

FILED
SUPREME COURT
STATE OF WASHINGTON
11/2/2018 1:45 PM
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.

THE WASHINGTON STATE LEGISLATURE'S OPENING 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.	ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE.....	3
A.	The Evolution of the PRA and its Unique Application to the Legislature and its Members	3
B.	The PRA Requests in this Case.....	9
C.	Procedural History.....	10
IV.	ARGUMENT	12
A.	Standard of Review	12
B.	The Legislature and its Individual Members are not “Agencies” Under the Plain Meaning of the PRA	12
1.	The Legislature Does not Fall Within the PRA Definition of “Agency.”	13
2.	Individual Legislators do not Fall Within the PRA Definition of “Agency.”	16
3.	Individual Legislators are not “State Offices” Under the PRA.....	17
4.	The Campaign Finance Law is not a Related Statute for Purposes of Defining State Office Under the PRA.....	23
5.	Secretary and Chief Clerk Share Responsibilities for the Legislature and its Members’ Unique PRA Obligations	28
C.	If the Court Determines the PRA is Ambiguous, Rules of Statutory Construction Confirm the Legislature and its Members Are Not “State Agencies.”	31

1.	Basic Canons of Statutory Construction Support that the Legislature Intended Different Definitions of “Agency” in the PRA and in the Campaign Finance Law	32
2.	Interpreting Individual Legislators to be State Agencies Renders Absurd Results	33
3.	The Attorney General has Historically Treated the Legislature and its Members Distinctly under the PRA	36
D.	The Legislature’s Establishment as a Uniquely Treated Entity Under the PRA is Consistent with Separation of Powers Principles and the Treatment of the Judiciary.	39
E.	The Records Requested are not “Public Records” Under the PRA	43
F.	The Legislature Complied with its Responsive Obligations Under the PRA	46
G.	There is no Case or Controversy Regarding the Individual Legislators’ Responses to the PRA Requests at Issue.....	47
V.	CONCLUSION	49

Table of Authorities

Washington Cases

<i>Anderson, Leech & Morse, Inc. v. Wash. State Liquor Control Bd.</i> , 89 Wn.2d 688, 575 P.2d 221 (1978).....	15
<i>Barry & Barry, Inc. v. Dep't of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	15
<i>Bayha v. Public Util. Dist. No. 1</i> , 2 Wash.2d 85, 97 P.2d 614 (1939).....	48
<i>Brown v. Owen</i> , 165 Wn.2d 706, 206 P.3d 310 (2009).....	39, 40, 42
<i>Burns v. City of Seattle</i> , 161 Wn.2d 129, 164 P.3d 475 (2007).....	13, 44
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	31
<i>Carrick v. Locke</i> , 125 Wn.2d 129, 882 P.2d 173 (1994).....	40
<i>Childers v. Childers</i> , 89 Wn.2d 592, 575 P.2d 201 (1978).....	22
<i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	40
<i>Clallam County Deputy Sheriff's Guild v. Bd. of Clallam County Comm'rs</i> , 92 Wn.2d 844, 601 P.2d 943 (1979).....	33
<i>Columbia Riverkeeper v. Port of Vancouver USA</i> , 188 Wn.2d 421, 395 P.3d 1031 (2017).....	13, 20
<i>Davis v. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	passim

<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	31
<i>Fortgang v. Woodland Park Zoo</i> , 187 Wn.2d 509, 387 P.3d 690 (2017).....	12
<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).....	33
<i>Freedom Foundation v. Gregoire</i> , 178 Wn.2d 686, 310 P.3d 1252 (2013).....	39, 40
<i>Green Collar Club v. State Dep’t of Revenue</i> , 413 P.3d 1083 (Wash. Ct. App. 2018).....	25
<i>In re Det. of Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002).....	32
<i>Jametsky v. Olsen</i> , 179 Wn.2d 756, 317 P.3d 1003 (2014).....	14, 25, 30, 32
<i>Keeting v. Public Util. Dist. No. 1</i> , 49 Wn.2d 761, 306 P.2d 762 (1957).....	17
<i>Lenander v. Washington State Dep’t of Ret. Sys.</i> , 186 Wn.2d 393, 377 P.3d 199 (2016).....	20
<i>McDermott v. Kaczmarek</i> , 2 Wn. App. 643, 469 P.2d 191 (1970).....	14
<i>Nast v. Michels</i> , 107 Wn.2d 300, 730 P.2d 54 (1984).....	17, 22, 42
<i>Pringle v. State</i> , 77 Wn.2d 569, 464 P.2d 425 (1970).....	15
<i>Seattle Times Co. v. Serko</i> , 170 Wn.2d 581, 243 P.3d 919 (2010).....	39
<i>State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	13

<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	13
<i>State v. Barnes</i> , 189 Wn.2d 492, 403 P.3d 72 (2017).....	27
<i>State v. Breazeale</i> , 144 Wn.2d 829, 31 P.3d 1155 (2001).....	12
<i>State v. Delgado</i> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	18
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008).....	passim
<i>State v. Gormley</i> , 40 Wash. 601, 82 P. 929 (1905).....	48
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	13
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	41
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	27, 29, 31
<i>Stewart v. State, Dep't of Employment Sec.</i> , 191 Wn.2d 42, 419 P.3d 838 (2018), <i>as amended</i>	22, 36
<i>Swinomish Indian Tribal Cmty. v. Washington State Dep't of Ecology</i> , 178 Wn.2d 571, 311 P.3d 6 (2013).....	32, 38
<i>Vita Food Prod., Inc. v. State</i> , 91 Wn.2d 132, 587 P.2d 535 (1978).....	22
<i>Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.</i> , 77 Wn.2d 94, 459 P.2d 633 (1969).....	32
<i>Washington State Farm Bureau Fed'n v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007).....	15

<i>Washington State Motorcycle Dealers Ass’n v. State</i> , 111 Wn.2d 667, 763 P.2d 442 (1988).....	39
<i>West v. Wash. State Ass’n of District and Municipal Court Judges</i> , 190 Wn. App. 931, 361 P.3d 210 (2015).....	40
<i>Woodson v. State</i> , 95 Wn.2d 257, 623 P.2d 683 (1980).....	17
<i>Wright v. Lyft, Inc.</i> , 189 Wn.2d 718, 406 P.3d 1149 (2017).....	20, 22
<i>Yakima County v. Yakima Herald–Republic</i> , 170 Wn.2d 775, 246 P.3d 768 (2011).....	39, 41

Non-Washington Cases

<i>Hiss v. Bartlett</i> , 69 Mass. 468, 3 Gray 468, 1855 WL 5710 (1855).....	42
<i>Moulton v. Scully</i> , 111 Me. 428, 89 A. 944 (1914).....	42
<i>Witherspoon v. State</i> , 138 Miss. 310, 103 So. 134 (1925).....	42, 45

Washington Statutes

CONST. art. II, §1.....	12, 15, 16, 17
CONST. art. II, §2.....	16, 20
CONST. art. II, §§4, 6.....	16
CONST. art. II, §8.....	41
CONST. art. II, §9.....	35, 41
CONST. art. II, §10.....	28
CONST. art. II, §11.....	4, 43

CONST. art. III, §17	4,43
CONST. art. IV, §1	41
RCW 34.05.010	24
RCW 34.05.010(2).....	35
RCW 40.14.100	passim
RCW 41.06.450	24
RCW 42.17	7, 8, 22
RCW 42.17A.005.....	23, 24, 26, 27
RCW 42.17A.005(3).....	8, 22, 33
RCW 42.17A.005(44).....	11
RCW 42.17A.005(48).....	8,11, 22, 33
RCW 42.52.010	23
RCW 42.52.010(1).....	8, 22, 33
42.56 RCW	7
RCW 42.56.010	23, 24, 27
RCW 42.56.010(1).....	passim
RCW 42.56.010(3).....	passim
RCW 42.56.040(1).....	35
RCW 42.56.070	30, 35
RCW 42.56.070(1).....	14
RCW 42.56.070(5)(b), (d), and (e)	24
RCW 42.56.070(8).....	29, 30

RCW 42.56.080	36
RCW 42.56.090	36
RCW 42.56.100	29, 30, 34
RCW 42.56.110	24
RCW 42.56.210(3).....	46
RCW 42.56.520	29, 47
RCW 42.56.550(3).....	29
RCW 42.56.560	37
RCW 43.07.040	43
RCW 9A.04.110(29).....	27
RCW 9A.56.065.....	27

Other Authorities

GR 31(c)(4).....	42
Opinion of the Justices, 252 Ala. 205, 40 So. 2d 623 (1949).....	42
1 SUTHERLAND STATUTORY CONSTRUCTION §7:2	42

I. INTRODUCTION

The Legislature has exercised its constitutional authority to revise Washington's Public Records Act ("PRA"), Ch. 42.56 RCW, more than 100 times in the over 46 years since it originally passed as Initiative 276 ("I-276"). Relevant here, the Legislature has specifically revised the PRA with respect to its application to legislative records. The sole issue before the Court is the correct statutory interpretation of the Legislature's treatment of legislative records under the PRA.

Under the PRA's plain meaning, the Legislature, its members, and their respective offices are not "state agencies" as defined in the act subject to "agency" disclosure requirements. Rather, the Legislature, its members, and their respective offices are subject only to the disclosure requirements in RCW 42.56.010(3) and 40.14.100. The Legislature appropriately responded to the PRA requests at issue here when it determined that the requests fell outside the scope of the Legislature's discrete record disclosure requirements, and indeed provided more than is required under the PRA.

Accordingly, the trial court only got it half right. The trial court properly concluded that the Legislature, the Senate, and the House of Representatives as bodies of government are not subject to the PRA's broad disclosure requirements. But the court incorrectly determined that

individual legislators—part-time citizen legislators—are “state agencies” fully subject to the act. In reaching this conclusion, the court ignored the plain meaning of the term “agency,” erred in its consideration of the amendments to the PRA that show the Legislature and its members have disclosure requirements distinguishable from those of state and local agencies, and improperly applied a distinct definition from another statute to the terms of the PRA.

The Washington State Legislature, the Washington State Senate, the Washington State House of Representatives, Senate Majority Leader Mark Schoesler, House Speaker Frank Chopp, Senate Minority Leader Sharon Nelson, and House Minority Leader Dan Kristiansen¹, each in their official capacity (collectively, the “Legislature”) therefore respectfully request that this Court uphold the trial court’s decision regarding the Legislature, and reverse with respect to the individual legislators.

II. ASSIGNMENTS OF ERROR

1. Under the PRA, the plain meaning of “agencies” includes only “state agencies.” The Legislature is not a “state agency.” Individual legislators make up the Legislature as a whole and do not individually fall within the definition of “state agencies.” The trial court erred in ruling that

¹ As of March 6, 2018, Mr. Kristiansen is no longer serving as House Minority Leader.

individual legislators and their offices are “state agencies” under the PRA and subject to the act’s generally applicable disclosure requirements.

2. A plain meaning statutory analysis includes considering the amendatory changes to the statute at issue and presuming those amendments have a material purpose. The trial court erred in failing to give significance to the amendments to the PRA, which created a standalone definition of “agency” that does not include legislators, and which created a specific set of disclosure requirements for the legislative branch.

3. A plain meaning statutory analysis does not permit the court to import definitions from one statutory chapter to another where the affected statute specifically directs otherwise. The trial court erred by borrowing the definition of “state office” from the campaign finance chapter and applying it to the PRA chapter, which has its own distinct definitions.

III. STATEMENT OF THE CASE

A. The Evolution of the PRA and its Unique Application to the Legislature and its Members.

The obligations of the Washington State Legislature and its members can be traced through years of statutory development that resulted in the PRA and related provisions at issue here.

In 1971, the Legislature amended the pre-existing laws on archiving and records preservation to add duties specific to legislative

records. Under the state constitution, the Senate and House are required to maintain and publish journals, and the Secretary of State must maintain records of legislative acts. CONST. art. II, §11, art. III, §17. But the 1971 legislation established a more comprehensive system to preserve and archive additional records of the Legislature. Under the 1971 legislation:

“Legislative records” shall be defined as correspondence, amendments, reports, and minutes of meetings made by or submitted to legislative committees or subcommittees and transcripts or other records of hearings or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions, but does not include the records of an official act of the legislature kept by the secretary of state, bills and their copies, published materials, digests, or multi-copied matter which are routinely retained and otherwise available at the state library or in a public repository, or reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature.

Laws of 1971, ch. 102, §2 (codified as RCW 40.14.100).² The Legislature adopted this definition to determine which legislative records should be preserved and placed into the state archives. *See id.* The law distinguished records related to actions of legislative committees and subcommittees in debating and recommending legislation from documents held personally by individual

² Washington State Legislature, Code Reviser, *available at* [http://leg.wa.gov/CodeReviser/documents/sessionlaw/1971ex1c102.pdf?cite=1971 ex.s. c 102 §2](http://leg.wa.gov/CodeReviser/documents/sessionlaw/1971ex1c102.pdf?cite=1971%20ex.s.%20c102%20%242) (last visited November 2, 2018).

legislators, including correspondence. *Id.* The former were to be retained as public records; the latter not. *Id.* Moreover, the law assigned responsibility to the Chief Clerk of the House of Representatives (“Chief Clerk”) and to the Secretary of the Senate (“Secretary”) to collect and maintain legislative records. *Id.* at §§ 5, 8.

One year later, Washington voters passed I-276. This initiative addressed four distinct issues: campaign financing, activities of lobbyists, conflicts of interest, and access to public records. Laws of 1973, ch.1, §1.³ Formerly codified as Chapter 42.17 RCW, I-276 defined agencies broadly, as “all state agencies and all local agencies.” *Id.* at §2. At that time, the definition of “state agency” included “public official.” *Id.*

In 1977, the Legislature amended the scope of the term of “agency,” specifically removing the words “public official” from the definition section that applied to chapter 42.17 RCW. Laws of 1977, ch.313, §1.⁴

In 1995, the Legislature passed an amendment to chapter 42.17 that defined the legislative documents that constitute “public records”

³ Washington Secretary of State, Voter Pamphlet setting out full text of I-276, *available at* https://www.sos.wa.gov/_assets/elections/voters%27%20pamphlet%201972.pdf (last visited November 2, 2018).

⁴ Washington State Legislature, Code Reviser, *available at* [http://leg.wa.gov/CodeReviser/documents/sessionlaw/1977ex1c313.pdf?cite=1977 ex.s. c 313 §1](http://leg.wa.gov/CodeReviser/documents/sessionlaw/1977ex1c313.pdf?cite=1977%20ex.s.c.313%20%241) (last visited November 2, 2018).

subject to disclosure under that chapter. Clerk's Papers (CP) at 123, 132.

This definition remains in effect today as recodified in Ch. 42.56 RCW:

“Public record” includes . . . For the office of the secretary of the senate and the office of the chief clerk of the house of representative, public records means legislative record as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

Id. at 132. Notably, the 1995 amendment incorporated the definition of legislative records found in RCW 40.14.100, a definition of records different from that contained in the general provisions of the PRA. *Id.* In doing so, the Legislature subjected seven categories of its records to public disclosure under the PRA. *Id.* This structure is unique within the PRA and contrasts with the structure of other, generalized disclosure requirements subject to exceptions that apply to other government entities. The 1995 legislation, like the 1971 law, named the Secretary and Chief Clerk as the persons responsible for responding to public records requests for the Legislature and its members. CP at 132, 153-55.

The 1995 amendments to chapter 42.17 also included amendments to the campaign finance and ethics provisions of I-276. The Legislature amended the definitions section such that “agencies” included “state office.” CP at 123. Then, the Legislature defined “state office” to include

“legislative offices.” *Id.* at 132. However, the new “state office” language was only incorporated into provisions relating to campaign finance and ethics, such as the campaign contribution limits (*see id.* at 159-60); “state office” was not added to the sections of the law dealing with public disclosure of records. *Compare id.* at 144 (noting financial affair statement requirements for candidates and electeds) *and* 161-62 (discussing acceptable campaign contributions) *with* 153-55 (setting requirements for facilitating public record inspection and responding to record requests). Instead, as described above, the 1995 amendment set out a complete and substantively distinct set of disclosure duties for the legislative branch.

Next, in 2005 the Legislature moved the PRA from the codification of I-276 in chapter 42.17 into its own separate chapter, 42.56, intentionally differentiating the PRA from the campaign finance and ethics provisions of the code because each law covers “discrete subjects.” *Id.* at 391. At the time, the statutory structures for each of these three separate topics still expressly referenced back to the common definition section in chapter 42.17. *Id.*

That changed in 2007, when the Legislature established a definition section unique to the PRA chapter, 42.56 RCW, and removed the cross-reference to the definitions found in RCW 42.17. *Id.* at 606. The PRA “public record” definition established the Secretary and Chief Clerk

as those responsible for “legislative records” and other specified categories of records. *Id.* 606-07 (codified as RCW 42.56.010(3)). This definition also expressly incorporated the definition contained in RCW 40.14.100, the original definition of “legislative records” from 1971. *Id.* at 607. For the first time, the PRA definitions of “agency” and “state agency” did not include state legislative offices or the Legislature as a whole. *Id.* at 606 (codified as RCW 42.56.010(1)). Further, the 2007 amendment expressly provided that only those definitions set forth in the PRA apply to public records requests, “unless context clearly required otherwise.” *Id.*

Finally, in 2010, the Legislature completed the separation of the original elements of I-276 by placing the campaign finance and ethics provisions in their own discrete chapters, Chapter 42.17A RCW and Chapter 42.52 RCW, and replacing 42.17 RCW. Laws of 2010, ch. 204, §1102.⁵ In contrast to the PRA recodification, the Legislature included “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). The Legislature did not include “legislative office” or “the state legislature” in the definition of “agency” in the PRA. This series of legislative revisions to the public

⁵ Washington State Legislature, Code Reviser, *available at* <http://leg.wa.gov/CodeReviser/documents/sessionlaw/2010pam2.pdf> (last visited November 2, 2018).

records laws reflects the current law applicable to this litigation.

B. The PRA Requests in this Case.

Between January 25 and July 26, 2017, the Appellees, reporters from the Associated Press and other media outlets (collectively, the “Associated Press”), made approximately one-hundred and sixty-three PRA requests. CP at 12-32.⁶ Some requests were sent directly to individual legislators’ offices, seeking their calendars and schedules, text messages, legislative videos, and emails. *Id.* The Associated Press made other requests directly to the Senate and House, to each legislator and their individual offices, as well as to the leadership of both bodies. *Id.* These requests sought documentation of staff complaints made against lawmakers within varying time periods, and any reports documenting investigations and/or actions taken as a result of those complaints. *Id.*

Senate Counsel Jeannie Gorrell from the Secretary’s office and House Counsel Alison Hellberg from the Chief Clerk’s office timely responded to each request on behalf of all of the recipients at the Legislature. *Id.*; CP at 327. They released certain records to the Associated Press that had already been made public, as well as additional records voluntarily supplied by individual legislators. *Id.* at 327-28. However, Senate and House Counsel did not release the remaining requested

⁶ The Legislature agreed to these facts set out in the Associated Press’ original complaint. *See* CP at 70-82.

documents because they were not public records as set forth in RCW 42.56.010(3) and RCW 40.14.100—provisions the Legislature routinely adheres to when responding to such requests. *Id.* The Senate and House Counsel also provided full explanations for the requests that were denied. *Id.* at 329.

C. Procedural History.

The Associated Press filed a lawsuit challenging the Legislature’s response to the PRA requests on September 12, 2017. *Id.* at 33-41. After agreeing there were no material facts at issue in the dispute, the parties brought cross motions for summary judgment. *Id.* at 95-96; 293, 303.

The trial court granted in part and denied in part summary judgment to the Legislature and to the Associated Press on January 19, 2018. *Id.* at 779. The court held that the Legislature, House of Representatives, and Senate are not “agencies” as defined in the PRA and are only responsible for disclosing defined “legislative records.” *Id.* at 804. The court also held, however, that each individual state legislator and their offices were “agencies” as defined in the PRA, and were thus broadly subject to the act’s requirements. *Id.* at 788. In reaching this conclusion the court acknowledged that the PRA definition of “agency,” which includes “state office,” does not incorporate “legislative offices.” *See id.* at 787. Nonetheless, the court ruled that “the plain meaning of the Public

Records Act speaks to the inclusion of state legislative offices as ‘agencies.’” *Id.* at 801-02. The court reasoned that the PRA’s distinct definition of agency should be construed based on the separate definition of “state office” from the campaign finance law, Chapter RCW 42.17A, (*id.* at 787),⁷ even though the PRA was recodified in a separate chapter and does not reference or incorporate the definitions from chapter 42.17A. The court disregarded the fact that the PRA’s definition of “agency” does not include legislative offices, as well as the significance of the amendments to the PRA that recodified it in a separate chapter and created its distinct definition section. *See id.* at 795-97.

Lastly, the court correctly held that the Secretary and Chief Clerk are a part of the Legislature, and their unique designation under the PRA signals neither they nor the Legislature are “agencies” under the PRA. *Id.* at 803-4.

The Legislature timely appealed and sought discretionary review by this Court. The Associated Press cross appealed and joined the request for discretionary review. The Court granted the request for direct discretionary review on May 29, 2018.

⁷ The trial court repeatedly cited to “RCW 42.17A.005(44)” for the definition of “state office.” CP at 787; 792; 798. RCW 42.17A.005(44) defines “Recall campaign,” so the Court presumably meant to cite to RCW 42.17A.005(48), which defines “State office.”

IV. ARGUMENT

A. Standard of Review.

This appeal is from a summary judgment ruling. Thus, the standard of review for the Court is de novo. *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 518, 387 P.3d 690 (2017). The parties agree that there are no material facts in dispute. CP at 96; 303. The decision before the Court, therefore, turns solely on whether as a matter of law (1) the legislative branch and its individual members are “agencies” for purposes of the PRA, and (2) the records sought by the Associated Press are “public records” pursuant to the act. *See State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001) (holding that the meaning of a statute is a question of law). Because the answer to both of these questions is no, the trial court’s decision should be affirmed in part and reversed in part.

B. The Legislature and its Individual Members are not “Agencies” Under the Plain Meaning of the PRA.

Washington State’s authority to enact and amend laws is vested in the Legislature. CONST. art. II, §1. Except as the state and federal constitutions expressly or by fair inference prohibit, this legislative power to enact and amend the law applies with equal force to initiatives enacted by the voters, including the state’s public records laws. *Id.* This is evidenced by the Legislature’s regular and repeated amendments to the PRA over its now 46-year history. At issue here is the plain meaning of

the PRA in 2017, the time when the Associated Press made their records requests. Pursuant to the plain meaning of the PRA, the Legislature and its members are not “agencies” as defined in the act. Instead, the Legislature established record preservation and disclosure requirements for itself and its members distinct from the broader requirements applicable to state agencies.

1. The Legislature Does not Fall Within the PRA Definition of “Agency.”

“The goal of statutory interpretation is to discern and implement the legislature’s intent.” *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). “In interpreting a statute, this court looks first to its plain language.” *Id.* “If the plain language of the statute is unambiguous, then this court’s inquiry is at an end.” *Id.*; see also *Burns v. City of Seattle*, 161 Wn.2d 129, 140, 164 P.3d 475 (2007) (stating that if a statute’s meaning is plain on its face, then the court must give “effect to that plain meaning as an expression of legislative intent.”). The Court discerns “a statute’s plain language by considering the text itself, 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) (citing *State Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-11, 43 P.3d 4

(2002)). “Words must be given their commonly understood meaning if possible.” *McDermott v. Kaczmarek*, 2 Wn. App. 643, 647, 469 P.2d 191 (1970)). A phrase in a statute is “unambiguous” if on its face “it is not subject to more than one reasonable interpretation.” *Jametsky v. Olsen*, 179 Wn.2d 756, 763, 317 P.3d 1003 (2014) (finding plain meaning of phrase in statute at issue “at risk of loss due to nonpayment of taxes,” unambiguous because it is not subject to more than one reasonable interpretation).

The first issue is whether the State Legislature falls within the PRA definition of “agency.” The PRA defines an “agency” as follows:

all state agencies and all local agencies. “State agency” includes every state office, department, division, bureau, board, commission, or other state agency. “Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

RCW 42.56.010(1). “State agencies” are required to “make available for public inspection and copying all public records.” RCW 42.56.070(1), .080(2). Entities that fall outside of this definition do not have these broad disclosure obligations.

Read plainly, “State agency” does not include the Legislature. The Washington constitution and case law have long recognized the difference

between the constitutionally-created legislative branch of government and the agencies that the Legislature establishes and regulates via statute. The Legislature is the branch of government with the full plenary power to enact and amend laws on any matter except as the constitution limits. CONST. art. II, §1; *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 306, 174 P.3d 1142 (2007). Only the Legislature has the constitutional authority to create and delegate powers to state and local agencies to carry out the laws it passes. See CONST. art. II §1; *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972) (stating the Legislature may delegate power to an agency if the Legislature provides standards and guidelines of what can be done and what body is to accomplish it).

In contrast, administrative agencies are creatures of the Legislature without such authority. *Anderson, Leech & Morse, Inc. v. Wash. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221 (1978) (stating agencies created by statute have only the powers expressly granted or necessarily implied from the statute, and that “[a]n agency cannot legislate”); *Pringle v. State*, 77 Wn.2d 569, 573, 464 P.2d 425 (1970) (holding that an agency may not “amend or change the enactments of the legislature”). In light of the Legislature’s status as a constitutional branch of government, its authority to create state agencies, and state agencies’

limited authority compared to the Legislature, the Legislature is not a “state agency” as that term is commonly understood. The trial court agreed, holding that the Legislature does not fall within the definition of “agency” under the PRA.

2. Individual Legislators do not Fall Within the PRA Definition of “Agency.”

Individual legislators and their offices are also not “state agencies” as defined in the PRA. Instead, senators and representatives are independently elected constitutional members of the legislative branch representing defined legislative districts. CONST. art. II, §§4, 6. As a collective, these individual legislators make up the legislative branch of government. CONST. art. II, §1 (stating that “legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington”); CONST. art. II, §2 (stating that the House of Representatives and Senate are composed of members). Legislators are not included within the list of identified entities considered agencies in the PRA. RCW 42.56.010(1). Nor do individual legislators—part-time officials with limited staffs—fulfill any of the traditional duties of a state agency. The individual legislators are no more state agencies for the purposes of the general provisions of the PRA than are individual judges.

Accord Nast v. Michels, 107 Wn.2d 300, 307, 730 P.2d 54 (1984) (holding that the judicial branch was not subject to the prior version of the PRA because, in part, the act “does not specifically include courts”).

Individual legislators cannot be thought of as “agents” of the Legislature itself either. The state constitution makes plain that Washington’s legislative authority is vested in the Legislature as a whole, not in its individual members. *See* CONST. art. II, §1; *Keeting v. Public Util. Dist. No. 1*, 49 Wn.2d 761, 767, 306 P.2d 762 (1957). Individual legislators cannot enact legislation and do not speak for the collective Legislature. *Woodson v. State*, 95 Wn.2d 257, 264, 623 P.2d 683 (1980) (stating that courts interpret legislation that the Legislature passes, not the intent of “some independent or isolated legislators”). There is no sense in which the Legislature or its individual members are understood to be “state agencies” as the trial court concluded.

3. Individual Legislators are not “State Offices” Under the PRA.

The trial court erred here by determining that the term “state office,” within the list of exemplars of “state agencies,” encompasses individual legislators. A plain reading of the PRA demonstrates that this was error. The term “state office” does not bring individual legislators within the definition of “state agencies” in the PRA.

First, the way the PRA defines “state agency” demonstrates that “state office” is not something distinct from what otherwise would be considered a “state agency.” The definition includes “every state office, department, division, bureau, board, commission, **or other state agency.**” RCW 42.56.010(1) (emphasis added). Where, as here, a statute explicitly lists the items to which it applies, courts should treat such lists as exclusive. *See State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003) (concluding list of strike offenses was exclusive where 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.”). By its very structure—concluding with “or other state agency”—the PRA definition of state agency does not purport to extend to entities not otherwise understood to be “state agencies.” As demonstrated above, the offices of individual legislators would not fall within the common understanding of the term “state agency.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999) (stating the court should assume the “legislature means exactly what it says”) (quotation omitted).

This conclusion is consistent with the State’s characterization of a number of undisputedly state agencies as an “office.” The following agencies are entitled Office: Office of Administrative Hearings, Environmental and Land Use Hearing Office, Office of Financial

Management, Office of Minority and Women’s Business Enterprises, Office of the Family and Children’s Ombuds, and Office of the Education Ombudsman.⁸ Similarly, several undisputedly state agencies are called departments: Department of Agriculture, Department of Commerce, or Department of Licensing. *Id.* Several are called “divisions”: the Consumer Protection Division, the Agriculture & Health Division, and the Natural Resource Division of the Office of the Attorney General. *Id.* There are also “bureaus” (Washington Fire Protection Bureau); “boards” (e.g., State Board of Accountancy, Public Works Board, State Board of Education, or Growth Management Hearings Board); “commissions” (e.g., Washington State Arts Commission, Parks and Recreation Commission, or Human Rights Commission); or other titles (e.g., Puget Sound Partnership, Building Code Council, Center for Childhood Deafness and Hearing Loss, or Health Care Authority). *Id.* Thus, the PRA listing of types of state agencies (offices, divisions, departments, etc.) is consistent with the types of denominations routinely associated with state agencies in the executive branch. The term “state office” in the definition of “state agency” should

⁸ Each agency title named in this section can be found in the 2017 ORGANIZATION CHART WASHINGTON STATE GOVERNMENT, <https://www.ofm.wa.gov/sites/default/files/public/legacy/reports/orgchart.pdf> (last visited November 2, 2018), the website of the Washington State Office of the Attorney General, Divisions, <http://www.atg.wa.gov/divisions/default.aspx> (last visited November 2, 2018), or the Washington State Patrol Bureau website, <http://www.wsp.wa.gov/about-us/bureaus/> (last visited November 2, 2018).

not be read as something other than an “agency.” The trial court erred in doing so.

Second, the history of amendments to the PRA supports the conclusion that individual legislative offices do not fall within the PRA’s definition of “agency.” This Court has held that it may consider “amendments to the statute” as part of the Court’s plain meaning analysis. *Columbia Riverkeeper*, 188 Wn.2d at 437. That holding specifically refutes the trial court’s questioning of whether an amendment can be considered as part of a plain meaning analysis if the statute in question has not been deemed ambiguous.⁹ *See* CP at 791.

The Legislature’s first definition of “legislative records,” adopted in 1971, did not include individual legislators’ documents such as correspondence as “legislative records.” Laws of 1971, ch.102, §2 (codified as RCW 40.14.100). Moreover, the Legislature allocated to the Secretary and Chief Clerk the responsibility to coordinate with the state archivist regarding the maintenance of and access to legislative records. *Id.* at §§5, 8.

⁹ This Court has clarified that consideration of amendments to the statute at issue is part of the plain meaning analysis; the court does not first have to find a statute to be ambiguous. *See Columbia Riverkeeper*, 188 Wn.2d 440 (“Plain language analysis also looks to amendments to the statute’s language over time.”); *Lenander v. Washington State Dep’t of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016) (“the court derives legislative intent from the plain language enacted by the legislature, considering . . . amendments to the provision”); *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 723-27, 406 P.3d 1149 (2017) (considering amendments in context of plain meaning analysis).

Shortly after the adoption of I-276, the Legislature amended the term “agency” to **remove** “public official” from that definition. Laws of 1977, ch. 313, §1. Subsequent amendments to the PRA did not reinstate “public official” within its scope.

While the Legislature further amended the then-omnibus public records/campaign finance/ethics chapter to include “legislative offices” within the definition of “state office,” a review of the 1995 amendment shows reference to state offices only appears in parts of the law relating to campaign finance and ethics.¹⁰ The appropriate interpretation of this change is that the Legislature added the “state office” definition to ensure that the campaign finance and ethics laws were expressly applied to state legislative offices, rather than to address individual legislators’ public record disclosure obligations.

The 2005 and 2007 amendments confirm that that the definition of “agency” under the PRA does not include the Legislature and individual legislators. First, in 2005, the Legislature moved the PRA into its own

¹⁰ See CP at 140 (limiting the mail correspondence a legislator may send a constituent the year before certification of election results), 145 (discussing statement of financial affairs requirements, including requirements for staff members of the legislature as “executive state officers”), 160 (limiting contributions that can be made to a candidate for a state legislative office) 161-62 (discussing contributions received following a recall election or special election to fill a state office vacancy), 164-65 (clarifying the terms under which a loan may be made to a candidate for public office, and prohibiting certain solicitations or certain uses of solicited funds to contribute to a candidate for public office, political party, or political committee) 169-70 (setting limitation on the use of agency facilities for the purposes of assisting a campaign for election), 171-72 (clarifying those who are exempt from campaign finance registration and reporting requirements).

chapter, taking the substantive step to distinguish the PRA from the campaign finance and ethics laws because as the Legislature affirmatively stated: each covers “discrete subjects.” *Id.* at 391. Second, in 2007, the Legislature established a unique definition section for the PRA and removed reference to the definitions from RCW 42.17. *Id.* at 606. The definitions of “agency” and “state agency” added to the PRA chapter did not include the Legislature or state legislative offices. *Id.* (codified as RCW 42.56.010(1)). In contrast, the Legislature expressly included “legislative office” and “the state legislature” into the respective definitions of “agency” in the campaign finance and ethics laws. RCW 42.17A.005(3) and (48); RCW 42.52.010(1).

These amendments signal purposeful changes. “The presumption is that every amendment is made to effect some material purpose.” *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)). The Legislature’s deliberate exclusion within the PRA of “legislative offices” as agencies, and corresponding inclusion in the campaign finance and ethics laws, is thus dispositive. *See, e.g., State v. Flores*, 164 Wn.2d 1, 14, 186 P.3d 1038 (2008) (stating “when the legislature uses different words in statutes relating to a similar subject matter, it intends different meanings.”); *Stewart v. State, Dep’t of*

Employment Sec., 191 Wn.2d 42, 49-52, 419 P.3d 838 (2018), *as amended* (Aug. 30, 2018) (concluding that the Legislature’s creation of the Administrative Procedures Act and removal of rules for judicial review from agency-specific statutes showed that it intended for APA procedural rules to apply to agency-specific statutes). The Legislature’s actions to create three distinct laws with distinct definition sections for the PRA, campaign finance, and ethics laws demonstrate intentional and purposeful changes. As each of the three definition sections expressly state, the definitions contained therein are those that apply to their respective chapters. RCW 42.56.010, RCW 42.17A.005, RCW 42.52.010.

The distinctions in the PRA, campaign finance, and ethics laws’ definitions of agency also make practical sense. It would make no sense if the campaign finance laws and ethics laws did not apply to individual legislators. The same cannot be said for the application of the PRA in light of the obligations placed on the Secretary and Chief Clerk under the PRA. Including the legislators in the former statutes and not in the PRA is a reasonable choice of the Legislature.

4. The Campaign Finance Law is not a Related Statute for Purposes of Defining State Office Under the PRA.

Consistent with this analysis is the conclusion that the campaign finance law is not a “related statute” such that the definition of “state

office” found in the former should not be deemed incorporated into the PRA. As noted above, both the PRA and the campaign finance chapter include language that makes explicit that each law’s definition section “apply throughout [the respective] *chapter* unless the context clearly requires otherwise.” RCW 42.56.010, RCW 42.17A.005 (emphasis supplied). By its own express terms, the PRA does not purport to incorporate the definition of “state office” from the campaign finance chapter. And by its own express terms, the campaign finance chapter’s definitions do not purport to define “state office” for PRA purposes.

The PRA **does** in places incorporate definitions or provisions found in other sections of the law, but it does so by express cross-reference. *See, e.g.*, RCW 42.56.010(3) (referencing RCW 40.14.100 to define public record); RCW 42.56.070(5)(b), (d), and (e) (referencing RCW 34.05.010 to define final orders, interpretive statements, and policy statements); RCW 42.56.110 (referencing RCW 41.06.450 to explain when agencies may destroy information related to employee misconduct). Regardless of what could be argued about the significance of defining the term “state office” in the 1995 legislation, the necessary legal effect of the Legislature’s subsequent decision to separate the PRA from the remainder of chapter 42.17 means that the PRA now contains a stand-alone definition section. In other words, the Legislature’s decision to add a separate

definition and stop borrowing from the campaign finance chapter to help define state agency “cannot be viewed as accidental” and further supports that it is “not relevant for defining” state agency in the PRA. *Jametsky*, 179 Wn.2d at 766; *cf. Green Collar Club v. State Dep’t of Revenue*, 413 P.3d 1083, 1092 (Wash. Ct. App. 2018) (holding it could refer to definitions from another statutory scheme that were “explicitly incorporated” into the tax exemption provision at issue). In short, the Legislature understands how to incorporate definitions from other statutes into the PRA when that is its intent. Because the Legislature itself ended this inter-chapter “borrowing,” the trial court may not reinstate it on its own in the guise of giving the statute its supposedly plain reading.

This Court’s analysis in *Davis* is instructive. In *Davis*, the Court rejected arguments that it should borrow a definition from one chapter of law to interpret a term that is separately defined in a different chapter. The *Davis* Court was asked to interpret language in the Uniform Controlled Substances Act (“UCSA”) that established the scope of the act with respect to juveniles. 137 Wn.2d at 963. The Court concluded that the language defining “juvenile” was not ambiguous because it precisely defined the range of ages that fell in its purview. *Id.* at 964. The Court held that ambiguity as to the definition of “juvenile” only arises if one “imports the definition of ‘juvenile’ from another statute, the Juvenile Justice Act

(“JJA”) into the statute.” *Id.* Although both the UCSA and the JJA address the treatment of juvenile offenders, the Court noted that the JJA did not contain language stating its definition should be applied to the UCSA. *Id.* The Court also relied on the fact that the JJA’s definitional section began with the words, “For the purposes of this chapter.” *Id.* By these words the Court concluded that the Legislature “specifically confined” the definition of juvenile from the JJA to that chapter, and that the Legislature “chose another definition” for the purposes of the UCSA provision at issue. *Id.*

Here, as in *Davis*, the Legislature specifically defined “agencies” in chapter 42.56 for purposes of the PRA. RCW 42.56.010(1). The trial court created ambiguity by importing the definition of “state agency” and its subordinate definition of “state office” from another chapter, here the campaign finance law in chapter 42.17A, into the PRA. But as with the statute in *Davis*, the campaign finance chapter contains no language stating its definitions should be applied to the PRA. *See generally* RCW 42.17A.005. And the PRA contains no cross-reference to incorporate chapter 42.17A—quite the opposite, because in 2007 the Legislature not only added the unique definition section to the PRA, but amended out the old cross-reference to chapter 42.17’s definition section. CP at 606. Also as in the case of the JJA, both the PRA and campaign finance chapters declare in their respective definition sections that “[t]he definitions in this

section apply throughout *this chapter* unless the context clearly requires otherwise.” RCW 42.56.010, RCW 42.17A.005 (emphasis added). These matching directives make plain that the Legislature did not intend one definition to be incorporated into the other. Finally, as noted above, the campaign finance and ethics laws necessarily extend to legislators who run for office for good reason. *See supra* p. 23.

This Court has recently declined to transplant other distinct definitions from one statute onto another in other instances as well. *See State v. Barnes*, 189 Wn.2d 492, 496-97, 403 P.3d 72 (2017) (declining to apply the term “motor vehicle” as defined in RCW 9A.04.110(29) when it is not defined in RCW 9A.56.065); *State v. Roggenkamp*, 153 Wn.2d 614, 627-30, 106 P.3d 196 (2005) (declining to export language from a reckless driving statute to define “in a reckless manner” when it was not defined in the felony statutes at issue). There is no basis to do so here.

The trial court thus erred when it concluded “the plain meaning of the Public Records Act speaks to the inclusion of state legislative offices as ‘agencies’” by importing the definition of “state agency” and subordinate definition of “state office” from the campaign finance chapter into the PRA chapter. CP at 787, 801-02. Read plainly, the general disclosure requirements of the PRA apply to Washington State agencies, not the Legislature or individual legislators.

5. Secretary and Chief Clerk Share Responsibilities for the Legislature and its Members' Unique PRA Obligations.

Although the Legislature did not include itself or legislators as “agencies” subject to the general disclosure duties of the PRA, the Legislature did not place itself outside of the PRA entirely. Additional PRA provisions set forth the Legislature’s distinct public disclosure obligations and specify what should be disclosed by the Secretary and Chief Clerk, the Legislature’s records custodians. As described above, the PRA specifically defines “public records” for purposes of the Secretary and Chief Clerk’s offices. *Supra* p. 6; RCW 42.56.010(3). The inclusion of the Secretary and Chief Clerk’s offices within this definition shows that the specific legislative records provisions cover the whole of the Legislature, including its members. No other government entity has such a specific office called out in this way in the PRA—demonstrating that these two offices were meant to fulfill the public records obligations of the full Legislature.

This comports with the origin and structure of the Secretary and Chief Clerk’s offices. The Washington constitution authorizes the positions of the Secretary and the Chief Clerk. CONST. art. II, §10. They are the chief operational officers for the Legislature and routinely serve as the primary points of contact for each chamber for administrative matters.

CP at 325. All legislative entities report to or are overseen by the Secretary and Chief Clerk, and in this role they have served as the record custodians for the whole of the Legislature. *Id.*

Having one custodian for public records requests for each body of the Legislature also makes operational sense: it promotes consistency and completeness. *Id.* at 326. The Legislature has 147 elected part-time citizen legislators, hundreds of employees, dozens of committees, and a myriad of internal systems. *Id.* As officers with a comprehensive knowledge of these aspects of the Legislature, the Secretary and Chief Clerk are uniquely equipped to act as liaisons between the Legislature and the public to ensure the right information is obtained from the right work unit, staffer, or legislator. *Id.* Formally acknowledging these positions as the records officers for the Legislature is consistent with the duties and oversight of their work imposed by the PRA. *Id.*; *see also* RCW 42.56.070(8), .120, .560 (imposing specific duties related to public records on the Secretary and Chief Clerk); RCW 42.56.550(3) (specifying that either officer's decision to deny a request for records is subject to judicial review under the PRA by reference to RCW 42.56.520).

The PRA plainly distinguishes the responsibilities of the Secretary and Chief Clerk from the broader responsibilities of "agencies." RCW

42.56.100, for instance, sets forth the requirements regarding record protection and inspection. In doing so the statute notes that:

[n]othing in this section shall relieve agencies, **the office of the secretary of the senate, and the office of the chief clerk of the house of representatives** from honoring requests received by mail for copies of identifiable public records.

If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, **the agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives** shall retain possession of the record.

RCW 42.56.100(emphasis added). RCW 42.56.070 similarly distinguishes between agencies and the Secretary and Chief Clerk. “This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give” RCW 42.56.070(8).

As the trial court aptly concluded, 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 “superfluous.” CP at 803-04. The trial court thus appropriately 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.

Placing the entire responsibility on the Secretary and Chief Clerk for the PRA disclosures of the Legislature and its members is consistent with the fact that those offices are ultimately responsible for nearly every practical aspect of operating legislators' offices. *Id.* at 731. They hire and fire staff, assign and manage office space, approve legislators' expenses, and manage most of the administrative functions on the legislators' behalf. *Id.* The Secretary and Chief Clerk's unique obligations throughout the plain language of the PRA shows the PRA considers the Legislature and its individual members to be a single entity, not that individual legislators are stand-alone state agencies.

C. If the Court Determines the PRA is Ambiguous, Rules of Statutory Construction Confirm the Legislature and its Members Are Not "State Agencies."

The fact that two or more interpretations of a statute are conceivable does not render a statute ambiguous. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). As set forth above, the plain language of chapter 42.56 RCW excludes legislators from the PRA's definition of "state agency," and instead establishes specific disclosure duties for the entire branch under the supervision of the Secretary and Chief Clerk. However, if a statute is "susceptible to two or more reasonable interpretations," it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). Should the Court conclude the

PRA is ambiguous, the court can review relevant case law and applicable statutory construction principles. *Jametsky*, 179 Wn.2d at 762. These sources confirm that legislators are not “agencies.”

1. Basic Canons of Statutory Construction Support that the Legislature Intended Different Definitions of “Agency” in the PRA and in the Campaign Finance Law.

Where a statute specifically designates the things on which it operates, an inference arises in law that all things omitted from it were intentionally omitted under the maxim “expressio unius est exclusio alterius”—specific inclusions exclude implication. *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (internal citation omitted). Applying this statutory maxim here, the omission of “legislative office” from the definition of “state agency” in the PRA should be treated as deliberate. *See, e.g., In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (stating omissions are deemed exclusions).

Further, where, as here, the Legislature includes language in one statutory provision but omits it in another, there is a presumption that different meanings were intended. *See, e.g., Swinomish Indian Tribal Cmty. v. Washington State Dep’t of Ecology*, 178 Wn.2d 571, 587, 311 P.3d 6 (2013) (stating the Legislature’s choice of different words in subsections of the same statute shows the Legislature was “plainly aware

of the importance and meaning of the terms” used, and intended a different meaning in the subsections); *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.”) (citing 2A C. Dallas Sands, *Statutes and Statutory Construction* § 51.02 (4th ed.1973)). Thus, “state office” as used in the PRA should be treated differently than “state office” in the campaign finance law.

The Legislature demonstrated that it knew how to craft a definition of agency inclusive of the Legislature and individual members in the unambiguous definitions of the campaign finance and ethics laws. RCW 42.52.010(1); RCW 42.17A.005 (3) and (48). The use of different language in the statutes that originated together with I-276 shows that each statute should be interpreted separately.

2. Interpreting Individual Legislators to be State Agencies Renders Absurd Results.

The Legislature’s position is also supported by the principle of statutory construction directing the courts to avoid reading a statute in a way that would lead to “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).

Here, concluding as the trial court did that the Legislature has excluded several categories of documents from production by the Legislature, House, and Senate, through the Secretary and Chief Clerk's offices, but that the same documents could be procured by sending a request to an individual legislator makes no sense. This Court should not conclude that the Legislature intended such a strained result.

Further, the PRA acknowledges that record accumulation, disclosure and retention obligations must be balanced with legislative responsibilities, stating:

Agencies shall adopt and enforce reasonable rules and regulations, and **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,** consonant with the intent of this chapter to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions.

RCW 42.56.100 (emphasis added). It would make no sense to conclude this section was only meant to mediate the Secretary and Chief Clerk's public records responsibilities so they may focus on responsibilities "associated with legislative session," while the same does not apply to individual legislators during the legislative session.

The trial court’s interpretation of other provisions of the PRA would also lead to other results not intended by the Legislature. If individual legislators are included within the definition of “state agency,” then all 147 part-time, term-elected legislators must publish rules and other matters in the WAC, thereby potentially creating 147, possibly-temporary versions of the WACs. *See* RCW 42.56.040(1) (requiring “[e]ach state agency” to “separately” publish in the WACs their public records procedures). But agencies adopt rules; legislators do not. Indeed, the state Administrative Procedure Act (“APA”), which governs state agencies’ adoption of rules in the WAC, expressly *excludes* the legislative branch from its scope. RCW 34.05.010(2). The trial court’s interpretation of “state agency” in the PRA would therefore require individual legislators to wield an administrative power expressly denied to them under the APA. *Compare* CONST. art. II, §9 (respective legislative bodies may adopt rules for their own proceedings). The PRA’s requirement that “state agencies” use administrative rulemaking to implement their PRA responsibilities demonstrates the absurdity of deeming legislators to be “agencies.”

Similarly, if individual members of a part-time Legislature were “agencies” subject to the PRA, each member’s office would be responsible for establishing rule and indexing requirements (RCW 42.56.070); establishing facilities available for copying public records

(RCW 42.56.080); and establishing that each office have records available for inspection and copying a minimum of 30 hours per week (RCW 42.56.090). That result is particularly untenable as each staff member of every legislator is employed by the Secretary or Chief Clerk, who are not treated as agencies under the PRA. Thus, the entire responsibility for PRA compliance would fall on each individual part-time legislator.

The trial court's conclusion that individual legislators could "pool resources" to address these requirements, CP at 832, is both speculative and would not be compliant with the PRA or APA. These provisions establish requirements for "each agency," and each such entity thus bears responsibility for them. The court's conclusion also ignores that charged with these duties, each part-time legislator may decide to establish different public records procedures to comply with the PRA. This Court should conclude the Legislature did not intend these results.

3. The Attorney General has Historically Treated the Legislature and its Members Distinctly under the PRA.

Finally, applying the PRA to the Legislature as an "agency" contradicts the historical practices of the Attorney General's Office as set forth in its prior public guidance. Guidance created by the Office of the Attorney General may be considered by a Court. *See Stewart*, 191 Wn.2d

at 49 (referring to a 2009 desk book to discuss proper interpretation of administrative procedure in Washington).

Chapter 3 of the Public Records Act Deskbook, written by the Special Assistant Attorney General for Government Accountability, states:

The House of Representatives and the Senate, while not executive branch “agencies,” are subject to the PRA, albeit in a slightly limited way. See RCW 42.17.341/RCW 42.56.560 (specifying that judicial enforcement remedies of the PRA apply to the Chief Clerk of the House and the Secretary of the Senate). **However, the House and Senate have slightly fewer obligations under the PRA than an “agency.”** For example, the definition of “public record” is limited as applied to the House and Senate and individual members of the House and Senate arguably enjoy legislative immunity.

GREG OVERSTREET, WASHINGTON PUBLIC RECORDS ACT
DESKBOOK: WASHINGTON’S PUBLIC DISCLOSURE AND OPEN
PUBLIC MEETINGS LAWS at 2-3 (Greg Overstreet et al. eds., 1st ed.
2006) (emphasis added).

Similarly, the 2016 version of the Washington State Open Government Resource Manual, written and published by the Assistant Attorney General for Open Government, recognized the Legislature’s independence with respect to the PRA. Governmental entities rely on the manual for public records guidance, and the manual provides in the introduction that the “Records of the Washington State Legislature are defined in RCW 42.56.010(3) **and** RCW 40.14.100. Discussion of court

and legislative records is outside the scope of this manual.” (emphasis added). Washington State Office of the Attorney General, Bob Ferguson, WASHINGTON STATE SUNSHINE LAWS 2016: AN OPEN GOVERNMENT RESOURCE MANUAL at 5 (2016).¹¹ If the Legislature were indeed a “state agency” it obviously would not be outside the scope of the Manual.

The Manual also subsequently highlights that “The PRA applies in a more limited form to the Washington State Legislature. Information about accessing legislative documents is available here.” (links in the original). *Id* at 8; *see also* THOMAS A. CARR, ANNUAL REPORT OF THE PUBLIC RECORDS EXCEPTIONS ACCOUNTABILITY COMMITTEE at 7 (2009) (summarizing the committee’s vote to recommend the PRA be amended to “eliminate the Legislative exemption”). These guides expressly differentiate between state and local agencies and the Legislature and courts. The guides also contain no suggestion that documents held by individual legislators, like their calendars or correspondences, are within the scope of the PRA’s broad disclosure requirements.

¹¹ Available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Open_Government/Open_Government_Internet_Manual/Open%20Government%20Resource%20Manual%202016%20-%20Oct.%2031%202016%20%282%29.pdf (last visited November 2, 2018).

D. The Legislature’s Establishment as a Uniquely Treated Entity Under the PRA is Consistent with Separation of Powers Principles and the Treatment of the Judiciary.

The PRA does not and has never stood for the proposition that all records of all government entities are subject to the act. Instead, like any other law adopted by the Legislature or through initiative, the PRA is subject to constitutional and statutory limitations and separation of powers principles. *See 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”); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595-96, 243 P.3d 919 (2010) (noting that constitutional fair trial rights may serve as an exemption under the PRA); *Yakima County v. Yakima Herald–Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011) (noting in dictum that the argument that constitutional provisions can serve as PRA exemptions “has force”). Washington courts have long described the separation of powers as one of the “cardinal and fundamental principles” of our state constitutional system. *Washington State Motorcycle Dealers Ass’n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). “Our constitution does not contain a formal separation of powers clause.” *Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). “Nonetheless, the very division of our government into different

branches has been presumed throughout our state's history to give rise to a vital separation of powers doctrine.” *Id.* (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994)).

To avoid separation of powers problems, the judicial branch has interpreted the PRA in a manner consistent with the constitutional assignment of authority to the respective branches. In the case of the executive and the PRA, the *Freedom Foundation* Court determined that a constitutional executive communications privilege barred using the PRA to judicially compel wholesale disclosure of the governor's internal deliberations. 178 Wn.2d at 703-704, 708. In the case of the judicial branch and the PRA, the courts have used their power of statutory interpretation to steer around interbranch obstacles, concluding that the PRA does not apply to the judicial branch. *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 an agency). This Court has also determined that because the branch itself is not subject to the act, the records of individual judicial officers' personal correspondence created in the scope of their official duties are not subject to disclosure under the PRA. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 344-48, 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).

Just as the courts and the offices of their individual judges are not included within the list of identified agencies in the PRA, neither are the Legislature and its individual legislators. RCW 42.56.010(1). And as discussed above, it is the definition in the PRA chapter, not the campaign finance chapter that is at issue here. *See supra* pp. 12-15, 23-27. The trial court erred by concluding judges and individual legislators are not analogous because legislators are included in the campaign finance law definition of agency, while the judiciary is not. *See* CP at 798.

The courts have also recognized the independence of the judicial branch, CONST. art. IV, §1; *State v. Moreno*, 147 Wn.2d 500, 505, 58 P.3d 265 (2002), and the constitutional basis to control its own proceedings, *Yakima County*, 170 Wn.2d at 795. The authority and characteristics of the Legislature are analogous. Consistent with the principles of separation of powers, the state constitution leaves internal operations of the Legislature to the Legislature. CONST. art. II, §8 (allowing each house of the Legislature to judge the election returns and qualifications of its own members); CONST. art. II, §9 (making the Legislature responsible for its own procedures). The power to make and

enforce its own rules is inherent in the very nature of a legislative body, even in the absence of an express constitutional grant. *See Brown*, 165 Wn.2d at 720-22 (refusing to overturn a Senate parliamentary ruling); 1 SUTHERLAND STATUTORY CONSTRUCTION §7:2 (7th ed.).¹² Further, as noted above, these provisions provide operational efficiency for a large, part-time Legislature. *See supra* p. 29.

The treatment of the judiciary's records is also analogous here. Through the adoption of court rules, courts have voluntarily submitted many, but not all, categories of records to public disclosure. GR 31(c)(4) (defining "court records" to not include data maintained by a judge pertaining to a particular case such as drafts and memoranda). The Courts have also emphasized a common law right of access to judicial records predating the PRA. *Nast*, 107 Wn.2d at 307 ("the PDA does not apply to court case files because the common law provides access to court case files").

Similarly, the Legislature has made approximately 505,000 documents available on its public website and TVW has about 40,000

¹² This power has also been applied beyond legislative activity in other states. *See, e.g. Moulton v. Scully*, 111 Me. 428, 89 A. 944 (1914) (impeachment proceedings); *Hiss v. Bartlett*, 69 Mass. 468, 3 Gray 468, 1855 WL 5710 (1855) (expelling a member of the legislature); *Witherspoon v. State*, 138 Miss. 310, 103 So. 134 (1925) (appointment of a public officer); *Opinion of the Justices*, 252 Ala. 205, 40 So. 2d 623 (1949) (passage of constitutional amendments and to regulate the manner of exercising constitutional prerogatives of members).

hours of footage largely related to the legislative process on its site. CP at 326. Additionally, much like there is a common law right of access to court files, the constitution provides for other means of public access to the Legislature's records that trace that body's action. *See, e.g.*, CONST. art. II, §11 (requiring open door hearings and legislative journals to be published); *id.* §22 (requiring recording of votes for bill to become law); CONST. art. III, §17 (requiring Secretary of State to keep a record "of the official acts of the legislature"); RCW 43.07.040 (charging the Secretary of State with custody of all acts and resolutions the Legislature passes and the Legislature's journals); House Rule 26 (committee consideration and vote must be in public); Senate Rule 45 (same). Although the Legislature believes that this case can be properly resolved as a matter of statutory interpretation, the treatment of the judicial branch under the PRA and separation of powers concerns further support summary judgment for the Legislature.

E. The Records Requested are not "Public Records" Under the PRA.

As with the PRA definition of "agency," the Legislature defined the public records that are subject to the PRA through the Secretary and Chief Clerk as a specified set of legislative records. The definition of these legislative public records is plain such that that definition must be given

effect. *Burns*, 161 Wn.2d at 140 (if a statute’s meaning is plain on its face, then the court must give “effect to that plain meaning as an expression of legislative intent.”). The PRA definition of “public records” includes a general definition and also states:

For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, **public records means legislative records as defined in RCW 40.14.100 and also means the following:** All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

RCW 42.56.010(3) (emphasis added). RCW 40.14.100 defines legislative records specifically:

unless the context requires otherwise, “legislative records” shall be defined as correspondence, amendments, reports, and minutes of meetings made by or submitted to legislative committees or subcommittees and transcripts or other records of hearings or supplementary written testimony or data thereof filed with committees or subcommittees in connection with the exercise of legislative or investigatory functions, but does not include the records of an official act of the legislature kept by the secretary of state, bills and their copies, published materials, digests, or multi-copied matter which are routinely retained and otherwise available at the state library or in a public repository, or reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature.

RCW 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. Specifically, these provisions explain which records the Secretary and Chief Clerk manage. As analyzed above, the Secretary and Chief Clerk serve the full Legislature and its members (*see supra* pp. 28-31) and thus their disclosure responsibilities dictate those of the Legislature and its members.

The PRA definition of “public record” evidences legislative intent to affirmatively define the legislative documents subject to disclosure under the act. *See Flores*, 164 Wn.2d at 14 (stating the Legislature is deemed to intend a different meaning when it uses different terms). Notably, the definition specifically excludes documents widely available through other means, such as at the libraries and the Secretary of State’s office. RCW 40.14.100. The records generally available under the PRA are fiscal and administrative documents as well as public committee materials. RCW 42.56.010(3); RCW 40.14.100. The definition also excludes documents under the personal control of individual legislators. *Id.*

The Associated Press’ PRA requests are for the individual schedules and calendars of legislators; legislators’ emails, text messages, and videos; and complaints and reports related to personnel and human resource investigations. *Id.* at 327. Under a plain reading of the PRA

definition of legislative record, these documents are among those not subject to public disclosure. *See* RCW 40.14.100 (excluding “reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature,” from the definition of legislative records). This provides an additional limitation on the scope of the Legislature’s response to a PRA request.

F. The Legislature Complied with its Responsive Obligations Under the PRA.

Because the Legislature and its members are not state agencies under PRA and the requested records do not fall within the definition of public records, the Associated Press’ assertions that the Legislature did not comply with the PRA fail. The Secretary and Chief Clerk provided all properly responsive documents and then some.

The Associated Press nonetheless complains that the Legislature should have provided an exemption log. *Id.* at 37-38. Under the PRA, agencies must provide a “statement of the specific exemption authorizing the withholding” in response to a denial for a “public record.” RCW 42.56.210(3). But the Legislature did not claim that any exemptions under the statute apply. Instead, each response made clear that the Secretary and Chief Clerk released responsive records and that remaining documents were not public records under the PRA. CP at 14-32; 328-29. Once that

determination was made and properly communicated to the requestors, no further actions were required. In other words, the requirement to provide an exemption log only applies where an agency that is subject to the PRA's general disclosure requirements is asserting an exemption as a basis for withholding a document. That is not the case here. The Legislature made a timely and professional response to the requestors. *Id.* And consistent with the intent of RCW 42.56.520, the offices of the Secretary and Chief Clerk specified the reasons for the denial, namely, that no records meeting the definition of public records existed. *Id.*

G. There is no Case or Controversy Regarding the Individual Legislators' Responses to the PRA Requests at Issue.

The Associated Press did not name individual state legislators as defendants in this case. The lawsuit did name the four caucus leaders, but they were sued in their leadership roles, not in an individual legislator capacity. CP at 4,6. The four leaders' leadership roles are distinct from their roles as individual legislators. For example, the Speaker of the House acts as the official spokesperson of the House, presides over that chamber's daily sessions, refers legislation to committee and signs it, and is charged with appointments of house members to committees, boards, advisory councils, panels, and task forces.¹³ The Senate majority leader

¹³ National Conference of State Legislatures, Roles and Responsibilities of Selected Leadership Positions, *available at* <http://www.ncsl.org/legislators->

assists the President of the Senate with program development, policy formation, and policy decisions. *Id.* Minority leaders develop the minority position, negotiate with the majority party, and direct minority caucus activity. *Id.*

The only causes of action the Associated Press brought were against the Legislature Defendants for non-compliance with the PRA. *Id.* at 33-40. There is no cause of action against individual legislators for non-compliance. The only Prayer for Relief is against the Legislature Defendants. *Id.* at 40. There is no relief requested against individual legislators. Thus, there should be no adjudication of claims against individual legislators who were not sued and not before the court. *Bayha v. Public Util. Dist. No. 1, 2* Wash.2d 85, 113, 97 P.2d 614 (1939) (“[A] court cannot adjudicate the rights of parties who are not actually or constructively before it, with an opportunity to defend or maintain their rights in the action.”) (quoting *State v. Gormley*, 40 Wash. 601, 82 P. 929 (1905)).

At oral argument, the Associated Press admitted they chose not to sue all individual state legislators because some had voluntarily produced the records the Associated Press seeks. Verbatim Report of Proceedings December 22, 2017 (“VRP”) at 89. They further acknowledged that they

staff/legislators/legislative-leaders/leadership-positions-roles-and-responsibilities.aspx (last visited November 2, 2018).

deliberately chose instead to sue the four legislative leaders, in their leadership roles, because they “figured [doing so] would make the point that the legislative offices were subject to the Act as opposed to all 147 [individual legislators].” VRP at 90. But a party cannot sue just to make a point and then ask for injunctive and monetary sanctions to be imposed on persons not before the Court. Under these circumstances, the Court lacks jurisdiction to adjudicate the rights of the individual legislators to whom the records requests were made.

Accordingly, if the Court agrees with the trial court that the Legislature, House of Representatives, and Senate are only subject to the PRA through the Secretary and Chief Clerk, and therefore limited to “legislative records” as defined in RCW 42.56.010(3) and RCW 40.14.100, the Court should reverse and grant summary judgment to the named Defendant-Appellants.

V. 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, the amendments to the PRA over time, as well as by practicality. This Court should uphold the trial court with respect to the PRA’s application to the Legislature, and reverse the trial court’s incongruous holding with respect to individual legislators.

RESPECTFULLY SUBMITTED this 2nd day of November, 2018.

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@pacificalawgroup.com

Nicholas.Brown@pacificalawgroup.com

Claire.McNamara@pacificalawgroup.com

Galexander@bgwp.net

Attorneys for Appellants

PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 2nd day of November, 2018, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon all active parties in this case.



Sydney Henderson

PACIFICA LAW GROUP

November 02, 2018 - 1:45 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_20181102134251SC515382_0562.pdf
This File Contains:
Briefs - Appellants
The Original File Name was WSL Opening Brief.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
- tricia.okonek@pacificalawgroup.com

Comments:

Sender Name: Sydney Henderson - Email: sydney.henderson@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 20181102134251SC515382