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NO. 86384-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION, a Washington nonprofit corporation,
Appellant,

v.

CHRISTINE O. GREGOIRE, in her official capacity as Governor of the
State of Washington,
Respondent.

**ANSWER TO STATEMENT OF GROUNDS
FOR DIRECT REVIEW**

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ORIGINAL

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I. NATURE OF CASE

This case presents an issue of first impression in the Washington Supreme Court: whether the governor of the State of Washington may assert a qualified executive privilege, grounded in separation of powers under the Washington Constitution, as an exemption under the Public Records Act (PRA), RCW 42.56. The superior court ruled that a qualified privilege exists and that it constitutes an exemption to the PRA under the “other statute” provision, RCW 42.56.070(1). Order, COL 1-5.¹

Appellant Freedom Foundation filed a public records request for eleven specific records that the Office of the Governor had withheld under a claim of executive privilege in response to other public records requests, and copies of those other requests. Order, FOF 1. The governor’s office responded by producing some of the requested documents and providing an estimate of the time required to review the remaining documents for possible release. Order, FOF 2. Instead of simply reasserting executive privilege for the eleven targeted records, however, the governor’s general counsel reviewed and reevaluated each document to determine whether a claim of executive privilege was still appropriate. Order, FOF 3. Of the eleven targeted documents, the governor produced five documents in their

¹ “Order” refers to the Findings of Fact, Conclusions of Law, and Final Order signed by Thurston County Superior Court Judge Carol Murphy on July 22, 2011. “FOF” refers to numbered findings of fact in the Order, and “COL” refers to numbered conclusions of law in the Order.

entirety, produced one document with the governor's handwritten notes redacted under a claim of executive privilege, and withheld five documents under a continuing claim of executive privilege. Order, FOF 5. The production was accompanied by a privilege log that identified each document for which executive privilege was claimed, providing the date, author, recipient(s), a brief description of the document, and the basis for claiming executive privilege. Order, FOF 4. The privilege log was supplemented by a letter from the governor's general counsel further explaining the basis for claiming executive privilege for each document that was withheld or redacted. Order, FOF 4. As explained in the letter and the privilege log, each privileged document is a communication between the governor and an executive policy advisor to the governor or a member of the governor's executive staff, and each document contains advice, recommendations, discussion, or instructions relating to decision-making or policy-making functions within the governor's constitutional responsibilities.²

Freedom Foundation filed a PRA action in superior court to compel production of the withheld records and redacted information. On cross motions for summary judgment, the superior court ruled (1) the

² As explained below, at page 5, the purpose of executive privilege is to foster informed and sound gubernatorial deliberations, policy making, and decision making by preserving the governor's access to candid advice and multiple perspectives, recommendations, and opinions.

governor possesses a qualified executive privilege grounded in separation of powers under the Washington Constitution; (2) the constitutional privilege operates as a PRA exemption under the “other statute” provision in RCW 42.56.070(1); and (3) a challenge to the governor’s assertion of constitutional executive privilege should be analyzed using the three-part test established in *United States v. Nixon*, 418 U.S. 683, 707-13, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and adopted by other federal and state courts. Order, COL 1-6. Following additional briefing, the superior court applied that three-part test and ruled (4) the governor properly asserted executive privilege for the documents at issue, which Freedom Foundation did not attempt to overcome; and (5) the records, therefore, were exempt from production under the PRA, and there was no denial of records in violation of the PRA. Order, COL 7-13.

Freedom Foundation seeks direct review of the superior court’s Order. The governor disputes the Foundation’s characterizations of the superior court’s Order, its assertions that the Order is inconsistent with prior decisions of this Court and the PRA, and its contention that the constitutionality of the PRA somehow is at stake. Nevertheless, the governor agrees the issues listed below are important public issues that are properly before this Court as issues of first impression requiring prompt

and ultimate determination by this Court, so that direct review is therefore warranted under RAP 4.2(a)(4).

II. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the governor of the State of Washington may claim a qualified executive privilege, grounded in the separation of powers under the Washington Constitution, as an exemption from mandatory production under the Public Records Act under the “other statute” exemption of RCW 42.56.070(1).

2. Whether a challenge to the governor’s assertion of qualified executive privilege should be evaluated using the three-part test established as part of the privilege by the United States Supreme Court in *Nixon*, as other state courts have done.

3. Whether the governor properly asserted qualified executive privilege for the records at issue in this case.

III. DISCUSSION OF GROUNDS FOR DIRECT REVIEW

A qualified presidential executive privilege grounded in the separation of powers in the federal Constitution was recognized explicitly by the United States Supreme Court in *Nixon*. The Court explained that a qualified executive privilege for communications to and from the president is “fundamental to the operation of Government and inextricably

rooted in the separation of powers under the Constitution.” *Nixon*, 418 U.S. at 708.³ Over the succeeding years, several state courts have had occasion to recognize a parallel qualified gubernatorial executive privilege grounded in state constitutional separation of powers. These decisions were before the superior court when it reached its decision in this case.⁴

The purpose of the privilege, as articulated by the courts, is to serve the constitutional and public interest in the effective discharge of the governor’s constitutional duties by preserving the governor’s access to candid advice, multiple perspectives and recommendations, and even blunt or harsh opinions.⁵ Moreover, as in *Nixon*, the privilege does not bar a court, upon a proper showing, from ordering the production of documents alleged to reflect unlawful conduct by the governor or a member of the governor’s staff.⁶

³ The privilege is qualified, not absolute, because, under the three-part test explained below, it can be overcome by a showing that the needs of justice outweigh the constitutional interest in preserving separation of powers.

⁴ The following state court decisions recognizing gubernatorial privilege were among those argued to the superior court in this case: *Hamilton v. Verdow*, 287 Md. 544, 414 A.2d 914 (1980); *Doe v. Alaska Superior Ct.*, 721 P.2d 617 (Alaska 1986); *Killington, Ltd. v. Lash*, 153 Vt. 628, 572 A.2d 1368 (1990); *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777 (Del. Super. Ct.), *appeal dismissed*, 670 A.2d 1338 (Del. 1995); *State ex rel. Dann v. Taft (Dann I)*, 109 Ohio St. 3d 364, 2006-Ohio-1825, 848 N.E.2d 472 (2006); *Wilson v. Brown*, 404 N.J. Super. 557, 574, 962 A.2d 1122 (Ct. App. Div. 2009).

⁵ *See, e.g., Dann I*, 109 Ohio St. 3d at 376-77; *Doe*, 721 P.2d at 624-25; *see also Nixon*, 418 U.S. at 708; Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1410 (1974).

⁶ *See Hamilton*, 287 Md. at 563-64; *Killington*, 153 Vt. at 638.

In this case, the superior court found that the Washington Constitution articulates the same constitutional principles that justified the recognition of a qualified executive privilege in the national government and in these other states. The recognition of a qualified gubernatorial executive privilege is not a judicial creation by a superior court, but a proper construction of the separation of powers under the Washington Constitution, under which each branch of government is constitutionally granted responsibilities, discretion, and deliberative space that should not be invaded by the other branches.⁷

Following this Court's lead,⁸ the superior court ruled that a constitutionally-based privilege should be recognized as an "other statute" under RCW 42.56.070(1). As Freedom Foundation acknowledges,⁹ neither this Court nor the Washington Court of Appeals has addressed

⁷ See *State ex rel. Reed v. Jones*, 6 Wash. 452, 461, 34 P. 201 (1893) ("Each of the three departments into which the government is divided are equal, and each department should be held responsible to the people that it represents, and not to the other departments of the government, or either of them."); see also *Gottstein v. Lister*, 88 Wash. 462, 479, 153 P. 595 (1915) ("[W]hile it is necessary that each department of the government heed the mandates of [the Constitution], it is no less important that the courts should not reach out beyond their constitutional sphere to question and draw to themselves duties and powers which belong to the other departments of the government.").

⁸ See *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595-96, 243 P.3d 919 (2010) (no specific exemption under the PRA mentions the protection of an individual's constitutional fair trial rights, but courts have an independent obligation to secure such rights; court signaled its readiness to order records withheld under constitution); *Yakima Cnty. v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011) (argument that constitutional provisions are incorporated as exemptions under the "other statute" provision of RCW 42.56.070(1) "has force" but need not be decided because information at issue was exempt under a specific statute).

⁹ Statement of Grounds at 14.

constitutional executive privilege, or the interplay between that privilege and the PRA. This case truly presents issues of first impression in Washington.

Freedom Foundation suggests the superior court's decision conflicts with *Garner v. Cherburg*, 111 Wn.2d 811, 765 P.2d 1284 (1988), in which a legislative committee issued a subpoena duces tecum in an attempt to force the production of records of the Commission on Judicial Conduct. The Foundation cites *Garner* for the premise that the Constitution does not supersede the PRA's existing burdens and presumptions.¹⁰ The PRA does not purport to abrogate the Constitution, nor could it do so—the Constitution would supersede any such statute. Moreover, in *Garner* this Court specifically cautioned against reducing “constitutionally based confidentiality interests to a statutory level.” *Id.* at 822.¹¹ The Foundation disregards that caution, instead pressing an argument that logically extends to other privileges with roots in constitutional separation of powers, including, for example, the

¹⁰ Statement of Grounds at 11-12.

¹¹ In quashing the subpoena, this Court articulated the principle that a constitutional confidentiality requirement is “impervious to legislative or judicial change, and it must be implemented except as overriding Federal due process requirements compel us to do otherwise.” *Garner*, 111 Wn.2d at 822 (quoting *Owen v. Mann*, 105 Ill. 2d 525, 535, 475 N.E.2d 886, 86 Ill. Dec. 507 (1985)).

confidentiality of judicial deliberations.¹² The Foundation's argument logically would reduce all such privileges to a statutory level by making them subject to control by the legislature. The superior court's ruling, and the very provisions of the PRA, avoid this constitutional impasse.

The Foundation also misrepresents the character of the privilege at issue. The governor has never claimed an absolute privilege to determine which documents fall within the privilege, but rather a qualified privilege. The privilege is not absolute, but qualified, because its application is subject to judicial review and it can be limited by the court where the court determines the privilege was asserted without identifying the records for which the privilege is asserted and briefly explaining why each record falls within the privilege for documents, or that the requester has demonstrated a particularized need for the documents that outweighs the constitutional interest in maintaining the privilege.¹³ That is the function of the three-part test *Nixon* established as an integral part of the privilege,

¹² The Washington Constitution provides no explicit privilege for judicial deliberations and judges' notes, but federal and state courts have recognized such a privilege as necessary to the judicial function and protected as part of the courts' assigned area of constitutional duties under the separation of powers. *See e.g., In re Certain Complaints*, 783 F.2d 1488, 1519-20 (11th Cir. 1986); *Dann I*, 109 Ohio St. 3d at 375; *Thomas v. Page*, 361 Ill. App. 3d 484, 490-91, 837 N.E.2d 483, 297 Ill. Dec. 400 (2005).

¹³ *See Doe*, 721 P.2d at 626; *Guy*, 659 A.2d at 785; *Hamilton*, 287 Md. at 563-64 (citing *Nixon*, 418 U.S. at 708, 713-14); *Wilson*, 404 N.J. Super. at 574; *Dann I*, 109 Ohio St. 3d at 378-79; *Killington*, 153 Vt. at 639.

and adopted by state courts on that same basis.¹⁴ The Foundation is simply incorrect when it asserts the superior court simply “created” the test or “ignored” the PRA.¹⁵

Finally, as explained above, the existence of a qualified constitutional executive privilege does not shield the governor from public accountability, and that is neither its purpose nor its effect. The governor remains accountable to the electorate for the decisions and policies she makes, or does not make.

Neither has the governor sought to place records beyond the reach of the courts, as the Foundation claims.¹⁶ The governor willingly submitted to judicial review in this case and appropriately argued for a qualified exemption under the PRA that gives effect to the separation of powers that is intrinsic in and fundamental to the Washington Constitution. The governor has agreed throughout this matter that judicial review is the appropriate means to resolve this dispute as to the asserted constitutional privilege.

¹⁴ As the Vermont Supreme Court explained, application of the test “is an essential part of the privilege itself, not a corollary procedure annexed to the privilege.” See *Killington*, 153 Vt. at 638-39; accord *Guy*, 659 A.2d at 785.

¹⁵ Statement of Grounds at 8.

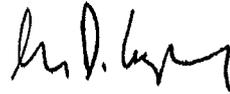
¹⁶ Statement of Grounds at 14.

IV. CONCLUSION

This Court should accept direct review of the issues set forth in part II of this Answer, under RAP 4.2(a)(4).

RESPECTFULLY SUBMITTED this 15th day of September 2011.

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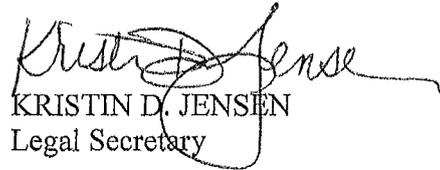
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I certify, under penalty of perjury under the laws of the state of Washington, that I served a copy of respondent's Answer to Statement of Grounds for Direct Review, via electronic mail per agreement of the parties, upon the following:

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Dear Clerk:

Attached for filing please find the respondent's Answer to Statement of Grounds for Direct Review with Certificate of Service for the matter noted above.

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Respectfully,

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