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SUPREME COURT
STATE OF WASHINGTON
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No. 86384-9

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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.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

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ORIGINAL

I. NATURE OF THE CASE AND DECISION

Appellant Freedom Foundation respectfully seeks direct review by the Washington State Supreme Court of the Final Order entered by the Thurston County Superior Court on July 22, 2011. A copy of the Final Order is attached as Appendix A.

In this case the trial court found that executive privilege operated as an “other statute” providing an exemption from the Public Records Act, Chapter 42.56 RCW (“PRA”), but did not treat the exemption as is mandated by the PRA. Instead, the court created a three-part test ignoring the burdens and construction of the PRA, in addition to ignoring the PRA’s prohibition from distinguishing among requestors and forcing requestors to disclose reasons for requesting records. This wholesale undercutting of multiple provisions of the PRA is an issue this Court must address.

This case presents the significant question of whether the Governor of the State of Washington enjoys an executive privilege that would operate as an exemption to, or as the State has argued, a partial or complete circumvention of, the mandate of disclosure found in the PRA.

On April 5, 2010, the Freedom Foundation (formerly the Evergreen Freedom Foundation) submitted a public records request under the PRA to the Office of the Governor, requesting eleven specific

documents. Each of the documents had been withheld from previous requesters on the basis of executive privilege. In response to the records request, the Governor produced five of the requested documents, withheld five others in their entirety and redacted a portion of a sixth document. A privilege log provided by the Governor identified “executive privilege” as the basis for withholding and redacting the records. A letter from Narda Pierce, the Governor’s General Counsel, further explained the Governor’s reliance on the doctrine of executive privilege.

The Freedom Foundation filed suit against Respondent Christine O. Gregoire on April 4, 2011, asserting the Governor had violated the PRA by withholding and redacting documents without identifying a specific exemption that would justify the withholding.

The matter came before Thurston County Superior Court Judge Carol Murphy on cross-motions for summary judgment on June 17, 2011. Following oral argument and an oral ruling, Judge Murphy requested additional briefing and argument, which was heard on July 15, 2011. Judge Murphy entered Findings of Fact, Conclusions of Law, and Final Order on July 22, 2011.

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).

The trial court held that constitutionally-based privileges are incorporated as exemptions under the “other statute” provision of the PRA. RCW 42.56.070(1). 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.

Addressing the question of executive privilege, the trial court referenced *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090 (1974), in which the U.S. Supreme Court recognized a qualified executive privilege grounded in separation of powers under the U.S. Constitution. The trial court noted several state courts that have applied the *Nixon* decision to recognize a qualified gubernatorial privilege grounded in state constitutional separation of powers. The trial court concluded that these cases provide persuasive authority in Washington and that the Governor of Washington possesses a qualified executive privilege grounded in separation of powers under the Washington Constitution, and that the privilege therefore may be asserted as an exemption in response to a request for records under the PRA.

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

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. The Governor or her representative formally asserts the privilege 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.

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. The trial court therefore recognized a presumption that executive privilege was established for the documents in question.

In the second step of the three-part test, the trial court held that the burden shifts to the requester, who may overcome the presumption and obtain production of the documents by demonstrating a particularized need for the documents and identifying an interest that could outweigh the public interests served by executive privilege. If a sufficient need is not

shown, however, the trial court held that the presumption is not overcome and the privilege is upheld.

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

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 makes a determination (which may include in camera review) whether the demonstrated need outweighs the Governor's interest.

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.

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. 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.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Governor possesses a right of executive privilege?

2. Whether executive privilege is an exemption from production under the PRA?

3. Whether executive privilege is an “other statute” prohibiting disclosure pursuant to the PRA?

4. If executive privilege is an exemption from the PRA, whether it may and should operate differently than other exemptions, and not pursuant to the mandates of PRA exemptions, 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. Whether the Governor has violated the PRA in her response to the PRA request at issue here?

III. GROUNDS FOR DIRECT REVIEW

This Court should grant direct review pursuant to RAP 4.2(a)(3) and (4) because the trial court’s Final Order is inconsistent with rulings of the Supreme Court and because this case involves fundamental and urgent

issues of broad public import which require prompt and ultimate determination by this Court—specifically, whether the Governor enjoys executive privilege and whether such a privilege would allow the Governor to withhold public records from the public.

A. The Trial Court’s Final Order is Inconsistent with Decisions of the Supreme Court.

The trial court’s Final Order is inconsistent with numerous decisions of the Supreme Court interpreting the provisions of the PRA.

Fundamentally, the PRA states that public records must be produced upon request unless a “specific exemption” would justify withholding the record. *Rental Housing Ass’n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 535, 199 P.3d 393 (2009). Exemptions can be found in the PRA or in some “other statute” that would exempt or prohibit disclosure. RCW 42.56.070(1). Even when courts incorporate “other statute” exemptions into the PRA they unfailingly identify the statute that allows the agency to withhold the record.¹

¹ See *Ameritrust Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245, 1255 (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)).

The trial court ruled that executive privilege is incorporated into the PRA as an “other statute” exemption, and that the Governor was justified in withholding records from the Freedom Foundation on that basis. The privilege, however, is not codified in the PRA or some other statute, and is not expressed in the Washington Constitution.

Additionally, the trial court ignored numerous provisions of the PRA by incorporating executive privilege as an exemption. When “other statute” exemptions are incorporated into the PRA pursuant to RCW 42.56.070(1), the incorporation should be accomplished in a manner consistent with the other provisions of the PRA. A newly-incorporated exemption may well expand the *information* that is exempt from disclosure but cannot alter the PRA’s *procedural* requirements. *Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (incorporation of a federal statute into the PRA supplements the PRA’s “exemptions”).

Nevertheless, the trial court created a three-part test for analyzing assertions of executive privilege, and this test ignores numerous features of the PRA.

In the first step of the three-part test, the Governor’s formal assertion of executive privilege for specific documents was deemed to automatically establish a presumption that the privilege applies to those

documents. The PRA, however, states that the mandate for disclosure is to be construed broadly and exemptions are to be construed narrowly. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 590, 243 P.3d 919 (2010) and RCW 42.56.030. Presuming that any exemption applies simply because a public agency asserts it is inconsistent with the mandate to interpret exemptions narrowly. Courts are not to defer to an agency's assertion of an exemption, but are to review a denial of records de novo. *See Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011), *citing* RCW 42.56.550(3).

In the second step of the trial court's three-part test, the burden shifts to the requester, who must overcome the presumption and obtain production of the documents by demonstrating a particularized need that could outweigh the interests served by executive privilege. The PRA, however, unequivocally places the burden on the agency to establish that nondisclosure is justified. *See Progressive Animal Welfare Soc. v. University of Wash. (PAWS II)*, 125 Wn.2d 243, 251-52, 884 P.2d 592 (1994) and RCW 42.56.550(1).

Requiring a requester to show a particularized need for records sought directly contradicts the text of the PRA, which 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) and RCW 42.56.080. Requesters are entitled to records under the PRA's broad mandate for disclosure and agencies may not distinguish among requestors based on their reason for requesting records, nor can agencies force a requestor to provide the reason for requesting records. *See* RCW 42.56.080.

The third step in three-part test requires the court to 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 before reaching the third step, arguing that judicial review intrudes on the Governor's executive powers.² 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 exemption, and there is "no violation of the separation of powers theory in this function." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978).

The Governor has argued that the Washington Constitution trumps

² Defendant's Motion for Summary Judgment, pp. 15-16.

the statutory provisions of the PRA, but the Governor cites no specific constitutional provision that prohibits disclosure in this case. Instead, the Governor asserts a qualified privilege, which is inferred from the implied doctrine of separation of powers.

This Court 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 to Judge Gary Little. Lieutenant Governor John Cherberg, the President of the Senate, argued that when a conflict arises, other powers must yield to the Legislature's constitutionally-implied authority to conduct inquiries. The Supreme Court disagreed:

Respondent [Cherberg] 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.

Garner, 111 Wn.2d at 819.

Similarly, in this case the trial court ruled that the PRA must yield to implied burdens and privileges associated with executive privilege. This is incorrect. Neither the Washington Constitution nor RCW 43.06.010

(describing the Governor's general powers and duties) supersede the PRA's existing burdens and presumptions.

This Court should grant direct review of the trial court's Final Order given its numerous conclusions that are in conflict with this Court's previous decisions. The Final Order properly recognized that the Governor is subject to the PRA, yet ignores several of the PRA's requirements. Constitutionally-implicit powers do not override "existing, valid, statutory enactments." *Garner*, 111 Wn.2d at 817. In the event of conflicting provisions, the PRA prevails. RCW 42.56.030.

B. This Case Presents Fundamental Questions About the Powers of the Office of the Governor and the Governor's Accountability to the People.

The PRA provides "a strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d at 127.

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.” *PAWS II*, 125 Wn.2d at 251.

Despite these mandates, Gov. Gregoire has asserted executive privilege for years in response to records requests, as did the Office of the Governor under Gov. Gary Locke. This issue has attracted substantial attention and commentary from members of the news media.³

This is a case of first impression that requires prompt and ultimate determination by this Court. The trial court has declared that all a Governor need do is state records are covered by executive privilege and such records are then presumptively secret and exempt unless the requestor can establish a specific need for the records that outweighs the

³ See Appendix B: Editorial, *The phantom loophole in state records law*, The News Tribune, August 18, 2009; Editorial, *Governor's office rejects disclosure law's spirit*, The Spokesman-Review, August 31, 2010; Brad Shannon, *Freedom Foundation sues governor over privilege*, The Olympian, April 4, 2011; Molly Rosbach, *Lawsuit claims overuse of executive privilege*, The Olympian, April 5, 2011; Editorial, *Executive privilege should come with limits*, The Spokesman-Review, April 5, 2011; Alicia Feichtmeir, *No Freedom for Executives? Freedom Foundation Sues Washington Governor Christine Gregoire Over Documents Withheld Under "Executive Privilege,"* Foster Pepper, Local Open Government Blog, April 6, 2011; Editorial, *Executive privilege keeps public in dark*, Walla-Walla Union-Bulletin, April 8, 2011; Editorial, *Court needs to clarify governor's power over public records*, The Olympian, April 18, 2011; Editorial, *Wanted: Up-or down ruling on 'executive privilege,'* The News Tribune, April 26, 2011; Mike Baker, *Judge: Gregoire can claim 'executive privilege,'* The Seattle Times, June 17, 2011; Editorial, *Gov. Gregoire's claim of executive privilege off mark*, Walla Walla Union-Bulletin, June 21, 2011; Erik Smith, *Shades of Richard Nixon!—Governor Claims 'Executive Privilege' and Some Say She's Conducting Business in Secret*, Washington State Wire, June 22, 2011; Editorial, *Judge's ruling weakens state Public Records Act*, Tri-City Herald, June 29, 2011; Brad Shannon, *UPDATE: Think tank plans appeal on Gregoire's privilege claim*, The Olympian, July 22, 2011; Karen Peterson, *Governor's privilege in hands of state court*, The News Tribune, Aug 21, 2011; Editorial, *A case of executive overreach*, The Herald, August 23, 2011.

Governor's asserted desire for secrecy. The three-part test allows the Governor's Office to place itself and its records beyond the reach of the public, and its actions beyond the reach of the courts as the agency here has alleged the judicial branch may not even perform an in camera review of record consistent with separation of powers. The three-part test flies in the face of the requirements of the PRA and decades of cases by this Court and the lower appellate courts interpreting it. The doctrine of gubernatorial executive privilege has never been recognized by an appellate court in the State of Washington. Furthermore, the Public Records Act was approved by voters nearly forty years ago. Laws of 1973, ch. 1, p. 1 (Initiative 276, approved Nov. 7, 1972). Not a single appellate court has recognized that executive privilege would allow the Office of the Governor to withhold records from the public in the context of a public records request.⁴ A ruling by this Court would provide much-needed guidance for agencies, requesters, litigators and lower courts.

This case ultimately presents fundamental questions about the proper balance of powers between branches of government and the accountability of those branches demanded by the people. Gov. Gregoire's

⁴ The only case that mentions executive privilege as it relates to access to records is *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142 (2007). There, the trial court ruled that legislative and executive privileges would preclude release of records sought from the State in discovery. The Supreme Court resolved the case on separate grounds and declined to address the issue of executive privilege. *Id.* at 297 n.20.

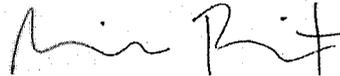
refusal to produce public records on constitutional grounds sets up a potential conflict over the PRA's constitutionality as applied to the Governor. This Court has recognized its "constitutional responsibility to referee disputes between the branches." *Washington State Legislature v. Lowry*, 131 Wn.2d 309, 320, 931 P.2d 885 (1997). This case presents such a dispute and warrants direct review as the trial court ruling conflicts with statutory provisions of the PRA.

IV. CONCLUSION

Based on the foregoing, Appellant Freedom Foundation respectfully requests that the Court grant direct review pursuant to RAP 4.2(a)(3) and (4).

RESPECTFULLY SUBMITTED this 1st day of September, 2011.

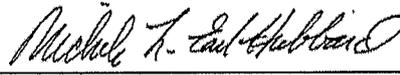
FREEDOM FOUNDATION



By: _____

Michael J. Reitz, WSBA No. 36195

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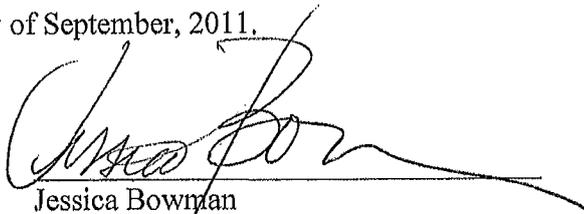
CERTIFICATE OF
SERVICE

I certify that on September 1, 2011, I served a copy of the
Statement of Grounds for Direct Review by e-mail and first class mail,
postage prepaid, on the following:

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Attorney for Respondent

DATED this 1st day of September, 2011.

By:


Jessica Bowman
Legal Assistant

Appendix A

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SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

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STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

FREEDOM FOUNDATION, a
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CHRISTINE O. GREGOIRE, in her
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NO. 11-2-00774-7

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

~~(PROPOSED)~~ cm

This matter came before the Court on June 17, 2011, on cross-motions for summary judgment. Plaintiff Freedom Foundation appeared through Michael J. Reitz. Defendant Christine O. Gregoire, Governor of the State of Washington, appeared through Alan D. Copsey, Deputy Solicitor General. Following oral argument and an oral ruling, the Court requested additional briefing and argument, which was heard on July 15, 2011.

1 3. Instead of simply reasserting executive privilege because the privilege
2 has been asserted previously for the requested documents, the General Counsel to
3 the Governor, as designated by the Governor, reevaluated each document to
4 determine whether executive privilege would still be asserted or would be waived,
5 based on an assessment whether disclosure under the circumstances would interfere
6 with the Governor's ability to obtain candid opinions and advice relating to her
7 constitutional decision-making or policy-making functions.

8 4. On August 25, 2010, after completing the review of each document,
9 the Office of the Governor waived executive privilege for some documents and
10 produced them. The production was accompanied by a privilege log and letter
11 from the General Counsel to the Governor describing each document that was
12 withheld or redacted and explaining the basis for asserting executive privilege for
13 the document. The letter and privilege log described each privileged document as a
14 communication between the Governor and an Executive Policy Advisor or member
15 of the Governor's executive staff containing advice, recommendations, discussion,
16 or instructions relating to decision-making or policy-making functions within the
17 Governor's constitutional responsibilities.

18 5. Of the eleven documents requested, the Office of the Governor
19 produced five documents in their entirety and claimed executive privilege for five
20 documents that were withheld in their entirety and for handwritten notes by the
21 Governor that were redacted from one document.

22 6. On April 4, 2011, Freedom Foundation initiated this action by filing a
23 Complaint for Disclosure of Public Records. Its Amended Complaint for
24 Disclosure of Public Records was filed on April 6, 2011. Freedom Foundation
25 challenged the Governor's assertion of gubernatorial executive privilege for the six
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1 documents that were withheld or redacted, but raised no challenge regarding the
2 production of the remaining six documents.

3 7. The Governor timely answered the amended complaint on April 25,
4 2011.

5 8. The Court heard oral arguments on cross-motions for summary
6 judgment on June 17, 2011, addressing whether an executive privilege based on
7 state constitutional separation of powers should be recognized in Washington as an
8 exemption under the "other statute provision of the Public Records Act, in RCW
9 42.56.070(1). After hearing arguments, the Court entered an oral decision
10 recognizing the privilege and requested additional briefing and argument on
11 application of the privilege to the documents at issue.

12 9. Freedom Foundation has not attempted to demonstrate any specific,
13 particularized need for the documents that might outweigh the constitutional and
14 public interests supporting executive privilege.

15 CONCLUSIONS OF LAW

16 At issue in this case is whether the Governor may claim a qualified executive
17 privilege, grounded in the separation of powers under the Washington Constitution,
18 as an exemption under the "other statute" exemption of RCW 42.56.070(1), and, if
19 so, whether the records at issue in this case fall within that privilege and exemption.

20 The Court concludes as follows:

21 1. The Office of the Governor is an "agency" as defined in the Public
22 Records Act, RCW 42.56.010(1).

23 2. Constitutionally-based privileges are incorporated as exemptions
24 under the "other statute" provision of the Public Records Act, RCW 42.56.070(1),
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1 by the language of that statute, without any need for any other statute to reference a
2 specific constitutional right or privilege.

3 3. If, however, RCW 42.56.070(1) were to require that a different statute
4 cite a specific constitutional right or privilege for that right or privilege to be
5 incorporated as an exemption, RCW 43.06.010 constitutes an "other statute" that
6 references the Governor's constitutional duties and powers sufficiently to
7 incorporate gubernatorial executive privilege grounded in separation of powers as
8 an "other statute" exemption under RCW 42.56.070(1).

9 4. In *United States v. Nixon*, 418 U.S. 683, 707-13 (1974), the Court
10 recognized a qualified presidential executive privilege grounded in separation of
11 powers under the United States Constitution. Applying that decision, state courts
12 have recognized a qualified gubernatorial privilege grounded in state constitutional
13 separation of powers. Those cases provide persuasive authority in Washington.

14 5. Based on the reasoning and analysis of those cases, the Court
15 concludes that the Governor of Washington possesses a qualified executive
16 privilege grounded in separation of powers under the Washington Constitution, and
17 that privilege therefore may be asserted as an exemption in response to a request for
18 records under the Public Records Act, RCW 42.56.

19 6. A challenge to the Governor's assertion of executive privilege as an
20 exemption to a request for records under the Public Records Act should be analyzed
21 using the three-part test established in *United States v. Nixon*, 418 U.S. 683, 707-13
22 (1974), and incorporated into the gubernatorial executive privilege recognized in
23 the courts of the other states.

24 7. In the first step of the three-part test, the Governor's formal assertion
25 of executive privilege for specific documents establishes a presumption that the
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1 privilege applies to those documents. The Governor or her representative formally
2 asserts the privilege by declaring that the Governor or her designee has reviewed
3 each requested document and determined that it falls within the privilege, because it
4 is a communication to or from the Governor that was made to foster informed and
5 sound gubernatorial deliberations, policymaking, or decision-making; and that
6 production of the document would interfere with that function.

7 8. In the letter from Narda Pierce, General Counsel to the Governor, to
8 Scott St. Clair, Evergreen Freedom Foundation, dated August 25, 2010, and in the
9 accompanying Privilege Log, the Governor formally and adequately asserted a
10 constitutionally-based gubernatorial executive privilege for the six documents that
11 were withheld or redacted. That assertion of the privilege is confirmed in the
12 Declaration of Narda Pierce, dated May 6, 2011, provided to the Court as an
13 attachment to Defendant's Motion for Summary Judgment. A presumption that the
14 privilege applies therefore was established.

15 9. In the second step of the three-part test, a requester may overcome the
16 presumption and obtain production of the documents at issue by demonstrating a
17 particularized need for the documents and identifying an interest that could
18 outweigh the public interests and constitutional interests served by executive
19 privilege. It is this opportunity to obtain privileged documents by demonstrating
20 particularized need and interest that makes executive privilege a qualified privilege.
21 If a sufficient showing is not made, however, the presumption is not overcome, the
22 analysis is at an end, and the privilege is upheld.

23 10. Freedom Foundation did not offer any showing of particularized need
24 for any document at issue. Therefore, the presumption that executive privilege
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1 applies to the six documents that were withheld or redacted was not overcome and
2 no further analysis of the privilege is necessary.

3 11 Because Freedom Foundation did not make a sufficient demonstration
4 of need and interest in this case, there is no need for the Court to proceed to the
5 third part of the three-part test or to conduct in camera review.

6 12. Qualified executive privilege was properly claimed for the six
7 documents at issue in this case, and those documents are exempt from production
8 under the Public Records Act through incorporation of executive privilege as an
9 exemption under RCW 42.56.070(1).

10 13. Because executive privilege was properly asserted for the documents
11 at issue in this case, there has been no denial of records in violation of the Public
12 Records Act, RCW 42.56.

13 14. Plaintiff Freedom Foundation is not entitled to any penalty, costs, fees,
14 or other relief under the Public Records Act.

15 15. Any finding or conclusion that is improperly designated is deemed to
16 be redesignated to preserve its operation and effect.

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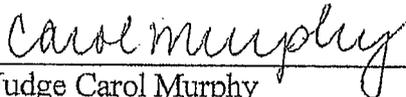
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ORDER

Based upon the foregoing, it is hereby ORDERED as follows:

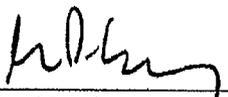
1. Defendant's Motion for Summary Judgment is GRANTED.
2. Plaintiff's Cross-Motion for Summary Judgment is DENIED.
3. Plaintiff's Amended Complaint is DISMISSED with prejudice.
4. Each party is to bear its own costs and fees.

Done in open court this 22nd day of July, 2011.



Judge Carol Murphy
Thurston County Superior Court

Presented by:



Alan D. Copsey
Deputy Solicitor General
Attorney for Defendant

Notice of Presentation Waived and
Approved as to Form:



Michael J. Reitz
Attorney for Plaintiff

Appendix B

The News Tribune

The phantom loophole in state records law

THE NEWS TRIBUNE
LAST UPDATED: AUGUST 18TH, 2009 12:14 AM (PDT)

Washington's open records law is far from absolute. Over the years, lawmakers have granted more than 300 exceptions to its broad mandate for public disclosure.

But the common theme among most of those exemptions is that they reside explicitly in state law. Government agencies and citizens may not always agree on whether an exemption should apply, but at least they are both reading from the same page.

Not so with the nebulous "privilege" invoked by the Legislature and governor. In at least three publicized instances this year – and perhaps more lesser-known ones – the legislative and executive branches have claimed an immunity that appears nowhere in statute.

The latest case was in response to a request made by the Evergreen Freedom Foundation for records pertaining to Gov. Chris Gregoire's executive order on climate change. The governor's office initially withheld some documents based on "executive privilege."

The basis for the denial: a 2006 Snohomish County Superior Court decision that created an executive privilege for written communications between the governor and members of the governor's staff.

That's the same case that the Department of Revenue cited earlier this year for delaying the release of records about tax increase proposals it had analyzed at the request of state lawmakers. The agency stalled to give lawmakers time to decide whether they would invoke "legislative privilege."

Lawmakers eventually turned over the documents. So did Gregoire earlier this month after the EFF challenged her office's use of executive privilege. But both the Legislature and the governor said that they reserve the right to assert their special exception to state records laws in the future.

Here's the problem: The privilege they assert is largely untested in this state. The Snohomish County judge ruled that the constitutional separation of powers prevented the judiciary from demanding access to the deliberative process of policy makers. But when the state Supreme Court had the opportunity to weigh in on the matter, it declined.

Who knows what the state's highest court will decide when squarely asked if legislative or executive privilege exists – if the question ever goes before the court. Lawmakers and the governor certainly don't appear eager to press the issue.

In the meantime, "privilege" looks a whole lot like the rabbit that gets pulled out of lawyers' and records keepers' hats when they'd rather not disclose something.

The governor and Legislature, if truly convinced that constitutional principles give them greater leeway to disregard the state's public records laws, would write the exemptions in statute for everyone to see. But that would invite a public debate that elected officials know they would lose.

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THE SPOKESMAN-REVIEW

August 31, 2010

Editorial: Governor's office rejects disclosure law's spirit

The Spokesman-Review

The determined citizen activists who wrote Washington's Public Disclosure Act in the 1970s were clear-headed enough to concede a few circumstances in which government business can properly be done outside the public's view.

But just a few.

It would compromise the public's interest, for example, if the state had to disclose its strategy in pending litigation, real estate transactions or collective bargaining activities. Such situations were enumerated in the law.

Over the decades, the Legislature has liberally stretched the boundaries well beyond what the drafters considered government activities that might escape public observation. But as courts have said consistently, those exemptions must be strictly and narrowly construed – another way of saying that the protected activity has to be clearly the sort of thing the exemption was intended to cover. No creative interpretations allowed.

So how does Gov. Chris Gregoire's office justify repeated claims of executive privilege as grounds for withholding documents?

The statutes recognize no such exemption, as the Evergreen Freedom Foundation, a conservative, Olympia-based think tank, keeps reminding the governor. The governor's office is unmoved, continuing to turn down requests for internal memos generated by the governor's advisers.

In the three-year period 2007-'09, Gregoire's office denied more than 400 records requests on grounds of executive privilege. At least one dissatisfied requester took her to court and ultimately obtained the document he was seeking, but in a disappointingly equivocal ruling from a Thurston County judge who admitted she doesn't know whether executive privilege is a valid claim.

Judge Paula Casey commented in her oral ruling earlier this year that extending a qualified privilege to advisers' written advice to the governor "makes some sense to me" – but it's not in the law.

The memo being sought in the case before her contained no advice, just a recitation of the positions taken by "various entities" and a listing of proposals before the Legislature. That, said the judge, would not qualify for the privilege, even if it exists, so the plaintiff should get his document.

In his criticisms of the governor, Evergreen Freedom Foundation general counsel Michael Reitz has noted that both the legislative and judicial branches of government enjoy certain exemptions from the public records law, but in those cases, unlike the governor's, it's spelled out in statute.

Reitz recommends that if the privilege is going to be asserted and recognized it needs to be codified – which might not be all that difficult, given how generously the Legislature has responded to other requests for open-government exemptions.

If it comes to that, at least lawmakers would be able to prescribe limited circumstances in which such an exemption would apply. The case that wound up in Judge Casey's court revealed how far a government agency will go to draw a blanket of confidentiality over a seemingly innocuous document.

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Published April 04, 2011

Freedom Foundation sues governor over privilege

Brad Shannon: The Politics Blog

The Freedom Foundation, an Olympia-based think tank with a right-of-center agenda, **filed suit today against Gov. Chris Gregoire** over her office's use of executive privilege to shield public records from disclosure.

Foundation general counsel Michael Retiz said Gregoire's office used the privilege to deny release of some 500 documents sought in 46 different records requests since 2007. The suit targets half a dozen instances where Freedom Foundation requests were rejected.

Gregoire's spokeswoman Karina Shagren said they had not seen **the suit**.

The cases deal with Gregoire's decision on a medical-marijuana policy, a briefing document on Columbia River issues, a draft memorandum of understanding as well as a meeting memorandum, both dealing with the tortured Alaskan Way Viaduct project in Seattle.

Here is TFF's background on the case. **Here** is TFF's log of denied requests.

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Published April 05, 2011

Lawsuit claims overuse of executive privilege

BY MOLLY ROSBACH, The Associated Press

A libertarian think tank on Monday sued Gov. Chris Gregoire's office for withholding public records, saying executive privilege isn't a legitimate exemption under state law.

Under the state's Public Records Act, records of state agencies must be made available to the public upon request unless they're covered by a statutory exemption, such as proprietary information or medical records.

The Freedom Foundation said in the complaint, filed in Thurston County Superior Court, that executive privilege is not a legitimate exemption to the public disclosure. There are more than 300 recognized exemptions in Washington statute, but executive privilege is not one of them.

In bringing suit against the governor, the foundation is seeking an appellate court decision to clarify the state's position on executive privilege.

The foundation said the Governor's Office has cited executive privilege at least 500 times in the past four years as grounds for withholding records. It contends that executive privilege should cover only communication between Gregoire and her closest aides, and it claims she has expanded that to a far broader category of records.

The Public Records Act is written so that its mandate for disclosure is to be interpreted broadly, and any exemptions are to be interpreted narrowly, ensuring public disclosure whenever possible.

"What the Governor's Office is doing by invoking executive privilege really frustrates the goal of accountable government," said Mike Reitz, attorney for the foundation in the lawsuit. "It goes beyond what people would normally think of as executive privilege and what it should rightfully protect."

But the Governor's Office says executive privilege is inherent in the constitutional guarantee of separation of powers. The Governor's Office has argued that executive privilege encourages policy advisers to speak openly without fear of reprisal.

"We have made the decision and have tried to protect the candor that helps to ensure good information and decision-making, while also releasing portions of the documents or releasing them at a certain point in time when we feel that release doesn't threaten those core values," said Narda Pierce, general counsel for the governor.

Pierce also said that the foundation may not be giving the full story when it says the governor has used executive privilege 500 times in the past four years. Many of those cases were requests for documents regarding Indian gaming negotiations at a time when talks were ongoing, and the Governor's Office also cited deliberative process as a reason for withholding.

Deliberative process is a statutory exemption that protects records involved in policy-making at the time decisions are being made. Once the policy is in place, records are typically released, which is what the governor did with many requests from the gaming negotiations, Pierce said.

The records at stake in the lawsuit were requested by a political writer with the foundation last April and concerned a variety of subjects, including documents on the Alaskan Way Viaduct replacement options and medical marijuana legislation.

For many of those requests, large sections of the records were released and explanations given for the portions withheld, Pierce said.

The lawsuit seeks the release of all requested records in unredacted form, as well as monetary penalties for the public records violation.

To date, there has been only one definitive court case on executive privilege in Washington, when a Snohomish County trial court ruled in favor of the exemption. That case went on to the state Supreme Court, but the judge avoided making a call on executive privilege and resolved the case on other issues. The Freedom Foundation was also the requester in that instance.

"Since it's happened so often, we feel there's a higher need for litigation because people are being turned away," often without knowing that the reason cited is a "nonexistent exemption," Reitze said.

There are currently 35 documents being withheld by the governor on the basis of executive privilege alone, with 15 more where another exemption is also claimed, Pierce said.

THE SPOKESMAN-REVIEW

April 5, 2011

Editorial: Executive privilege should come with limits

The Spokesman-Review

Washington has had a public records law for three decades. So, an Olympia judge said in February, it's curious that no court case "really addresses" if there's any such thing as executive privilege, the doctrine Gov. Chris Gregoire has cited to deny hundreds of requests for documents.

Thurston County Superior Court Judge Paula Casey declined a perfect opportunity to propose the missing answer. She ordered that the governor had to turn over a memo sought by citizen activist Arthur West, but only because it would not have been protected by executive privilege. If it exists. And she's not sure it does. Although it makes sense.

On Monday, the Freedom Foundation, a libertarian-oriented think tank, filed its own case against Gregoire, asking the courts to make her comply with the disclosure law the same as any other public agency.

Washington's open-government law was created in the 1970s as an initiative, but it has become encumbered over the years with 300 or more exemptions that dwarf the original handful. Executive privilege is not on the list.

Not that Gregoire or any other governor is apt to embrace that option. Although executive privilege is not mentioned in the state or U.S. constitutions, it has been divined there as an outgrowth of the separation of powers. That trumps a mere statute.

It's also been around since 1796 when George Washington refused to give the House of Representatives documents related to negotiation of the Jay Treaty.

The concept is too firmly rooted for the Freedom Foundation's legal challenge to eliminate it. But a desperately needed restriction may be in reach.

Washington isn't the only state where governors are in conflict with open records laws. New Mexico Gov. Susana Martinez this year issued an executive order narrowing, but not eliminating, the circumstances under which executive privilege could be invoked.

An executive privilege showdown over New Jersey Gov. Frank Corzine's emails with a former girlfriend prompted Ingrid Reed, then with the Eagleton Institute of Politics, to say the situation was "crying out for reclarification, redefinition of what you mean by executive privilege."

Is it ever. Correspondence from Gregoire's office stresses that executive privilege is something she can invoke or waive as she sees fit. According to the Freedom Foundation she has even substituted executive privilege as her authority for withholding records after another was challenged by the requestor.

It's probably not practical to deny a governor a limited measure of confidentiality in her intraoffice dealings, but the circumstances need to be narrowly defined and each use meticulously justified.

The frequency and flexibility with which Gregoire has exercised this doctrine are cause for concern. In questions involving public records, the default setting should be to release them – as in "public."

To respond to this editorial online, go to www.spokesman.com and click on Opinion under the Topics menu.

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No Freedom for Executives? Freedom Foundation Sues Washington Governor Christine Gregoire Over Documents Withheld Under "Executive Privilege"

Posted on April 6, 2011 by [Alicia Feichtmeir](#)

The Libertarian group Freedom Foundation has recently [filed suit](#) against Washington Governor Christine Gregoire, alleging that the Governor withheld public records under an "Executive Privilege" exemption not found in the text of Washington's Public Records Act ("PRA"), [42.56 RCW](#).

According to the Foundation's [website](#), the suit was commenced after a member of the Foundation requested documents from the Governor's Office in April 2010, including records dealing with "medical marijuana legislation, Alaskan Way Viaduct replacement proposals, and the Columbia River hydro system." The [complaint](#) seeks production of the requested records (some of which were withheld or redacted), attorneys' fees and penalties for violating the PRA. The complaint only addresses the Governor's response to the April 2010 request; however the Freedom Foundation has also alleged that since 2007, Gregoire has used the executive privilege [500 times](#) in efforts to withhold records.

Under Washington's PRA, public agency records must be made available to the public upon request unless they're covered by a specific exemption, identified in the PRA itself, or covered by other applicable Federal and State laws. [See WAC 44-14-010](#). There is a strong policy in favor of disclosure, and exemptions are construed narrowly. [See *Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 \(1994\)](#) ("PAWS II"). Although there are many exemptions listed in the PRA, the statute does not contain a general "executive privilege" exemption. Nor is the executive privilege listed as an exemption recognized by the Washington State Attorney General in its Model Rules on Public Disclosure. [See WAC 44-14-06002](#).

According to a recent [article in the Seattle Times](#), the Governor's Office says that the source of the executive privilege is the constitutional guarantee of separation of powers. As the Times reports, there has only been one definitive Washington court case addressing executive privilege, where a Snohomish County trial court made an oral ruling in favor of the exemption. However, [in that case](#) the executive privilege was raised in the context of documents requested in litigation, and used in conjunction with the deliberative process exemption, which prevents disclosure of records used as part of the policy and decision-making processes during the time such decisions are being made. [PAWS II, 125 Wn.2d at 256](#). It is important to note, however, that after a decision is finalized, the records may be subject to disclosure. *Id.*

A Washington court may find that the deliberative process exemption applies to at least some of the records Freedom Foundation alleges were withheld in April 2010, particularly if the records reflect ongoing decision and policy making within the Governor's Office. However, it remains to be seen whether the courts will directly address the issues of executive privilege and separation of powers. On the other hand, facing a parallel separation of powers issue in 1986, the Washington Supreme Court held that the judiciary is not included within the reach of the Public Records Act. [Nast v. Michels](#), 107 Wn.2d 300, 730 P.2d 54 (1986).

Tags: [Articles](#), [Christine Gregoire](#), [Elected officials](#), [Freedom](#), [Freedom Foundation](#), [Governor](#), [Libertarian group](#), [Privilege](#), [Public Records Act](#), [Public record](#)

Walla Walla, WA
(Walla Walla Co.)

Union-Bulletin
(Cir. D. 12,000)
(Cir. S. 14,000)

APR 08 2011

Allen's P. O. B. Est. 1888

OUR OPINION

2021 Executive privilege keeps public in dark

The Freedom Foundation points out executive privilege isn't one of the more than 300 exemptions in the state's Public Records Act.

Gov. Chris Gregoire is wielding what she believes to be a shield that will keep the prying eyes of the public out of some things she and her staff are doing. This powerful shield is called "executive privilege."

For some reason, people in power seem to think that phrase will make everything all right and people will simply nod knowingly and look the other way.

The Freedom Foundation hasn't been so easily cowed. It says Gregoire has invoked executive privilege at least 500 times in the last four years. However, the foundation points out in its lawsuit, executive privilege isn't one of the more than 300 exemptions in the Washington Public Records Act.

The act says: "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 in-

The people insist on remaining informed so that they may maintain control over the instruments that they have created."

The governor's office claims executive privilege is inherent in the separation of powers in the constitution. Besides, it says, it needs to do things secretly so policy advisers will speak freely.

"We have made the decision and have tried to protect the candor that helps to ensure good information and decision-making, while also releasing portions of the documents or releasing them at a certain point in time when we feel that release doesn't threaten those core values," Narda Pierce, general counsel for the governor, told The Associated Press.

The constitution doesn't give the executive branch the power to keep secrets from the public.

Gregoire is correct that it is easier to work without people looking over your shoulder. There is a freedom associated with knowing you won't be held accountable for anything you say or do. It makes it more efficient. But government wasn't designed to be done behind closed doors. Transparency trumps efficiency when doing the public's business. People have the right to know the whole story, not just what the governor wants to release, when she wants to release it.

Waiting until the "release doesn't threaten those core values" actually threatens the principles of a representative government. It is more akin to a monarchy in which the king pats his subjects on the head and assures them he knows what is best for them.

The governor has more than 300 possible exemptions to keep these records secret. If none of them apply, then she should bend to the will of the people. Or she can always propose legislation that would create executive privilege.

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Published April 18, 2011

Court needs to clarify governor's power over public records

THE OLYMPIAN

This state's Public Records Act makes it clear that records in government offices do not belong to the elected and appointed people who preside over those offices. They are the mere guardians of the records, which rightfully belong to the people of the state of Washington.

The Public Records Act says: "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."

According to the Freedom Foundation, an Olympia-based libertarian think tank formerly known as the Evergreen Freedom Foundation, Gov. Chris Gregoire has refused to turn over public records on more than 500 occasions in the last four years. Gregoire claims that she has an "executive privilege" to withhold public documents.

The Public Records Act has more than 300 exemptions but "executive privilege" is not one of them. That's why the Freedom Foundation has filed suit against the governor questioning her ability to deny public record requests based on executive privilege.

Good for the Freedom Foundation. This issue has been hanging around for years, so it's important to get the courts to settle the matter once and for all.

The Freedom Foundation contends that executive privilege should only cover communication between Gregoire and her closest aides. Foundation attorneys claim she has expanded that to a far broader category of records.

In their favor is the provision of the Public Records Act that says the disclosure law is to be interpreted broadly and any exemptions are to be interpreted narrowly, ensuring public disclosure whenever possible.

"What the governor's office is doing by invoking executive privilege really frustrates the goal of accountable government," said Mike Reitz, attorney for the foundation in the lawsuit. "It goes beyond what people would normally think of as executive privilege and what it should rightfully protect."

It's not surprising that Narda Pierce, general counsel for Gregoire, sees things differently. She says executive privilege encourages the governor's policy advisers to speak openly without fear of reprisal.

"We have made the decision and have tried to protect the candor that helps to ensure good information and decision-making, while also releasing portions of the documents or releasing them at a certain point in time when we feel that release doesn't threaten those core values," Pierce said.

She questions the foundation's claim that the governor has invoked executive privilege 500 times in four years. Many of those cases were requests for documents regarding Indian gaming negotiations at a time when talks were ongoing, and the governor's office also cited deliberative process as a reason for withholding. Deliberative process is a legal exemption that protects records involved in policy-making at the time decisions are being made. Once the policy is in place, records are typically released, which is what the governor did with many requests from the gaming negotiations, Pierce said.

The records at stake in the lawsuit were requested by a political writer with the foundation last April and concerned a variety of subjects, including documents on the Columbia River hydro project, the Alaskan Way Viaduct replacement options and medical marijuana legislation.

For many of those requests, large sections of the records were released, and explanations given for the portions withheld, Pierce said.

The lawsuit seeks the release of all requested records in unredacted form, as well as monetary penalties for the public records violation.

The state Supreme Court has not ruled on the executive privilege question directly. But it should be noted that in a 1986 ruling, the state's highest court said that the judiciary is not included within the reach of the Public Records Act based on the separation of powers. That's the same argument Gregoire's attorneys will make as defenders of the executive branch of government.

According to Pierce, there are 35 documents being withheld by the governor on the basis of executive privilege alone, with 15 more where another exemption is also claimed. That's not a lot considering the number of public records requests the governor's office receives.

But clarity on the governor's executive privilege claim is needed. A Supreme Court decision on the Freedom Foundation's lawsuit will provide that clarity.

The News Tribune

Wanted: Up-or-down ruling on 'executive privilege'

THE NEWS TRIBUNE
LAST UPDATED: APRIL 26TH, 2011 12:16 AM (PDT)

Gov. Chris Gregoire's office has claimed immunity from the state's public records law at least 500 times in the past four years.

That may have been six times too many to keep the charade alive.

The Freedom Foundation, a libertarian think tank, is suing Gregoire after her office partially denied the foundation's request for 11 documents.

Gubernatorial staffers withheld five records and part of a sixth, citing "executive privilege," a nebulous exception to the state's sunshine laws that appears nowhere in statute.

State lawyers claim the privilege is inherent in the constitutional separation of powers, and they point to a Snohomish County court ruling from 2008 for support.

Problem is, that was the assessment of one trial judge for one county. No Washington state appellate court has ever squarely tackled the question of executive privilege. The state Supreme Court had a chance a few years back but declined to weigh in.

The Freedom Foundation now hopes to put the state judiciary on the spot. Executive privilege isn't some side issue in this lawsuit -- it is the issue.

Here's hoping the foundation gets a more definitive ruling than citizen activist Arthur West received last year.

He also sued Gregoire for denying a records request on the basis of executive privilege -- and won. But the case did nothing to settle the law.

West won his suit essentially by default, when a Thurston County judge ruled that executive privilege -- if it exists -- did not apply to the documents West sought.

Judge Paula Casey noted, "It is really curious to me ... (that) there has been no case of any kind that really addresses whether there is such an executive privilege. What we do know is that there are many cases from the appellate courts indicating that the Public Records Act exemptions are to be strictly and narrowly construed."

More than 300 exemptions to the Public Records Act exist in statute, proving state lawmakers are only too willing to limit public disclosure. Yet they have never carved out a special exception for the governor.

The governor says lawmakers don't have to act -- that the privilege to keep some records secret is hers by virtue of her position in the executive branch. But without statute or court cases to guide its use, executive privilege becomes a well-worn excuse which citizens have little recourse to fight.

The Freedom Foundation, which could get a ruling from judges sympathetic to the government's arguments, is taking a bit of a gamble by pressing the issue.

But it's a gamble worth taking to, if nothing else, clarify the parameters of a loophole through which so much public information is slipping.

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Winner of Eight Pulitzer Prizes

Originally published Friday, June 17, 2011 at 11:36 AM

Judge: Gregoire can claim 'executive privilege'

A judge says that Washington's governor can claim "executive privilege" as a reason to withhold records from the public.

By MIKE BAKER

Associated Press

OLYMPIA, Wash. —

A judge says that Washington's governor can claim "executive privilege" as a reason to withhold records from the public.

Thurston County Superior Court Judge Carol Murphy said in a decision Friday that she wants to hold another hearing to determine whether Gov. Chris Gregoire properly asserted the claim in blocking the release of documents to a libertarian think tank.

Top comments

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 I, for one, will remember the judge's name. The law was written to allow the public... (June 17, 2011, by pete1427) [Read more](#)

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The Freedom Foundation has sued Gregoire, arguing that executive privilege isn't a legitimate exemption under state law and that the governor is using it to keep a broad range of documents secret. The governor's office contends that executive privilege is inherent in the constitutional guarantee of separation of powers and that it is necessary to allow advisers to talk candidly.

Walla Walla, WA
(Walla Walla Co.)

Union-Bulletin
(Cir. D. 12,000)
(Cir. S. 14,000)

JUN 21 2011

Allen's P.C.B. Est. 1888

OUR OPINION

2021 Gov. Gregoire's claim of executive privilege off mark

Yet, a judge is keeping the argument alive even though executive privilege is not included in the state constitution.

Public documents should be available to the public except for the few exemptions allowed in state law. That's as it should be. After all, the documents and records produced are created on behalf of the people as part of their government.

Yet, it's not always easy — or pleasant — for public officials when documents and records are made public. The information can be embarrassing — or worse.

We don't know the specific reasons Gov. Chris Gregoire and her staff want to keep secret documents requested by a Libertarian think tank, the Freedom Foundation. There might well be a legitimate reason for keeping the documents secret.

But we aren't buying the broad reason — executive privilege — offered by Gregoire's office and then accepted by Thurston County Superior Court Judge Carol Murphy. The judge's decision last week allowed the documents to remain secret — at least for now.

Ironically, Murphy said Gregoire can claim executive privilege

Walla Walla, WA
(Walla Walla Co.)

Union-Bulletin

(Cir. D. 12-000) said Greg-

goire can claim executive privilege as a reason to withhold records even though it is not listed as a specific exemption under state law.

Gregoire's office contends that executive privilege is inherent in the constitutional guarantee of separation of powers and it is necessary so she and her advisers can talk candidly as they work to make decisions.

Really? Why then is that not specifically mentioned in the state constitution or spelled out in state law where there is more than 300 specific exemptions listed.

We believe, absent a compelling reason linked to one of those 300-plus exemptions, the public should have access to the documents and records.

In addition, we hope the Freedom Foundation appeals the ruling. Allowing blanket executive privilege to stand will make it easier for the governor and other state leaders to withhold documents in the future.

"At that point," said Mike Reitz, an attorney for the Freedom Foundation, "the governor has a broad exemption at her disposal as opposed to a narrow one."

This matter isn't finished in Murphy's court. She said she will hold another hearing to determine whether Gregoire properly asserted the executive privilege claim in blocking the release of documents.

That clarification might be of some help, although we fear her original ruling has already — as the old saying goes — opened the barn door.

It would be best for citizens if the claim of executive privilege were overturned by the courts. State laws on open records is clear and should be followed.



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Shades of Richard Nixon! – Governor Claims ‘Executive Privilege,’ and Some Say She’s Conducting Business in Secret

Lawsuits Challenge Governor’s Right to Withhold Documents – Privilege Not Granted by Law Is Cited by Gregoire Nearly 500 Times Since 2007



Former President Richard Nixon and Washington Gov. Christine Gregoire.

By Erik Smith
Staff writer/ Washington State Wire

OLYMPIA, June 22.—Two judges in two different courtrooms Friday decided Gov. Christine Gregoire has the right to keep some things to herself, and it appears the state’s high court will be asked to decide whether she can make the same claim Nixon once did – that there’s such a thing as “executive privilege.”

Gregoire’s office has used the claim nearly 500 times since 2007 to withhold documents sought under the state’s public records law. The law doesn’t give her the right to do it. But Gregoire’s office maintains it can do it anyway. Like Nixon at the height of Watergate and governors since then in other states, Gregoire maintains that a state’s chief executive has constitutional rights no law can touch.

The issue poses one of the biggest challenges for the state public records law since it was passed by a voter initiative in 1972. The law gives the public the right to inspect the records of public agencies and political bodies. It is used by the press, commercial and political interests and the public at large to shed light on the actions of government. The fact that a public records request can always be filed is one of the things that helps keep government in the Evergreen State on the straight and narrow.

Gregoire might not be in the kind of trouble that prompted Nixon to take his case to the U.S. Supreme Court. But she is making the same argument, and her brief relies on the decision made in that case. She says there’s an unwritten rule inherent in the constitution that trumps ordinary lawmaking and allows a state’s chief executive to shield some things from public view. The decision in the Nixon case has been cited numerous times by other governors seeking to keep things private, but it is the first time the issue has approached the high-court level in Washington.

“There is a public interest in allowing the governor to determine when disclosure of a particular document would inhibit candid and robust exchanges with her staff and hinder her ability to

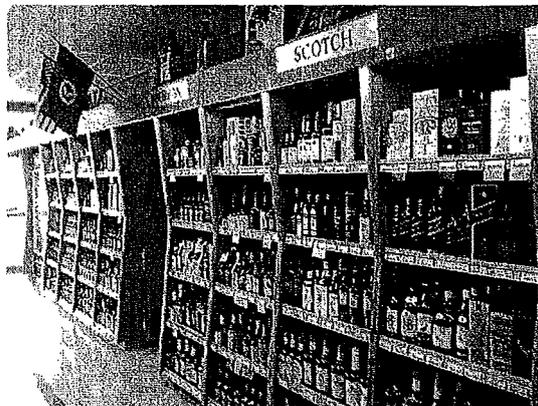
Spotlight



State Unemployment Back Up to 9.3%, and Big Trouble with Benefits Is Sneaking Up on Lawmakers

By: Washington State Wire Editorial Board | Aug. 23, 2011

Nearly 100,000 jobless in Washington stand to lose extended benefits beginning at the end of December. Congress will debate the issue, but if they gridlock again, the state legislature will be left with the controversy.



Liquor Warehouse Proposal Will Make Headlines Just Before Vote on Initiative – Will it Confuse Things?

By: Erik Smith | Washington State Wire | Aug. 19, 2011

A plan to privatize Washington’s liquor distribution system will be making headlines just before the public takes a vote on an even broader plan to close the state liquor stores. Some folks smell a rat.



On Vacation

Washington State Wire’s lead writer Erik Smith is on vacation until the 29th. Don’t worry – he’ll be back.

do her constitutional job as governor," said spokesman Scott Whiteaker.

Matters of Public Interest

The issues involved are big ones. That much is demonstrated by the records sought by the Freedom Foundation, a libertarian think tank that filed one of the suits. They cover a half-dozen topics that have made headlines in recent months, including medical marijuana, the replacement of the Alaskan Way Viaduct in Seattle and salmon-recovery efforts involving the dam system on the Columbia River.

After Gregoire's office balked, the Freedom Foundation filed a suit in April based seeking those specific records. Meanwhile, citizen activist Arthur West of Olympia filed a separate lawsuit challenging the governor's ability to claim executive privilege. Simultaneously in two different courtrooms in Thurston County Superior Court Friday, judges Carol Murphy and Gary Tabor decided the same issue the same way. They said Gregoire can do it. West has filed an appeal directly to the Supreme Court.

The Freedom Foundation is taking a more conservative approach – it will ask the Thurston County court to determine whether executive privilege applies to the documents it is seeking. If the answer is yes, it will appeal, thus establishing a decision that carries weight statewide. And if the Freedom Foundation doesn't win in appeals court, ultimately it will ask the state's high court to rule.

West also has appealed to the Supreme Court on a somewhat different public-records case he filed last year. In that case, a Thurston County judge ordered the governor's office to produce records that had been denied on executive-privilege grounds, but set a low \$25 fine for a violation.

One way or another, the courts will settle the question, says Mike Reitz, attorney for the Freedom Foundation. And it's a big one.

No court ruling has set the standard for Washington. Various county courts have issued rulings all over the map, he said, but no appeals courts have established a precedent that holds statewide. "That's why you can have the governor asserting executive privilege – there is no appellate guidance, and until an appellate court says otherwise, I suppose they will continue to do so," he said.

Following Nixon's Rules

If the argument has a familiar ring, it's because "executive privilege" was a hot topic back in the Watergate years. The Nixon Administration argued that it shouldn't have to produce witnesses and documents demanded by the courts and Congress. The U.S. Supreme Court agreed, to an extent. Its 1974 decision didn't keep Nixon out of hot water, but it said that where ordinary policymaking is involved, the executive branch of government ought to be able to operate without fear of harassment from the other two. So documents addressed to and from the president were exempt.

The governor's office says the same principle applies to state government – an argument that has been upheld in Alaska, Delaware, Maryland, New Jersey, Ohio and Vermont. "Each branch must have some internal space to ponder its business free from the intermeddling of other branches," says the governor's brief. "Legislators must be free to talk candidly and confidentially among themselves and with staff in caucuses and offices. Judges must be free to conference with each other and with their clerks and staff. The same principle holds true for the governor as she communicates with her advisors and staff."

The central concept hinges on the separation of powers, a concept embodied in the federal constitution as well as those adopted by the states. Laws are a function of the legislative branch, the governor's office argues, and it doesn't matter whether they are passed by the Legislature or by the people in the form of an initiative. It says the governor's constitutional rights trump any law.

Gregoire's office argues that it ought to follow the rules the U.S. Supreme Court laid down for Nixon. It ought to be able to explain why a specific document is exempt from disclosure. The decision can be challenged in court. But the only reasons to

PI's Joel Connelly Acknowledges Tax Tolerance Limit in Seattle?

By: Jim Boldt | Washington State Wire | August 19, 2011

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By: Jim Boldt | Washington State Wire | August 18, 2011

So if you don't think your vote counts, review these numbers.

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WSDOT Creates Answer To Sticky Tolling Question

By: Jim Boldt | Washington State Wire | August 16th, 2011

The study lacks fresh empirical data, it is an answer looking for a question. And both the U of W and WSDOT lack transparency in their motives.

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Eating OK, Wading Not So Much. A Church Picnic

By: Jim Boldt | Washington State Wire | August 15, 2011

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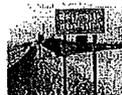
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overturn its decision involve criminal misconduct, certain matters of civil litigation and compelling matters of public interest.

Can't Just Make It Up

By forcing the issue in court, West and the Freedom Foundation are risking a ruling that the governor has the ability to invent an exemption to the public records law. But it's not as if they have much to lose -- the governor's office is asserting the power already.

Previous governors have cited the same principle in denying records requests, but the Gregoire Administration has resorted to it so often that Reitz says it's about time the courts weigh in. There are 300 limited exemptions to the state's public records law -- police officers' addresses can't be disclosed, for example -- but it grants no special rights to the governor. And such an enormous loophole isn't something the governor's office ought to be able to make up by itself, he says.

"The public records act, and more significantly the state constitution, say power belongs to the governor and other branches of government because it has been delegated to them by the people," Reitz said. "The people are the ultimate sovereigns and demand accountability, and one of the ways you get accountability from public officials is access to information about their decision-making process.

"The public records act specifically is very clear that the default is toward disclosure. If a member of the public wants a document from the public agency, they should be able to get it unless there is a very good reason to keep it confidential, and those reasons, as the public records act request says, have to be stated in the law, the records act or in some other statute. But they can't just be a reason made up by a public agency. It has to have a basis in law.

"Our concern in this particular situation with the claim of executive privilege is that in 120 years of statehood we have no cases that have said the governor has an executive privilege that would allow that office to withhold information or records from the public. Our contention is that the governor, if she is going to withhold records, should do so on the basis of some identified recognizable exemption in law, and not a constitutional theory that hasn't been recognized in this state."

Making Decisions in Secret

West, in a sense, piggy-backed on the Freedom Foundation's efforts. When Reitz wrote a paper in 2009 about the Gregoire Administration's frequent use of executive privilege, West filed a request for all the records that had been withheld. That was the basis for his own lawsuit. He scheduled his hearing Friday to coincide with the Freedom Foundation case, figuring that one or the other might have a better shot if there was no precedent to guide the decision. But no luck. The two judges ruled the same way.

The governor's office is using executive privilege to avoid public scrutiny, West says.

"If you look at the records that they have claimed executive privilege for, they range across the spectrum from 60-day supply of marijuana to transportation -- the 520 bridge, that [State Data Center] building that was built, everything government does -- and they are using it routinely to obstruct oversight of virtually all the briefings that her advisers give her, a large segment of it on a wide range of important issues.

"If the privilege is allowed in the manner that Judge Tabor has described, it is a virtually unlimited privilege that government can assert, and there is effectively no way for a citizen to challenge it or get an in-camera review. You have to show a need for the records and basically it stands the public records act on its head. Rather than the agency having to show a reason for the exemption, the requester would have to show a reason for the record.

"The governor's office does so many discretionary things that it just shouldn't be allowed to happen in secret. If they are allowed to assert this privilege routinely they will be able to conduct government without any effective oversight, and I don't think that's



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By: TriCity Herald



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By: Seattle Times



No FEMA Funds for Thurston County Charities
Fewer Dollars Allocated by Congress, Means Higher Threshold to Qualify
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what the public records act is about.”

By: Kaiser Health News

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Smart cuts eliminate spending on medical tests, treatments and procedures that don't work — or that cost significantly more than other treatments while delivering no better health outcomes. There are plenty of examples; here are three.

By: New York Times Op-Ed

Idaho Lawmakers, Otter: Take Federal Money for Exchange
Gov. C.L. "Butch" Otter and many state lawmakers agree: Idaho would be shortsighted to pass up millions of federal dollars to help set up health insurance exchanges.

By: Houston Chronicle



More Heart-Attack Patients Are Getting Treated Quickly

In 2005, only 44% of patients were getting treated within the recommended 90 minutes. But by 2010, that had increased to 91%.

By: Wall Street Journal

State Rule Requires Chemical-Reporting for Toys

State officials have come up with a list of 66 chemicals that would trigger reporting to the state. The new law went into effect this week.

Enough with SEIU's Self-Serving Political Power-Grabbing Initiative

The bait-and-switch arguments of Service Employees International Union and its beneficiaries in support of Initiative 1163 — in and out of state government — are getting tiresome.

By: Olympian Op-Ed

Is Coronary Calcium Better Than CRP for Predicting Heart Problems?

"Although definitive proof of treatment effects is scarce, CAC identifies high cardiovascular risk, and statin therapy is most effective in high-risk patients."



When Trust is Betrayed for Dependent Adults

In 2010, the State Department of Social and Health Services received 543 complaints related to adult family homes.

By: Columbian

55% Still Favor Repeal of Health Care Law

But nearly half of likely voters, 49%, don't think the new law means they'll have to change insurance coverage.

By: Rasmussen



Social Security Disability Payments in Peril by 2017

Applications are up nearly 50 percent over a decade ago and some people are double dipping the system — collecting unemployment insurance benefits, which extend for 99 weeks, as well as Social Security benefits and/or state and federal pensions.

By: Kaiser Health News/Fiscal Times

HHS Grants 106 New Healthcare Walvers

The department announced it would cut off applications after September, but let companies that received one-year exemptions extend their walvers through 2014. The 106 walvers approved in July will last three years.

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Wednesday, Jun. 29, 2011

1 Comment

Judge's ruling weakens state Public Records Act

Good luck to Thurston County Superior Court Judge Carol Murphy.

She'll need it to follow through on her interpretation of the state Constitution.

Earlier this month, Murphy ruled that Washington's governor can invoke executive privilege to justify withholding government documents from a public records request.

Determining that an executive privilege exists under the state Constitution is just the first step in a controversial case that looks alarmingly like an attempt to legislate from the bench.

The next step -- when Murphy presides over a hearing to determine whether Gov. Chris Gregoire has appropriately applied the privilege -- can only enhance the appearance of judicial activism.

Admittedly, that charge is far too freely leveled at court officials. Often, the term "activist judge" is code for "judge whose rulings run counter to my point of view."

But it's hard not to see how Murphy can continue on her current path without, in essence, writing law.

That's because neither the state Constitution nor state law mentions executive privilege.

Now that Murphy has ruled that it exists, she'll have to define the privilege before deciding whether Gregoire has overstepped her authority.

Alternatively, the appellate process might sidetrack the case. It's a good bet the issue of executive privilege will end up at the state Supreme Court.

Murphy's ruling stems from a lawsuit filed against Gregoire by The Freedom Foundation, a Libertarian think tank based in Olympia.

The foundation accused the governor of using executive privilege to shield documents, emails, memos to outside agencies and other public records it had requested under the state Public Records Act.

The documents at stake concern a variety of subjects, including the Alaskan Way Viaduct replacement options and medical marijuana legislation, The Associated Press reported.

The public's interest in the government's handling of those issues is self-evident.

The foundation's lawyers argued that executive privilege is not one of the 300-plus exemptions to Washington's Public Records Act.

Gregoire's office convinced the judge that executive privilege is implicit in the separation of powers doctrine, which limits legislative or judicial control over the executive branch of state government.

It's an important concept, but stretched too far in this case. Separation of powers doctrine doesn't exempt the governor from state law.

That said, it may be in the public's best interest for the governor to deny some requests for records. Experts may hedge their advice if they know it's subject to the Open Records Act. Companies considering a move to Washington might shy away if details can be disclosed to competitors.

But those are the sort of narrow exemptions that ought to be defined by the Legislature, not created by judicial fiat.

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Published July 22, 2011

UPDATE: Think tank plans appeal on Gregoire's privilege claim

Brad Shannon: The Politics Blog

A judge has ruled Gov. Chris Gregoire can use executive privilege to deny requests for certain records, and the right-of-center Freedom Foundation said today it will appeal that decision.

Foundation lawyer Michael Reitz said in a news release today:

... Thurston County Superior Court Judge Carol Murphy signed a final order holding that Gov. Christine Gregoire can assert "executive privilege" to shield internal deliberations and withhold records from the public. The Freedom Foundation will appeal this ruling.

After hearings on June 17 and July 15, Judge Murphy ruled that the governor enjoys an executive privilege, which is inherent in the Washington Constitution and based on the separation of powers doctrine. The judge held executive privilege can be cited as a reason to withhold records from the public under the Public Records Act. Judge Murphy ruled that the privilege is not absolute—some limitations apply—but held that the records the Freedom Foundation sought were privileged.

The Associated Press **reported on the judge's first ruling in June, and I wrote about the lawsuit and its rationale in April.**

UPDATE: The judge's final order is **here.**

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Governor's privilege in hands of state court

It's hard to believe, but a recent court ruling essentially allowed our governor to wave a magic wand over public documents and make them private.

KAREN PETERSON; EXECUTIVE EDITOR

Published: 08/21/11 12:05 am | Updated: 08/21/11 3:28 am

2 Comments

It's hard to believe, but a recent court ruling essentially allowed our governor to wave a magic wand over public documents and make them private.

Last week, the libertarian Freedom Foundation appealed that Thurston County court ruling, which allowed Gov. Chris Gregoire to withhold public records simply by asserting an executive privilege to do so. The Freedom Foundation filed the lawsuit against Gregoire in April after she refused to turn over documents related to the Alaskan Way Viaduct and other matters.

Executive privilege is not one of the 300 specific exemptions to the state Public Records Act. The act says agencies must release documents unless they fall under one of these exemptions.

The governor's office said executive privilege is inherent in the state constitution and necessary so she can communicate candidly with her advisers as she makes decisions.

Thurston County Superior Court Judge Carol Murphy agreed, and applied a three-part test to see if the privilege applied.

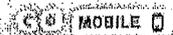
First, the judge said, the governor must declare that she or her designee "has reviewed each requested document and determined that it falls within the privilege." Documents must be communications to or from the governor and part of a decision-making process.

Gregoire did that.

Second, the judge said, the requestor must demonstrate a particular interest that outweighs the governor's. That runs counter to state law, which says requestors don't have to tell anyone why they want a document. The judge said the Freedom Foundation didn't demonstrate a greater interest, so she never went to the third step of reviewing the documents herself.

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In this case, the governor said the documents are private, so they are.

The appeal goes to the state Supreme Court, which has never ruled directly on executive privilege.

Essentially, the justices would have to weigh what the governor cites as her "inherent" privilege against the rights of the people spelled out in state law: "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."

We will follow the appeal through the courts.

PRINT MEDIA REMAIN STRONG

To hear some folks tell it, print media are dead. Replaced by the Internet. Soon to be available only on tablet computers.

But new research suggest that's not the case at all and is likely not to be for years to come. The research comes from Ipsos Mendelsohn, one of the largest advertising and market research firms in the world, and appeared in a recent issue of Advertising Age.

In online interviews with 1,000 affluent adults (those with household incomes exceeding \$100,000 a year, chosen because their news consumption choices aren't generally constrained by income) 93 percent of them still consume magazines in their printed form, and 86 percent still consume newspapers in their printed form, far exceeding the ways new media enable them to get that information – through computers, tablets, e-readers and smartphones.

Less than a third of those surveyed (27 percent) seek information that originated in magazines by looking for it on a computer, and fewer than 10 percent of them seek that information by other means (including smartphones, e-readers and tablet computers).

Those who look for information from newspapers are slightly more willing to experiment with how they get that news. After the 86 percent who choose the printed form, 39 percent consume newspaper information on a computer, and 14 percent consume newspaper news on smartphones, followed by 7 percent who find such news on tablet computers, and 3 percent who use e-readers.

Even when one looks at younger affluent consumers – those between the ages of 18 and 34 – the general trend still holds true. The rate of print to Internet-on-computer use is 88 percent to 35 percent for magazines and 70 percent to 54 percent for newspapers.

While it's clear that younger consumers are more willing to consume information on alternative platforms, it's also true that both they and all adults still primarily consume information the way it's been done since Gutenberg.

Even with a mature Internet, and even when they have nearly limitless choices, people still choose ink-on-paper over pixels-on-a-screen.

HeraldNet

Everett, Washington

Published: Tuesday, August 23, 2011

In our view / Open government

A case of executive overreach

Our state's public records act leans heavily in favor of disclosure, and for good reason. It was enacted by voters in 1972 as an expression of their insistence on open government.

Under that law, records produced or held by government -- official documents, memos, emails, databases, audio recordings, etc. -- are open to the public unless another law specifically exempts it.

Among those exemptions are certain government deliberations, such as policy recommendations made by subordinates to agency heads before a policy decision is made. The idea behind that exemption, which the state Supreme Court has narrowly accepted, is to avoid harming an agency's legitimate deliberative or consultative process. But the court has set tight boundaries around it, in keeping with the law's spirit of openness.

Gov. Chris Gregoire's administration thinks state law allows a broader exemption for its internal communications. It says the state Constitution inherently contains an "executive privilege" that allows the governor to conceal records at her own discretion.

The Olympia-based Freedom Foundation asked to see records relating to Alaskan Way Viaduct replacement proposals, medical marijuana legislation, and the Columbia River hydro-electric system. The governor's office denied its requests, asserting executive privilege. The Freedom Foundation sued.

Siding with the governor, Thurston County Superior Court Judge Carol Murphy turned public records law on its head in April, ruling not only that executive privilege exists, but that someone requesting a record the governor claims is privileged carries the burden of proving otherwise.

The Freedom Foundation has appealed to the state Supreme Court. This is an important principle that needs a high-court ruling.

Executive privilege isn't explicitly mentioned in the Constitution. The open records act, however, is quite clear about *its* intent:

"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 act, and court rulings that have interpreted it, also make clear its strong pro-disclosure approach. For the governor to assert power to decide what will or won't be disclosed flies in the face of that long-established principle. At minimum, the burden of showing a government record should be hidden from public view should rest with the government, with a court making the ultimate decision.

The state's highest court is being asked to defend a principle of openness that the people have long claimed. It's being asked to do so by rejecting a specious assertion of executive power which undermines that very principle.

It should take this opportunity to underscore Washington's commitment to open government.

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OFFICE RECEPTIONIST, CLERK

To: Jessica Bowman
Cc: Mike Reitz
Subject: RE: Freedom Foundation v. Christine O. Gregoire, No. 86384-9

Rec. 9-1-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jessica Bowman [<mailto:JBowman@myfreedomfoundation.org>]
Sent: Thursday, September 01, 2011 12:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mike Reitz
Subject: Freedom Foundation v. Christine O. Gregoire, No. 86384-9

Dear Clerk:

Attached for electronic filing are the following documents in the matter of *Freedom Foundation v. Christine O. Gregoire*, No. 86384-9:

1. Statement of Grounds for Direct Review; and
2. Certificate of Service.

Per your request, the appendices for this filing will be sent by first class mail since they exceed twenty-five pages.

Sincerely,

Jessica Bowman

Legal Assistant, Constitutional Law Center
P: 360.956.3482 F: 360.352.1874
PO Box 552 | Olympia | WA | 98507
jbowman@myfreedomfoundation.org
myfreedomfoundation.org



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