strong interest in government transparency and accountability and the timely and complete information concerning the conduct of government. Each day, the Coalition and its members request records from government under the Public Records Act ("PRA"). ALEC's members seek to encourage government transparency in response to these requests. In this case, the trial court created legislative and executive privileges, shielding certain documents from discovery. *Amici* seek, through their brief, to clarify that,

even should such privileges be applicable to discovery, they do not exempt public records from disclosure under the PRA.

This Court's decision regarding the applicability and scope of such privileges will affect the PRA and the rights of requesters under the PRA by potentially creating new and expansive exemptions of legislative and executive privilege not contemplated by the statute or the legislature. The Coalition and its members are regularly forced to challenge agency withholding of records under the PRA, and rely upon the statutory exemptions as the only appropriate justification for withholding of records, and ALEC's members have an interest in limiting such exemptions to those considered and approved by the legislature. Should this Court find that the PRA incorporates heretofore unrecognized executive and legislative privileges as exemptions to disclosure, the PRA and citizens' abilities to obtain information regarding their government under the PRA will be constrained. Thus, *Amici* have a legitimate interest in assuring the Court is adequately informed about the impact its decision will have on all record requesters and public agencies should the Court determine that the PRA is limited by the executive or legislative privilege found by the trial court.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case of Respondents/Cross-Appellants, and additionally notes that the facts relevant to the issue addressed by *Amici* are as follows:

In the proceedings in the trial court, Respondents/Cross-Appellants sought the production of certain documents from the State. CP 1651-74. Though many documents were produced, the State withheld certain documents on the ground that the documents were protected by legislative privilege, executive privilege, or both. CP 968-90. The State defined the “executive privilege” as the “deliberative process privilege.” CP 1650.

The trial court applied the two privileges with certain exceptions (Jan. 13, 2006 Trans. at 2-7) and allowed the State to withhold several documents as exempt from disclosure under the privileges. CP 218-310.

IV. ARGUMENT AND AUTHORITY

A. **The Public Records Act Reflects The Strong Public Policy Of Full Access To Government Records.**

This is not a public records case. However, should the trial court’s decision allowing the State to withhold records on the basis of legislative and executive privileges be affirmed, requesters seeking public records in the Public Records Act may be prejudiced by public agencies withholding records under these privileges. As discussed below, because the Act does

not permit judicially-created exemptions to disclosure, any executive or legislative privilege found to apply in the discovery process should not be found to equally apply to public records.

In 1972, the people of Washington passed the Public Records Act through Initiative 276. As enacted, the PRA is a strong statement of the public policy of openness in government:

The provisions of this chapter shall be liberally construed to promote ... full access to public records so as to assure continuing public confidence of ... governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17.010(11).

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. This Court has likewise repeatedly recognized “the Legislature’s intent to ensure full access to public records.” *ACLU v. Blaine Sch. Dist.*, 86 Wn. App. 688, 697, 937 P.2d 1176 (1997); *Progressive Animal Welfare Soc’y (“PAWS”) v. University of Washington*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (the Act is “a strongly worded mandate for broad disclosure of public records”).

B. The Legislative And Executive Privileges Are Not Exemptions To The Public Records Act, And The Records At Issue Would Be Discloseable In Response To A Public Records Request.

1. Public Records Must Be Disclosed Absent A Specific Statutory Exemption.

In order to promote “complete disclosure,” courts must construe the Act’s disclosure provisions liberally. *Dawson v. Daly*, 120 Wn.2d 782, 788, 845 P.2d 995 (1993); *see also PAWS*, 125 Wn.2d at 251. An agency must make available public records unless the record falls within a specific exemption of the Act or “other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). The State argues that the legislative and executive privileges arise from the Washington Constitution, implying that the allegedly privileged documents would be exempt from disclosure in response to a public records request under the “other statute” prong of the PRA.

This Court, however, explained that courts are not permitted to infer exemption of material, but only utilize the “other statutes” exemption when there is a specific codification that certain information cannot be released:

The "other statutes" exemption incorporates into the Act other statutes which exempt or prohibit disclosure of specific information or records...The rule applies only to those exemptions explicitly identified in other statutes; its language does not allow a court

"to imply exemptions but only allows specific exemptions to stand".

PAWS, 125 Wn.2d at 261-62 (internal citations omitted). This exemption thus applies to statutes where the legislature has made the substantive determination that certain records should be exempt from disclosure. Courts therefore have confined this exemption to narrow instances reflecting a legislative judgment that specific records should not be disclosed.¹

This Court has addressed the intersection of a long-standing privilege and the PRA. In *Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004), this Court held that RCW 5.60.060(2)(a), the attorney-client privilege statute, was an "other statute" prohibiting disclosure of

¹ For example, in *Hudgens v. City of Renton*, 49 Wn. App. 842, 746 P.2d 320 (1987), the court held that although the Criminal Records Privacy Act precluded a journalist from copying police records regarding a strip search of an acquitted driving-while-intoxicated defendant, the journalist was entitled to inspect records under PDA. The court therefore narrowly read the Criminal Records Privacy Act to prevent public dissemination of copies of the records at issue, but allowed inspection of those same records. Likewise, Washington courts have found that the Uniform Trade Secrets Act, which specifically protects certain trade secrets, is an "other statute" requiring exemption from disclosure of those trade secrets. See RCW 19.108 *et. seq.*; *PAWS*, 125 Wn.2d at 262; *Evergreen Freedom Foundation v. Locke*, 127 Wn. App. 243, 110 P.3d 858 (2005); *Spokane Research & Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999). An anti-harassment statute protecting animal researchers which provides for a mechanism for researchers to seek an injunction to prevent release of records has been found to constitute an "other statute." *PAWS*, 125 Wn.2d at 263. Similarly, a statute providing that information supplied to the Insurance Commissioner regarding the acquisition of insurance companies by other insurance companies that protects such information from disclosure unless the Commissioner decides to make it available after a hearing, qualifies. *Washington Citizen Action v. Office of Insurance Commissioner*, 94 Wn. App. 64, 971 P.2d 527 (1999). Juvenile dependency records, sealed in certain circumstances by RCW 13.50, are an "other statute" preventing disclosure under the PRA. *Deer v. DSHS*, 122 Wn. App. 84, 93 P.3d 195 (2004).

privileged records. That statute specifically prohibits revelation of communications between an attorney and his or her client. RCW 5.60.060(2)(a).

In contrast, here, the privileges at issue do not arise from statutes that prohibit revealing information.² The Speech and Debate Clause, upon which the trial court relied as to the legislative privilege, states as follows:

No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.

WASH. CONST., Art. II, § 17. This clause addresses only information which is *per se* publicly available, that spoken in debate (which is open to public observation by constitutional decree, *see* WASH. CONST., Art. II, § 11) by members of the legislature. There is nothing in the clause that indicates that such information should be hidden from public view, or that any policy supports such withholding of information. As such, the clause is inapposite to the narrow reading of the “other statute” exemption mandated by the PRA.

Likewise, the executive privilege as found by the trial court rests solely upon the separation of powers doctrine, not on any specific constitutional or statutory language codifying a policy that certain

² *Amici* incorporate by reference the arguments of Respondents/Cross-Appellants on pages 60-74 of their brief, and herein only address those arguments particular to the effect of this case on the PRA and the PRA’s application to this case.

information should be withheld from the public. Such general doctrine does not constitute an “other statute” within the purview of the PRA.

In sum, the legislative and executive privileges found by the trial court do not rest upon a specific legislative or constitutional determination that certain information must be withheld from public view. As such, the “other statute” exemption to the PRA does not apply. Because Respondents/Cross-Appellants could have therefore received the documents at issue through a public records request, they should likewise be available in discovery. *See O'Connor v. Department of Social and Health Services*, 143 Wn.2d 895, 907, 25 P.3d 426 (2001) (parties may utilize the PRA to obtain documents for use in litigation, and are not confined to use only the regular discovery process).

2. Disclosure Of Records Like Those At Issue Is Specifically Contemplated By The Public Records Act.

Moreover, the legislature has already considered the issue of intra-agency deliberations and enacted a specific statutory exemption to the PRA to protect such processes from public view until the policy in question is enacted. Indeed, the State indicated in the proceedings below that the claimed executive privilege is coextensive with the deliberative process privilege, a concept arising from the PRA. CP 1650.

Under RCW 42.56.280, intra-agency deliberative materials are exempt from disclosure. This does not, however, include purely factual material or the raw data upon which a decision is based. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978); *PAWS*, 125 Wn.2d at 256. To the extent such material is contained within the documents, that material must be disclosed. More importantly, however, the exemption for deliberative materials only applies until such policies or recommendations contained in the records are implemented. *Dawson*, 120 Wn.2d at 793; *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990). Here, it is undisputed that the legislation at issue in the records has been adopted by the Legislature. As such, any deliberative process protection once available for these records no longer exists. *Id.*

V. CONCLUSION

Though this case is not a public records case, the Court cannot ignore the implications of its ruling on members of the public who seek information from the State, whether in litigation or through the Public Records Act. The trial court's decision implementing legislative and executive privileges operates to raise questions as to whether certain materials may be kept from public view even beyond those exemptions contained within the Public Records Act, including the deliberative process exemption already in place. Because the public policy of

Washington as codified in the Act favors at all costs openness in government, the Court should decline to create new avenues by which the public's business is shielded from public view.

For the foregoing reasons, the Washington Coalition for Open Government and the American Legislative Exchange Council urge the Court to reverse the trial court's ruling that certain State documents are exempt from disclosure pursuant to the legislative and/or executive privileges.

RESPECTFULLY SUBMITTED this 26th day of October, 2006.

WITHERSPOON, KELLEY, DAVENPORT &
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CERTIFICATE OF SERVICE

BY JANET FERRELL

I, Janet L. Ferrell, declare and state as follows: _____
CLERK

1. I am over the age of eighteen and competent to testify to the matters herein.

2. I am an employee of the law firm of Witherspoon, Kelley, Davenport & Toole. My business and mailing address are: 422 W. Riverside Avenue, Suite 1100, Spokane, Washington 99201.

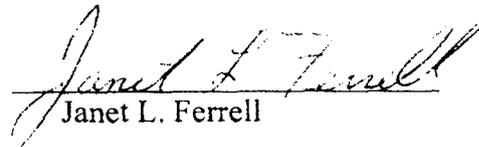
3. On October 26, 2006, I caused to be served a copy of the within document on the following, per the method indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Spokane, Washington, this 26th day of October, 2006.


Janet L. Ferrell