

FILED
SUPREME COURT
STATE OF WASHINGTON
2/19/2019 8:00 AM
BY SUSAN L. CARLSON
CLERK

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 REPLY BRIEF

Paul J. Lawrence, WSBA # 13557
Nicholas W. Brown, WSBA # 33586
Claire E. McNamara, WSBA # 50097
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700

Gerry Lee Alexander, WSBA # 775
910 Lakeridge Way SW
Olympia, WA 98502-6068
(360) 357-2852

Attorneys for Washington State Legislature et. al

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ARGUMENT	2
A.	The Legislature and its Members are not “State Agencies” Under the PRA.	2
1.	The Plain Meaning of “State Agencies” in the PRA Does Not Include the Legislature or Individual State Legislators.....	3
2.	The Amendments to the PRA Created Distinct Disclosure Obligations for the Legislature and Individual Legislators.....	5
3.	The Definitions from Other Distinct Chapters of the RCW Demonstrate that the Legislature and its Members are Not State Agencies.....	10
4.	Prior Failed Attempts to Amend the PRA are Irrelevant.	12
5.	The Legislature’s Limited History of Responding to PRA Requests Supports the Legislature’s Narrow Construction of the PRA.....	14
B.	The Secretary and Chief Clerk Oversee and Fulfill the Administrative Functions of the Whole of the Legislature, Including Public Records Duties.....	15
C.	The Legislature and Individual Members Are Only Responsible for Disclosing Legislative Records as Specified in the PRA.	19
D.	The Associated Press Ignores the Constitutional Limitations of the PRA.	21
E.	Trial Court Erred in Allowing the Declaration of Rowland Thompson.....	24
F.	Absent the Legislature’s Inclusion within the PRA, No Case or Controversy Exists.	27

G.	The Court Should Not Apply Penalties or Award the Associated Press Fees or Costs on Appeal.....	29
III.	CONCLUSION	30

Table of Authorities

	Page(s)
State Cases	
<i>Allen v. Employment Sec. Dep't</i> , 83 Wn.2d 145, 516 P.2d 1032 (1973).....	9
<i>Bayha v. Public Util. Dist. No. 1</i> , 2 Wn.2d 85, 97 P.2d 614 (1939).....	28
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995).....	26
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	22, 23
<i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	22
<i>Columbia Riverkeeper v. Port of Vancouver USA</i> , 188 Wn.2d 421, 395 P.3d 1031 (2017).....	5
<i>Davis v. Dep't of Labor & Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	25
<i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 716 P.2d 842 (1986).....	25
<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).....	18
<i>Freedom Found. v. Gregoire</i> , 178 Wn.2d 686, 310 P.3d 1252 (2013).....	21, 24
<i>Grimwood v. University of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	24, 25
<i>In re Krueger's Estate</i> , 11 Wn.2d 329, 119 P.2d 312 (1941).....	28

<i>Leeper v. Dep’t of Labor & Indus.</i> , 123 Wn.2d 803, 872 P.2d 507 (1994).....	13, 15, 16
<i>Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.</i> , 189 Wn.2d 516, 404 P.3d 464 (2017).....	24
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1984).....	22
<i>Nissen v. Pierce Cty.</i> , 183 Wn.2d 863, 357 P.3d 45 (2015).....	21
<i>Pringle v. State</i> , 77 Wn.2d 569, 464 P.2d 425 (1970).....	4
<i>Rousso v. State</i> , 170 Wn.2d 70, 239 P.3d 1084 (2010).....	19
<i>Spokane Cty. Health Dist. v. Brockett</i> , 120 Wn. 2d 140, 839 P.2d 324 (1992).....	13
<i>State ex rel. Citizens Against Tolls v. Murphy</i> , 151 Wn.2d 226, 88 P.3d 375 (2004).....	4
<i>State of Wash., Dep’t of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	10
<i>State v. Barnes</i> , 189 Wn.2d 492, 403 P.3d 72 (2017).....	9
<i>State v. Conover</i> , 183 Wn.2d 706, 355 P.3d 1093 (2015).....	3, 5
<i>State v. Conte</i> , 159 Wn. 2d 797, 154 P.3d 194 (2007).....	13
<i>State v. Dennis</i> , 191 Wn.2d 169, 421 P.3d 944 (2018).....	23
<i>State v. Evergreen Freedom Found.</i> , 9).....	3

<i>State v. Gonzales Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	11, 12
<i>State v. Martin</i> , 94 Wn.2d 1, 614 P.2d 164 (1980).....	23, 27
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	22
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	27
<i>State v. Reis</i> , 183 Wn.2d 197, 351 P.3d 127 (2015).....	23
<i>Vita Food Products, Inc. v. State</i> , 91 Wn.2d 132, 587 P.2d 535 (1978).....	23
<i>Washington State Farm Bureau Fed'n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	4
<i>Fahn v. Cowlitz County</i> , 93 Wn.2d 368, 610 P.2d 857 (1980).....	5
<i>State v. Evergreen Freedom Foundation</i> , 432 P.3d 805 (2019).....	3, 5
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	13, 17
<i>Yakima Cty. v. Yakima Herald–Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	22
State Statutes	
CONST. art. II, §1.....	4
CONST. art. II, §2.....	4
CONST. art. IV, §1	22
RCW 40.14.100	passim

RCW 42.17A.005.....	9
RCW 42.52.010	9
RCW 42.56.001	8
RCW 42.56.010	passim
RCW 42.56.070	16
RCW 42.56.100	16, 18
RCW 9A.04.110.....	9
RCW 9A.56.065.....	9
State Rules	
CR 56	24
RAP 1.2(a)	26
RAP 12.1(b).....	26
Other Authorities	
HB 1133	8
HB 1445	8
SB 5684.....	6, 7

I. INTRODUCTION

This appeal is about the proper construction of the Washington Public Records Act (PRA). It is not about whether the policy choices the State Legislature has made are appropriate or not. It is not about the content of the documents sought. It is not about proposed legislation that was never adopted. It is not about the State campaign finance law or the State ethics law. It is about whether the State Legislature and its members are “state agencies” as defined by the PRA.

Enactment and amendment of the PRA is an exercise of the State’s legislative power. Pursuant to its express constitutional legislative authority, the Washington State Legislature has amended the PRA numerous times since its enactment by Initiative 276 in 1972. Among these amendments, the Legislature determined to codify the PRA in Chapter 42.56 RCW separately from the other parts of Initiative 276 (campaign finance and ethics) with its own distinct definitions and scope of application. The PRA’s unique provisions make plain that neither the Legislature as a body nor its independently elected members are “state agencies” as defined in the PRA. The Legislature-Appellants, therefore, are not subject to the PRA’s general record disclosure requirements. They thus had no obligation to provide the records the Associated Press-

Appellees requested, or to provide any further explanation to the requestors than what was provided.

The Associated Press suggests that definitions found in separate chapters of the RCWs apply with “equal force” to the PRA. But they ignore contrary statutory guidance, cite no case affirmatively supporting their argument, and make no efforts to rebut the authority specifically refuting that position. Moreover, to support their claims, they rely on irrelevant, proposed amendments to the PRA that never passed; conclusory and inadmissible hearsay by a lobbyist declarant; and superseded law. The Associated Press’ construction of the PRA is wrong.

The trial court correctly determined that the Legislature, Senate, and House of Representatives are not “state agencies” under the PRA. That part of the trial court’s order should be affirmed. The trial court erred, however, by importing a definition from a different statutory chapter into the PRA to hold individual state legislators are “state agencies.” That part of the trial court’s order should be reversed.

II. ARGUMENT

A. The Legislature and its Members are not “State Agencies” Under the PRA.

The fundamental issue here is the definition of “state agencies” in the PRA. The Associated Press’ arguments that the Legislature and its individual members are “state agencies” as defined in the PRA subject to

broad disclosure obligations is contrary to the PRA’s plain meaning, legislative intent, and legislative history. *See generally*, Appellee’s Response Brief (“Appellee Br.”).

1. The Plain Meaning of “State Agencies” in the PRA Does Not Include the Legislature or Individual State Legislators.

“When possible, this court derives legislative intent from the plain language enacted by the legislature.” *State v. Evergreen Freedom Foundation*, 432 P.3d 805, 809 (2019). To the extent there is any ambiguity in the language at issue, 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.” *Id.* (citing *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015)) (internal quotation omitted).

As analyzed in the Legislature’s Opening Brief, the plain meaning of “state agency” as the PRA defines it in RCW 42.56.010(1) does not extend to the Legislature and its individually elected members. Appellants’ Opening Brief (“Opening Br.”) at 13-17. The State Constitution and Washington law have consistently distinguished between the Legislature as a branch of government created in the constitution, and state agencies created by the Legislature itself. For example, the Legislature has the plenary authority to enact and amend laws.

Washington State Farm Bureau Federation v. Gregoire, 162 Wn.2d 284, 306, 174 P.3d 1142 (2007) (“The legislature has plenary power to enact, amend, or repeal a statute, except as restrained by the state and federal constitutions.”) (citing *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). Agencies have no such authority. *Pringle v. State*, 77 Wn.2d 569, 573, 464 P.2d 425 (1970) (holding that an agency may not “amend or change enactments of the legislature”); *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980) (“[A]n administrative agency is limited to the powers and authority granted to it by the legislature.”). The Associated Press does not dispute this analysis.

Similarly, individual state senators and representatives cannot be said to be “state agencies” under the plain language of the PRA. They are independently elected constitutional members of a branch of government. CONST. art. II, § 1; CONST. art. II, § 2. As part-time, citizen legislators, they fulfill none of the duties traditionally associated with or required of state agencies, including the obligation to adopt and publish rules under the Washington Administrative Code (WAC). Nor are legislators included within the list of identified entities considered agencies in the PRA. RCW 42.56.010(1).

In response, the Associate Press asserts only that “reasonable people” do not distinguish between the Legislature and the agencies the

Legislature creates. Appellee Br. at 30. Instead, they urge the Court to “recognize the broader concept of ‘State Agencies’” encompassing all administrative, executive, and legislative offices and officers. *Id.* But the Associated Press cites no authority in support of this nebulous, summary assertion. Indeed, in examining the Legislature’s intent, the Associated Press does not engage in any substantive plain meaning analysis whatsoever. *Id.* at 38-41. Instead, they rely almost exclusively on inadmissible and irrelevant legislative anecdotes, prior failed legislation, and conclusory statements to support their interpretation of the law. None of this comports with this Court’s process for discerning a statute’s plain meaning: evaluate the statute’s text, amendments to the statute, and related statutory provisions. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 437, 395 P.3d 1031 (2017).

2. The Amendments to the PRA Created Distinct Disclosure Obligations for the Legislature and Individual Legislators.

To reach their conclusions, the Associated Press ignores a well-established principle of statutory construction, restated by the Court as recently this year, that discerning legislative intent includes giving effect to amendments to the statute at issue. *Evergreen Freedom Foundation*, 432 P.3d at 809; *Conover*, 183 Wn.2d at 711. Thus, to determine the PRA’s legislative intent, this Court should look at the plain meaning of the

statute as it existed when the requests at issue were made, and examine the multiple amendments the Legislature made impacting the scope of the PRA since its first iteration as Initiative 276.

As demonstrated in the Legislature's brief, the history of amendments to the PRA shows (1) the Legislature identified specified "legislative records" that were made subject to the PRA and (2) the Legislature re-codified Initiative 276 putting the public records components into a separate chapter of the RCW with its own specific definition of "state agency," that unlike the re-codification of the campaign finance and ethics components of the Initiative, does not extend to the Legislature as a body or to its individual members.

The Associated Press mischaracterizes the changes to the public records laws over time. Initially, it ignores key parts of Senate Bill 5684 (SB 5684) adopted in 1995. Appellee Br. at 11-16. Specifically, the Associated Press provides an incomplete definition for "public record" as established in SB 5684, *id.* at 11, ignoring that the definition incorporated the original definition of "legislative records" found in RCW 40.14.100. CP 132. This specific definition differentiates legislative records from the broad definition of public records used throughout the PRA.

Similarly, while the Associated Press accurately states the definitions for "state office" and "state legislative office" created in the

1995 amendment, they fail to mention (and do not dispute) that the new “state office” language was only incorporated into provisions relating to campaign finance and ethics, rather than the sections addressing public records. *See* CP 145, 159-62. Indeed, amending only the campaign finance and ethics provisions is consistent with the Associated Press’ representation that campaign and election violations were the genesis in part of SB 5684. *See* Appellee Br. at 15-17.

The 1995 amendments further changed the scope of the law by naming the Secretary of the Senate and Chief Clerk of the House of Representatives, the chief operational and public records officers for the Legislature. CP 132. Without citation to the record or law, the Associated Press asserts that the 1995 amendment to the PRA was actually enacted to stop the Secretary and Chief Clerk from serving as the Legislature’s centralized records officers. Appellee Br. at 38. But nowhere in the plain language of the 1995 amendment is that legislative intent expressed. *See* CP 123-177. Rather, by incorporating the definition of “legislative records” found in RCW 40.14.100 and specifying the Secretary and Chief Clerk were responsible for those records, the 1995 amendment was a comprehensive effort to set out the distinct public records duties of the legislative branch and its members. *See* CP 132.

The Associated Press next argues that the Legislature’s enactment of House Bill 1133 (HB 1133) in 2005—which moved the PRA from Chapter 42.17 RCW into its own separate chapter—“was not meant to change in any way the meaning of either law.” Appellee Br. at 20. This assertion fails to address the bill’s plain language. HB 1133 expressly states that Chapter 42.17 RCW “contains laws relating to several discrete subjects. Therefore, the purpose of [HB 1133] is to recodify some of those laws and create a new chapter in the Revised Code of Washington that contains laws pertaining to public records.” RCW 42.56.001, *see* CP 391. The fact that the Legislature intended to separate PRA and campaign finance and ethics laws as “discrete subjects” is ignored throughout the Associated Press’ brief.

The Associated Press’ mischaracterizations continue with respect to the amendments to the PRA enacted in 2007 with House Bill 1445 (HB 1445). This amendment removed the incorporation of Chapter 42.17 RCW’s definition section from the PRA. In so doing, the Legislature specifically stated that the definitions in the PRA would be those that applied to the PRA, “**unless context clearly requires otherwise.**” CP 606 (emphasis added). The definitions of “state office” and “state legislative office” thus remained in the later discrete campaign finance and disclosure laws, but were not incorporated into the definitions that apply to the PRA.

RCW 42.17A.005(3) and (48); RCW 42.52.010(1); RCW 42.56.010. As part of this change, the definition of “state legislative office” was removed from the PRA’s definitions of “agency” and “state agency.” RCW 42.56.010. These definitional changes were maintained when the Legislature completed the separation of the PRA from the campaign finance and ethics in 2010, moving each subject into its own discreet chapter. Laws of 2010, ch. 204, §1102. Where such a material change takes place, a change in legislative purpose must be presumed. *Allen v. Employment Sec. Dep’t*, 83 Wn.2d 145, 151, 516 P.2d 1032 (1973).

Despite the statutory directive that the newly codified definitions in the PRA applied “unless context clearly requires otherwise,” the Associated Press claims that the definitions of “state office” and “state legislative agency” contained in the campaign finance law in Chapter 42.17A RCW apply with “equal force” to the PRA. Appellee Br. at 22. But they fail to provide any legal authority supporting this argument. Indeed, as noted in the Legislature’s Opening Brief, this Court has explicitly rejected such an approach, declining to apply definitions from separate statutes where those statutes do not so direct. Opening Br. at 23-27; *see, e.g., State v. Barnes*, 189 Wn.2d 492, 497-98, 403 P.3d 72 (2017) (declining to apply the term “motor vehicle” in RCW 9A.04.110(29) when it is not defined in RCW 9A.56.065) (lead op. by Owens, J.). The

Legislature could have retained the specific definitions of “state office” and “state legislative agency” in the PRA but chose not to do so.

3. The Definitions from Other Distinct Chapters of the RCW Demonstrate that the Legislature and its Members are Not State Agencies.

The Associated Press argues that because “[s]everal other statutes in Title 42” specifically include the Legislature and individual legislative offices within their definition of “agency,” this Court should apply those definitions to the PRA. Appellee Br. at 25-26. It is not clear how this argument differs from the unsupported “equal force” argument debunked above. Regardless, that other statutes in Chapter 42 RCW have different definitions than the PRA again reinforces that the plain meaning of “agencies” within the PRA does not include the Legislature and individual legislative offices.

First, examining related statutes is a helpful part of a plain meaning analysis “because legislators enact legislation in light of existing statutes.” *State of Wash., Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48A:16, at 809–10 (6th ed. 2000)). Thus, the fact that the Ethics in Public Service Act defines agency to include “all elective offices” and the “state legislature,” and that the Campaign Disclosure and Contribution law separately defines “state

office” to include legislative offices, demonstrates that the Legislature understands how to draft statutory provisions to specifically include legislators and their offices. The fact that they deliberately chose not to do so within the PRA at the same time those definitions were included in other statutes confirms the Legislature’s intent to adopt a more limited definition of “state agency” in the PRA. *See State v. Gonzales Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (A “fundamental principle of statutory interpretation is that when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings.”).

Second, the inclusion of these specific definitions in both the campaign finance and ethics laws, but not in the PRA, cannot be viewed as a mere oversight. Those definitions specifically including individual legislators and their offices were necessary to affect the purposes of the campaign finance and ethics laws. It would make no sense if the campaign finance laws and ethics laws did not apply to individual legislators. Chapter 42.17A RCW thus includes a definition of “legislative offices” to make clear that the campaign financing laws apply to all those seeking such an office. And Chapter 42.56 RCW relating to ethics includes a broader definition of “agency” to ensure that all state and local officials fall within that statute’s scope.

Third, the Associated Press' citation to a federal statute, "Access Washington," "Data.wa.gov," Wikipedia, the Office of Financial Management webpage, and other websites as authority is irrelevant. They offer no support for how those sources are appropriate sources for statutory construction to determine the plain meaning of the PRA. *See* Appellee Br. at 28-30. The Associated Press fails to provide any link demonstrating that these websites were established or approved by the Legislature to provide guidance as to the application of the PRA. The Court should decline to consider them.

Further, the Associated Press' references to certain legislatively created agencies on the legislative website is a red herring. There are no records requests to any of those entities. Thus, whether any of these entities are within the definition of "state agency" is not before the Court.

4. Prior Failed Attempts to Amend the PRA are Irrelevant.

The Associated Press devotes substantial effort trying to give significance to prior failed efforts to amend the PRA in 2003 and 2005. Appellee Br. at 17-20, 23. Indeed, the Associated Press claims that these failed bills represent the "understanding of the legislators at the time" and what the "Legislators and the Legislature" believed regarding the scope of the PRA. *Id.* at 18-19. But the Appellees cite no authority suggesting the Court should give credence to these failed legislative efforts. Indeed, the

Supreme Court has refused to use rejected amendments as evidence of legislative intent: “when the Legislature rejects a proposed amendment, as they did here, we will not speculate as to the reason for the rejection.” *Spokane Cty. Health Dist. v. Brockett*, 120 Wn. 2d 140, 153, 839 P.2d 324 (1992); *see also State v. Conte*, 159 Wn. 2d 797, 813, 154 P.3d 194 (2007) (“legislative intent cannot be gleaned from the failure to enact a measure”). Similarly, the statements accompanying failed legislation are irrelevant to determining legislative intent: “comments about the purpose of an amendment which does not become part of the enacted legislation . . . cannot serve as evidence of legislative intent.” *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991). The only thing that the failed bills support is speculation about what may have been the perspective of one sponsor of these amendments out of the 147 members of the legislative body. The Associated Press’ reliance on prior failed amends to the PRA is improper.

Further, a decision not to enact a measure is particularly inappropriate for evaluating legislative intent where “there are several different components of [the measure], any one of which might be critical to the decision to reject.” *Conte*, 159 Wn.2d at 813 (citing *Leeper v. Dep’t of Labor & Indus.*, 123 Wn.2d 803, 816, 872 P.2d 507 (1994)) (rejection of a bill with five sections, four of which had nothing to do with the

subject matter at issue, was not evidence of legislative intent). Thus the Associated Press' reliance on the 2005 failed bill, which addressed several subjects in addition to the PRA, is especially inappropriate. *See* CP 194, 204, 214, 218 (showing the different topics in the 2005 failed bill). The trial court's observation that it was "utterly unmoved" by the same arguments below regarding the failed bills was correct. Verbatim Report of Proceedings December 22, 2017 ("VRP 1") at 51.

5. The Legislature's Limited History of Responding to PRA Requests Supports the Legislature's Narrow Construction of the PRA.

The Associated Press claims that "[f]or years after 1995, the Legislature produced public records of the type sought in these PRA requests." Appellee's Br. at 24. This is unsupported by the record. At most, the record indicates that twice in the over 22 years since the comprehensive 1995 amendment to the PRA, the Senate has produced legislators' personal communications in response to a records request. *See* CP 345-47. This record does not support the Associated Press' argument. First, in addition to the list of legislative records that are subject to mandatory disclosure under RCW 42.56.010(3), that statute permits either body to designate additional records as public records. Consistent with this authority the Legislature has made hundreds of thousands of records available to the public. CP 326. Second, nothing in the list of records

subject to mandatory disclosure under that statute prohibits the Legislative or individual legislators from providing additional records on a voluntary basis—as did certain legislators here. CP 327. If anything, production of two sets of records over 22 years demonstrates that the Legislature has consistently adopted a narrow reading of the PRA.

B. The Secretary and Chief Clerk Oversee and Fulfill the Administrative Functions of the Whole of the Legislature, Including Public Records Duties.

While arguing the Legislature “overstated” the Secretary’s and Chief Clerk’s roles, the Associated Press fails to address those roles in practice or under the PRA. As part of their responsibility for the Legislature’s practical, administrative functions, the Secretary and Chief Clerk have served and currently serve as the Legislature and individual members’ centralized records officers. *See* Opening Br. at 28-31. This makes operational sense given the unique structure and duties of the Legislature. *Id.*

The manner in which the Secretary and Chief Clerk serve as the Legislature’s records officers in practice is also reflected in the duties and oversight of their work established in the PRA. Their role as the centralized records custodians is evident from the first “legislative records” definition in 1971, tasking the Secretary and Chief Clerk to help to maintain and ensure access to legislative records. Laws of 1971, ch.102,

§§§ 2, 5, 8 (§2 codified as RCW 40.14.100). Now the PRA specifically defines “legislative records,” for purposes of the Secretary and Chief Clerk’s offices, *see* RCW 42.56.010(3), while also plainly distinguishing their PRA responsibilities from agencies’ broader responsibilities. *See, e.g.,* RCW 42.56.100, RCW 42.56.070(8). The PRA does not specifically call out any other government office this way, demonstrating that the Secretary and Chief Clerk’s offices were intended to be the full Legislature’s records officers.

Upon review of these PRA provisions, the trial court rightly held that to interpret the PRA as including the Secretary and Chief Clerk as “agencies” “would impermissibly render these repeated, separate references” to their offices “superfluous.” CP 803-04. The trial court thus recognized “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.

The Associated Press does not address the trial court’s conclusion or the unique treatment of the Secretary and Chief Clerk under the contemporary PRA. *See* Appellee’s Br. at 41. Rather, the Associated Press relies on a summary description of the Secretary and Chief Clerk’s roles from the legislative website, highlighting that some of their actions are

“subject to” Senate or Speaker of the House “approval.” *Id.* at 36-37.

Based on this, the Associated Press argues that the Secretary and Chief Clerk cannot serve as records custodians because they lack “power to compel compliance,” from individual members. *Id.* at 38. This argument ignores that the Legislature has created a specific role for the Secretary and Chief Clerk with respect to legislative records under the PRA. That hiring and firing of employees are subject to approval does not negate the legislatively directed role for the Secretary and Chief Clerk under the PRA.

The Associated Press’ reliance on the Legislature’s internal organizational structure is equally unavailing. The Associated Press attempts to make hay out of the fact that individual members sit atop the Legislature’s organizational hierarchy above their staff, various committees and caucuses, the Secretary and Chief Clerk’s offices, and various Legislative agencies the Legislature creates. *See id.* at 30-35. That Senate and House staffers or other legislative entities serve at the direction of the elected officials, however, does not alter the Secretary and Chief Clerk’s mandatory PRA responsibilities. Once again, the Associated Press fails cite to any authority supporting its argument. Nor do they even attempt to explain how the Legislature’s hierarchical structure—essential to directing the flow of decisions to ensure effective policy making—bears

on whether the Legislature or its members are “agencies” under the plain meaning of the PRA.

Fundamentally, the Associated Press relies on its own sense of what the policy should be: that Senators’ and Representatives’ superior role in the Legislature means they “should be held to have custody and control over any record residing or under the control of anyone within the Senate or House” lest records go into a “black hole.” Appellee’s Br. at 33. But such policy arguments have no bearing on the statutory interpretation issues before the Court.

Under the Associated Press’ policy view, each of the 147 part-time citizen legislators would be responsible for hundreds of thousands of records, including any and all records held by their fellow members, as well as by the offices that serve them. 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). Such a policy would also be contrary to the PRA’s own provision acknowledging that record-related duties must be balanced with legislative responsibilities. *See* RCW 42.56.100 (stating the office of the Secretary of the Senate and the office of the Chief Clerk of the House of Representatives shall adopt reasonable

procedures allowing for the time, resource, and personnel constraints associated with legislative sessions).

Considering the same “black hole” argument below, the trial court aptly held that it would be inappropriate for it to rule on the Associated Press’ expressed policy concern. Verbatim Report of Proceedings January 19, 2018 (“VRP 2”) at 10-11 (stating that “the policy concerning those matters is not something for the Court to determine. It is up to the Legislature to determine which records should be subject to Public Records Act requests”). The trial court is correct. It is not the court’s role to enact law or balance policy interests. *Rouso v. State*, 170 Wn.2d 70, 92, 239 P.3d 1084 (2010). Here, RCW 42.56.010(3) and 40.14.100 establish the affirmative disclosure obligations of the Legislature, not as an “agency,” but as a distinct government branch with the Secretary and Chief Clerk serving as its record officers.

C. The Legislature and Individual Members Are Only Responsible for Disclosing Legislative Records as Specified in the PRA.

The Legislature and its individual members have affirmative disclosure obligations under the PRA to disclose records to the public. But by the PRA’s terms, these disclosure responsibilities are limited to “legislative records” as defined in RCW 42.56.010(3) and RCW 40.14.100. The PRA’s plain language and incorporated definition from

RCW 40.14.100 defines what constitutes a legislative public record subject to disclosure by the Legislature. The definition encompasses budget, financial, legislative session, personnel leave, travel, and payroll records, reports submitted to the Legislature, and any other record designated a public record by any official action of the Senate or the House. RCW 42.56.010(3). Further, the definition specifically *excludes* the following:

[T]he 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.**

RCW 40.14.100 (emphasis added). The Associated Press does not contend the Legislature failed to produce any “legislative records.” The Associated Press’ PRA requests are instead for individual legislators’ schedules, calendars, emails, text messages, and videos, as well as complaints and reports related to personnel and human resource investigations. CP 327, 12-32. These requested records are under the control of individual members or encompass non-leave, travel, or payroll personnel records. Under a plain reading of the PRA “legislative record” definition therefore, these records are not subject to public disclosure. *See* RCW 42.56.010(3),

RCW 40.14.100. Thus, all records requested are beyond the scope of “legislative records” and thus not subject to the PRA.¹

D. The Associated Press Ignores the Constitutional Limitations of the PRA.

The Associated Press fails to recognize the significance of the constitutional problems presented by their interpretation of the PRA and further misinterprets the Legislature’s argument. The Legislature has never claimed that any law made to apply to the Legislature would be unconstitutional. *See Appellees’ Br.* at 43. The Legislature only highlighted that like any other law adopted or amended by the Legislature or through initiative, the PRA is subject to constitutional limitations and separation of powers principles. *See Opening Br.* at 39-40 (citing authority including *Freedom Found. 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”)). The Associated Press fails to respond to this argument.

¹ The Associated Press cites, *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 357 P.3d 45 (2015) although why is not clear. Appellee’s Br. at 41. *Nissen* did not address the Legislature’s or its members’ PRA obligations—instead focusing on records prepared by agency employees. *See* 183 Wn.2d at 876, 879-80. And the Legislature and its members are not agencies or agency employees. *See supra* Section II. A. 1 p. 2-4.

The Associated Press similarly fails to address this Court’s analogous treatment of the judicial branch with respect to the PRA, which is in accord with the constitutional allocation of authority to the respective branches. Washington courts have consistently held that the PRA does not apply to the judicial branch as a whole or to individual judicial officers. *See, e.g., City of Fed. Way v. Koenig*, 167 Wn.2d 341, 346, 217 P.3d 1172 (2009) (holding the records of individual judicial officers’ personal correspondence created in the scope of their official duties are not subject to disclosure under the PRA). In so doing, courts have recognized 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 County v. Yakima Herald–Republic*, 170 Wn.2d 775, 795, 246 P.3d 768 (2011); and the availability of some of its records through alternative means, *Nast v. Michels*, 107 Wn.2d 300, 307, 730 P.2d 54 (1984). The authority and characteristics of the Legislature are analogous. *See* Opening Br. at 41-43.

Moreover, the trial court’s decision 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. The separation of powers doctrine ensures each branch of government’s fundamental functions remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129,

135, 882 P.2d 173 (1994). The doctrine is implicated where the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *Id.* (internal citation omitted).

Relevant here, 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. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) (stating adding words to a statute is “not within [the courts’] power”); *State v. Dennis*, 191 Wn.2d 169, 178, 421 P.3d 944 (2018) (stating if the Legislature intended a certain provision for restoration of firearm rights, “it could have said so,” but that the court “may not read language into the statute”). The Legislature specifically defined “agencies” in Chapter 42.56 for purposes of the PRA, and did not include the Legislature or its members. RCW 42.56.010(1). Thus, amending the public records laws to increase access to legislators’ personal records must be a legislative act, rather than a judicial one. *See Reis*, 183 Wn.2d at 215 (stating it is not the court’s job to “create judicial fixes” and that “[s]tatutes that frustrate the purpose of others, though perhaps unintentionally, are ‘purely a legislative problem.’”) (internal citation omitted). The treatment of the judicial branch under the PRA and

separation of powers principles further support summary judgment for the Legislature.

E. Trial Court Erred in Allowing the Declaration of Rowland Thompson.

The Associated Press argues that the declaration of Rowland Thompson—almost entirely a collection of personal anecdotes, hearsay, and speculation about the collective intent of the Legislature—is a verity on appeal. Appellees Br. at 24. They are wrong. As an initial matter, this Court reviews summary judgment motions de novo. *Freedom Found.*, 178 Wn.2d at 694. That review is subject to the general rules of CR 56 which limits consideration of evidence only to admissible, relevant evidence. *See Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein) abrogated on other grounds by *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 528, 404 P.3d 464 (2017).

As set out in the Legislature’s Motion to Strike, for the same reasons that Mr. Thompson’s declaration should not have been considered by the trial court on the parties’ cross-motions for summary judgment, CP 640-56, it should not be considered here. Thompson was a lobbyist for the

Allied Daily Newspapers of Washington and others during the time period relevant to this appeal. CP 343. His declaration fails to state the basis of his personal knowledge, properly lay necessary foundation, or explain how he came to know of the purported details in his numerous unsupported statements. *See* CP 342-52. Hearsay evidence should not be considered on summary judgment. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842, 846 (1986). Speculation should not be considered on summary judgment. *Grimwood*, 110 Wn.2d at 359 (an affidavit should set forth information as to “what took place, an act, an incident, a reality, as distinguished from supposition or opinion.”). And anecdotal personal observations about the enactment of a bill by a lobbyist has never, to our knowledge, been considered as part of a bill’s legislative history or otherwise admissible evidence of statutory construction. That the Thompson Declaration is part of the appellate record does not make inadmissible and inappropriate evidence all of a sudden admissible and relevant on review. The Associated Press fails to cite any authority to support this contention.

Second, Washington courts have made plain that only the trial court’s *finding of fact* to which no error has been assigned are verities on appeal. *See Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980) (stating that “unchallenged findings of fact become

verities on appeal”). The trial court here did not make findings of fact based on the content of Mr. Thompson’s declaration. Rather, the court simply denied the Legislature’s Motion to Strike the declaration without hearing argument, stating that:

I don’t necessarily disagree with the positions advocated for in the motion to strike. In fact, I largely agree with those as legal issues. However, given the posture of this case being one where we are dealing with legislative construction and the need to create a record for appeal, if a higher court were to disagree with me about the merits of needing to consider or not consider those additional materials, I don’t want to place any procedural hurdles with a motion to strike that has been granted and reviewed on an abuse of discretion standard. . . I’m not going to grant the motion to strike purely for the purpose of not making undue complications for the record for cases for appeals above.

VRP 1 at 5-6. If anything is to be taken from this ruling, it is that the trial court expressed agreement with the basis for the Legislature’s Motion.

Third, this Court has the discretion to consider whether the trial court erred by denying the Legislature’s Motion to Strike. RAP 1.2(a) (stating that the appellate rules “will be liberally interpreted to promote justice and facilitate the decision of cases on the merits”); *see also Boyd v. Davis*, 127 Wn.2d 256, 265, 897 P.2d 1239 (1995) (stating RAP 12.1(b) suggests that it is within the discretion of an appellate court to decide an issue regardless of which, if any, brief addresses it and declining to disturb appellate court decision to address issue raised initially in reply). Review of the trial court’s denial of the Motion to Strike is appropriate here as the

Associated Press raised the issue and will not be prejudiced by the Court's consideration. *See State v. Olson*, 126 Wn.2d 315, 318–24, 893 P.2d 629 (1995) (court will consider issue on appeal when nature of challenge has been made clear and addressing the issue will not prejudice the opposing party). For the reason outlined above, the Motion to Strike should have been granted.

F. Absent the Legislature's Inclusion within the PRA, No Case or Controversy Exists.

The Associated Press only brought causes of action against the Legislature and caucus leaders, named in those leadership roles. CP 33-40. There is no relief requested against the Legislature or caucus leaders as individual legislators. Thus, if the Court agrees with the trial court's determination with respect to the Legislature, House of Representatives, and Senate's PRA obligations, no controversy remains to be adjudicated.

In response to this argument, the Associated Press admits that they only sued the four named caucus leaders and fails to identify anything in the record establishing that they named them in their capacity as individual state legislators. *See Appellee's Br.* at 42. The Associated Press points to the fact that they sent PRA requests to all individual legislators (*id.* at 41-42)—but that does

not alter the fact that as they previously admitted, they chose not to sue all individual legislators. VRP 1 at 89. Further, the record shows that the Associated Press' Prayer for Relief within their Complaint is only against the Legislature and caucus leaders, named in those roles, contrary to the Associated Press' unsupported assertion otherwise. CP 6, 40-41. The Associated Press also fails to cite any authority refuting the Legislature's authority showing that the Associated Press cannot request adjudication of claims against legislators who were not sued and are not before the court. *See* Opening Br. at 48 (citing *Bayha v. Public Util. Dist. No. 1, 2* Wn.2d 85, 113, 97 P.2d 614 (1939)); *see also In re Krueger's Estate*, 11 Wn.2d 329, 342, 119 P.2d 312 (1941) (holding judgment against non-joined party is not binding). That there might be a future case against individual legislators does not create a PRA case or controversy here.

The Associated Press should not be allowed to seek injunctive and monetary relief against individual legislators not properly before the Court. Thus, if the Court holds as the trial court did that the Legislature, House, and Senate are only subject to the PRA through the Secretary and Chief Clerk, and therefore accountable only for "legislative records," the Court should reverse

the trial court's ruling regarding individual members and grant summary judgment to the Legislature.

At most, the Associated Press' claims about the application of the PRA to individual legislators is akin to a declaratory judgment claim which would not entitle an award of monetary penalties or fees if the Associated Press succeeds on appeal.

G. The Court Should Not Apply Penalties or Award the Associated Press Fees or Costs on Appeal.

The Associated Press accurately details this Court's duties with respect to awarding penalties and attorney fees in PRA cases. Yet the Associated Press' arguments regarding a penalty and award of attorney fees are misguided. First, there should be no penalty and the Associated Press should not prevail on appeal because the Legislature complied with the PRA. Second, any consideration of an award of fees and penalties should be remanded back to the trial court. There is no record on appeal that would support consideration of either penalties or a fee award. No penalties, fees or costs are appropriate at this point. Third, as noted above, the Associated Press' decision not to sue any legislators in their individual capacity makes that aspect of the case either a non-justiciable case or controversy or at most a declaratory judgment action. In either case, the Associated Press would not be entitled to a penalty or fee award.

III. CONCLUSION

The ultimate responsibility for making policy choices regarding the scope of the PRA rests with the Legislature, not with the press or with this Court. The Legislature made the policy choice to limit how the PRA applies to the Legislature and its individual members. That policy choice designates the Secretary and Chief Clerk as responsible for producing defined legislative records in response to PRA requests. The Legislature and its individual members are not “state agencies” under the plain meaning of the PRA subject to the PRA’s broader disclosure requirements. This Court should uphold the trial court with respect to the PRA’s application to the Legislature, and reverse the trial court’s holding with respect to individual legislators.

RESPECTFULLY SUBMITTED this 18th day of February, 2019.

PACIFICA LAW GROUP LLP

By: /s/Paul J. Lawrence

Paul J. Lawrence, WSBA # 13557

Nicholas W. Brown, WSBA # 33586

Claire E. McNamara, WSBA # 50097

/s/Gerry Lee Alexander

Gerry Lee Alexander, WSBA # 775

Paul.Lawrence@pacificallawgroup.com

Nicholas.Brown@pacificallawgroup.com

Claire.McNamara@pacificallawgroup.com

Gallexander@bgwp.net

Attorneys for Appellants

PACIFICA LAW GROUP

February 18, 2019 - 2:11 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95441-1
Appellate Court Case Title: The Associated Press, et al. v. The Washington State Legislature, et al.
Superior Court Case Number: 17-2-04986-4

The following documents have been uploaded:

- 954411_Briefs_20190218141003SC155051_9407.pdf
This File Contains:
Briefs - Appellants/Cross Respondents Reply
The Original File Name was WSL Reply Brief CODED.pdf

A copy of the uploaded files will be sent to:

- Nicholas.brown@pacificalawgroup.com
- claire.mcnamara@pacificalawgroup.com
- galexander@bgwp.net
- info@alliedlawgroup.com
- michele@alliedlawgroup.com

Comments:

Sender Name: Tricia O'Konek - Email: tricia.okonek@pacificalawgroup.com

Filing on Behalf of: Paul J. Lawrence - Email: paul.lawrence@pacificalawgroup.com (Alternate Email: dawn.taylor@pacificalawgroup.com)

Address:
1191 Second Avenue, Suite 2100
Seattle, WA, 98101
Phone: (206) 245-1700

Note: The Filing Id is 20190218141003SC155051