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No. 95441-1

IN THE 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,
Appellees,

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 KRISTIANSEN each in their official capacity
Appellants.

APPELLANT AND CROSS-RESPONDENT THE WASHINGTON STATE LEGISLATURE’S OMNIBUS ANSWER TO AMICUS CURIAE BRIEFS

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE..... 3

III. ARGUMENT IN RESPONSE TO AMICUS BRIEFS..... 3

 A. The Attorney General, the Legislature, and Trial Court Agree: The Legislative Branch is Not an Agency Under the PRA 3

 1. The Plain Meaning of “State Agencies” Under the PRA Does Not Include the Washington State Legislature, State Senate, or House of Representatives..... 4

 2. The Washington Constitution and Case Law Distinguish Between the Legislative Branch and Agencies Established by the Legislature 8

 3. The PRA Created Specific Obligations for the Secretary of the Senate and Clerk of the House with Regard to Production of Legislative Records..... 9

 B. Amici Err in Asserting that Individual Legislators are Agencies Under the PRA 12

 1. Legislative Amendments Show the Legislature’s Intent to Exclude Legislators from Broad PRA Requirements. 13

 2. Individual Legislators are not “Agents” of the Legislature..... 17

 3. State Legislators are Distinguishable from Other Elected Officials for Application of the PRA 20

 C. The PRA is consistent with Public Disclosure Laws in Other States 23

 D. The Washington PRA does Not Implicate, Let Alone Conflict with the First Amendment..... 26

 1. Courts Reject Constitutional Claims that are Based on Inability to Obtain Information Held by the Government 26

2.	The Intended Uses of the Requested Information as Asserted by FAC and other Amici are Irrelevant.	30
3.	PRA’s Unique Treatment of the Legislature and its Members is not Contrary to any Historical First Amendment Right	33
E.	Amici Ignore the Constitutional Limitations of the PRA.	34
IV.	CONCLUSION	38

Table of Authorities

	Page(s)
Federal Cases	
<i>Bd. of Educ. v. Pico</i> , 457 U.S. 853 (1982).....	29
<i>Capital Cities Media, Inc. v. Chester</i> , 797 F.2d 1164 (3d Cir. 1986).....	33
<i>First Nat’l Bank v. Bellotti</i> , 435 U.S. 765 (1978).....	29
<i>Houchins v. KQED, Inc.</i> , 438 U.S. 1 (1978).....	passim
<i>John Doe No. 1 v. Reed</i> , 561 U.S. 186 (2010).....	28
<i>Lamont v. Postmaster General</i> , 381 U.S. 301 (1965).....	29
<i>Los Angeles Police Dept. v. United Reporting Publ’g Corp.</i> , 528 U.S. 32 (1999).....	27
<i>Martin v. City of Struthers Ohio</i> , 319 U.S. 141 (1943).....	29
<i>McBurney v. Young</i> , 569 U.S. 221 (2013).....	28
<i>Regan v. Taxation With Representation of Wash.</i> , 461 U.S. 540 (1983).....	31
<i>Richmond Newspapers v. Va.</i> , 448 U.S. 555 (1980).....	29, 30
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	29

<i>Virginia Bd. of Pharm. v. Va. Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	29
--	----

Washington Cases

<i>Anderson, Leech & Morse, Inc. v. Wash. State Liquor Control Bd.</i> , 89 Wn.2d 688, 575 P.2d 221 (1978).....	8, 10
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	36
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	36
<i>Childers v. Childers</i> , 89 Wn.2d 592, 575 P.2d 201 (1978).....	16
<i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	7, 19, 36
<i>City of Seattle v. Egan</i> , 179 Wn. App. 333, 317 P.3d 568 (2014).....	28
<i>Clallam Cty. Deputy Sheriff's Guild v. Bd. of Clallam Cty. Comm'rs</i> , 92 Wn.2d 844, 601 P.2d 943 (1979).....	17
<i>Columbia Riverkeeper v. Port of Vancouver USA</i> , 188 Wn.2d 421, 395 P.3d 1031 (2017).....	13
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles</i> , 148 Wn.2d 224, 59 P.3d 655 (2002).....	22
<i>Freedom Found. v. Gregoire</i> , 178 Wn.2d 686, 310 P.3d 1252 (2013).....	35
<i>HomeStreet, Inc. v. Dep't of Revenue</i> , 166 Wn.2d 444, 210 P.3d 297 (2009).....	6
<i>Johnson v. Morris</i> , 87 Wn.2d 922, 557 P.2d 1299 (1976).....	16

<i>McDermott v. Kaczmarek</i> , 2 Wn. App. 643, 469 P.2d 191 (1970).....	6
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1984).....	passim
<i>Ockerman v. King Cty. Dep't of Developmental & Envtl. Services</i> , 102 Wn. App. 212, 6 P.3d 1214 (2000).....	11
<i>Rouso v. State</i> , 170 Wn.2d 70, 239 P.3d 1084 (2010).....	38
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	4, 6
<i>State v. Evergreen Freedom Found.</i> , 192 Wn.2d 782, 432 P.3d 805 (2019).....	11
<i>State v. Martin</i> , 94 Wn.2d 1, 614 P.2d 164 (1980).....	35, 38
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	36
<i>State v. Reis</i> , 183 Wn.2d 197, 351 P.3d 127 (2015).....	35
<i>Vita Food Prod., Inc. v. State</i> , 91 Wn.2d 132, 587 P.2d 535 (1978).....	16, 36
<i>Wash. Fed'n of State Employees v. State</i> , 127 Wn.2d 544, 901 P.2d 1028 (1995).....	37
<i>Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.</i> , 77 Wn.2d 94, 459 P.2d 633 (1969).....	17
<i>West v. Wash. State Ass'n of District and Municipal Court Judges</i> , 190 Wn. App. 931, 361 P.3d 210 (2015).....	35
<i>Yakima v. Yakima Herald-Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	36

Washington Statutes and Constitutional Provisions

Const. art. II, §1	8, 18
Const. art. II, §10	10
Const. art. II, § 2	18
Const. art. II, § 9	37
Const. art. II, § 11	8
Const. art. II, § 22	9
Const. art. III, § 2	22
Const. art. III, § 17	9
Const. art. IV, §1	36
RCW 40.14.100	4, 25
RCW 42.17	14, 15
RCW 42.17A.005.....	5, 15
RCW 42.52.010	5, 15
RCW 42.56.001	14
RCW 42.56.010	passim
RCW 42.56.070	11
RCW 42.56.090	11
RCW 42.56.100	11
RCW 43.06.010	22
RCW 43.07.040	9

Other States' Statutes and Regulations

29 Del. C. § 10002(h) 24

Ariz. Rev. Stat. Ann. § 39-121.01..... 24

Conn. Gen. Stat. § 1-200 (1)(A) 24

Ind. Code Ann. § 5-14-3-2 (q)(2)(C) 24

MCL 15.232, 1985-86..... 25

Minn. Stat. Sec. 13.02..... 24

Miss. Code Ann. Sec. 25-61-3(a)..... 25

I. INTRODUCTION

Amicus curiae the Attorney General of Washington rightly concludes that the Washington State Legislature as a branch of government is not an “agency” under the Public Records Act (PRA). This is consistent with the plain meaning of the Act and the Washington Constitution and case law. Each of the amici—the Attorney General of Washington (Attorney General), the First Amendment Center of the Freedom Forum Institute (FAC), American Civil Liberties Union of Washington, InvestigateWest, and Washington Coalition of Open Government (collectively, the ACLU), and the Reporters Committee for Freedom of the Press and 16 Media Organizations (collectively, the Reporters Committee) (together, the Amici)—err however, in arguing that individual legislators are “state agencies” under the PRA.

Applying the Act to individual legislators ignores the common understanding of term agency and the basic rules of statutory construction, including considering the Legislature’s intent in amending the PRA to eliminate “state legislative office” from the definition of “state agency” in the PRA. These amendments show that the Legislature intended not to define individual legislators as “state agencies.” Amici further ignore that unlike members of the executive branch, the Legislature does not act through its individual members, but only through the body as a whole.

Individual members of the Legislature are thus not agents of the Legislature.

Amici's argument that the Legislature's application of the PRA is inconsistent with how other states structure their public disclosure laws is also unfounded. Like numerous other states, the Washington Legislature deliberately created unique disclosure obligations for the Legislature and its members. Regardless, the question before this Court is the correct statutory interpretation of the PRA. Amici's arguments regarding how other states structure their public disclosure laws have no bearing here. The Amici's opinions regarding their policy preferences for public disclosure laws are also irrelevant.

Finally, the Amici's claim that the Legislature is infringing on First Amendment rights by establishing unique records disclosure obligations within the PRA is meritless. Courts distinguish between disclosure statutes, like the PRA, that regulate access to government-held information, and government action that burdens actual speech or expression. There is no constitutional issue with the former, even if the information is to be used for a constitutionally-protected activity. The Supreme Court and Washington courts have explicitly stated there is no constitutional right to obtain records held by the government. Amici's arguments should be rejected.

II. STATEMENT OF THE CASE

The Legislature incorporates by reference the statement of the case set forth in its Opening Brief to this Court at pages 3-11.

III. ARGUMENT IN RESPONSE TO AMICUS BRIEFS

Amici each correctly highlight the PRA's broad goals and general mandate for the disclosure of public records. AG Br. at 3; Reporters Comm. Br. at 14; ACLU Br. at 3; FAC Br. at 3. But the PRA has never provided that all of the records of all governmental entities are subject to disclosure under the Act. Rather, the PRA mandates the disclosure of "public records" held by "agencies" as defined in the Act subject to numerous exemptions. These definitions and exemptions exclude a substantial category of records, including the entirety of those held by the judicial branch and numerous records held by the executive branch. The question before the Court here is whether the Legislature and its individual members are "agencies" as defined by the PRA in RCW 42.56.010(1).

A. The Attorney General, the Legislature, and Trial Court Agree: The Legislative Branch is Not an Agency Under the PRA.

Amici Attorney General agrees with the Legislature and the trial court that as a collective branch of government, the Legislature, State Senate, and House of Representatives do not fall within the definition of "state agency," and must only disclose "legislative records" as defined in

RCW 42.56.010(3) and RCW 40.14.100. AG Br. at 6-12. As argued by Amici Attorney General, that determination is supported by the plain language of the Act, the Washington Constitution and case law, and the statutory obligations placed on the Secretary of the Senate and Chief Clerk of the House.

1. The Plain Meaning of “State Agencies” Under the PRA Does Not Include the Washington State Legislature, State Senate, or House of Representatives.

In opposition, Amici ACLU argues that the definition of “state agency,” which is defined as “includes every state office, department, division, bureau, board, commission, or other state agency,” is not exclusive to those entities. ACLU Br. at 6-7. They are wrong. The plain reading of the definition demonstrates that the listed entities are not something distinct from what otherwise would be considered a “state agency.” The “or other state agency” simply reiterates (albeit redundantly) that state agencies include not only state agencies but state offices, departments, divisions, bureaus, boards, and commissions. This conclusion is consistent with the holding of *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003). There, the Court concluded that the list of strike offenses was exclusive where the statute at issue “expressly lists” those qualifying prior convictions and ends with the limiting language “of an offense listed in (b)(i) of this subsection.” *Id.* at 727-28. Thus, to the

extent that the Amici ACLU are suggesting that something other than a state agency falls within the PRA definition, they are incorrect. Under no construction is the legislative branch of government a “state office, department, division, bureau, board [or] commission or other state agency.” RCW 42.56.010(1). The Legislature has created a number of such entities and they bear no relation to the constitutionally created legislative branch. *See* Appellants’ Opening Brief (Op. Br.) at 18-20.

Amici ACLU further contends that the dictionary definition of the terms set forth in RCW 42.56.010(1) show the Legislature’s intent to include the legislative branch within the definition of “state agency.” ACLU Br. at 7-12. This argument also fails. First, had the Legislature intended to include itself within the full scope of the PRA, it could have done so by listing the Legislature among the entities listed in the definition. The ACLU’s contention that the Legislature chose not to do so because it intended the entire legislative branch to fall within the narrower definitions of an “office,” “board,” “department,” or “bureau” is a nonsensical leap of logic. That the Legislature knows how to craft a definition of agency inclusive of the Legislature and its individual members is demonstrated by the unambiguous definitions in the campaign finance and ethics laws. RCW 42.17A.005 (3) and (48); RCW 42.52.010(1). This Court can discern the Legislature’s intent from its

decision to exclude itself and individual legislators from the PRA's definition of state agency. *See Delgado*, 148 Wn.2d at 727 (holding that the Court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language").

Second, the words in a statute "must be given their commonly understood meaning if possible." *McDermott v. Kaczmarek*, 2 Wn. App. 643, 647, 469 P.2d 191 (1970); *see also HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) ("Absent ambiguity or a statutory definition, we give the words in a statute their common and ordinary meaning."). As the Attorney General correctly recognizes, "[n]one of these terms [in RCW 42.56.010(1)] describes the Legislature as a branch of government" and "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.'" AG Br. at 7.

Third, Amici ACLU's reasoning would also extend the definition of a state agency subject to the Act to the judicial branch and judicial officers. The Washington Supreme Court, inferior courts, and judges are unquestionably "position[s] of authority," "a group controlling an organization," "a part of government," or a "government department or organization" under the broad dictionary definitions the ACLU cites.

ACLU Br. at 9-12. But this Court has already rejected such an argument. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 344-46, 217 P.3d 1172 (2009) (explaining that despite the “strongly-worded mandate for open government,” the PRA was limited in its reach and did not apply to the judiciary, including individual judges, because the courts “are not included in the definition of agency”) (internal quotation omitted). There is no reason for the Court to adopt such faulty logic here.

Fourth, the Legislature has never suggested, as Amici ACLU argues, that all policymaking entities are excluded from the Act. ACLU Br. at 11. This would make no sense, as the Act expressly refers to a number of such entities. RCW 42.56.010(1). Nor has the Legislature asserted that the name of a governmental entity is itself determinative of whether it is an agency under the PRA as the ACLU also asserts. ACLU Br. at 11. This Court’s precedent with respect to the PRA is explicit—governmental entities are obligated to produce public records under the Act if they meet the definition of “agencies” as defined in RCW 42.56.010(1). The Legislature simply does not meet that definition under the plain meaning of the Act.

2. The Washington Constitution and Case Law Distinguish Between the Legislative Branch and Agencies Established by the Legislature.

That the Legislature is not a “state agency” under the PRA is further supported by the Washington Constitution and case law, which recognize the difference between the constitutionally-created legislative branch of government and the agencies that the Legislature establishes and regulates via statute. Amici ACLU ignores the significance of these differences and misconstrues the Legislature’s argument. The Legislature has never claimed, as the ACLU suggests, that an “agency” under the PRA cannot have constitutional authority or only have powers delegated by the Legislature. ACLU Br. at 8. Rather, the Legislature highlighted that the Constitution makes plain the unique differences between the Legislature and state agencies. *See generally*, Op. Br. at 14-16. The Legislature, as a collective, is a constitutional branch of government with full plenary power to enact and amend laws. CONST. art. II, §1. Agencies, in contrast, “cannot legislate.” *Anderson, Leech & Morse, Inc. v. Wash. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978).

Importantly, as the Attorney General correctly notes, these constitutional differences are especially relevant when it comes to providing public access to legislative records. *See* AG Br. at 7-8, citing Const. art. II, § 11 (requiring open door hearings and legislative journals

to be published); 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”); and RCW 43.07.040 (Secretary of State assigned custody of all acts and resolutions passed by the Legislature and the journals of the Legislature).¹ In contrast to these constitutional mandates, the PRA determines the records that state agencies are required to provide to the public.

3. The PRA Created Specific Obligations for the Secretary of the Senate and Clerk of the House with Regard to Production of Legislative Records.

Amici ACLU largely repeats the arguments of the Associated Press that the records disclosure obligations placed on the Secretary of the Senate and Chief Clerk in RCW 42.56.010(3) only apply to those specific entities, and not the Legislature as a whole. *Compare* ACLU Br. at 12-16 *and* AP Opening Br. at 32-33. This argument was rejected by the trial court, is rejected by the Attorney General in its amicus brief, and fails under the same reasoning here.

As the Attorney General properly acknowledges, there is no basis to conclude that the Secretary and Chief Clerk are separate entities from

¹ The Legislature’s internal rules provide for additional access, *see, e.g.*, House Rule 26 (committee consideration and vote must be in public); Senate Rule 45 (same), and the Legislature has made thousands of additional documents available on its public website. Clerk’s Papers (CP) 326.

the Legislature. AG Br. at 9. This conclusion is consistent with the origin of the Secretary and Chief Clerk’s offices as entities authorized in the constitution to serve as officers for each legislative house. CONST. art. II, §10. It is consistent with their roles as the administrative offices of the Legislature statutorily tasked with document retention responsibilities. CP 325. And it is consistent with the distinctions made throughout the PRA between these offices and “state agencies” as defined in the Act. Op. Br. at 29-30, AG. Br. at 9-11. As the trial court held, to interpret the PRA “as defining ‘agencies’ to include the Secretary of the Senate and the Chief Clerk of the House would impermissibly render these “repeated, separate references” to their offices in the PRA “superfluous.” CP 803-04. The trial court thus concluded that the “Secretary of the Senate and the Chief Clerk of the House are not agencies under the Public Records Act,” and that a “necessary corollary” of that conclusion is that the Legislature and its chambers are not agencies either. *Id.* at 804.

Amici ACLU makes two arguments to the contrary—(1) that RCW 42.56.010(3) is not a “disclosure statute,” and (2) that the Secretary and Chief Clerk cannot claim exemptions unless they are agencies. ACLU Br. at 13, 17-18. Both arguments are without merit. First, there are numerous provisions in the PRA that create disclosure obligations, not just the two referenced by the ACLU. These statutes consistently reference the

Secretary and Chief Clerk as entities distinct from state agencies. For example, RCW 42.56.070(1) sets forth the obligations to make records available for public inspection and limits the applicable exemptions in subsection (8), which prohibits agencies, the Secretary, and the Chief Clerk from producing records requested for commercial purposes. RCW 42.56.070(1), .070(8). RCW 42.56.090 establishes the times that public records must be made available for inspection, and imposes the requirements on both agencies and the Secretary and Chief Clerk alike. RCW 42.56.090. And RCW 42.56.100 mandates that agencies, and the Secretary and Chief Clerk, adopt rules and regulations “to provide full public access to public records.” RCW 42.56.100.

In interpreting these distinctions, the Court must consider the PRA in its entirety in order to enforce the law’s overall purpose. *See Ockerman v. King County Dep’t of Developmental & Envtl. Services*, 102 Wn. App. 212, 216, 6 P.3d 1214 (2000) (“Statutes are construed as a whole, to give effect to all language and to harmonize all provisions.”); *State v. Evergreen Freedom Foundation*, 192 Wn.2d 782, 790-81, 432 P.3d 805 (2019), *cert. denied*, 18-1293, 2019 WL 1585321 (U.S. May 28, 2019) (the Court “looks to the entire context of the statute in which the provision is found, [as well as] related provisions, amendments to the provision, and the statutory scheme as a whole” to discern the Legislature’s intent)

(internal quotation omitted). Read together, the PRA establishes affirmative disclosure obligations for the Legislature through the Secretary and Chief Clerk, but limits those obligations to the records specifically defined in RCW 42.56.010(3) and 40.14.100. The plain language of these provisions sets forth specific types of legislative documents that are, or are not, public records subject to disclosure under the PRA.

Second, it would make little sense for the Legislature to have specifically designated the Secretary and Chief Clerk's offices as having unique obligations in the PRA unless the intention was for them to be the records officers for the entire Legislature. Amici ACLU offers no explanation for why the Secretary's and Chief Clerk's offices would be singled out in this manner and cannot point to any similar treatment of a state government office within the PRA. There is no basis to argue that PRA exemptions do not apply to the Secretary and Chief Clerk. Regardless, the Legislature did not claim that any exemptions under the PRA applied to the requested records. All responsive "legislative records" were produced. *See* CP 328.

B. Amici Err in Asserting that Individual Legislators are Agencies Under the PRA.

Amici are wrong in concluding that the PRA applies to individual legislators. In doing so they ignore basic rules of statutory construction,

including considering the amendments to the PRA and related statutory provisions. The Legislature deliberately chose not to define legislators as “agencies” with broad disclosure requirements in the PRA, in contrast to the inclusion of individual legislators under the definition of agency in other statutes. Amici further ignore that the Legislature is distinguishable from members of the executive branch and local officials. And contrary to Amici’s arguments, individual members of the Legislature are not agents of the Legislature.

1. Legislative Amendments Show the Legislature’s Intent to Exclude Legislators from Broad PRA Requirements.

A proper plain meaning analysis includes considering amendments to the statute at issue. Op. Br. at 20 (citing *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 437, 395 P.3d 1031 (2017)). None of the Amici dispute this assertion. *See, e.g.*, AG Brief at 4. Oddly, and without any explanation or citation to authority, the Attorney General later includes an analysis of PRA amendments as legislative history. AG Br. at 14-17. Amendments are not the same as legislative history.²

² The Attorney General also attempts to dismiss the historical practices of the Attorney General’s Office described by the Legislature in its Opening Brief. Op. Br. at 36-38. But these sources make plain that, to the extent the Attorney General has previously addressed the application of the PRA to the legislative branch and its members, it has consistently supported the Legislature’s position that it is not subject to the general obligations of an “agency.” *Id.*

The Attorney General also mischaracterizes the multiple amendments to the PRA that show individual legislators are not “state agencies” under the Act. Initially, the Attorney General concedes that in 1977, the Legislature amended the scope of the definition of “agency” in I-276 to remove “public officials” from its reach, but fails to acknowledge that subsequent amendments to the PRA never reinstated “public officials” within its scope. AG Br. at 15.

The Attorney General then accurately identifies the definitions for “state office” and “state legislative office” introduced in the 1995 amendment, AG Br. at 15; CP 123, 132, but dismisses that these provisions only appeared in that part of the Act relating to campaign finance and ethics. Op. Br. at 7. In so doing, the Attorney General fails to point to any part of the 1995 amendment where the Legislature used the new “state office” or “state legislative office” language to assign broad PRA duties to individual legislators.

Next, the Attorney General fails to acknowledge that the change made in 2005 was to move the PRA into its own chapter, thereby differentiating the PRA from the campaign finance laws and ethics laws because each covers “discrete subjects.” RCW 42.56.001; CP 391.

Finally, the Attorney General mischaracterizes the 2007 amendment, stating the amendment “copied over” the definition of

“agency” from RCW 42.17 to the newly established PRA chapter. AG Br. at 16. This is incorrect. The 2007 amendment affirmatively removed the incorporation of the definitions from RCW 42.17 into the PRA, and established unique definition sections for the PRA, Campaign Finance (Ch. 42.17A RCW), and Ethics laws (Ch. 42.52 RCW). In so doing, rather than copy the definition of “agency” from RCW 42.17, the 2007 amendment removed “state legislative office” from the PRA definitions of “agency” and “state agency.” RCW 42.56.010. In contrast to the PRA, the Legislature kept “legislative office” and “the state legislature” within the definitions of “agency” for the distinct campaign finance and ethics laws. RCW 42.17A.005(3) and (48); RCW 42.52.010(1).

Importantly, since 2007 the PRA has expressly stated that the definitions in the PRA would be those that applied to the Act, “unless context clearly requires otherwise.” CP 606 (codified as RCW 42.56.010). Indeed, each of the three distinct definition sections established for the PRA, campaign finance, and ethics laws expressly state that the definitions contained therein are those that apply to their respective chapters. RCW 42.56.010, RCW 42.17A.005, RCW 42.52.010. None of the Amici address this unambiguous directive from these now distinct statutory schemes, nor their differing definitions of “agency.”

Instead, the Attorney General asserts that there are “two logical conclusions,” to be read from the PRA’s amendments—(1) that the PRA “explicitly covered state legislative offices” from 1995 to 2007, and (2), that from 2007 to present, the PRA has covered those offices “implicitly” under the general definition of “state agency.” AG Br. at 16. But removing the “explicit” coverage must have meaning. To argue, nonetheless, that the post-2007 definition “implicitly” covers state legislative offices is to admit state legislative offices are no longer within the definition of “state agency” in the PRA. The argument relies on this Court re-writing the PRA to its pre-2007 language. Thus, the PRA in 2017 (when the requests were made), which does not include “state legislative offices,” does not cover legislative offices or their individual legislative employees.

Moreover, Amici fail to address, let alone dispute, authority from this Court establishing the **presumption** that statutory amendments like those to the PRA must be given weight as signaling purposeful changes. Op. Br. at 22-23, citing *Vita Food Prod., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535, 536–37 (1978) (citing *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978)); *see also Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976) (stating that the Legislature is presumed not to pass meaningless legislation, and in enacting an amending statute, a presumption exists that a change was intended). Nor do Amici address the

authority supporting that the omission of a specific definition of “state office” and “legislative office” from the PRA must be viewed as deliberate, and that differing definitions from the related statutes should not be applied. Op. Br. at 32-33, citing *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (omissions are deemed exclusions) and *Clallam County Deputy Sheriff’s Guild v. Bd. of Clallam County Comm’rs*, 92 Wn.2d 844, 851, 601 P.2d 943 (1979) (“[t]he omission of a similar provision from a similar statute usually indicates a different legislative intent.”) (internal citation omitted).

In accord with Washington case law regarding how to interpret amended statutes, a plain meaning analysis establishes that the removal of a specific definition of “state office” and “legislative office” from the PRA in 2007 should be treated as definitive legislative intent to take individual legislators outside the purview of the PRA.

2. Individual Legislators are not “Agents” of the Legislature.

The Attorney General mistakenly concludes that individual legislators are subject to the PRA by suggesting the law covers all state employees. AG Br. at 12. It plainly does not.

As the court held in *Nissen v. Pierce County*, “a record that an **agency employee** prepares, owns, uses, or retains in the scope of employment is necessarily a record ‘prepared, owned, used, or retained by

[a] state or local agency.’” 183 Wn.2d 863, 876, 357 P.3d 45 (2015) (emphasis added) (citing RCW 42.56.010(3)). If a governmental entity is not an agency under Act, its records are not subject to disclosure unless otherwise specified. Here, the Attorney General has correctly concluded that the Legislature is not an agency under the PRA, and further that it only has the obligation to disclose those records set forth in RCW 42.56.010(3) and 40.14.100. An individual legislator is thus not an “agency employee.”

Nor are individual legislators “agents” of the Legislature as the Attorney General suggests. *See* AG Br. at 12-13. As previously described, the Legislative branch as a whole only exists as a collection of its individual members. Op. Br. at 16 (citing CONST. art. II, § 1 and CONST. art. II, § 2). The state constitution further establishes that the Legislature as a whole controls the legislative authority of the state, not its individual members. Op. Br. at 17. The Legislature thus does not “act exclusively” through its individual members. Regardless, even if individual legislators are agents of the Legislature as suggested, they are not agents of an “agency” covered by the PRA. Under these requirements, the records requested of the individual legislators here are not subject to disclosure.

This conclusion is further supported by the court’s treatment of the judicial branch and judicial officers under the PRA. Washington courts

have consistently determined that the records of individual judicial officers, including their personal correspondence created in the scope of their official duties, are not disclosable under the PRA because the judicial branch itself is not subject to the act.

The Court's decision in *Koenig* illustrates this point. 167 Wn.2d at 344. In *Koenig* a request was made to a municipal court for records that included all correspondence to and from a municipal court judge. *Id.* at 343-44. The request was denied when the court asserted it was not subject to the PRA under *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1984). *Id.* at 344. In deciding the case, this Court held the PRA did not compel the disclosure of the correspondence. *Id.* at 348. The Court explained that despite the "strongly-worded mandate for open government," the PRA was limited in its reach. *Id.* at 344-45, 348. As the Court stated:

Either the entity maintaining a record is an agency under the PRA or it is not. Under *Nast*, the courts are not included in the definition of agency, and thus, the PRA does not apply to the judiciary. As a result, the court records requested by *Koenig* are not subject to disclosure under the PRA.

Id. at 346.

The facts in *Koenig* are analogous to the present case. The Associated Press here made multiple requests to the Legislature, House of Representatives, and Senate for the personal records of individual

legislators. CP 12-32. Those requests were denied because the Legislature and its members are collectively a branch of government outside of the definition of a state agency. *Id.* at 327-28. Just as the request for records was properly denied in *Koenig*, so was the response to the requests proper here. The individual legislators are no more agencies for the purposes of the general provisions of the PRA than are individual judges.

3. State Legislators are Distinguishable from Other Elected Officials for Application of the PRA.

The Attorney General further argues that legislators are analogous to other “elected officials” in Washington and suggests that the Legislature’s interpretation of the PRA would exempt such officers from the Act. AG Br. at 12-14. Initially, the application of the PRA to members of the executive branch and local officials is not before the Court. Moreover, the Attorney General’s assertions misstate the Legislature’s argument. The Legislature did not suggest that individual legislators are afforded unique treatment under the PRA because of their elected status. Rather, the Legislature explained that the plain meaning of “agency” in the PRA specifically does not include individual members of the Legislature.

First, the treatment of the Legislature and individual state legislators in the PRA is starkly distinct from the treatment of elected county or city legislators in the PRA. The definition of “local agency” is

very different from “state agency” and specifically includes “every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district.” RCW 42.56.010(1). That is much broader than the definition of “state agency” and encompasses the legislative and executive bodies and members of local government. *Id.* Moreover, the PRA imposes specific record keeping and disclosure requirements on the Legislature through the Chief Clerk and Secretary of the Senate. Op. Br. at 28-31. There is no similar treatment of county or city legislative bodies. Finally, there is a specific sequence of amendments to the PRA that show legislative intent to remove state legislative offices from the definition of “state agency” under the PRA. *See supra* pp. 13-17.

Second, contrary to the Attorney General and ACLU’s assertions, that the definition of “state agencies” includes “state office,” “bureau” and “division” does not indicate legislative intent to encompass individual legislators. AG Br. at 13; ACLU Br. at 12. Rather, as the Legislature has previously described, the inclusion of terms like “state office,” “bureau,” and “division” in the definition of “state agencies” was meant to encompass the spectrum of potential names of legislatively created agencies. Op. Br. at 18-19. And although amici laboriously rationalizes calling a state legislator a “bureau,” “division,” or “office,”—there is no reason the Court should do so. Individual legislators are not “state

agencies,” “state offices,” “divisions,” or “bureaus” as those terms are commonly understood. *See HomeStreet, Inc.*, Wn.2d at 451 (stating this Court gives words in a statute their common and ordinary meaning absent ambiguity).³

Third, legislators do not hold “state office” in the manner that statewide elected officials do. Legislators—part-time officials with limited staffs—represent specific, defined legislative districts. Collectively they make up the legislative branch of the state, but individually they do not represent the state as a whole as executive officers do. Other state elected officials have specific constitutional and statutory authority to act on behalf of the state. The Governor, for example, has the “supreme executive authority” in the state. CONST. art. III, § 2. She or he has independent authority to act on behalf of the executive branch on a range of matters set forth in the constitution and state statute. *Id.*; RCW 43.06.010 (setting forth the general powers and duties of the governor). In contrast, and as discussed above, individual legislators have no independent authority to act as the legislative branch of government. Moreover, the executive branch does not have independent constitutional

³ Subjecting each of the 147 part-time legislators to broad PRA obligations would also yield absurd, strained results. *See generally* Op. Br. at 33-36; Reply Br. at 18. The PRA should not be construed to lead to such “unlikely, absurd, or strained consequences.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002).

authority over its records, unlike the judiciary and the Legislature. Thus, individual legislators are more akin to the individual judges within the judicial branch as set forth in *Nast*. See Op. Br. at 26, 41-42.

C. The PRA is consistent with Public Disclosure Laws in Other States.

Amici Reporters Committee analyzes the public record disclosure laws of other states to suggest that the PRA is an outlier in how it addresses legislative records. Reporters Comm. Br. at 10-14. Initially, these arguments are irrelevant to the Washington statutory questions before this Court which should be decided based on the text of the PRA. Nor do the policies adopted by legislatures in other states have any bearing on the policy decisions of the Washington Legislature. As the trial court rightly held, “it is not the role of the Court to weigh” policy arguments, and “[s]uch arguments cannot render an otherwise unambiguous statute ambiguous.” CP at 789.

Regardless, the provisions of the public records laws in other states which the Reporters Committee cites to support the Legislature’s interpretation of the PRA here. As their brief demonstrates, those states that include legislative entities within the full scope of their record disclosure laws do so with express language indicating that intent. Idaho, for example, includes the legislative branch within the definition of “state

agency” and Connecticut defines “public agency” to include “legislative office.” Idaho Code § 74-101 (15); Conn. Gen. Stat. § 1-200 (1)(A). Similarly, Indiana defines “public agency” to include entities that exercise “legislative power,” and Arizona extends its records disclosure obligations to any “branch” of government and “any person elected” to any office. Ind. Code Ann. § 5-14-3-2 (q)(2)(C); Ariz. Rev. Stat. Ann. § 39-121.01. The decision by the Washington Legislature not to include the Legislature and legislators in the PRA, while specifically including these entities in the campaign finance and ethics laws, shows the narrow scope of the Act. There was no need for the Legislature to further exclude itself and individual legislators from the Act when the plain language demonstrates they are not included.

Moreover, as Amici Reporters Committee acknowledges, numerous states provide far less transparency of legislative records than Washington does through the PRA. *See* Reporters Comm. Br. at 13-14 (examining Oregon and Massachusetts, which exclude the state legislatures from the definition of “state agency”). Indeed, it is quite common for states to exclude altogether the records held by the legislative branch and individual legislators. *See e.g.*, 29 Del. C. § 10002(h) (excluding the Delaware General Assembly from the definition of a “public body” under the state FOIA); Minn. Stat. Sec. 13.02 (exempting

the legislature in Minnesota from the Government Data Practices Act); MCL 15.232, 1985-86 Op. Att’y Gen. No. 6390 (1986) (opining that Michigan legislators are exempt from the FOIA laws as they are not a “public body” under the act); 51 O.S. § 24A.3.2 (exempting the Oklahoma legislature from the Open Records Act, except for records kept and maintained on receipt and expenditure of any public funds); Miss. Code Ann. Sec. 25-61-3(a) (exempting legislators, judges, and executive officers from the state Public Records Act). In contrast, the Washington PRA specifically provides for seven different categories of legislative records to be provided to the public. RCW 40.14.100.

Finally, despite Amici’s contrary arguments, and as in other states, the PRA sets out a distinct statutory scheme regarding the legislature. By designating the Secretary of the Senate and Chief Clerk as the chief operational and public records officers for the Legislature, the PRA makes plain the public records duties of the legislative branch and its members. These provisions specify what categories of “public records” should be disclosed by the Secretary and Chief Clerk, distinguish between these entities and state agencies under the Act, and make plain that the Legislature and individual legislators do not fall within the definition of “state agency.” The PRA establishes the Legislature’s unique public disclosure obligations.

D. The Washington PRA does Not Implicate, Let Alone Conflict with the First Amendment.

Amici FAC focuses the majority of their brief asserting that the unique application of the PRA with respect to the Legislature and legislators infringes on the First Amendment. FAC Br. 8-17. But their First Amendment claim conflates two very different issues: (1) constitutionally-protected speech activity; and (2) the ability to obtain information held by the government. This case is only about access to information held by the government. FAC's contentions that the PRA impairs the public's First Amendment right to receive information is directly contrary to Supreme Court and Washington precedent.

1. Courts Reject Constitutional Claims that are Based on Inability to Obtain Information Held by the Government.

The United States Supreme Court has held that there is no constitutional right to access information within government control. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978). In *Houchins*, the Court held the media did not have a right beyond that of the general public to access jails and interview people who are incarcerated. *Id.* The Court recognized the media's First Amendment rights to gather news from "any source by means within the law" and to communicate information to the public. *Id.* at 10-11 (internal quotation omitted). But the Court clarified that right "affords no basis for the claim that the First Amendment

compels others—private persons or **governments**—to supply information.” *Id.* at 11(emphasis added). The Court further stated that “[t]his Court has never intimated a First Amendment guarantee of a right to access to all sources of information within government control,” *id.* at 9, and “[t]here is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information.” *Id.* at 14.⁴

Rather than presenting a constitutional question, government restriction on or denial of access to information in its possession is wholly within the legislative power and generally is left to the “political forces” that govern a democratic republic. *Houchins*, 438 U.S. at 14-15 (internal quotation omitted). Whether to provide access to government information, and to what extent, is “clearly a legislative task which the Constitution has left to the political processes.” *Id.* at 12. It “is a question of policy which a legislative body might appropriately resolve one way or the other.” *Id.*⁵

⁴ *Houchins* was decided by a seven-member Court as two justices took no part in the case. The plurality opinion was signed by three justices, and a fourth, Justice Stewart, concurred in the judgment and wrote that “[t]he First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government” and that he “agree[d] substantially” with what the lead opinion said on that topic. 438 U.S. at 16 (Stewart, J., concurring).

⁵ The precedent set forth in *Houchins* (and the many cases in accord) is not limited to only those claiming some right of special access to government-controlled sources of information beyond that afforded to the public. See, e.g., *Los Angeles Police Dept. v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (holding that exemptions from disclosure in public records laws do not present “a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses”);

Washington authority addressing constitutional challenges based on the PRA is consistent with this precedent. In *City of Seattle v. Egan*, 179 Wn. App. 333, 336-339, 317 P.3d 568 (2014), the Washington Court of Appeals determined that the City of Seattle did not violate an individual’s First Amendment rights when the City denied his record request for police “dash-cam” videos under a PRA exemption. Like the Supreme Court, the *Egan* court distinguished disclosure requests under the PRA and First Amendment protected activity: “the PRA is not a prohibition on speech, but a disclosure requirement. Disclosure requirements may burden the ability to speak, but they do not prevent anyone from speaking.” 179 Wn. App. at 339 (internal formatting omitted, quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 187, 196 (2010)). The *Egan* court also held that the PRA “is a legislatively created right of access to public records,” and that “[t]he legislature is free to restrict or even eliminate access without offending any constitutional protection.” *Id.* at 335.

Without engaging this authority, FAC cites several cases to show various contexts in which the Supreme Court concluded the First Amendment Right to receive information was infringed on—yet not one

McBurney v. Young, 569 U.S. 221, 232, (2013) (“This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws.”).

of these cases speaks to, let alone establishes a First Amendment right to access government information. FAC Br. at 12-14.⁶ For example, in *Martin v. City of Struthers Ohio*, 319 U.S. 141 (1943), the Supreme Court addressed local laws prohibiting the distribution of handbills or leaflets to the public. The Supreme Court found the laws impermissible because they restricted the public's right to communicate without government interference. *Martin*, 319 U.S. at 146-47. The City thus violated the First Amendment because it **censored** citizens' speech and a particular means of communication to a particular audience. *Id.*

Amici FAC's reliance on *Richmond Newspapers v. Va.*, 448 U.S. 555 (1980) is also misplaced. In *Richmond Newspapers*, the Supreme Court considered the "narrow question" of whether the press and public have a First Amendment right to attend criminal trials. 448 U.S. at 558. The Court did not establish a First Amendment right to compel the government to provide access to information. Rather, the Court stated criminal trials are one of the places "traditionally open to the public," and engaged in a lengthy analysis showing the "presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice."

⁶ See generally; *Stanley v. Georgia*, 394 U.S. 557 (1969); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982); *Virginia Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

Id. at 577, 573. The First Amendment right described in *Richmond Newspapers* was thus narrowly grounded “in the context of trials.” *Id.* at 576.

Thus, the First Amendment does not apply to the government’s decisions about what of its information to disclose. There is no burden on a “public place where the people generally—and representatives of the media—have a right to be present” as in *Richmond Newspapers*. *Id.* at 578. Rather, the Supreme Court and Washington Courts have specifically rejected the application of the First Amendment to public disclosure laws or requirements. Indeed, if there was such a constitutional right, there would be no need for the PRA in the first place.

2. The Intended Uses of the Requested Information as Asserted by FAC and other Amici are Irrelevant.

FAC’s assertions that the Legislature and its members must be broadly subject to the PRA to ensure freedoms of the press to communicate with the public are irrelevant. That a requester may want to use government information to carry out constitutionally-protected activities does not mean treating the Legislature and their members uniquely under the PRA is unconstitutional. In *Houchins*, there was no dispute that the news media sought to obtain information held by the government to use for constitutionally-protected speech and freedom of

the press activities. 438 U.S. at 11. But the Court held that such subsequent use of information was irrelevant to whether an exemption from disclosure was itself unconstitutional. *Id.* at 14.

Further, as the Court recognized in *Houchins*, that requesters may not be able to exercise their constitutional rights “as conveniently as they prefer” is of no consequence when examining access to government information. 438 U.S. at 15. No authority suggests that the First Amendment requires the government to affirmatively assist in the press’ or the public’s efforts to communicate simply because it would provide information they desire in a convenient manner. *Cf. Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 549-50 (1983) (“a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right”).

Finally, Amici Reporters Committee and the ACLU’s invocation of harassment allegations as the reason for needing the Legislature’s records is unavailing. First, Amici make no showing that the intent of the PRA’s treatment of the Legislature and its members is to withhold information regarding harassment. Indeed, the Amici’s arguments fail to recognize that the House and Senate may release investigations against members under the “any other record designated a public record ...”

definition of legislative record in the PRA, and have done so in the past.
RCW 42.56.010(3).

Second, Amici’s arguments conflate access to records with the call to establish internal policies to address harassment. Reporters Committee notes that women have expressed they have “no safe, neutral place to report our experiences.” Reporters Comm. Br. at 5. Presumably, this sentiment was focused on the treatment of harassment allegations in the workplace—not on a claim that the media should have greater, immediate access to information about those allegations through the PRA. Indeed, it is not difficult to imagine that many who report such allegations would prefer to have them reviewed and responded to internally, rather than hashed out on a public stage following release by the press.⁷

Moreover, nothing in the PRA’s treatment of the Legislature prevents individuals from sharing their stories, nor does it prevent the public and press’ ability to hear those stories. As in *Houchins*, “[t]he right to receive ideas and information is not at issue in this case,” and the First

⁷ The Washington Senate released its Respectful Workplace Policy on July 16, 2018, setting forth the policies, procedures, training, and workplace culture norms it will pursue to create workplace free of discrimination, harassment, and bullying. Washington State Wire, available at <https://washingtonstatewire.com/in-response-to-metoo-wa-senate-approves-new-policy-on-appropriate-workplace-conduct/> (last visited May 28, 2019). In the House, the first bill passed in the 2019 session was a resolution to change the chamber’s workplace culture following recommendations of a Workgroup on Prevention of Sexual Harassment. NW News Network, available at <https://www.nwnewsnetwork.org/post/new-code-conduct-shift-how-legislature-deals-sexual-harassment> (last visited May 28, 2019).

Amendment does not mandate “a right of access to government information or sources of information within the government’s control.”

Houchins, 438 U.S. at 12, 5.

3. PRA’s Unique Treatment of the Legislature and its Members is not Contrary to any Historical First Amendment Right.

FAC assertion that access to all government information is in line with historical precedent, FAC Br. at 8-9, is also incorrect. There is no long-recognized tradition of access to public records in either Washington or the nation. Indeed, this exact issue was debated by the founders of our country and they decided **against** making a right to government information. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167-71 (3d Cir. 1986). Instead, “[t]he founding fathers intended affirmative rights of access to government-held information, other than those expressly conferred by the Constitution, to depend upon political decisions made by the people and their elected representatives.” *Id.* at 1167.

In Washington, the state Constitution sets forth certain documents that must be made available for the benefit of the public. Op. Br. at 43. And, it was not until 1972 that voters exercised their political power to grant access to public records by adopting the PRA. Further, the Reporters Committee’s claim that without access to the records in this case the public’s ability to oversee the government “would be drastically

decreased,” Reporters Committee Br. at 7, ignores that the Legislature has managed its records in this manner since at least 1995. CP 329.

Finally, FAC’s attempt to cabin its vast expansion of the First Amendment right to receive information is misplaced. FAC asserts that the PRA must apply broadly to the Legislature because there is allegedly no other means for the public to oversee the legislative process. FAC at 16-17. Yet FAC offers no authority for asserting an alleged First Amendment right to information in instances when a records requester claims they have no other avenue. Even if that were the rule, it would eviscerate public records laws. Under FAC’s rationale, every exemption to public records law that withheld information held by a government entity would be subject to a First Amendment analysis, so long as someone could allege there was no other way to obtain the information. This Court should reject such a result and reject FAC’s First Amendment claims.

E. Amici Ignore the Constitutional Limitations of the PRA.

Amici misconstrue the Legislature’s arguments regarding the constitutional limitations of the PRA and fail to recognize the significance of the constitutional problems presented by their interpretation of the Act. Contrary to Amici Reporters Committee’s suggestions, the Legislature did not and has never argued that the judiciary is prohibited from interpreting the PRA. Rather, the Legislature highlighted that the PRA, like any other

law, is subject to constitutional and statutory limitations and separation of powers principles. *See* Op. Br. at Sec. IV D, citing *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 698-99, 310 P.3d 1252 (2013) (recognizing that forcing disclosure through the PRA can create interbranch conflict, which “lies at the heart of the separation of powers doctrine”). Indeed, this Court has used its power of statutory interpretation to steer around these interbranch obstacles, including by excluding the judiciary from the requirements of the PRA. *Accord, West v. Wash. State Ass’n of District and Municipal Court Judges*, 190 Wn. App. 931, 933, 361 P.3d 210 (2015) (stating that a judges’ association was part of the judicial branch and therefore not subject to the PRA).

Here, the trial court’s holding contravenes the separation of powers doctrine by adding the “state legislative offices” definition from the campaign finance chapter into the PRA. CP 787, 801-02. This decision directly conflicts with the Legislature’s decision to limit the definitions in the PRA to those within the Act, “unless context clearly requires otherwise.” CP 606. As previously set forth, this Court has held that the judiciary extends beyond its powers in a “clear usurpation of legislative power,” when it reads into a statute that which the court may believe the Legislature has omitted. *State v. Reis*, 183 Wn.2d 197, 214–15, 351 P.3d 127 (2015) (quoting *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980));

Vita Food Products, Inc., 91 Wn.2d at 134 (stating adding words to a statute is “not within [the courts’] power”). This error by the trial court “invad[ed] the prerogatives” of the legislative branch and therefore implicates the separation of powers doctrine. *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009) (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

Amici’s arguments also ignore the obvious similarities between the judicial branch and legislative branch, and how the Legislature’s decision to narrow the scope of the PRA with respect to the Legislature is consistent with the Court’s treatment of the judiciary. *See* Op. Br. at 41-43. As previously noted, despite the broad mandate for disclosure within the PRA, this Court has determined that judicial branch records, including the records of individual judicial officers’ created in the scope of their official duties, are not subject to the Act. *Koenig*, 167 Wn.2d at 344-48.

In determining that the PRA excludes the judiciary, the Courts have explained that the Act “does not specifically include courts or court case files.” *Nast*, 107 Wn.2d at 307. The Courts have also emphasized the independence of the judicial branch, CONST. art. IV, §1; *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002), the constitutional basis to control its own proceedings, *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 795, 246 P.3d 768 (2011), and the common law right of

access to judicial records predating the PRA, *Nast*, 107 Wn.2d at 307. In each of these areas, the authority and characteristics of the Legislature are analogous. *See* Op. Br. at 41-43; CONST. art. II, § 9 (stating each house may determine the rules of its own proceedings); *Washington Fed’n of State Employees v. State*, 127 Wn.2d 544, 569, 901 P.2d 1028 (1995) Talmadge, Justice (concurring in part/dissenting in part) (stating that the framers of the Washington State Constitution afforded substantial discretion to the Legislature as to how it was to conduct its business and simultaneously ensured that the public would be informed about the enactment of laws by providing for the maintenance of legislative journals, expressing a preference for open meetings, mandating recording of votes for final passage of legislation and recording elections of legislative officers).

Amici Reporters Committee’s brief also misstates the Court’s decision in *Nast*. In determining that the judiciary was excluded from the PRA, the Court did not rely on the fact that the “Act’s language **never** specifically included courts or case files” as Reporters Committee suggests. Reporters Comm. Br. at 14-15 (emphasis added). Rather, the Court determined that the language of the Act—as it existed **at that time**—did not specifically include the courts or case files. *Nast*, 107 Wn.2d at 307.

Today, the same is true with respect to the Legislature—the plain language of the PRA does not include the Legislature or its members. Indeed, as previously discussed, that the Legislature amended the earlier version of the PRA that included state legislators within the definition of “state office” demonstrates the Legislature’s intent to explicitly narrow its reach. *Supra* at 16-17. Moreover, this unique application of the PRA does not subject the disclosure of legislative records to the “whims” of the Legislature as Amici Reporters Committee alleges. Reporters Comm. Br. at 16. To the contrary, the records subject to disclosure by the Legislature are specifically defined in RCW 42.56.010(3) and 40.14.100. The Legislature has consistently responded to records requests by providing documents that meet those definitions. CP 327-28. Whether a different policy might allow for additional access to legislative records is irrelevant—it is not the court’s role to enact law or balance policy interests. *Rousso v. State*, 170 Wn.2d 70, 92, 239 P.3d 1084 (2010).

IV. CONCLUSION

The Legislature and its members are not “state agencies” under the PRA. This is supported by the plain meaning of the term “agency” as defined in the PRA, related statutes, and the amendments to the PRA. Amici’s reliance on First Amendment claims, non-Washington authority, and policy arguments is misplaced and should be rejected.

RESPECTFULLY SUBMITTED this 28th day of May, 2019.

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