

NO. 45812-8

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ARTHUR WEST,

Appellant,

v.

CHRISTINE O. GREGOIRE, in her official capacity as
Governor of the State of Washington,

Respondent.

STATE OF WASHINGTON'S SUPPLEMENTAL BRIEFING

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I. SUPPLEMENTAL ISSUE

Should the trial court's final order on the only properly-presented claim regarding executive privilege be affirmed, where Mr. West's theories of other alleged Public Records Act violations are based on bald allegations, undeveloped arguments, or are otherwise unsupported?

II. FACTS RELEVANT TO SUPPLEMENTAL ISSUE

The Request, the Record Review, and the Production

The facts relevant to the request, the review of the records for privilege, the waiver of privilege, and the production of records and exemption logs are detailed at pages 5-9 of the Respondent State's Brief and pages 1-2 of the Respondent State's Motion on the Merits.

The Proceedings

On September 13, 2010, Mr. West hand-delivered a complaint to the Governor's office that claimed records cannot be withheld based on executive privilege because it is not an actual exemption under the Public Records Act (PRA). CP 3, 566, 599. He had not yet reviewed or arranged to review or copy the records and privilege log produced on September 3, 2010, in response to his public records request. CP 566-67, 597, 1005.

On March 7, 2011, more than five months after obtaining records and a privilege log, Mr. West filed a motion to show cause, without briefing, again asserting generally that records cannot be withheld under

the PRA on a claim of executive privilege. CP 11-12.¹ Six weeks later on April 20, 2011, he filed a brief in support of his motion to show cause. CP 520. The brief was devoid of any factual allegations or arguments relevant to the specific records at issue in this case. Rather, it was a “cut and paste” version of what he had filed in his other case, and it argued only the legal issue of whether there is a gubernatorial executive privilege in Washington. The State responded, CP 1024-45, 564-606, 607-31, and a hearing was held on May 6, 2011, at which time Mr. West requested a continuance, and the matter was set over to June 17, 2011. Dkt #29.

Mr. West filed a supplemental memorandum on June 2, 2011. CP 639. Once again, his briefing contained no factual allegations or arguments regarding the specific records in this case. Mr. West *literally* photocopied the summary judgment briefing filed by Freedom Foundation in Thurston County Superior Court Case No. 11-2-00774-7, another case pending at the same time as Mr. West’s.² Mr. West removed the first few pages that had factual references to Freedom Foundation and then simply taped his name over that of the Freedom Foundation wherever it appeared.

¹ In the motion he alluded to a different matter he was the litigating against the former Governor in which he was attempting, unsuccessfully, to bring a test case before the Supreme Court (No. 84629-4) on the existence of executive privilege as an exemption under the PRA. CP 12. The case was transferred to this Court (No. 42779-6-II).

² The Freedom Foundation case was accepted for direct review by the Supreme Court, resulting in the decision recognizing gubernatorial executive privilege in Washington. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013).

The State filed supplemental briefing, a declaration, and an exhibit on behalf of the former Governor. CP 1046-67, 662-96.

Mr. West filed declarations on April 11, June 6, and June 13, 2011. CP 46, 661, 697. In the first and third declarations he appended the records the former Governor had produced to him after waiving executive privilege, and summarily asserted the records and exemption logs should have been produced sooner. CP 46, 697. In the second declaration, Mr. West stated that if the “broad claim of executive privilege is not sustained, secondary issues will remain as to backup claims asserted by the State as their ‘fallback’ position.” CP 661.

On June 23, 2011, after a hearing on the merits, the trial court issued a final order dismissing the case with prejudice. CP 1004. The trial court’s findings of fact and conclusions of law (CP 1004-08) are consistent with the holding ultimately adopted by the Supreme Court in *Freedom Foundation v. Gregoire*, 178 Wn.2d 686, 310 P.3d 1252 (2013). The trial court concluded that the governor could assert a constitutionally-based executive privilege as an exemption to the PRA, and that this was the only issue before it to decide. CP 1007-08.

Mr. West filed a Motion for Reconsideration attacking the trial court and counsel for the former Governor, but once again providing no factual allegations or legal arguments as to any specific record,

justification for overcoming the presumption of executive privilege, or other explanation of a PRA violation. CP 1010. The State responded, CP 1063, and the motion was denied, CP 1022.

III. SUPPLEMENTAL ARGUMENT

A. **The Bare Allegations and Undeveloped Arguments Made by Mr. West Presented No Issue for the Trial Court to Decide Other Than Whether the Former Governor Could Assert Executive Privilege as an Exemption Under the PRA**

Mr. West had repeated opportunities to offer facts and make arguments related to specific records at issue in this case, but he failed to do so. Rather, he relied on the single legal theory that there is no gubernatorial executive privilege under Washington law. Mr. West's generalized assertions of PRA violations are all based on his argument that executive privilege is not an exemption under the PRA.

The former Governor, however, met her burden under *Freedom Foundation* for withholding records under executive privilege. The privilege applies: (1) where the communications are authored, solicited, or received by the governor or her aides responsible for formulating policy advice, and (2) the communications occur for the purpose of informing policy choices. *Freedom Foundation*, 178 Wn.2d at 703-04. If the governor provides a privilege log identifying the author, recipient, and general subject matter, "the courts must treat the communications as presumptively privileged." *Id.* at 704-705. "Respect for a coordinate

branch of government . . . requires . . . [courts] to provide some deference to a governor's decision that material falls within the ambit of executive privilege." *Id.* at 704. The presumption may be overcome only if the requester makes a showing of particularized need for the materials; otherwise, the court shall "abstain from examining material the governor determined is privileged . . . for judicial examination necessarily intrudes into the executive branch's need for confidentiality" and is inconsistent with the constitutional principle of separation of powers. *Id.* at 705-06.

Utilizing the same analysis that the *Freedom Foundation* court ultimately applied, the trial court rejected Mr. West's claim. CP 1007-08. The former Governor's Legal Counsel engaged in the same review process and preparation of privilege logs in this case that was approved by the Supreme Court in *Freedom Foundation*, 178 Wn.2d at 691, 705-06. Based on the uncontroverted declarations of Narda Pierce, former Legal Counsel to the Governor, and the two privilege logs provided to Mr. West and the court, the former Governor met her burden in asserting executive privilege. CP 607, 662, 775, 667.

Mr. West had the opportunity before the trial court in two sets of briefing, three declarations, a motion for reconsideration, and oral arguments to explain why any particular document should not be exempt from disclosure. He offered no facts to support overcoming the privilege,

and none are in the record. He developed no arguments as to how the PRA allegedly had been violated, other than his argument that there is no executive privilege, which the trial court rejected here and the Supreme Court rejected in *Freedom Foundation*. This Court should not entertain speculative theories of PRA liability based on bald claims and undeveloped arguments. *West v. Thurston County*, 168 Wn. App. 162, 186-87, 275 P.3d 1200 (2012). Where a plaintiff has failed to plead and argue the alleged PRA violations in the trial court, he cannot repackage his theory of the case on appeal in the hope of obtaining yet another bite at the apple. *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 733-34, 218 P.3d 196 (2009); *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509-10, 182 P.3d 985 (2008).

B. Even if the Court Were to Consider Mr. West's Belated Arguments, They Do Not Provide Any Basis for Relief

Even if this Court or the trial court were to entertain Mr. West's various theories of alleged PRA liability, he still cannot prevail.

1. Mr. West's Theory That Executive Privilege Is Not an "Actual" Exemption Is Baseless

Mr. West's statement in the complaint and motion to show cause that the exemption logs do not contain "actual" exemptions presumes that executive privilege does not exist. CP 3, 11. However, *Freedom*

Foundation confirms that a constitutionally-based executive privilege does exist as an exemption to the PRA.

2. Mr. West’s Theory That He Should Now Be Able to Establish a “Particularized Need” for the Withheld Privileged Documents Is Baseless

The requirement of demonstrating a “particularized need” to overcome the presumption is integral to the privilege, part of the well-settled jurisprudence on the privilege, and was briefed by both parties before the trial court. *Freedom Foundation*, 178 Wn.2d at 705; CP 652-55, 1058-61. Mr. West, like *Freedom Foundation*, chose not to identify any need, instead advancing the argument that there simply is no privilege or, if there is a privilege, the test does not require a showing of need. *See Freedom Foundation*, 178 Wn.2d at 705. Having chosen that strategy and lost, Mr. West should not be allowed to recast the theory of his case.

3. Mr. West’s Theory That the Former Governor Was Required to Waive Executive Privilege Sooner Is Baseless

Mr. West suggests it was a violation of the PRA for the former Governor not to have waived the privilege sooner. At the very least, this theory presumes the former Governor was required to waive the privilege. However, if the PRA does not compel the production of a record, it cannot be a violation of the PRA to produce it some time after a request is made or not to produce it all. *See Sanders v. State*, 169 Wn.2d 827, 849-50, 240

P.3d 120 (2010) (penalizing an agency for waiving a privilege, no matter when that waiver occurs and even after litigation has been initiated, would be antithetical to the intent of the PRA). Because the records could be lawfully withheld under the PRA, there was no unlawful denial of record that could give rise to a penalty under RCW 42.56.550(4). Penalties may be awarded *only* if requester was *denied the right* to inspect or copy a public record. RCW 42.56.550(4).³

A requester may file a motion if he believes an agency has not provided a reasonable estimate of the time the agency requires to respond to a request. RCW 42.56.550(2). If the requester prevails, he is entitled to attorney's fees and costs, but not penalties. RCW 42.56.550(4). Mr. West's complaint did not challenge an estimate of time to respond; rather, it asserted records could not be denied based on executive privilege. He filed his action after the Governor's Office sent notice that some records were available for inspection or copying and others would be withheld, but before picking up any records or exemption log. CP 566-67, 1005. The gravamen of Mr. West's case from its inception has been

³ There also was no "silent withholding" of a record. The information required under *Freedom Foundation* and by *Rental Housing Ass'n v. City of Des Moines*, 165 Wn.2d 525, 199 P.3d 393 (2009), was provided as to each specific record in an exemption log. Furthermore, the declarations of Narda Pierce and Melynda Campbell detail the careful steps taken to identify and review the records. CP 607, 662, 564. The fact that it took time to review the records or that some records were produced during litigation is not relevant. "The appropriate inquiry is whether the records are exempt from disclosure." *Sanders v. State*, 169 Wn.2d at 849-50.

only that a gubernatorial executive privilege cannot be claimed as an exemption under the PRA. *Freedom Foundation* resolved that issue.

4. Mr. West's Theory That the Trial Court Was Required to Consider Whether Executive Privilege Should Have Been Asserted in Response to Prior Requests Made by Other Requesters Is Baseless

For the documents that were produced, Mr. West appears to suggest that a court should engage in an academic exercise of determining whether privilege should have been claimed in past responses to prior requesters. Mr. West does not have standing to challenge the response to another person's request. RCW 42.56.550(1) (person who made the request and was denied the record may file a motion). Additionally, such an exercise is in direct conflict with *Freedom Foundation*. Inherent in the claim of executive privilege is a recognition that deference must be given to the governor's determination that a communication with a policy advisor should remain confidential. *Freedom Foundation*, 178 Wn.2d at 704. This deference is so strong that once the governor has identified the records and provided the basis for the exemption, the court must presume the privilege applies and cannot conduct in camera review. *Id.* at 706. It would be bizarre if the governor's willingness to waive the privilege for a current requester resulted in prolonged litigation over why the privilege was claimed in the past in response to a different request, and it could

discourage future governors from making a discretionary waiver.

5. Mr. West's Theory That He Is Now Entitled to Challenge Exemptions Other Than Executive Privilege Is Baseless

Mr. West stated in a declaration that if the "broad claim of executive privilege is not sustained, secondary issues will remain as to backup claims asserted by the State as their 'fallback' position." CP 661. But he did not brief or argue any of those "backup claims." He did not identify with any specificity particular records he planned to dispute, nor did he argue the substance of any exemption other than executive privilege. His entire focus was on convincing the court to reject the former Governor's claim of executive privilege. And now that executive privilege has been recognized by the Supreme Court as an exemption to the PRA, all of his claims and arguments are moot. The validity of any unargued "backup claims" is irrelevant.

RESPECTFULLY SUBMITTED this 29th day of August 2014.

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CERTIFICATE OF SERVICE

I, KRISTIN D. JENSEN, certify that I served a copy of the foregoing document via electronic mail and First Class U.S. Mail, postage paid, on the following:

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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated this 29th day of August 2014.


KRISTIN D. JENSEN
Confidential Secretary

WASHINGTON STATE ATTORNEY GENERAL

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