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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.

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I. INTRODUCTION

The fundamental question in this case is whether the Governor of Washington enjoys a qualified executive privilege that can serve as an exemption to the mandate of disclosure in the Public Records Act (PRA), chapter 42.56 RCW. Accountability to the people is a cornerstone of the foundation of our democratic government in this State and this principle should not be undermined by an implied, non-enumerated privilege asserted by Governor Gregoire. Courts have repeatedly held that executive officers in Washington enjoy only the powers that are delegated by the Washington Constitution or by statute. Similarly, the Public Records Act explicitly states that its mandate for disclosure of records may only be overcome by specific exemptions found in law. Governor Gregoire relies on a small minority of states that have extended a qualified privilege to their chief executives. In doing so she ignores decades of Washington case law interpreting the Public Records Act. This Court should decline to recognize an implied, deferential privilege that would allow the Governor to keep secrets from the public.

II. ARGUMENT

A. The Governor of Washington Does Not Enjoy Implied Privileges.

The Governor invites this Court to hold that she enjoys an implied, non-enumerated privilege that would allow her to withhold records from

members of the public. This Court has consistently ruled that state officers, including the Governor, enjoy no implied powers. Rather, executive powers are “enacted by the people, either in their constitutional declarations or through legislative declarations in pursuance of constitutional provisions.” State v. O’Connell, 83 Wn.2d 797, 812, 523 P.2d 872 (1974).

In City of Seattle v. McKenna, 172 Wn.2d 551, 259 P.3d 1087 (2011), the City of Seattle objected to Attorney General Rob McKenna’s decision to join a multi-state challenge to the Patient Protection and Affordable Care Act, recently adopted by Congress. The Attorney General argued that the Washington Constitution vests him with the authority to initiate litigation on behalf of the State. 172 Wn.2d at 556. This Court looked to the text of the constitution and found no such authority. “[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” 172 Wn.2d at 557. The Governor similarly argues that executive privilege is a necessary implication to allow her to perform the functions of her office. The constitution, however, does not extend implied powers to executive officers. “Every office under our system of government, from

the governor down, is one of delegated powers.” State v. Seattle Gas & Elec. Co., 28 Wn. 488, 495, 68 P. 946 (1902).

In Fischer-McReynolds v. Quasim, 101 Wn.App. 801, 6 P.3d 30 (2000), a former public employee sued the Department of Social and Health Services for failure to provide a safe workplace and failure to accommodate a disability. Fischer-McReynolds argued that an executive order, dealing with domestic violence in the workplace, established a cause of action for state employees if an agency failed to comply with the order’s directives. The Court of Appeals held that the Governor does not enjoy implied powers, such as the ability to enact legislation. “While the Washington State Constitution grants the Governor certain express powers, the Governor lacks inherent legislative power except as provided in the Constitution or delegated by a statute.” 101 Wn.App. at 813.

The Governor in this current appeal offers a feeble response to this argument, suggesting that implied “privileges” rooted in the separation of powers are different than “powers.” Br. of Resp’t at 10. The Governor cites no authority for this distinction; ultimately it is a distinction without a difference. The Governor later argues that the Legislature “acknowledges” her constitutional powers in RCW 43.06.010. Br. of Resp’t at 32 n.21. That law states: “In addition to those prescribed by the Constitution, the governor may exercise the powers and perform the duties prescribed in

this and the following sections” While it is accurate to say the Legislature acknowledges the powers prescribed by the constitution, neither the constitution nor the Legislature’s enactments prescribe the power to withhold records on the basis of executive privilege.

The Governor also makes repeated references to a “judicial privilege” and argues that executive privilege is a functional equivalent.¹ Br. of Resp’t at 8-10, 36, 48. This comparison is misleading. On several occasions this Court has addressed the application of the PRA to the courts, beginning with Nast v. Michels, 107 Wn.2d 300, 730 P.2d 54 (1986). In Nast this Court held that while the public enjoys a common law right of access to court case files, the PRA does not include the courts within its definitions. 107 Wn.2d at 306. Therefore, the PRA simply does not apply to the courts. In each subsequent case that addressed the PRA’s application to the judiciary, courts have resolved the question on a statutory basis, rather than inferring a constitutional basis for barring access to records.² These cases do not support the creation of an executive privilege for the Governor.

¹ The Governor similarly references a legislative privilege but cites no case that holds the Washington Legislature may withhold records from the public on the basis of separation of powers.

² See Yakima Cy. v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768 (2011); City of Federal Way v. Koenig, 167 Wn.2d 341, 217 P.3d 1172 (2009); Spokane & Eastern Lawyer v. Tompkins, 136 Wn.App. 616, 150 P.3d 158 (2007); and Beuhler v. Small, 115 Wn.App. 914, 64 P.3d 78 (2003).

B. The PRA Does Not Recognize Implied Exemptions.

Governor Gregoire argues that an implied privilege can operate as an “other statute” exemption to the PRA. Br. of Resp’t at 31. This is incorrect. The PRA states that agencies must identify a specific statutory exemption when withholding records. RCW 42.56.070(1). Ignoring this requirement by recognizing implied exemptions would eviscerate the PRA. “It is the duty of this court to construe statutes so as to avoid rendering meaningless any word or provision.” State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

The Governor does not cite a single case in Washington that recognizes an implied “other statute” exemption. In **every** case where a new exemption is incorporated into the PRA the court has identified a specific provision that allows non-disclosure of records.³

On numerous occasions this Court has rejected an agency’s suggestion that it has an implied exemption that allows nondisclosure. For

³ See, e.g., 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) to incorporate the superior court civil rules); Building Industry Ass’n of Washington v. State Dept. of Labor & Industries, 123 Wn.App. 656, 663, 98 P.3d 537 (2004) (incorporating RCW 49.17.250(3)); Deer v. Department of Social and Health Services, 122 Wn.App. 84, 92, 93 P.3d 195 (2004) (incorporating chapter 13.50 RCW); Comaroto v. Pierce Cy. Medical Examiner’s Office, 111 Wn.App. 69, 75-76, 43 P.3d 539 (2002) (incorporating RCW 68.50.105); 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)).

example, in **Brouillet v. Cowles Pub. Co.**, 114 Wn.2d 788, 791 P.2d 526 (1990), a newspaper publisher sought records related to teacher certificate revocations. The teachers' union opposed disclosure, noting that the Legislature granted teachers a right to a closed hearing on certificate revocations. By implication, the union argued, all related records should be exempt from disclosure. This Court disagreed. "The public disclosure act exempts records falling 'within the specific exemptions' of other statutes. ... The language of the statute **does not authorize us to imply exemptions** but only allows specific exemptions to stand." 114 Wn.2d at 800 (emphasis added).

Similarly, this Court rejected an implied exemption asserted by a city in **Amren v. City of Kalama**, 131 Wn.2d 25, 929 P.2d 389 (1997). At the mayor's request, the State Patrol investigated citizen complaints lodged against the Kalama police chief but found no wrongdoing. A resident sued the City of Kalama to obtain a copy of the State Patrol's report. The city argued that RCW 41.06.450, which addresses the destruction or retention of information relating to state employee misconduct, "implicitly creates an exemption from disclosure" when an employee has been exonerated of wrongdoing. 131 Wn.2d at 32. This Court found no implicit exemption.

In **Hearst Corp. v. Hoppe**, 90 Wn.2d 123, 580 P.2d 246 (1978), the King County Assessor refused to disclose records related to the appraisal of real property. The assessor argued that he was “invested with a public trust” to protect private information obtained from taxpayers. 90 Wn.2d at 129. The Court noted the assessor’s “positive duty” to disclose records unless a specific exemption applied and stated that agencies cannot determine the scope of an exemption: “leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” 90 Wn.2d at 131.

Opponents of disclosure sought to expand the sources of exemptions in **Confederated Tribes of Chehalis Reservation v. Johnson**, 135 Wn.2d 734, 958 P.2d 260 (1998). Four Indian tribes sued the State Gambling Commission to prevent disclosure of records showing the amount of the “community contribution” paid by the Tribes under the terms of a tribal-state gaming compact.

The Tribes argued that the gaming compacts constituted “other statutes” which exempted the requested records from disclosure. The Supreme Court questioned this argument:

[T]he “other statutes exemption” applies only to exemptions which are **explicitly** set forth in another statute. In order to prevail on this claim, the Tribes would have to show that the compacts (1) explicitly exempt the Gambling Commission’s records relating to community contributions

from disclosure, and (2) that the compacts are statutes. The Tribes are unable to meet this burden.

Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.

135 Wn.2d at 750 (emphasis added).

The Governor attempts to justify her asserted implied privilege here by noting that a statute cannot supersede the Washington Constitution. Br. of Resp't at 33-35. She offers two cases for the proposition that this Court should incorporate implied constitutional privileges into the PRA: Seattle Times Co. v. Serko, 170 Wn.2d 581, 243 P.3d 919 (2010) and Yakima Cy. v. Yakima Herald-Republic, 170 Wn.2d 775, 246 P.3d 768 (2011).

Neither case supports the Governor's argument. The issue in Serko was whether pretrial publicity would jeopardize a criminal defendant's right to a fair trial. This Court noted a fair trial is guaranteed under the Sixth and Fourteenth Amendments to the U.S. Constitution, and under article I, section 22 of the Washington Constitution. "There is no specific exemption under the PRA that mentions the protection of an individual's constitutional fair trial rights, but courts have an independent obligation to secure such rights." 170 Wn.2d at 595. The Court did not find that disclosure would have violated the defendant's rights. In Yakima, an indigent criminal defendant opposed disclosure of certain records related

to his defense, arguing the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution could serve as “other statute” exemptions. 170 Wn.2d at 808. This Court acknowledged that the argument “has force” but declined to reach the issue. Id.

The decisions in Serko and Yakima do not establish a rule that implied constitutional theories should be incorporated as exemptions to the PRA. Neither case reached the conclusion that a constitutional provision acted as an “other statute.” Nevertheless, if this Court were inclined to incorporate the Washington Constitution into the PRA, both Serko and Yakima cited specific constitutional provisions. Neither case addressed implied privileges. The Governor argues that implied privileges should be treated as enumerated provisions, but this Court has previously held such action improper. “The [PRA] does not authorize us to imply exemptions but only allows specific exemptions to stand.” Brouillet, 114 Wn.2d at 800.

C. The Goal of Separation of Powers is Accountability to the People of Washington.

The Governor argues that the separation of powers doctrine serves as the basis for her refusal to release records to the public. This application transforms the doctrine from a shield between branches into a barrier erected between the people and their government.

The separation of powers doctrine ensures that “the fundamental functions of each branch remain inviolate.” **Carrick v. Locke**, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The branches of government, however, are not “hermetically sealed off from one another” but are “partially intertwined” to “maintain an effective system of checks and balances, as well as an effective government.” 125 Wn.2d at 135.

A separation of powers violation does not occur when two branches of government engage in coinciding activities. Rather, it occurs when the “activity of one branch threatens the independence or integrity or invades the prerogatives of another.” **Zylstra v. Piva**, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). The invasion occurs when one branch interferes with or attempts to perform the fundamental function of another branch.

What are those fundamental functions? Quite simply: “The legislature enacts laws, and is commanded by the constitution to enact them in a certain way. The executive enforces the laws, and by the constitution it is made his duty to take certain steps looking towards such enforcement in the manner prescribed therein upon the happening of certain contingencies. The judicial department is charged with the duty of interpreting the laws, and adjudging rights and obligations thereunder.” **State ex rel. Reed v. Jones**, 6 Wn. 452, 461, 34 P. 201 (1893).

Courts have identified numerous scenarios where the doctrine of separation of powers calls for restraint by a branch of government. For example, it is “beyond the power of the legislature to rule that a law it has enacted is unconstitutional.” **Brown v. Owen**, 165 Wn.2d 706, 726, 206 P.3d 310 (2009). Separation of powers precludes the legislature from making judicial determinations. **Washington State Farm Bureau Federation v. Gregoire**, 162 Wn.2d 284, 303-04, 174 P.3d 1142 (2007). A basic function of the judicial branch is regulation of the practice of law and the Legislature cannot order the bar association to bargain collectively with its employees. **Washington State Bar Ass’n v. State**, 125 Wn.2d 901, 890 P.2d 1047 (1995). Courts are admonished to resist the temptation to rewrite an unambiguous statute, recognizing that “the drafting of a statute is a legislative, not a judicial, function.” **State v. Jackson**, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (citation omitted). The enrolled bill rule forbids courts from inquiring into legislative procedures preceding the enactment of a statute. **Brown**, 165 Wn.2d at 723. Courts may not review a Governor’s decision to convene a special session, which is the executive’s prerogative. **State v. Fair**, 35 Wn. 127, 131, 76 P. 731 (1904). The Legislature may not employ flagrant gimmicks to circumvent the Governor’s veto power. **Washington State Legislature v. Lowry**, 131 Wn.2d 309, 320, 931 P.2d 885 (1997).

Fundamentally, “[s]eparation of powers was intended to balance governmental power against governmental power to prevent the abuse of that power held in any one set of hands.” **Island County v. State**, 135 Wn.2d 141, 163-64, 955 P.2d 377 (1998) (Sanders, J. concurring). The goal is that “each department should be held responsible to the people that it represents” **Jones**, 6 Wn. at 461. The PRA, adopted through the initiative process, facilitates this accountability.⁴

Checks and balances promote accountability to the people and prevent any one branch from absorbing too much power. The present case is a demonstration of how effectively these checks and balances operate. The Governor’s fundamental functions are not being invaded. Her duties have not been absorbed by another branch. She is not prevented from performing her constitutional duties. Rather, the people of the State of Washington are utilizing a law they wrote and passed by initiative to monitor and keep control of their government. The PRA includes a built-in right to utilize another branch of government to perform a check upon the Governor’s power for the purpose of promoting accountability. Such an action does not violate the separation of powers doctrine.

⁴ This Court has noted that the initiative process 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).

D. The PRA Applies to the Office of the Governor.

The Governor states that she is not challenging the constitutionality of the PRA or seeking immunity from it. Br. of Resp't at 2. Yet later the Governor notes that the PRA does not explicitly mention her office in its definitions, referring to this omission as "significant." *Id.* at 48. This insinuation notwithstanding, 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). The Washington Constitution states: "The executive **department** shall consist of a governor" WASH. CONST. art. III, § 1 (emphasis added). The constitution repeatedly refers to the Governor's position as an "office." WASH. CONST. art. III, §§ 2, 10. The Governor has been a party to past PRA actions and no court has ruled that the Governor falls outside of the PRA. Additionally, the Office of the Governor has adopted administrative regulations to "ensure compliance by the office of the governor with the provisions of [the PRA]." WAC 240-06-010.⁵

The Governor's implication, though unclear, seems to be that the PRA cannot constitutionally be applied to her office without the creation

⁵ Gov. Gregoire has personally spoken to the importance of the PRA. In a directive sent to agency heads, the Governor stressed her expectation that "this administration will live up to the spirit of this very important law." The directive later stated: "We must all work to build full public confidence that state government is open and accountable." Directive of the Governor, Washington Public Disclosure Act (Feb. 7, 2006), available at: http://www.governor.wa.gov/directives/dir_06_02_07.pdf.

of her proposed executive privilege. This argument should be rejected. Accountability to the people is a cornerstone of this State's governing documents. From the opening words of the Washington Constitution⁶ to the intent language of the PRA,⁷ the people have insisted on maintaining a close watch over their public servants.

E. This Court Should Not Recognize a Three-Part Test that Ignores Multiple Provisions of the PRA.

The Governor asks this Court to adopt a three-part test for applying executive privilege that is not articulated in the Washington Constitution or in statute.

The Governor cites Ameriquist Mortg. Co. v. Washington State Office of Atty. Gen., 170 Wn.2d 418, 241 P.3d 1245 (2010) for the proposition that other statute exemptions can displace the express requirements of the PRA. Br. of Resp't at 43. This exaggerates the Ameriquist holding. This Court held that the federal Gramm–Leach–Bliley Act (GLBA), 15 U.S.C. §§ 6801–6809, was incorporated as an other statute exemption. The GLBA prohibits “third parties,” including the Attorney General, from disclosing certain protected information. This Court determined that the GLBA did not permit the Attorney General to

⁶ “All political power is inherent in the people, and governments derive their just powers from the consent of the governed” WASH. CONST. art. I, § 1.

⁷ “The people insist on remaining informed so that they may maintain control over the instruments that they have created.” RCW 42.56.030.

apply the PRA's redaction requirement found at RCW 42.56.210. 170 Wn.2d at 440. The Governor relies on this holding to claim that newly-incorporated exemptions can displace the procedural requirements of the PRA. This Court, however, saw no conflict between the GLBA and PRA:

[T]he PRA's redaction requirement applies only where "information ... can be deleted." Id. Further, the PRA's "other statute" exemption allows for a separate statute to preclude disclosure of "specific information" or entire "records." RCW 42.56.070(1). Thus, the PRA makes room for an "other statute" that expressly prohibits redactions or disclosures of entire records.

170 Wn.2d at 440.

Withholding records in their entirety is consistent with the PRA—it is not a displacement. The PRA recognizes that other statutes may exempt disclosure of portions of records or records in their entirety. Thus, RCW 42.56.070(1) recognizes that an other statute may exempt or prohibit "disclosure of specific information or records." This rule was affirmed by this Court:

The "other statutes" exemption incorporates into the Act other statutes which exempt or prohibit disclosure of specific information or records. RCW 42.17.260(1). In other words, if such other statutes mesh with the Act, they operate to supplement it. However, in the event of a conflict between the Act and other statutes, the provisions of the Act govern. RCW 42.17.920. Thus, if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement.

Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994).

The Freedom Foundation has already shown that the proposed three-part test conflicts with multiple PRA provisions. Br. of Appellant at 39-47. First, the Governor argues for a presumption of confidentiality when asserting executive privilege. PRA 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 ignores this rule. Courts are not to defer to an agency's assertion of an exemption, but are to review a denial of records de novo. **Yakima Cy.**, 170 Wn.2d at 791.

Second, the Governor would shift the burden of proof to the requester who can only overcome the presumption by showing a particularized need. 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."). The Governor cites no in-state authority that supports her proposed

burden-shifting; in every case where a new exemption is incorporated into the PRA the agency retains the burden of proving that it applies.⁸ Additionally, forcing a requester to show a particularized need for records conflicts with another express requirement of the PRA. RCW 42.56.080 prohibits agencies from distinguishing among persons or requiring requesters to provide information about the purpose of the request. See Livingston v. Cedeno, 164 Wn.2d 46, 53, 186 P.3d 1055 (2008).

Third, the Governor argues a court must balance the interests of the parties to determine whether the records should be released. The Governor also argued that courts should refrain from in camera review, arguing that judicial review intrudes on the Governor's executive powers. There is, however, no balancing test in the PRA that evaluates the interest of the requester against the interest of the agency. Instead, the PRA "is to be liberally construed to promote full access to public records, and its exemptions are to be narrowly construed." Amren v. City of Kalama, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). Additionally, the PRA permits in camera review of records withheld by an agency. RCW 42.56.550(3). It is the judiciary's role to determine whether public records fall within an

⁸ See, e.g., Mechling v. City of Monroe, 152 Wn.App. 830, 852, 222 P.3d 808 (2009) ("The party asserting attorney-client privilege has the burden of showing that the privilege exists and the requested documents contain privileged communications.").

exemption, and there is “no violation of the separation of powers theory in this function.” Hearst Corp., 90 Wn.2d at 130.

In the case of a conflict with an “other statute” exemption, the PRA prevails. RCW 42.56.030. The Governor asks this Court to ignore multiple requirements found in the PRA in order to adopt a deferential test for applying executive privilege—a test that is not found in the constitution or statute. The PRA trumps other conflicting acts. It cannot be overcome by an implied test that accompanies an implied exemption.

F. It is Appropriate to Consider Constraints on Executive Privilege.

The Governor advocates creating a qualified privilege in Washington, along with a highly-specific process for applying the privilege, yet then objects to limitations that should apply to the proposed qualified privilege. Br. of Resp’t at 48.

Ultimately, the Governor’s interest in secrecy should be evaluated in light of the public’s interest in accountability. The Governor suggests that executive privilege is “for the benefit of the public, not the individual holding the office of governor[.]” Br. of Resp’t at 19 n.12. This assertion has been soundly reject by the PRA, as previously explained by the Freedom Foundation. Br. of Appellant at 32-33. “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 so that they may maintain control over the instruments that they have created.” RCW 42.56.030.

Courts have recognized that the purpose of other exemptions limits their application. See *Mechling v. City of Monroe*, 152 Wn.App. 830, 852, 222 P.3d 808, 819 (2009) (“the attorney-client privilege . . . must be strictly limited to its purpose.”); and *Hearst Corp.*, 90 Wn.2d at 133 (“The purpose of the [deliberative process] exemption severely limits its scope.”). Similarly, the application of executive privilege should be strictly limited.

The very cases the Governor relies on for the adoption of executive privilege have identified numerous constraints upon the privilege. Executive privilege, if it exists at all in Washington (and again, Appellant contends it does not), would only protect the communication of the Governor’s closest advisors. See *United States v. Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090 (1974) (shielding “confidential conversations between a President and his close advisors”); *Marbury v. Madison*, 5 U.S. 137, 170, 2 L.Ed. 60 (1803) (warning against intrusions into the “secrets of the cabinet”).

Communication between the Governor and another branch of government cannot be shielded by executive privilege. Separation of

powers is intended to protect a branch from interference by other branches. It cannot shroud the interactions of two branches in secrecy. See State ex rel. Atty. Gen. v. First Judicial Dist. Court of New Mexico, 96 N.M. 254, 258, 629 P.2d 330 (1981) (“this privilege does not protect communications . . . between the executive department and . . . others not employed in the executive department.”). Similarly, executive privilege should not protect the Governor’s communication with separate agencies that are established or regulated by another branch of government. See Doe v. Alaska Superior Court, Third Judicial Dist., 721 P.2d 617, 624 (Alaska,1986) (applying the privilege to “internal communications”); Hamilton v. Verdow, 287 Md. 544, 558, 414 A.2d 914 (1980) (only communications “from a subordinate to a governmental officer” are privileged); and Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939, 946 (1958) (the privilege allows “open, frank discussion between subordinate and chief”).

If executive privilege is intended to shield sensitive deliberations, it may not extend to “purely factual material” that is considered during the decision-making process. Hamilton, 287 Md. at 564.

Finally, the privilege can only apply when the executive is operating “within its own assigned area of constitutional duties.” Hamilton, 287 Md. at 562, citing Nixon, 418 U.S. at 705.

A review of the records requested by the Freedom Foundation in this case demonstrates the Governor's overreliance on executive privilege. The Governor released several documents to the Foundation that had previously been withheld on the basis of executive privilege. Among them: a proposal to remodel Key Arena in order to retain the Seattle Sonics NBA franchise; a document addressing pending medical marijuana legislation; and a document regarding national education standards. CP 22-23. It is unclear how disclosure of these documents would invade the Governor's fundamental function.

Additionally, the Governor continues to withhold records from the Freedom Foundation, including communications about federal litigation to which the State is not a party; a memorandum of understanding between the State, King County, and Seattle regarding the Alaskan Way Viaduct; and a memorandum for a meeting with House Speaker Frank Chopp. CP 23-25. If executive privilege is rooted in separation of powers, as the Governor argues, it does not create a cocoon of secrecy to protect the Governor's interactions with other branches of government.

While not at issue in this case, other instances where the Governor asserted executive privilege illustrate her broad application of the privilege. Since 2007, Gov. Gregoire has asserted the privilege at least 492

times in response to 46 records requests.⁹ CP 127. Documents that have been withheld include: a memorandum exchanged among three employees of the Washington State Department of Community, Trade and Economic Development (CP 130); “draft talking points” exchanged between two members of the Governor’s staff (CP 131); a meeting brief summarizing “issues and legislation Sen. Kohl-Welles discussed with Governor’s policy staff and would likely discuss with Governor” (CP 132); a budget briefing document from an employee of the Department of Natural Resources (CP 133); a meeting memorandum with portions redacted that reflected “Rep. Conway’s concerns and positions to the Governor on matters in the Legislative process” (CP 134); and a document from the Washington State Liquor Control Board (LCB) sent to numerous individuals in the Governor’s office, other LCB employees, and employees of the Office of Financial Management regarding “revenue and customer convenience opportunities” for the LCB (CP 135). These examples demonstrate the wide variety of documents that could be withheld from the people if the Governor is permitted to assert executive privilege.

⁹ The Governor claims that this number of assertions of executive privilege is “misleading” because various requesters may have requested overlapping records. Br. of Resp’t at 4 n.1. Regardless, in the time period discussed, the Governor asserted executive privilege in at least 492 separate instances in response to dozens of separate requests.

III. 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.

RESPECTFULLY SUBMITTED this 22nd day of February, 2012.



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