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IN THE 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.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case presents issues of first impression in Washington: Whether the Governor of Washington enjoys a qualified executive privilege, and if so, how the privilege interacts with the Public Records Act, Chapter 42.56 RCW (“PRA”). The trial court found that executive privilege operated as an “other statute” exemption to the PRA, but did not treat the exemption as the PRA mandates. Instead, the court created a three-part test ignoring the burdens and construction of the PRA, in addition to ignoring the PRA’s prohibition against distinguishing among requestors and forcing requestors to disclose reasons for requesting records. The trial court undercut multiple provisions of the PRA and threatens its very constitutionality. The trial court ruling must be overturned.

II. ASSIGNMENTS OF ERROR

Assignments of Error

The trial court erred in issuing its Final Order denying the Freedom Foundation’s Cross-Motion for Summary Judgment and granting Governor Gregoire’s Motion for Summary Judgment on July 22, 2011.

Issues Pertaining to Assignments of Error

1. Whether the Governor possesses a qualified executive privilege?
2. Whether executive privilege is an exemption from production under the PRA?
3. Whether executive privilege is an “other statute” exemption prohibiting disclosure pursuant to the PRA?

4. If executive privilege is an exemption to the PRA, whether it should operate differently than other exemptions and not pursuant to the mandates of the PRA, as the trial court ruled by placing the burden on the requestor to show the records are releasable, inviting analysis of the purpose of the request, and balancing the interests of the Governor and the requestor?
5. If executive privilege is a exemption to the PRA, whether the trial court's three-part test is a proper test for applying the privilege in a PRA action?
6. Whether the Governor violated the PRA in her response to the PRA request at issue here?

III. STATEMENT OF THE CASE

A. Factual History

The Freedom Foundation (“the Foundation”) is a not-for-profit corporation in Olympia with the mission of advancing individual liberty, free enterprise, and limited, accountable government. CP 102.

1. The Governor’s Denial of Records Based on Hundreds of Assertions of Alleged “Executive Privilege.”

In 2009, the Foundation began investigating the practice by the Governor’s Office of denying requests for public records based on an assertion of alleged “executive privilege.” CP 126-127. In 2009 and 2011 it made PRA requests to the Governor’s Office for all requests, responses and exemption logs where executive privilege was asserted to prevent disclosure. **Id.** The records produced collected denials dating from January 1, 2007, to March 15, 2011. **Id.** The records produced showed that the Governor had asserted executive privilege as a basis to deny records at least 492 times in response to at least 46 requests from 2007 to March 15,

2011. CP 127-135. The withheld records included, in part, communications from the Governor and her staff to employees in other agencies (including a communication from employees of the Liquor Control Board regarding “revenue and customer convenience opportunities” for the Liquor Control Board), memos of meetings with legislators, a proposal to remodel the Key Arena to prevent the departure of the Seattle Sonics, and records related to national education standards. CP 22-26, CP 126-135.

2. The PRA Request at Issue in this Litigation.

On April 5, 2010, Scott St. Clair, an employee of the Foundation, sent a records request via email to Melynda Campbell at the Office of the Governor, requesting eleven specific documents. CP 103. Each of the documents had been previously withheld from other requesters by the Office of the Governor on the sole basis of executive privilege. **Id.** Ms. Campbell acknowledged Mr. St. Clair’s request by email on April 8, 2010, within the five-day response time required by RCW 42.56.520. CP 103. Ms. Campbell enclosed a response letter and several pages of responsive documents. **Id.** In the response letter, Ms. Campbell estimated a time frame of two to three weeks to review and provide any releasable documents. **Id.**

Over the next several months Mr. St. Clair contacted Ms. Campbell

twice asking for updates on his records request. CP 103. Specifically, on June 9, 2010, Mr. St. Clair sent an email to Ms. Campbell noting that despite her estimate of two to three weeks to provide records, two months had now elapsed. Id. On June 11, 2010, Ms. Campbell responded via email and stated that review would be finished “by the end of next week.” Id. On August 24, 2010, more than seven weeks later, Mr. St. Clair had not received the records, and he emailed Ms. Campbell for an update. Id.

On August 25, 2010, Ms. Campbell provided a final response to the records request, in which she sent several responsive records and an exemption log identified the withheld records. CP 103. The response was supplemented with a letter from Narda Pierce, General Counsel to the Governor. Id. The exemption log and Ms. Pierce’s letter identified and explained “executive privilege” as the basis for withholding five records in their entirety and a sixth in partially-redacted form. Id.

B. Procedural History

On April 4, 2011, the Foundation filed suit against Governor Gregoire. An amended complaint was filed on April 6, 2011, asserting the Governor had violated the PRA by withholding and redacting documents without identifying a specific exemption that would justify disclosure. CP 6. The matter came before Thurston County Superior Court Judge Carol Murphy on cross-motions for summary judgment on June 17, 2011.

Verbatim Report of Proceedings (“RP”) (June 17, 2011) at 3. Following oral argument, Judge Murphy ruled that the Governor enjoys a qualified executive privilege which may operate as an exemption to the PRA. RP (June 17, 2011) at 27-30. Judge Murphy directed the parties to provide additional briefing and argument to address the application of executive privilege to the facts of the case. RP (July 15, 2011) at 3.

Judge Murphy entered Findings of Fact, Conclusions of Law, and Final Order on July 22, 2011. CP 232. As an initial question, the trial court held that the Office of the Governor is an “agency” subject to the provisions of the PRA pursuant to RCW 42.56.010(1). CP 235.

The trial court held that constitutionally-based privileges are incorporated as exemptions under the “other statute” provision of the PRA at RCW 42.56.070(1). CP 235-236. The court also held that should RCW 42.56.070(1) require a constitutional privilege to have an expression in a specific statute, RCW 43.06.010 constitutes an “other statute” that references the Governor’s constitutional duties and powers. Id.

Addressing the question of executive privilege, the trial court cited United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974), in which the U.S. Supreme Court recognized a qualified Presidential executive privilege grounded in separation of powers under the U.S. Constitution. CP 236. The trial court noted other state courts have applied the Nixon

decision to recognize a qualified gubernatorial privilege grounded in those states' constitutional separation of powers. Id. The trial court concluded that the Governor of Washington possesses a qualified executive privilege grounded in separation of powers under the Washington Constitution, and that the privilege may be asserted in response to a request for records under the PRA. Id.

Additionally, citing Nixon, the trial court adopted a three-part test to be used when the Governor's assertion of executive privilege is challenged. CP 236.

In the first step of the three-part test, the trial court held that the Governor's formal assertion of executive privilege for specific documents establishes a presumption that the privilege applies to those documents. CP 236-237. The Governor or her representative formally asserts the privilege simply by declaring that the Governor or her designee has reviewed each requested document and determined that it falls within the privilege because it is a communication to or from the Governor that was made to foster informed and sound gubernatorial deliberations, policymaking, or decision-making; and that production of the document would interfere with that function. Id.

In this case, the trial court determined that the Governor formally asserted executive privilege for the six documents that were withheld or

redacted through a letter from Narda Pierce, General Counsel to the Governor, dated August 25, 2010. CP 237. The trial court therefore recognized a presumption that executive privilege was established for the documents in question. **Id.**

In the second step of the three-part test, the trial court held that once the presumption of executive privilege is established by this formal assertion by the Governor or her representative, the burden shifts to the requester, who may overcome the presumption and obtain production of the documents only by demonstrating a particularized need for the documents and identifying an interest that could outweigh the public interests served by executive privilege. CP 237. If a sufficient need is not shown, however, the trial court held that the presumption is not overcome and the privilege is upheld. **Id.**

The trial court determined the Freedom Foundation did not assert a particularized need for any document at issue. CP 237-238. Therefore, the court concluded that the privilege was not overcome as to the six documents that were withheld and redacted and concluded that no further analysis was necessary. **Id.**

In the third step of the test, the trial court held that if a requester shows a particularized need for the requested records, the court then makes a determination (which may include in camera review) whether the

demonstrated need outweighs the Governor's interest. CP 238.

The trial court concluded that the Freedom Foundation did not overcome the Governor's assertion of executive privilege with any showing of a particularized need, and therefore did not proceed to the third step of the test and did not conduct in camera review. CP 238.

The trial court held that the Governor properly claimed qualified executive privilege for the six documents at issue, that those documents were exempt from production under the PRA, and that no violation of the PRA had occurred. CP 238. The court granted the Governor's motion for summary judgment, denied the Freedom Foundation's motion for summary judgment, ordered each party to bear its own costs, and dismissed the action. Id.

C. Records Withheld by the Governor

Ultimately, the Governor produced one record in partially-redacted form and withheld five records in their entirety. CP 234. The records concern a variety of issues of significant public importance and were described by Pierce in her letter dated August 25, 2010, and in subsequent filings with the trial court. See CP 23-26, 68-69, and 215-18.

- **Document 1** (partially-redacted): Governor's Decision Document, dated March 30, 2007. Sent to Gov. Gregoire from Christina Hulet, Executive Policy Advisor on Health Care. Regarding medical marijuana bill, with a handwritten note from the Governor. The document was produced with the handwritten note redacted.

- **Document 2:** Governor’s Decision Document, dated April 20, 2009. Sent to Gov. Gregoire from Bob Nichols, Executive Policy Advisor, regarding the Columbia River Biological Opinion and raising questions and concerns about federal actions, litigation involving those actions, and communications with high level federal officials.
- **Document 3:** Email thread dated April 13 and 14, 2009, attached to Governor’s Decision Document, dated April 20, 2009, with Governor’s handwritten response. This exchange transmitted questions and direction from Gov. Gregoire to her policy advisors and senior staff, and recommendations and advice to the Governor regarding a Columbia River Biological Opinion Update, related federal actions and litigation, and recommendations regarding communications with high level federal officials.
- **Document 4:** Draft Memorandum of Understanding Between State, King County, and Seattle regarding the Alaskan Way Viaduct, dated October 11, 2007, with Governor’s handwritten notes.
- **Document 5:** Governor’s Decision Document, dated October 9, 2009. Sent to Gov. Gregoire from Jennifer Ziegler, Executive Policy Advisor, regarding options for the decision-making process for state and local governments on remedies for the Alaskan Way Viaduct.
- **Document 6:** Governor’s Meeting Memorandum, dated December 22, 2008. Sent to Gov. Gregoire from Jennifer Ziegler, Executive Policy Advisor, in preparation for a meeting to be held between the Governor and Frank Chopp, Speaker of the House of Representatives, regarding options for the Alaskan Way Viaduct.

IV. STANDARD OF REVIEW

Agency actions under the PRA are subject to de novo review.

Neighborhood Alliance of Spokane County v. County of Spokane, 172

Wn.2d 702, 715, 261 P.3d 119 (2011). Issues of constitutional interpretation are questions of law and are similarly reviewed de novo.

State v. Robinson, 171 Wn.2d 292, 301, 253 P.3d 84 (2011).

V. LEGAL AUTHORITY AND ARGUMENT

A. Records Sought by the Freedom Foundation are Subject to the PRA's Strong Mandate of Broad Disclosure.

1. The PRA Advances the Fundamental Tenant of Accountability to the People.

The PRA provides “a strongly worded mandate for broad disclosure of public records.” Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). RCW 42.56.030 states the PRA's public policy intent:

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.

The purpose of the PRA is “nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” Progressive Animal Welfare Soc. v. University of Wash. (PAWS II), 125 Wn.2d 243, 251, 884 P.2d 592 (1994). Agencies are to provide the “fullest assistance” to requestors and “the most timely possible action on requests for information.” RCW 42.56.100. The PRA provides that each agency shall make available for public inspection and copying “all public records, unless the record falls within the specific exemptions of [the PRA], or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1).

Agencies subject to the PRA are broadly defined. “‘Agency’ includes all state agencies and all local agencies. ‘State agency’ includes every state office, department, division, bureau, board, commission, or other state agency.” RCW 42.56.010(1). “Public record” includes: “any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” RCW 42.56.010(2).

The PRA’s mandate for disclosure must be liberally construed, while the exemptions are to be narrowly construed. **City of Fed. Way v. Koenig**, 167 Wn.2d 341, 217 P.3d 1172 (2009); RCW 42.56.030. An agency that withholds or redacts a record must “specify the exemption and give a brief explanation of how the exemption applies to the document. RCW 42.56.210(3).” **Sanders v. State**, 169 Wn.2d 827, 846, 240 P.3d 120 (2010). The agency bears the burden of proof to establish that non-disclosure is justified. **Burt v. Washington State Dep’t of Corr.**, 168 Wn.2d 828, 231 P.3d 191 (2010). When reviewing an agency’s denial, courts are admonished to take into account the policy of “free and open examination” of records, even if disclosure “may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

The Governor of Washington falls within the PRA's definition of state agency, which is broadly defined to include every "state office" and "department." RCW 42.56.010(1). See WASH. CONST. art. III, § 1 ("The executive department shall consist of a governor"); see also WASH. CONST. art. III, §§ 2, 10 (repeatedly referring to governor's position as an "office"). The records sought in this case are held by the Governor, the Governor is an agency subject to the PRA, and the records at issue pertain to the conduct of government. Thus, the records are public records covered by the PRA which must be produced unless an exemption applies.

2. The Governor Fails to Cite an Exemption that Would Justify Withholding Records.

In response to the Foundation's records request, the Governor withheld and redacted six records, asserting "executive privilege" as the sole basis for withholding them. Executive privilege is not a sufficient basis for withholding records. The privilege is not articulated in the state constitution. It is not codified in statute. No appellate case has afforded the Governor of Washington an executive privilege that would justify withholding public records from members of the public.

The question is whether an implied privilege asserted by Gov. Gregoire can act as an exemption to the PRA. The trial court ruled that constitutionally-based privileges, including an implied qualified executive privilege, are incorporated as "other statute" exemptions. Additionally, the

trial court held that should RCW 42.56.070(1) require constitutional privileges to have a parallel expression in statute, the statute referencing the Governor's general duties and powers (RCW 43.06.010) constitutes an "other statute" exemption. These conclusions ignore the text of the PRA and cases interpreting it.

On three separate occasions the PRA states that an agency withholding records must cite a statutory exemption. See RCW 42.56.070(1), -.080, and -.550(1). Numerous cases reiterate that agency denials must be authorized by statute. See, e.g., Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (refusal to produce a record must be "in accordance with a statute"); Bellevue John Does 1-11 v. Bellevue School Dist. #405, 164 Wn.2d 199, 209, 189 P.3d 139 (2008) (records are disclosable unless "within a specific [PRA] exemption or other statutory exemption"); Livingston v. Cedeno, 164 Wn.2d 46, 50, 186 P.3d 1055 (2008) ("an agency must disclose a public record unless a statutory exemption applies."); and PAWS II, 125 Wn.2d at 259 (agencies "should rely only upon statutory exemptions or prohibitions").

The PRA, of course, recognizes that other statutes may exempt records from production, and the Act incorporates those laws as exemptions under its "other statute" provision. See Hangartner v. City of

Seattle, 151 Wn.2d 439, 90 P.3d 26 (2004) and RCW 42.56.070(1). However, when courts incorporate other statutes into the PRA they unfailingly identify the statute that allows the agency to withhold the record, as they must.¹

The trial court here held that an implied privilege asserted by Gov. Gregoire is an “other statute” exemption to the PRA. Statutes, of course, cannot be inconsistent with the Washington Constitution. The Governor, however, does not cite a specific constitutional provision that prohibits disclosure. Instead, she relies on an implied privilege flowing from an implied doctrine of separation of powers. Additionally, the statute identified by the trial court, RCW 43.06.010, outlines the Governor’s general powers and duties. Nothing in that section authorizes the Governor to withhold public records.

The PRA prohibits courts from incorporating implied exemptions: “The [other statute] 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 II, 125

¹ See Ameritrust Mortg. Co. v. Washington State Office of Atty. Gen., 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (incorporating the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809); Hangartner v. City of Seattle, 151 Wn.2d 439, 452-53, 90 P.3d 26 (2004) (incorporating RCW 5.60.060(2)(a)); O’Connor v. Department of Social and Health Services, 143 Wn.2d 895, 25 P.3d 426 (2001) (relying on RCW 2.04.190 and former RCW 42.17.310(1)(j) when incorporating the superior court civil rules); Deer v. Department of Social and Health Services, 122 Wn.App. 84, 92, 93 P.3d 195 (2004) (incorporating chapter 13.50 RCW); and Washington Citizen Action v. Office of Ins. Com’r, 94 Wn.App. 64, 70, 971 P.2d 527 (1999) (incorporating RCW 48.13.220(4)(g)).

Wn.2d at 261-62, quoting Brouillet v. Cowles Publishing Co., 114 Wn.2d 788, 800, 791 P.2d 526 (1990).

The Governor cannot cite any specific constitutional or statutory language to support the assertion of executive privilege. A qualified privilege, drawn from an implied doctrine of separation of powers, does not constitute an exemption to the PRA.

B. Executive Privilege Has Never Been Recognized for the Governor of Washington.

1. The Governor Only Possesses Powers Conferred by the Constitution or by Statute.

The Washington Constitution is not embedded with implied powers for state officers, and the Governor does not have the authority to create or assert privileges that have not been granted to the office. Rather, the state constitution serves to limit powers.² As this Court noted in an early case

² As one state constitutional delegate, who later served on the state supreme court, noted: "In its operation upon the executive, and especially upon the legislative branches of the state government, the constitution is an instrument of limitation . . ." Theodore L. Stiles, The Constitution of the State and its Effects Upon Public Interests, 4 Wash. Hist. Q. 281, 282 (1913). See also, e.g., WASH. CONST. art. I, § 1 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."); WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."); WASH. CONST. art. I, § 4 ("The right of petition and of the people peaceably to assemble for the common good shall never be abridged."); WASH. CONST. art. I, § 5 ("Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."); WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); WASH. CONST. art. II, § 1 ("The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.").

addressing the executive office, the Governor enjoys only those powers conferred by constitutional or statutory provisions. Young v. State, 19 Wn. 634, 637, 54 P. 36 (1898). Nothing in the state constitution authorizes the Governor to withhold public records from the public.

This Court recently addressed the issue of implied powers of executive officers in City of Seattle v. McKenna, 172 Wn.2d 551, 259 P.3d 1087 (2011). The City of Seattle sought a writ of mandamus directing Attorney General McKenna to withdraw the state from a multi-state challenge to the constitutionality of federal health care legislation. The Attorney General argued that the Washington Constitution vested him with the authority to initiate litigation on behalf of the state. This Court disagreed. “[T]here are no common law or implied powers of the attorney general under our constitution. This court has always insisted on finding an enumerated constitutional or statutory basis for the powers of executive officers, including the attorney general.” 172 Wn.2d at 557 (emphasis added).

The McKenna decision discussed an early case related to the Attorney General’s authority. The issue in State v. Seattle Gas & Elec. Co., 28 Wn. 488, 68 P. 946 (1902), was whether the Attorney General possessed authority to bring a quo warranto action against a Washington corporation. This Court concluded that he did not: “The attorney general

of the state, although bearing the same title as the attorney general of England, is not a common-law officer. ... Every office under our system of government, **from the governor down**, is one of delegated powers.” 28 Wn. at 495 (emphasis added).

This Court also addressed the balance between constitutional interests and statutory mandates in **Garner v. Cherberg**, 111 Wn.2d 811, 765 P.2d 1284 (1988). The Washington State Senate Committee on Rules issued a subpoena duces tecum directing the Commission on Judicial Conduct to release records and files related an investigation of a judge.³ The President of the Senate argued that the Legislature held a constitutionally-implied authority to conduct inquiries—an authority that should prevail over the Commission’s confidentiality rules. The Supreme Court disagreed:

Respondent argues, since the Committee on Rules’ investigative power is constitutionally based, any contradictory power that is not constitutionally based must fall when the two clash. Such reasoning, however, is flawed. Respondent inappropriately attempts to apply a test of judicial balancing to gauge the validity of the Legislature’s actions. Such an analysis fails to recognize that even the Committee on Rules’ actions must conform to valid, statutory enactments.

111 Wn.2d at 819. The danger with this argument, noted the court, is that “all statutorily created privileges [such as physician-patient and attorney-

³ The Commission on Judicial Conduct is a constitutionally-created body. WASH. CONST. art. 4, § 31 (amend. 71).

client privileges] would fall in the face of legislative subpoena.” 111 Wn.2d at 818. Similarly, in this case, any implied powers asserted by the Governor must conform to “valid, statutory enactments.” **Id.**

The Governor cannot claim powers not enumerated by the constitution or by statute. In the 122 years of Washington’s statehood, and the nearly 40 years since adoption of the Public Records Act, not a single appellate court has ruled that the Governor can withhold records from the public by asserting executive privilege.⁴

2. Washington Enjoys a Long History of Transparency in Government.

From its earliest days the State of Washington has placed an emphasis on open, accountable government. The debates of the constitutional convention of 1889 were open. **See Yelle v. Bishop**, 55 Wn.2d 286, 292, 347 P.2d 1081 (1959) (relying on first-hand newspaper accounts of the convention).⁵ When drafting the Washington Constitution, the framers believed “liberty could best be secured through open

⁴ Two cases mention Presidential executive privilege while discussing the case of **United States v. Nixon**, 418 U.S. 683, 94 S.Ct. 3090 (1974). **See Garner v. Cherberg**, 111 Wn.2d 811, 819, 765 P.2d 1284 (1988) and **In re Krogh**, 85 Wn.2d 462, 467, 536 P.2d 578 (1975). More recently, this Court declined to address whether legislative or executive privilege would preclude release of records sought from the State in discovery. **Washington State Farm Bureau Fed’n v. Gregoire**, 162 Wn.2d 284, 297 n.20, 174 P.3d 1142 (2007).

⁵ **Compare U.S. v. Nixon**, 418 U.S. at 705 n.15 (the meetings of the Constitutional Convention in 1787 were conducted in complete privacy).

democratic government.” Cornell W. Clayton, **Toward a Theory of the Washington Constitution**, 37 Gonz. L. Rev. 41, 66 (2002).

The state constitution recognizes that ultimate authority rests with the people: “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.” WASH. CONST. art. I, § 1. The people constitutionally reserved to themselves the power of initiative, which acts as a “powerful check and balance on the other branches of government.” **Coppernoll v. Reed**, 155 Wn.2d 290, 296-97, 119 P.3d 318 (2005).

In 1972, using the constitutionally-guaranteed right of initiative, the voters of Washington placed additional mandates of accountability on government entities by approving the Public Records Act. Laws of 1973, ch. 1, p. 1 (Initiative 276, approved Nov. 7, 1972). The PRA expressly states that openness in government is a requirement imposed upon public servants. RCW 42.56.030.

The public’s right to know details about the conduct of their public servants has been described as “fundamental.” **Fritz v. Gordon**, 83 Wn.2d 275, 517 P.2d 911 (1974). In **Fritz**, Initiative 276 withstood a constitutional challenge to several of its sections. The state Supreme Court stressed the importance of constitutional safeguards that “assure the public

the right to receive information in an open society.” 83 Wn.2d. at 297-98.

3. Separation of Powers Does Not Prohibit Accountability to the People.

The trial court here held that the Governor possesses a qualified executive privilege rooted in the separation of powers under the Washington Constitution. Separation of powers, however, does not relieve the Governor from her obligation of accountability to the people.

The Washington Constitution does not contain a formal separation of powers clause. Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010). Rather, the division of our government into different, co-equal branches—executive, legislative, and judicial—has been presumed to give rise to a “vital separation of powers doctrine.” Brown v. Owen, 165 Wn.2d 706, 718, 206 P.3d 310 (2009), quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The separation of powers doctrine serves to “ensure that the fundamental functions of each branch remain inviolate.” Brown, 165 Wn.2d at 718. It prevents one branch from threatening the independence, integrity, or prerogatives of another. Zylstra v. Piva, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

A separation of powers invasion occurs when one branch attempts to perform a fundamental function of another branch. For example, the doctrine would be violated if the state Supreme Court overturned the President of the Senate’s ruling on a point of order and compelled the

President of the Senate to forward a bill to the House of Representatives. **Brown**, 165 Wn.2d at 719. Promulgating court rules is a fundamental function that falls “within the inherent power of the judicial branch,” and the Legislature cannot adopt procedural rules that conflict on procedural matters. **Putman v. Wenatchee Valley Medical Center, P.S.**, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). Convening a special session was deemed “the exclusive province of the governor, under the Constitution,” and the decision to do so is “not subject to review by the courts.” **State v. Fair**, 35 Wn. 127, 131, 76 P. 731 (1904).

The separate branches of government, however, are not “hermetically sealed off from one another.” **Carrick**, 125 Wn.2d at 135. The separate branches remain “partially intertwined” to “maintain an effective system of checks and balances, as well as an effective government.” **Id.** The functions of the three branches may overlap without violating separation of powers; the goal is to maintain effective operation of each branch and “the rule of law which all branches are committed to maintain” **Matter of Salary of Juvenile Director**, 87 Wn.2d 232, 243, 552 P.2d 163 (1976).

Furthermore, the framers of the Washington Constitution included “democratic checks” to the three branches of government and “rendered the traditional separation of powers an incomplete description of

Washington's idea of free government." Brian Snure, Comment, **A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution**, 67 Wash. L. Rev. 669, 684 (1992). Thus, while the separation of powers may serve as a shield between branches—any separation of powers analysis should consider what democratic checks the people have reserved to themselves.

Separation of powers prohibits government-on-government encroachments, but it is not be used as a shield to protect government branches from the electorate's demands of accountability. As the Supreme Court of North Carolina observed: "The Public Records Act allows intrusion not by the legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches." **News and Observer Pub. Co., Inc. v. Poole**, 330 N.C. 465, 484, 412 S.E.2d 7 (1992).

Requiring the Governor to comply with the public's demand of accountability is not an invasion of her fundamental functions; it is a legitimate check on the executive's power.

C. The Out-of-State Authority Relied Upon by the Trial Court is an Insufficient Basis for Creating Executive Privilege in Washington.

Lacking any basis in state law to support the existence of executive privilege, the trial court relied on out-of-state authority to create an executive privilege for the Governor.

1. United States v. Nixon

The U.S. Supreme Court's decision in United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974), is a poor basis for recognizing executive privilege in Washington. In Nixon, a special prosecutor caused a third-party subpoena duces tecum to be issued requiring the President to produce certain tape recordings and documents for use in a criminal prosecution. 418 U.S. at 688.

The President sought to quash the subpoena, claiming an absolute executive privilege. The President advanced two grounds to support his claim: first, the need to protect "communications between high Government officials and those who advise and assist them in the performance of their manifold duties"; and second, that the doctrine of separation of powers guarantees the independence of the executive branch and "insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications." 418 U.S. at 705-06.

The U.S. Supreme Court refused to recognize an absolute Presidential privilege. The Court noted that such a finding would impair the functions of the judiciary and the constitutional protections afforded criminal defendants. The Court refused to extend a “high degree of deference to a President's generalized interest in confidentiality.” 418 U.S. at 711. The Court, however, noted that the President enjoyed a qualified executive privilege.

A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

418 U.S. at 708.

The holding in Nixon should be disregarded for purposes of defining the scope of a gubernatorial executive privilege. The U.S. Supreme Court carefully limited its holding to balancing the President’s general interest in confidentiality with the fair administration of criminal justice:

We are not here concerned with the balance between the President’s generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President’s interest in preserving state secrets. We address only the conflict between the President’s assertion of a generalized privilege of confidentiality and the constitutional need for relevant

evidence in criminal trials.

418 U.S. at 716 n.19.

Furthermore, Nixon applied to presidential communications and did not address state executive officers. The U.S. Supreme Court noted that the privilege is grounded in “the singularly unique role under Art. II of a President’s communications and activities, related to the performance of duties under that Article.” 418 U.S. at 715. Accordingly, numerous decisions point out that Nixon’s application should be limited to the Office of the President.⁶

The President occupies a “unique position in the constitutional scheme[.]” Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 382, 124 S.Ct. 2576 (2004) (citation omitted). In contrast, the Governor of Washington occupies a weaker office. Although “supreme executive power” is vested in a governor, WASH. CONST., art. III, § 2, the executive branch is divided among eight state officers. WASH. CONST., art.

⁶ See Corporacion Insular de Seguros v. Garcia, 876 F.2d 254, 257 (1st Cir. 1989) (“Nixon was a unique case, and we do not believe that the Court meant to extend it to any government official other than the President himself.”); In re Attorney General of United States, 596 F.2d 58, 62 (2d Cir. 1979), cert. denied, 444 U.S. 903, 100 S.Ct. 217 (1979) (“courts have declined to accord to Cabinet or other executive officials the same prerogatives that they accord to the President himself”) (emphasis added); and Hobley v. Chicago Police Commander Burge, 445 F.Supp.2d 990, 998 (N.D.Ill.,2006) (“federal courts have recognized the presidential communications privilege as belonging only to the President of the United States.”) While Garcia and In re Attorney General do not address executive privilege *per se*, both note distinctions between the president and other executive officers.

III, § 1.⁷ The framers of the Washington Constitution did not give the Governor the ability to appoint these state officers, but placed their selection in the hands of the state's electors. *Id.* Moreover, while the framers created a privilege for legislators, WASH. CONST., art. II, § 17, no comparable clause exists for the Governor.

2. Executive Privilege in Other States

States recognizing a gubernatorial executive privilege have relied on a variety of theories, including the separation of powers and common law privileges. The inconsistent treatment at the state level was discussed in a 2007 law review: “The state court holdings addressing executive privilege have identified two primary evolutionary lines: the chief executive communications privilege and the deliberative process privilege. Yet, the state courts have spoken of both forms of executive privilege together, thereby blurring distinctions between them.” Matthew W. Warnock, Comment, Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials, 35 Cap. U.L.Rev. 983, 1012 (2007). Regardless of the origins, “[t]he fundamental distinction between the two forms of executive privilege, however, appears to be inconsequential at the state level.” *Id.* Warnock notes that most states have

⁷ The executive branch consists of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands.

implemented the “highly specific and technical procedural requirements” of the deliberative process privilege. Id. at 1011.

In the proceedings below, the Governor cited six states that have recognized a gubernatorial executive privilege. Considering the differences in each state’s constitutions and statutes, the recognition of executive privilege in those six states does not justify it in Washington.

The first state to extend the Nixon holding to its governor was New Jersey in 1978. Nero v. Hyland, 76 N.J. 213, 386 A.2d 846 (1978). John Nero was a prospective gubernatorial candidate. When the appointment did not occur, Nero sued the Attorney General seeking access to the files of the character investigation. The Supreme Court of New Jersey held that character investigations conducted for the governor fall outside the state’s definition of “public records.” 76 N.J. at 220. Disclosure, therefore, was not a matter of statutory right. The court also examined whether Nero held a common law right to the records. “Under the common law rule of access to public documents, a citizen is entitled to inspect documents of a public nature provided he shows the requisite interest therein.” 76 N.J. at 222 (citation and internal punctuation omitted). The court said that while Nero possessed a qualified common law interest, he held “no absolute right to the documents.” 76 N.J. at 223. The court therefore sought to balance Nero’s interest against the public interest in confidentiality. The court

noted that the New Jersey Constitution created a strong executive,⁸ and reasoned that the Governor must protect the confidentiality of communications related to his office. 76 N.J. at 225-26. Balancing the interests, the court declined to order release of the records.

The next state to create gubernatorial executive privilege was Maryland. Hamilton v. Verdow, 287 Md. 544, 414 A.2d 914 (1980). The Governor had requested an investigative report concerning the handling of a patient of a state hospital. The patient had been released and had killed two people. The estate of one of the victims sued and sought a copy of the investigative report. The Governor opposed disclosure, asserting executive privilege. The doctrine of executive privilege was a matter of first impression, but the court noted that it had previously recognized “that the Governor bears the same relation to this State as does the President to the United States, and that generally the Governor is entitled to the same privileges and exemptions in the discharge of his duties as is the President.” 287 Md. at 556. Furthermore, the court noted the Maryland Constitution contains an express separation of powers clause, which had been interpreted as placing “limits on a court’s power to review or interfere with the conclusions, acts or decisions” of the other branches. Id. The court determined that executive privilege was rooted both in the

⁸ The New Jersey Constitution contains an express separation of powers clause. N.J. CONST. Art. III, par. 1.

“common law of evidence” and in the “separation of powers principle.” 287 Md. at 562. The privilege, said the court, protected “deliberative and mental processes of decision-makers,” 287 Md. at 561, and was intended “for the benefit of the public and not the governmental officials who claim the privilege.” 287 Md. at 563. Given these justifications, the court held: “In light of the reasons underlying the privilege, and considering the express separation of powers provision in Article 8 of the Maryland Declaration of Rights, we do recognize . . . executive privilege” 287 Md. at 562.

In Alaska, executive privilege was recognized in **Doe v. Alaska Superior Court, Third Judicial Dist.**, 721 P.2d 617 (Alaska 1986). The issue in this case was whether a trial court could order production of a Governor’s files related to an appointment to the State Medical Board. The Supreme Court of Alaska adopted the public policy rationale identified in **Nixon**—namely, the interest in keeping confidential internal advice, opinion, and recommendations in order to protect the “deliberative and mental processes of decision-makers.” 721 P.2d at 623. The court held that letters from constituents opposed to an appointment would not be shielded by executive privilege, but that the privilege might extend to internal memoranda in the appointment file. 721 P.2d at 625.

Vermont recognized the privilege in **Killington, Ltd. v. Lash**, 153

Vt. 628, 572 A.2d 1368 (1990), where a company sought a variety of records from the Vermont Agency of Natural Resources and two departments within the agency. The agency refused to turn over communications directly to or from the Governor's office, citing executive privilege. The Vermont Constitution contains an express separation of powers clause. 153 Vt. at 633. Additionally, Vermont's public records law "excepts from public access all 'records which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege.'" 153 Vt. at 631, **quoting** 1 V.S.A. § 317(b)(4). The Vermont Supreme Court observed that both the "constitutional and common-law roots of the privilege strongly require its recognition in Vermont." 153 Vt. at 636.

Delaware's intermediate appeals court recognized executive privilege in **Guy v. Judicial Nominating Commission**, 659 A.2d 777 (Del. Supr. 1995). An individual sued to obtain records of the Judicial Nominating Commission concerning prospective nominees for the Governor to a judicial vacancy on the Delaware Supreme Court. The Commission opposed disclosure, arguing that the records were privileged under the Delaware Freedom of Information Act pursuant to the statutory exemption of 29 Del. C. § 10002(d)(6), which exempts records exempted by "statute or common law." 659 A.2d at 782. The court noted that

executive privilege is grounded in common law and the separation of powers doctrine. “This Court, therefore, recognizes as part of the constitutional and common law of the State the doctrine of executive privilege with respect to the source and substance of communications to and from the Governor in the exercise of his appointive power.” 659 A.2d at 785.

Finally, in Ohio a state senator brought action in his individual capacity against the Governor to obtain weekly reports prepared for the Governor by executive branch officials. State ex rel. Dann v. Taft, 109 Ohio St.3d 364, 848 N.E.2d 472 (2006). Beginning with Ohio’s public records law, the court noted that the law exempted certain records from the definition a public record, including: “Records the release of which is prohibited by state or federal law.” 109 Ohio St.3d at 368, quoting R.C. 149.43(A)(1)(v). Relying on this in previous cases, the court had incorporated other common law privileges into the records law. The court conducted an extensive review of the doctrine of executive privilege as articulated in Nixon and other states, and concluded that documents protected by a “gubernatorial-communications privilege” fell outside the definition of public records.

These out-of-state cases can be distinguished in multiple ways and do not support creation of a gubernatorial executive privilege in

Washington. First, Washington has rejected the justification offered for executive privilege in those states—that the privilege serves a public interest: “[Executive privilege] is for the benefit of the public and not the governmental officials who claim the privilege.” Hamilton, 287 Md. at 563. The Governor’s decision making functions, held New Jersey, can only be discharged effectively “under a mantle of privacy and security.” Nero, 76 N.J. at 226. Ohio held that advisors should be able to offer vigorous opinions “without concern that unwanted consequences will follow from public dissemination.” Dann, 109 Ohio St.3d at 377.

Yet in Washington, the PRA rejects the notion that the public benefits from secrecy. “The people . . . 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” RCW 42.56.030. The policy of the PRA is “free and open examination of public records is in the public interest, **even if examination may cause inconvenience or embarrassment.**” Neighborhood Alliance of Spokane County, 172 Wn.2d at 715 (emphasis added).

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the

special interests. In the famous words of James Madison, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”

PAWS II, 125 Wn.2d at 251. **See also Daines v. Spokane County**, 111 Wn. App. 342, 347, 44 P.3d 909 (2002) (“The purpose of the [PRA] is to keep public officials and institutions accountable to the people.”); **Yousoufian v. Office of Ron Sims**, 152 Wn.2d 421, 429-30, 98 P.3d 463 (2004) (“The [PRA] enables citizens to retain their sovereignty over their government and to demand full access to information relating to their government’s activities.”).

Moreover, the PRA accommodates sensitive deliberations; numerous statutory exemptions allow for the candid exchange of ideas. **See** RCW 42.56.280 (exempting preliminary drafts, notes, recommendations, and intra-agency memorandums); RCW 5.60.060(2)(a) and RCW 42.56.290 (exempting attorney-client communications and work product); and RCW 42.56.420 (exempting records related to state security and the prevention of terrorism).

Second, as discussed above, Washington does not recognize implied common law privileges for executive officers. Five of the six states recognizing a gubernatorial executive privilege relied on the common law to recognize the privilege. **See Nero**, 76 N.J. at 222; **Hamilton**, 287 Md.

at 562; **Killington**, 153 Vt. at 636; **Guy**, 659 A.2d at 785; **Dann**, 109 Ohio St.3d at 369. Additionally, three of these states exempt from disclosure any records covered by a common law privilege. **See Killington**, 153 Vt. at 631; **Guy**, 659 A.2d at 782; **Dann**, 109 Ohio St.3d at 368. Washington does not incorporate the common law as a PRA exemption.

Third, four of the six states noted that documents covered by executive privilege simply fall outside their state's definition of "public record" and are not required to be disclosed. **See Nero**, 76 N.J. at 220; **Killington**, 153 Vt. at 631; **Guy**, 659 A.2d at 782; **Dann**, 109 Ohio St.3d at 368. The records sought by the Freedom Foundation are clearly "public records" as defined by RCW 42.56.010(2), and Gov. Gregoire has not argued otherwise.

Fourth, the unique constitutional provisions of each of the six states factored into a recognition of the privilege. For example, the constitutions of New Jersey, Maryland, and Vermont contain express separation of powers clauses, as noted in **Hamilton**, 287 Md. at 562. Washington has no such provision. Also, five of the states held their Governors held a position analogous to President. **See Nero**, 76 N.J. at 225; **Hamilton**, 287 Md. at 556; **Doe**, 721 P.2d at 623; **Guy**, 659 A.2d at 783; and **Dann**, 109 Ohio

St.3d at 374. Washington has no such comparison.⁹

Thus, these out-of-state authorities from six states are distinguishable and not persuasive authority for creation of a gubernatorial executive privilege here.

Three other states have declined to recognize an executive privilege. In Massachusetts the state's highest court rejected an executive branch privilege. **Babets v. Secretary of Executive Office of Human Services**, 403 Mass. 230, 526 N.E.2d 1261 (1988). The plaintiffs sued the Department of Social Services seeking certain documents. The defendant agency asserted "governmental privilege" as a "necessary ramification" of the state constitution's express separation of powers clause. 403 Mass. at 233. The court disagreed. "Had the framers of our government's structure intended to recognize in our Constitution an executive privilege, it is reasonable to expect that they would expressly have created one." **Id.** While **Babets** did not involve records held by the Governor, the court's holding was a broad rejection of an executive privilege: "there is no such privilege in Massachusetts." 403 Mass. at 231. The court referred to the executive branch broadly, stating that its decision did not "interfere with

⁹ Only two Washington cases make passing comparisons to the President. **See State v. Womack**, 4 Wn. 19, 29 P. 939 (1892) (noting that the Governor divides executive power with other state officers while the President serves as the head of the executive branch) and **Gottstein v. Lister**, 88 Wn. 462, 478-79, 153 P. 595 (1915) (the Governor, like the President, acts in a legislative capacity when vetoing legislation).

the Executive's power." 403 Mass. at 233.

Like Washington, the Massachusetts Constitution creates a legislative privilege without a corresponding executive privilege. The **Babets** court noted this difference: "the explicit constitutional grant to the Legislature of a 'privilege' as to its deliberations . . . further supports our view that a corresponding privilege in the Executive is not constitutionally required." **Id.** The court also rejected the argument that disclosure would harm the functions of the executive office. "We think that the defendants' assertions (which are unsupported by any empirical evidence) are speculative in light of the long history of the Commonwealth and the lack of any showing of real harm that has accrued from the absence of the privilege." 403 Mass. at 238.

In **News and Observer Pub. Co., Inc. v. Poole**, 330 N.C. 465, 412 S.E.2d 7 (1992), a publisher sought disclosure of records compiled by a commission appointed to investigate improprieties related to a state university basketball team. The defendants asked the North Carolina court to recognize a "deliberative process privilege" that would protect preliminary draft reports prepared by members of the commission. The defendants insisted the court should infer this privilege to "prevent the legislature from intruding into the decision-making processes of other government branches, in violation of the separation of powers provision in

Article I, Section 6 of the North Carolina Constitution.” 330 N.C. at 484. The court refused to infer such a privilege: “A policy of open government does not infringe on the independence of governmental branches. Statutes affecting other branches of government do not automatically raise separation of powers problems.” **Id.**

Likewise, in **People ex rel. Birkett v. City of Chicago**, 184 Ill.2d 521, 705 N.E.2d 48 (1998), the Illinois Supreme Court declined to recognize a common law deliberative process privilege.¹⁰ The City of Chicago resisted disclosure of documents related to construction at O’Hare International Airport, arguing that a privilege should shield confidential advice given to those involved in making decisions and policy for state and local government, similar to executive privilege as adopted at the federal level. 184 Ill.2d at 526. The court noted that in Illinois privileges are strongly disfavored as they “exclude relevant evidence and thus work against the truth-seeking function of legal proceedings.” 184 Ill.2d at 527. Furthermore, the court held that governmental privileges, if created and applied indiscriminately, would undermine public trust in the government’s commitment to serving the public interest. **Id.** Ultimately

¹⁰ The court noted that the terms “deliberative process” and “executive privilege” are often used interchangeably, citing **United States v. Nixon** and **Hamilton v. Verdow**, and defined the privilege as exempting from disclosure “confidential advice given to those involved in making [decisions and] policy for state and local government.” **Birkett**, 184 Ill.2d at 526 n.2.

the court concluded that the adoption of such a privilege should be left to the Legislature. 184 Ill.2d at 533.

The six states that have created executive privilege have public record laws and constitutions that differ from Washington's, and those out-of-state authorities do not support creation of a gubernatorial executive privilege in Washington.

3. If an Executive Privilege is Created, its Application Must be Narrowly Constrained.

While the Foundation contends executive privilege cannot and should not be recognized in Washington, even if this Court determines such privilege exists the instances to which it applies must be narrowly constrained and the records being denied the Foundation cannot fall within the privilege. First, as in Nixon, only discussions with the executive and his or her closest advisors should be covered. 418 U.S. at 703. Communications between a Governor and another branch of government cannot be covered. The alleged privilege is based on separation of powers concern and is intended to protect the executive from interference by other branches—not to shroud his or her interactions in secrecy. Doe, 721 P.2d at 624 (applying the privilege to “internal communications”); Hamilton, 287 Md. At 558 (only communications from a “subordinate to a governmental officer” are privileged); Kaiser v. Aluminum & Chemical

Corp., 157 F. Supp. 939, 946 (1958) (the privilege allows “open, frank discussions between subordinate and chief”). It cannot shield “purely factual material.” Hamilton, 287 Md. at 564.

The record indicates a broad use of the alleged exemption by the Governor despite no judicial or statutory support. Communications with other agencies, with legislators, and purely factual material have been denied the public in their entirety. CP 22-26, CP 126-135. This Court should not recognize a gubernatorial executive privilege but even if it did its scope must be severely limited and the vast majority, if not all, of the records denied by the Governor held outside of its scope.

D. The Trial Court’s Three-Part Test is Inconsistent with the PRA and Washington Supreme Court Decisions.

Even if the creation of executive privilege in Washington was proper, which it was not, the test created by the trial court to evaluate executive privilege claims is seriously flawed and cannot stand. The trial court created a three-part test for analyzing assertions of executive privilege. This test has no Washington statutory or constitutional provision to support it. It further gives great deference to a Governor when a Governor chooses to shield records from public review. The three-part test ignores and violates numerous requirements found in the PRA and must be rejected and its application overturned.

Newly-incorporated exemptions must be incorporated consistent

with the other provisions of the PRA. An “other statute” exemption may well expand the **information** that is exempt from disclosure, but does not alter the PRA’s procedural requirements. **See Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.**, 170 Wn.2d 418, 440, 241 P.3d 1245, 1255 (2010) (a newly-incorporated federal statute “supplement[s] the PRA’s exemptions.”). This Court incorporated the attorney-client privilege into the PRA in **Hangartner v. City of Seattle**, 151 Wn.2d 439, 90 P.3d 26 (2004). The new exemption was characterized as a “narrow privilege” consistent with the PRA’s requirement to construe exemptions narrowly. 151 Wn.2d at 452. Significantly, the attorney-client privilege does not alter an agency’s burden to justify nondisclosure. “The party asserting attorney-client privilege has the burden of showing the attorney-client relationship existed and that relevant materials contain privileged communications.” **Soter v. Cowles Pub. Co.**, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) (citation omitted).

The trial court’s three-part test fails to mesh with the procedural requirements of the PRA. In the first step of the test, the trial court held that the Governor’s formal assertion of executive privilege for specific documents establishes a presumption that the privilege applies to those documents.

Empowering an agency with a presumption of nondisclosure violates

the PRA's strong mandate for broad disclosure. As the PRA's intent language make clear, the people insist on remaining informed about the activities of government entities. Public servants are not given "the right to decide what is good for the people to know and what is not good for them to know." RCW 42.56.030. The PRA's mandate for disclosure must be liberally construed, while exemptions are to be narrowly construed to ensure the public's interest in disclosure. **Bainbridge Island Police Guild v. City of Puyallup**, 172 Wn.2d 398, 408, 259 P.3d 190 (2011). Creating a presumption that an exemption applies simply because the Governor asserts it completely reverses this rule—the presumption constrains disclosure and creates a broad exemption.

Courts have long held that agencies are provided "no deference" when attempting to withhold public records. **O'Neill v. City of Shoreline**, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010). Judicial review of agency actions is **de novo**. RCW 42.56.550(3). Application of the PRA is not left to the whim of public officials. As this Court noted: "leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." **Hearst Corp. v. Hoppe**, 90 Wn.2d at 131. **See also Amren v. City of Kalama**, 131 Wn.2d 25, 34, 929 P.2d 389 (1997) ("The court, not the agency seeking to avoid disclosure, determines whether the records are exempt."); **Servais v. Port of Bellingham**, 127 Wn.2d 820,

834, 904 P.2d 1124 (1995) (refusing to allow an agency to determine which records would be exempt); and **Brouillet**, 114 Wn.2d at 794 (“We cannot defer to the [agency] . . .”).

In the second step of the three-part test, the trial court held that once the presumption of executive privilege is established, the burden shifts to the requester, who can only overcome the presumption by demonstrating a particularized need for the records.

Shifting the burden of obtaining disclosure to the requester has no basis in state law. The PRA unequivocally places the burden on the agency to justify nondisclosure, RCW 42.56.550(1), and courts routinely reiterate this standard. **See Brouillet**, 114 Wn.2d at 794 (“The agency must shoulder the burden of proving that one of the act’s narrow exemptions shields the records it wishes to keep confidential.”). As noted above, incorporating attorney-client privilege did not relieve an agency from the burden of establishing the privilege.

Two of the cases cited by the Governor at summary judgment note that the burden shifts to the requester only when state law incorporates common law privileges. In **Killington, Ltd. v. Lash**, the Vermont public records law exempted from disclosure all “records which, if made public pursuant to this subchapter, would cause the custodian to violate any statutory or common law privilege.” 153 Vt. at 631. Vermont’s public

records law ordinarily placed the burden on the agency, but the court placed the burden on the requester:

The language of § 317(b)(4) brings common-law privileges with their established burdens into the law. Once incorporated, the privileges are to be applied as a whole and not piecemeal. The manner in which the common-law executive privilege is to be applied is an integral part of the law incorporated through § 317(b).

153 Vt. at 639. Thus, the court in Killington approved of shifting the burden to the requester because the state incorporated the common law and its established burdens.

Similarly, in Guy v. Judicial Nominating Commission, Delaware public records law incorporates the common law into its exemptions. 659 A.2d at 785. Relying on Killington, the Guy court noted that the burden shifts to the requester after a claim of executive privilege. Id. In contrast, however, the court said: “This **burden does not shift** when records are being sought pursuant to a state freedom of information statute which **places the burden** of establishing any exemption to disclosure **on the public agency.**” Id. (emphasis added).

Unlike Vermont and Delaware, Washington’s Public Records Act does **not** incorporate common law privileges into its scheme of exemptions. Thus, the burden should lie where the law places it—on the Governor.

Not only does the burden-shift violate the PRA, but requiring a requester to show a “particularized need” for public records contradicts the PRA, which prohibits agencies from distinguishing among persons or requiring requesters to provide information about the purpose of the request. Requiring requesters to prove a particularized need undermines the PRA’s strong mandate for broad disclosure; most requesters would be unable to overcome this high burden.¹¹

In the third step of the three-part test, the trial court held that if a requester demonstrates a particularized need for the requested records, the court then determines whether the need outweighs the Governor’s interest. The PRA, however, provides no balancing test that evaluates the interest of the requester against the agency’s interest. Agencies have a “positive duty to disclose public records unless they fall within the specific exemptions.” **Hearst**, 90 Wn.2d at 130.

¹¹ States recognizing executive privilege identify rare instances where a particularized need would overcome an assertion of executive privilege. Specifically, when evidence is needed in a criminal trial or to protect the due administration of justice. **See Nixon**, 418 U.S. at 713; **Dann**, 109 Ohio St.3d at 378; **Killington**, 153 Vt. at 638; **Hamilton**, 287 Md. at 564. The privilege may be overcome when records are needed as evidence in a civil trial, particularly where the government itself is a party in the underlying litigation. **Hamilton**, 287 Md. at 564. The privilege may be overcome where there is an allegation of governmental wrongdoing. **Killington**, 153 Vt. at 638; **Hamilton**, 287 Md. at 564. A vague suspicion of misconduct, however, may be inadequate. **Wilson v. Brown**, 404 N.J.Super. 557, 581, 962 A.2d 1122 (2009). A body with the authority to investigate criminal or civil matters, such as a legislative committee or a grand jury, may demonstrate a particularized need. **Dann**, 109 Ohio St.3d at 378. **Dann** also said the privilege may be overcome by a “uniquely qualified representative of the general public” if disclosure would “serve the public interest.” 109 Ohio St.3d. at 378-79.

This element of the three-part test creates another conflict with the PRA. At summary judgment, the Governor argued that courts should refrain from in camera review of requested records before reaching this third step, arguing that in camera review could be an unconstitutional invasion of the Governor's executive powers. CP 90-91, 93.

The PRA permits in camera review of records regardless of which agency opposes production. "Courts may examine any record in camera in any proceeding brought under this section." RCW 42.56.550(3) (emphasis added). The decision to conduct in camera review is left to the discretion of the trial court, but numerous decisions suggest review is necessary to verify whether records should be disclosed. In Limstrom v. Ladenburg, the Supreme Court remanded a PRA case as in camera review was the only way to accurately determine what portions of the records should be disclosed. 136 Wn.2d 595, 615, 963 P.2d 869 (1998). See also Cowles Publishing Co. v. Spokane Police Dep't, 139 Wn.2d 472, 987 P.2d 620 (1999) (nondisclosure of records may be necessary but the trial court should conduct in camera review); State v. Jones, 96 Wn.App. 369, 979 P.2d 898 (1999) (trial court's failure to conduct in camera hearing in connection with State's claim of government witness privilege required remand); and Overlake Fund v. City of Bellevue, 60

Wn.App. 787, 810 P.2d 507 (1991) (case remanded after trial court had previously denied disclosure without a review).

The practical effect of the trial court's three-part test is that courts will be prevented from adequately evaluating records when the Governor claims the records are privileged. Courts will be asked to defer to the Governor's description of the records.

The Governor suggested that in camera review of allegedly-privileged records would implicate separation of powers concerns. CP 90. This Court rejected a similar argument where a public official opposed disclosure. "[I]t is ultimately for the court to declare the law and the effect of the statute. There is no violation of the separation of powers theory in this function. It is within an orderly concept of checks and balances and the result of constitutional definition of the role of the judiciary." **Hearst**, 90 Wn.2d at 130 (citations omitted). Courts are charged with applying the law "even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch." **Matter of Salary of Juvenile Director**, 87 Wn.2d 232, 241, 552 P.2d 163 (1976).

The records at issue here are not before this Court because the trial court declined to receive them based on a mistaken belief to do so would implicate separation of powers concerns. A trial court must be authorized

to receive the very documents one branch of government contends are exempt when that agency is sued for a violation of the PRA. There is no violation of the concept of separation of powers by allowing judges to review the very evidence and determine if a government official and government agency are breaking the law.

The trial court's created three-part test for applying "executive privilege" has no basis in state law. Every step of the test is in conflict with the PRA. Even if this Court were to recognize a gubernatorial privilege that operates as an exemption to the PRA—something Appellant contends cannot and should not occur as explained above—the trial court's deferential three-part test must be rejected.

E. The Trial Court's Ruling Raises Concerns about the Constitutionality of the PRA.

The trial court's Final Order raises a fundamental issue: whether the PRA is constitutional when applied to the Governor. The Governor hinted at this potential conflict in her motion for summary judgment: "Because the governor's executive privilege is a constitutional privilege, it is not within the power of the Legislature to abrogate the privilege, anymore than it is within the legislative power to dispense with the confidentiality of judicial deliberations." CP 97-98. Later, the Governor noted that the PRA does not include the courts within the definition of "agency," and analogized the executive office to the courts: "Reading the Public Records

Act as a whole does not reveal any legislative intent to make the governor subject to the disclosure provisions of the Act.” CP 98.

The trial court rejected this argument by concluding that the Governor is an agency subject to the PRA. The Governor’s argument, reiterated here, suggesting the PRA cannot be applied to her without creating her executive privilege exception should be soundly answered and rejected. It is not unconstitutional for the people to pass a law that applies to the Governor. It is not unconstitutional for the people to require their Governor to produce public records limited to specific narrowly construed statutory exemptions. The PRA, of course, is not a mere suggestion to disclose public records upon request. The PRA creates a comprehensive framework to promote broad disclosure, and places numerous obligations on agencies. These obligations include establishing procedures to comply with the PRA, promptly acknowledging requests for records, allowing for inspection or copying of records, providing full and timely assistance to requesters, and explaining a withholding or redaction of records by listing applicable exemptions. RCW 42.56.070, -.080, -.090, -.100, -.210, -.520. The PRA also provides for judicial review of agency actions and mandates remedies for agency violations of the PRA, including costs and per-day penalties. RCW 42.56.550. The people created an exemption to address the Governor’s deliberative process concerns.

RCW 42.56.280. The Court is not required to accept the Governor's proposed broader implied, non-enumerated, and non-existent executive privilege to apply the PRA to her and maintain its constitutionality.

F. Penalties and Attorneys Fees

The PRA provides that a party who prevails against an agency in an action seeking public records shall be awarded all costs, including reasonable attorney's fees. RCW 42.56.550(4) and RAP 18.1. The PRA also allows per-day penalties for each day a record was wrongfully withheld. **Id.** The PRA's penalty and cost provisions are "intended to encourage broad disclosure and to deter agencies from improperly denying access to public records." **Lindberg v. County of Kitsap**, 133 Wn.2d 729, 746, 948 P.2d 805 (1997). If this Court determines that records withheld by the Governor are not exempt, that the executive privilege asserted by the Governor is not a proper exemption, or that the three-part test violates the PRA and cannot stand, the Freedom Foundation will be a prevailing party under the PRA and should be awarded all fees and costs and a statutory penalty.

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VI. CONCLUSION

Based on the foregoing, Appellant Freedom Foundation respectfully requests that this Court reverse the trial court's Final Order and grant summary judgment in the Freedom Foundation's favor and award it its fees, costs and a statutory penalty as the prevailing party.

RESPECTFULLY SUBMITTED this 23rd day of December, 2011.



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