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SUPREME COURT OF THE STATE OF WASHINGTON

THE ASSOCIATED PRESS, NORTHWEST NEWS NETWORK,
KING-TV (“KING 5”), KIRO 7, ALLIED DAILY NEWSPAPERS OF
WASHINGTON, THE SPOKESMAN-REVIEW, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION, SOUND PUBLISHING,
INC., TACOMA NEWS, INC. (“THE NEWS TRIBUNE”),
and THE SEATTLE TIMES,

Plaintiffs-Respondents,

v.

THE WASHINGTON STATE LEGISLATURE, THE WASHINGTON
STATE SENATE, THE WASHINGTON STATE HOUSE OF
REPRESENTATIVES, Washington State Agencies, and SENATE
MAJORITY LEADER MARK SCHOESLER, HOUSE SPEAKER
FRANK CHOPP, SENATE MINORITY LEADER SHARON NELSON,
and HOUSE MINORITY LEADER DAN KRISTIANSSEN,
each in their official capacity,

Defendants-Appellants.

**BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

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I. INTRODUCTION

The Public Records Act (PRA) “reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government.” *Worthington v. Westnet*, 182 Wn.2d 500, 507, 341 P.3d 995 (2015). Its purpose is “nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions.” *Progressive Animal Welfare Soc’y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994). The question before the Court is whether the Legislature, or any of its legislative offices, is subject to the requirements of the PRA.

Because the PRA is a statute, which the Legislature can amend, the Legislature can define which units of government, which public officials, and which records and information are subject to the Act. The Legislature has defined how the Act applies to the House of Representatives and the Senate by defining which records must be made available for release by the offices of the Chief Clerk and the Secretary of the Senate for their respective houses. But the Legislature has not enacted any special provisions governing the responsibilities of individual legislative offices and their officers under the Act. Accordingly, under the plain language of the PRA, individual legislators are subject to its provisions in the same way as other state officers in Washington. Only this view comports with the text and purpose of the Act, as well as its legislative history.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

This amicus curiae brief is filed by the Attorney General of Washington. As the legal officer for the State, the Attorney General advises state officers and agencies in interpreting and applying the PRA and, when necessary, represents them in legal actions under the Act. Const. art. III, § 21; RCW 43.10.030, .040.¹ The Attorney General also fulfills specific statutory roles in administering the Act, including providing training and technical assistance (RCW 42.56.155), issuing written opinions concerning state agency denials (RCW 42.56.530), and adopting advisory model rules for state and local agencies (RCW 42.56.570). Accordingly, the Attorney General has a significant interest in the scope and construction of the Act. This brief presents the Attorney General's view of the PRA's application to the Legislature and its various offices. The Attorney General takes no position on any specific record request made to the House of Representatives, the Senate, individual legislators, or legislative staff.

III. STATEMENT OF THE CASE

In the trial court, both the Associated Press et al. and the Washington State Legislature et al. filed cross motions for summary judgment. CP 95-17, 293-323. There were no disputed material facts. CP 96-97, 109-10, 303-04. The Attorney General therefore relies on the facts agreed to in the parties' complaint and answer. CP 4-63, 64-91; *see, e.g., Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237 (2014) ("By

¹ The Attorney General's Office is not representing any of the legislative defendants in this matter. *See* RCW 43.10.045.

filing cross motions for summary judgment, the parties concede there were no material issues of fact.”).

The Associated Press sought a ruling that both houses of the Legislature and individual legislators are subject to the full requirements of the PRA and that they did not comply with those requirements in responding to the Associated Press’s record requests. CP 109-17. The Legislative Appellants sought a ruling that the Legislative Branch, including individual legislators, are subject to the PRA only as provided in RCW 42.56.010(3) and RCW 40.14.100, and that they fully complied with those provisions. CP 304-22. At the trial court’s request, the Attorney General filed an amicus brief making essentially the same argument that is presented in this amicus brief: first, that the PRA specifically defines which records must be made available for release by the House of Representatives and the Senate through the offices of the Chief Clerk and the Secretary of the Senate, respectively; and second, that individual legislators and their offices are subject to the provisions of the PRA in the same way as other state officers in Washington. CP 694-706.

IV. ANALYSIS

A. **Principles of Statutory Construction to Be Applied to the Public Records Act**

The PRA is to be “liberally construed and its exemptions narrowly construed” to ensure that the public’s interest in “full access” to government information is protected. *Worthington*, 182 Wn.2d at 507 (quoting RCW 42.56.030; *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389

(1997)). Accordingly, the Court “avoid[s] interpreting the PRA in a “way that would tend to frustrate that purpose.” *Id.* The Court’s “fundamental objective” when interpreting the PRA is to “ascertain and carry out the [] intent” of the people in enacting the original measure and the Legislature in subsequently amending and recodifying it. *See Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 720, 328 P.3d 905 (2014) (interpreting the PRA).

This inquiry begins with the text of the PRA. *Nissen v. Pierce County*, 183 Wn.2d 863, 873, 357 P.3d 45 (2015). The Court also looks at the entire context of the Act, including related statutes, amendments, and the statutory scheme as a whole. *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 789-90, 432 P.3d 805 (2019), *petition for cert. filed*, No. 18-1293 (Apr. 12, 2019).

The meaning of words in a statute is not gleaned from the words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.

Id. (internal quotation marks and brackets omitted) (quoting *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007)). Accordingly, the Court will not interpret statutory terms in isolation from the context in which they are used. *Nissen*, 183 Wn.2d at 875; *see also Wright v. Lyft, Inc.*, 189 Wn.2d 718, 723, 406 P.3d 1149 (2017). Rather, the Court examines the PRA in its entirety in order to enforce the law’s overall purpose. *Nissen*,

183 Wn.2d at 875; *see also Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

B. The Public Records Act Applies to the Legislative Branch in Different Ways

The Act mandates that “[e]ach agency . . . make available for public inspection and copying all public records” unless the record is exempt from disclosure by law. RCW 42.56.070(1). “Agency” is defined to mean “*all state agencies and all local agencies. ‘State agency’ includes every state office, department, division, bureau, board, commission, or other state agency.*” RCW 42.56.010(1) (emphases added). “Public record” is defined to mean:

any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

RCW 42.56.010(3). These two “very broad” definitions mean that for “agencies,” as defined in the statute, the PRA “subjects virtually any record related to the conduct of government to public disclosure” and “give[s] the public access to information about every aspect of state and local government.” *Nissen*, 183 Wn.2d at 874 (internal quotation marks omitted).

1. The “Legislature” as a Unified Branch of Government Is Not Subject to the Public Records Act

The Legislative Appellants assert the term “state agency” in the PRA “does not include the Legislature.” Leg. Op. Br. at 14. The Attorney General agrees, but only to the extent that “Legislature” means the unified constitutional branch of government.

The Constitution vests the State’s legislative authority in the Legislature, which consists jointly of the House of Representatives and the Senate, not in either separately. Const. art. II, § 1; *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 213, 191 P.2d 241 (1948). Neither house can act alone to fulfill the State’s legislative duties. It takes both houses to enact laws and exercise certain constitutional functions. *See, e.g.*, Const. art. II, § 12 (governing legislative sessions); Const. art. II, § 18 (style of laws to be by “legislature”); Const. art. III, § 12 (two-thirds of Legislature can override gubernatorial veto); *State ex rel. O’Connell v. Yelle*, 51 Wn.2d 620, 320 P.2d 1086 (1958) (only unified Legislature has power to set compensation of officials; House could not unilaterally increase compensation for a member); *State ex rel. Robinson*, 30 Wn.2d at 213-14 (single house could not establish standing legislative committee). Accordingly, neither the House of Representatives nor the Senate alone constitutes the “Legislature” as that term is used in the Constitution or in state law. *See, e.g.*, Const. art. II, §§ 1, 2; RCW 44.04.010, .021.

Nor does the State’s legislative power reside in just the two houses. As used in the Constitution, the “Legislature” also includes the Governor when he approves or disapproves legislation. *Wash. Fed’n of State Emps. v.*

State, 101 Wn.2d 536, 544, 682 P.2d 869 (1984). It also includes the people when they exercise their initiative and referendum powers. Const. art. II, § 1; *Yelle v. Kramer*, 83 Wn.2d 464, 474-75, 520 P.2d 927 (1974). “[T]he word ‘legislature,’ as used in the constitution [therefore] must be deemed to include all branches or component parts of the legislative power,” and does not denote a single house or member. *See Yelle*, 83 Wn.2d at 473 (citing *State ex rel. Mullen v. Howell*, 107 Wash. 67, 181 P. 920 (1919)).

Under this construction, the PRA would not apply to the Legislature as a constitutional entity. As noted above, the Act applies only to “state agencies,” which are defined as state offices, departments, divisions, bureaus, boards or commissions. RCW 42.56.010(1). None of these terms describes the Legislature as a unified branch of government. Moreover, nothing in the PRA indicates that the people or the Legislature intended that the Act would encompass an entire branch of government without differentiation, as opposed to an “agency.” *See generally* RCW 42.56.

This conclusion is consistent with this Court’s determination that the definition of “agency” does not encompass the judicial branch of our state government. *See City of Federal Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) (the judiciary is not a “state or local agency” under the Act); *Nast v. Michaels*, 107 Wn.2d 300, 304, 730 P.2d 54 (1986) (finding that the common law, not the PRA, provided access to court case files). Like the judiciary, other constitutional provisions and considerations provide public access to the Legislature’s records when that body acts as a unified branch of government. *See, e.g.*, Const. art. II, § 11 (requiring legislative

journals and open doors); Const. art. II, § 22 (requiring recording of votes for bill to become law); Const. art. III, § 17 (requiring Secretary of State to keep a record “of the official acts of the legislature”); RCW 43.07.040 (Secretary of State assigned custody of all acts and resolutions passed by the Legislature and the journals of the Legislature). Importantly, the law deems those “records of an official act of the legislature kept by the secretary of state, bills and their copies, published materials, digests, or multi-copied matter which are routinely retained and otherwise available at the state library or in a public repository” to be records that belong to the public, not “legislative records.” *See* RCW 40.14.100 (incorporated by reference into RCW 42.56.010(3)).

The Legislature, as a unified branch of government, is not an “agency” under RCW 42.56.010(1). Accordingly, the PRA does not encompass the Legislature when viewed through this constitutional lens. As explained below, however, this conclusion does not mean that the entire legislative branch evades the requirements of the PRA.

2. The Public Records Act Applies to the House of Representatives and the Senate Through the Chief Clerk and the Secretary of the Senate

Although the Legislature, defined as the unified branch of government, is not an “agency” under the plain language of RCW 42.56.010(1), the Legislature itself has made the House and Senate subject to the PRA through the administrative offices of the Chief Clerk of the House of Representatives and the Secretary of the Senate, respectively. *See, e.g.*, RCW 42.56.010(3), .520, .560.

The Associated Press seems to argue that the offices of the Chief Clerk and the Secretary of the Senate are separate from the House and the Senate, *see* AP Br. at 32-33, but there is no basis for this contention. The offices of the Chief Clerk and the Secretary of the Senate are the internal administrative offices of the House and the Senate, respectively. *See* <http://leg.wa.gov/House/Pages/HouseAdministration.aspx> (last visited April 16, 2019); <http://leg.wa.gov/Senate/Administration/Pages/default.aspx> (last visited April 16, 2019). In fact, state law specifically tasks the Chief Clerk and the Secretary of the Senate with the document retention duties of their respective houses and committees. *See* RCW 40.14.010, .100-.180. And RCW 40.14.130 imposes a general requirement on the chairs and members of committees, subcommittees, and interim committees of the House and Senate, and the staff they employ, to deliver to the offices of the Chief Clerk or the Secretary of the Senate all legislative records that are no longer needed for the regular performance of their official duties (or within 10 days after sine die). It therefore makes sense to reference those offices in the PRA when referring to the public record requirements of the House and the Senate. *E.g.*, RCW 42.56.010(3), .520, .560. The Chief Clerk and the Secretary of the Senate are responsible for the House and Senate's records and other administrative duties. They are not "state offices" unto themselves.

The plain text of the PRA supports this conclusion. The Act sets forth a specific definition of "public record" for the offices of the Chief Clerk and the Secretary of the Senate in RCW 42.56.010(3), as follows:

- “Legislative records,” defined in RCW 40.14.100 to mean “correspondence, amendments, reports, and minutes of meetings made by or submitted to legislative committees or subcommittees and transcripts or other records of hearings or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions,” *but not* “the records of an official act of the legislature kept by the secretary of state, bills and their copies, published materials, digests, or multi-copied matter which are routinely retained and otherwise available at the state library or in a public repository, or reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature”;
- All budget and financial records;
- Personnel leave, travel, and payroll records;
- Records of legislative sessions;
- Reports submitted to the legislature; and
- Any other record designated by any official action of the Senate or the House of Representatives.

See RCW 42.56.010(3). Each listed category naturally relates to records of the individual legislative houses and their employees, but do not include official acts of the Legislature kept by the Secretary of State, or records held by individual legislators (e.g., reports or correspondence received and controlled by individual members) apart from committee or subcommittee records they may hold.

RCW 42.56.010(3), together with its cross reference to RCW 40.14.100, thus carefully defines the “public records” of the House and the Senate that are subject to release under the PRA. It recognizes the offices of the Chief Clerk and the Secretary of the Senate as the entities charged with collecting, retaining, and making publically available those

records for the House and the Senate, respectively.² Consistent with that recognition, the PRA imposes duties on the Chief Clerk and Secretary of the Senate that are consistent with those imposed on “state agencies.” *See* RCW 42.56.070, .090, .100, .120, .520, .560.

Finally, while unnecessary to the plain reading of the text, the legislative history supports the conclusion that the Act’s references to the offices of the Chief Clerk and the Secretary of the Senate encompass the public record requirements imposed on the House and the Senate. In 1995, the Legislature made a number of changes to the prior codification of the Act, former RCW 42.17, which addressed campaign finance, ethics, and public records. The changes included new definitions for “state office” and “state legislative office,” a revision to the definition of “public records” to include the language addressed above, and the addition of other references to the Chief Clerk and the Secretary of the Senate that describe the public record duties of those offices. Laws of 1995, ch. 397, §§ 1, 11-16.³ The Final Bill Report of the enacted law described these revisions as follows: “Public disclosure statutes are amended to specifically address access to and production of public records *in the possession of the Senate and the House*

² Consistent with this conclusion, the Legislature’s website provides “information about submitting a public records request to either the House or the Senate” and then provides links to the House and the Senate’s respective public records officers. *See* <http://leg.wa.gov/> (middle of the page, yellow box) (last visited Apr. 17, 2019).

³ The Legislative Appellants contend that the added definitions of “state office” and “legislative offices” applied only to the campaign finance and ethics portions of the prior codification of the Act. Leg. Op. Br. at 21. As will be discussed further in the next section, this contention is contradicted by the omnibus nature of the original act and amendments.

of Representatives.” Final Bill Report on Engrossed Substitute S.B. 5684, at 2, 54th Leg., Reg. Sess. (Wash. 1995) (emphasis added). Because there is no reference to the House or the Senate in the legislation itself, the report must refer to those amendments concerning the offices of the Chief Clerk and the Secretary of the Senate as the offices undertaking the public records duties for their respective houses. These amendments remain untouched in the PRA as it currently exists.

3. Individual Legislative Offices Are “State Agencies” Under the Public Records Act

While the PRA specifically addresses the House and the Senate, the text does not make any separate provision for the offices of individual legislators.⁴ The Legislative Appellants contend that individual legislators and their offices therefore are not separately subject to the PRA. Leg. Op. Br. at 16-18. Neither the plain meaning of “agency,” nor the PRA’s purpose supports that contention. Rather, by its plain language, the PRA covers individual legislative officers and their offices—just as it does for other state officers and their offices, constitutional or otherwise.

a. The Plain Text of the PRA Applies to Legislators and Their Individual Offices

The PRA is explicit: the Act covers *every* state office, department, division, bureau, board, commission, or other state agency. RCW 42.56.010(1). It also covers individual state employees because

⁴ The PRA also does not address legislative agencies, such as the Office of the State Actuary, RCW 44.44, or the Legislative Support Services, RCW 44.80. Application of the PRA to those agencies is outside the scope of the issues presented here, but there is no language in the PRA that exempts those agencies from the Act.

agencies “act exclusively through their employees and other agents, and when an employee acts within the scope of his or her employment, the employee’s actions are tantamount to ‘the actions of the [agency] itself.’” *Nissen*, 183 Wn.2d at 876 (quoting *Houser v. City of Redmond*, 91 Wn.2d 36, 40, 586 P.2d 482 (1978)). Individual legislators and their offices plainly fall within this broad coverage.

The Legislative Appellants suggest that because independently elected legislators are not explicitly included in the definition of “agency,” they are not separately subject to the PRA’s requirements. Leg. Op. Br. at 16. But the definition of “agency” in RCW 42.56.010(1) specifically includes every “state office” and every local “office,” without distinguishing those offices held by elected officers from other offices. Consequently, to distinguish between elected public officers and other public employees in construing that term would exempt every elected public officer in the State. There is nothing in the PRA that suggests such a gaping hole in the people’s ability to access public records at every government level. *See Neigh. All. of Spokane County v. Spokane County*, 172 Wn.2d 702, 714, 261 P.3d 119 (2011).

It is true that this Court noted in *Nissen* that it is an open question whether the PRA applies independently to elected officials. *Nissen*, 183 Wn.2d at 875 n.6. But courts, including this one, have long treated elected officials as subject to the PRA. *See, e.g., Freedom Found. v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013) (PRA action against governor); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (PRA action against

county assessor); *West v. Vermillion*, 196 Wn. App. 627, 640-41, 384 P.3d 634 (2016), *review denied*, 187 Wn.2d 1024 (2017), *cert. denied*, 138 S. Ct. 202 (2017) (PRA action against elected city council member). There is no principled reason why the PRA would apply to these elected officials and their offices, but not legislative officers and their offices.

The Legislative Appellants also contend that the inclusion of the Chief Clerk and Secretary of the Senate within the PRA covers the entire Legislature, including its members. Leg. Op. Br. at 28. The language of the statute does not support that contention. As highlighted above, records under the personal control of individual legislators are *not* the responsibility of the Chief Clerk or the Secretary of the Senate. RCW 40.14.100. Such records must be considered separately and would fall within the general definition of “public record” so long as they relate “to the conduct of government or the performance of any governmental or proprietary function.” RCW 42.56.010(3).

b. The Legislative History Supports Application of the PRA to Individual Legislators

Even without explicit reference to individual legislators and their offices, the legislative history including amendments shows that the PRA has long encompassed them. The people enacted Initiative 276 to secure a right to “full access to the conduct of government . . . and public records.” Laws of 1973, ch. 1, § 1 (Initiative 276, approved Nov. 7, 1972). They defined “agency” similar to its current iteration, including the term “state office,” but also included “public official” in the definition. Laws of 1973,

ch. 1, § 2. The definition of “public record” was also similar to its current form, but did not include the clause about the offices of Chief Clerk and Secretary of the Senate. *Id.* Four years later, the Legislature removed “public official” from the definition of “agency.” Laws of 1977, ch. 313, § 1.

In 1995, the Legislature added definitions for “state office” and “state legislative office,” and added the provisions for the offices of the Chief Clerk and the Secretary of the Senate discussed above. Laws of 1995, ch. 397, § 1. “State office” was defined as “state legislative office or the office of governor, lieutenant governor, secretary of state, attorney general, commissioner of public lands, insurance commissioner, superintendent of public instruction, state auditor, or state treasurer.” *Id.* “State legislative office” meant “the office of a member of the state house of representatives or the office of a member of the state senate.” *Id.* Thus, contrary to the Legislative Appellants’ current position, the Legislature explicitly applied Initiative 276’s public record requirements to the offices of *all* state officers, including those of individual legislators, and specifically distinguished individual state legislative offices from the offices of Chief Clerk and Secretary of the Senate.

Ten years later, in 2005, the Legislature recodified the public record requirements of Initiative 276 into their own chapter, RCW 42.56, which it designated the “Public Records Act.” *See* Laws of 2005, ch. 274, §§ 101-103. The Legislature did not include any definitions in RCW 42.56, but instead cross-referenced the definitions found in then RCW 42.17,

where the public records requirements had been originally codified. Laws of 2005, ch. 274, § 101. The definitions for “agency,” “state office,” and “state legislative office” remained the same.⁵ Two years later, in 2007, the Legislature removed the cross-reference to RCW 42.17 and copied over the definitions of “agency,” “public records,” and “writing” into RCW 42.56. Laws of 2007, ch. 197, § 1. Then, in 2010, the Legislature again amended both RCW 42.17 and RCW 42.56 in the same session law, recodifying the campaign finance provisions into RCW 42.17A, and adding a definition of “person in interest” to the PRA. Laws of 2010, ch. 204, § 1005(2).

This history supports two logical conclusions. First, from at least 1995 to 2007, the PRA explicitly covered state legislative offices along with all other “state offices” (e.g., the office of the Governor, Lieutenant Governor, etc.). Second, from 2007 to today, the PRA continues to cover those offices implicitly under the general definition of “state agency.” While Legislative Appellants assert this definition deliberately *excludes* individual legislators and their offices, Leg. Op. Br. at 22, there is no contemporaneous support for such an assertion when the entire history of the Act and related laws are considered. If that assertion were true, then the offices of the Governor, Lieutenant Governor, Secretary of State, Attorney General, Commissioner of Public Lands, Insurance Commissioner,

⁵ Legislative Appellants contend that these definitions applied only in relation to the campaign finance and ethics laws, Leg. Op. Br. at 21, but there is no support in the 1995 session law or the legislative documents for this assertion. If that were true, there would have been no need to reference back to the definitions of RCW 42.17 when the Public Records Act was recodified in 2005.

Superintendent of Public Instruction, State Auditor, and State Treasurer would also be excluded from the Act. As discussed above, this would be inconsistent with the longstanding application and purpose of the PRA. *See* RCW 42.56.030.

C. No Independent Authority Excuses Individual Legislators and Their Offices From the PRA’s Requirements

The Legislative Appellants selectively cite various guidance documents to suggest historical agreement that individual legislators have not been considered “agencies” under the PRA. Leg. Op. Br. at 36-38. Those documents do not support that contention.

The entire discussion of the issue in the 2006 edition of the WSBA public records deskbook consists of the three sentences the Legislative Appellants present as a block quote. Leg. Op. Br. at 37.⁶ The sole reference to individual legislators is a conclusory statement that they “arguably enjoy legislative immunity.”⁷ The quoted language does not otherwise address the obligations of individual legislators under the PRA. The second edition of the deskbook includes a longer discussion of the House and the Senate’s

⁶ Quoting Wash. State Bar Ass’n, *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws* ch. 3, at 3-2 (1st ed. 2006).

⁷ It is not clear whether the writer intended to refer to common law legislative immunity typically addressed in the context of actions brought under 42 U.S.C. § 1983 (*see, e.g., Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998)), or a privilege provided in Const. art. II, § 16 (partial privilege from arrest or service of civil process during and just before legislative session) or § 17 (immunity from criminal prosecution or civil action for words spoken in legislative debate). Regardless, no decision of this Court has held that the privilege or immunity would exclude individual legislators from application of a statute such as the PRA.

obligation to provide “legislative records,” but it also does not address the responsibilities of individual legislators under the PRA.⁸

Likewise, the Open Government Resource Manual says nothing at all about the obligations of individual legislators under the PRA. It simply states that a discussion of “legislative records”—defined in RCW 40.14.100 to *exclude* records under the personal control of an individual legislator—is outside the scope of the manual.⁹ Nothing more should be read into that statement than what it says.

Finally, while the “Sunshine Committee” in 2009 recommended eliminating the “legislative exemption” in RCW 42.56.010(3),¹⁰ that recommendation was not based on a shared understanding as to the scope of the “exemption.” To the contrary, the committee members disagreed as to whether individual legislators were included in the “exemption” and whether individual legislators should be exempt from the PRA at all.¹¹

⁸ Wash. State Bar Ass’n, *Public Records Act Deskbook: Washington’s Public Disclosure and Open Public Meetings Laws* ch. 4, at 4-4 (2d ed. 2014).

⁹ Washington State Office of the Attorney General, *Open Government Resource Manual* (2016), <https://www.atg.wa.gov/open-government-internet-manual> (last visited Apr. 18, 2019).

¹⁰ *Annual Report of the Public Records Exemptions Accountability Committee*, Appendix C (Aug. 31, 2009), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Sunshine_Committee/2009%20Report%20to%20the%20Legislature.pdf. The relevant provision, now located at RCW 42.56.010(3), was codified at RCW 42.56.010(2) in 2009.

¹¹ The disagreement is reflected in the August 31, 2009, meeting at which the committee voted on eliminating the “legislative exemption.” <https://www.tvw.org/watch/?eventID=2009081003> at 2:04 to 1:00:20 (last visited Apr. 17, 2019).

D. Including Individual Legislators and Their Offices Within the PRA Does Not Implicate Constitutional Separation of Powers

The Legislative Appellants argue that constitutional separation of powers requires the Court to hold that the legislative branch of the State is exempt from the PRA in the same way the judicial branch is exempt. Leg. Op. Br. at 39. While the Attorney General agrees that the term “state agency” in the PRA does not include the legislative branch in its entirety as explained above, separation of powers is not implicated here. In a separation of powers analysis, the Court examines “whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)). Where the Legislature, by enacting a statute, requires the House, the Senate, individual legislators, or others in the legislative branch to comply with the PRA (or that exempts them from the PRA), there is no interbranch intrusion that raises any separation of powers concern.¹²

The absence of any interbranch intrusion also explains why individual legislators are not comparable to judges when assessing whether they are or could be subject to the PRA. *See* Leg. Op. Br. at 40-42;

¹² The Legislative Appellants disagree with the superior court’s construction of the relevant statutes, claiming a further violation of separation of powers. Leg. Reply Br. at 23-24. But the superior court did no more than engage in a proper judicial function: construing the words of the statutes. Where a statute does not say what the Legislature intended, “[i]t is not the court’s job to remove words from statutes or to create judicial fixes, even if we think the legislature would approve.” *State v. Reis*, 183 Wn.2d 197, 215, 351 P.3d 127 (2015). If the Legislature disagrees with the Court’s interpretation of RCW 42.56.010(3)—or any other provision in the PRA—it is squarely within the Legislature’s power to amend the statute to make its intent and meaning clear.

Leg. Reply Br. at 22. Simply put, the Legislature is not controlling another branch of government when it makes itself subject to or exempt from a statute.

V. CONCLUSION

In the end, the Legislature has the power to change the way the PRA applies to individual legislators and their offices. It has the power to circumscribe their responsibilities under the Act or to exempt them entirely. It can do so at any time it chooses. Until the Legislature changes the law, however, the Act must be understood to apply to all state offices, including the offices of individual legislators.

This Court should affirm the superior court and hold (1) that the PRA applies to the House of Representatives and the Senate through the offices of the Chief Clerk of the House and the Secretary of the Senate; and (2) that individual legislators and their offices fall within the definition of “agency” in RCW 42.56.010(1) and are subject to the PRA. To hold otherwise would be contrary to the plain language and purpose of the Act.

RESPECTFULLY SUBMITTED this 26th day of April 2019.

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