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Will 'privilege' give WA lawmakers a long-sought exemption from public records law?

By Shauna Sowersby, The Olympian

On a Thursday morning in early January, leading Washington lawmakers were questioned at a pre-session news conference about a term some reporters, and even some legislators, had only recently heard: "legislative privilege."

Lawmakers fielded a question from Crosscut referencing an article published the previous day by McClatchy after the story revealed that some lawmakers were using the term to justify withholding public records.

Multiple legislators on the panel claimed they had used it "rarely," which proved to be incorrect in some cases, and also claimed that the privilege was grounded in the Washington Constitution.

Since then, a review of thousands of public records obtained in a joint effort by McClatchy and Crosscut found that not only was the exemption first quietly rolled out in 2021, but that the legally untested idea of "legislative privilege" for state lawmakers already had been introduced to, and largely ignored by, the Washington State Supreme Court more than a decade before.

After a request for all records previously or currently withheld under claims of legislative privilege from both the House and Senate, various types of documents were released by the Legislature including emails and texts regarding a Chinese American History Month bill, legislation that would have allowed legislative staff to unionize, and records pertaining to the 2021 Redistricting Commission.

One lawmaker who asserted the privilege over her records had 136 fully blacked-out pages of redactions related to a draft amendment on a bill that updated the Uniform Unclaimed Property Act.

The genesis of privilege

Although the redactions citing legislative privilege only recently appeared in public documents released by the Legislature, the body was considering the idea of "legislative privilege" as far back as 2006, according to a former attorney for the state Senate, who asked not to be named because they still work in connection with state government.

The Legislature did not act alone when trying to get a decision from the state Supreme Court on whether they were afforded the privilege to withhold public records or not under a case called Farm Bureau v. Gregoire, the attorney said.

Two outside sources also were hired to help craft a brief in the case.

"We're like, 'Look, let's get somebody who has done this before," the attorney said. "They were experts in it and they helped us write an amicus brief."

The attempt to have the Supreme Court weigh in on the topic at the time was unsuccessful, the attorney said, as justices figured out a way to decide the case without considering legislative privilege as it applied to the Legislature.

But the Legislature wasn't done with the idea of implementing legislative privilege yet.

In 2018, the Legislature attempted again to legitimize the use of the exemption when they crafted a bill exempting themselves from the Public Records Act with the privilege in mind, according to Victoria Cantore, another former attorney for the Washington State Senate.

That legislation was quickly passed out of both chambers with no public deliberation, but Gov. Jay Inslee later vetoed the measure after massive public outcry.

Cantore said legislative privilege was always something that was talked about during her time at the Legislature between 2017 and 2022. She also said she personally saw documents related to "some kerfluffle about public records in the early 2000s, and they had started talking it about then."

Various legal memoranda from that time period showed what the privilege might look like, she said.

The reason the privilege is only recently being invoked by legislators, Cantore said, is that until a Thurston County Superior Court judge ruled in 2018 that lawmakers are subject to the Public Records Act, "the Legislature didn't even think it needed to respond to these public records requests."

Legislative privilege wasn't needed as an exemption until after the ruling, she added, "because the only response that anybody would get is, 'Actually, we're not even subject to the Public Records Act, so like, pound sand, essentially. That was the company line for a very long time."

The Associated Press and other media outlets had filed the lawsuit against lawmakers in 2017 for withholding records such as calendars, sexual harassment reports and other documents. The court ruled that lawmakers are individual agencies under the PRA, and as such must disclose all public records.

In late 2019, the Washington State Supreme Court affirmed the Superior Court ruling.

Narrow interpretation

For that case, however, the Legislature did not ask the state Supreme Court to take a look at legislative privilege, nor is legislative privilege mentioned in the opinion.

Professor Steven F. Huefner from the Moritz College of Law in Ohio told McClatchy and Crosscut in an email that he was puzzled by the decision from legislators not to again address the issue with the high court in 2019.

"If the state court were to conclude that the state constitution's legislative privilege extends to documents, and not just to 'words spoken in debate' (which is the language of the Washington Constitution), that would trump whatever interpretation the court had previously put on the PRA," Huefner said. "But why that issue wasn't addressed in the 2019 case is a mystery; the legislature surely knew they could have raised the issue then."

After the Superior Court decision was handed down and the legislative session adjourned in 2018, Huefner was asked to make a presentation at a PRA Task Force that was established in the wake of lawmakers' attempts to circumvent public records laws.

Within minutes of the first meeting, Huefner was introduced to present findings from his paper titled "The Neglected Value of the Legislative Privilege in State Legislatures."

The presentation defended the use of "a broad constitutional privilege for state legislators to protect the integrity of the deliberative process" and presented "a framework for state courts to use in applying the privilege to state legislatures."

At one point Huefner noted that while other states have more room for interpretation in their constitutions regarding the privilege, Washington's Constitutional language is more narrow.

There are 42 other states with protections for legislators while on the debate floor.

Washington State Constitution's Speech and Debate Clause that says "no member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate," but the provision does not speak specifically to public records, such as emails and texts, held by legislators.

Similarly, the U.S. Constitution has a Speech and Debate clause that protects lawmakers from prosecution for what they say while in debate.

Bruce E. H. Johnson, a constitutional law attorney in Seattle, said cases at the national level such as U.S. v. Renzi have already held that the clause in the U.S. constitution "does not prohibit the compelled disclosure of legislative documents to the government."

Another case at the national level held in 2015 that "the speech and debate clause does not prohibit the disclosure of privileged documents, rather it forbids the evidentiary use of such documents," Johnson said. He added that the federal constitutional privilege is "also very confined."

How this will be resolved

At least one lawsuit has already been filed against the Legislature for the use of legislative privilege to redact documents, and the case will likely end up in the Supreme Court.

The Washington Attorney General's office has already contended in filings that state lawmakers can refuse to provide certain records to the public under a legislative privilege exemption.

Katherine George, an attorney who chaired the legal committee for the Washington State Coalition of Open Government, also sat on the PRA task force in 2018 and said that she and other attorneys looked at the privilege issue then and did not see how it applied to lawmakers' records. She said the idea of legislative privilege was "completely driven by the Legislature."

"We thought they were reaching," she said.

She told McClatchy and Crosscut that there were some legislators on the task force that were committed to transparency, but that they were in the minority.

Michele Earl-Hubbard, a public records attorney who represented the media in the 2017 lawsuit, said that even if the Legislature's attorneys preemptively told legislators that the use of the privilege was lawful, those individual lawmakers could be held liable in court if the Supreme Court determines that they violated the PRA.

Bernard Dean, the Chief Clerk for the Washington State House of Representatives, told McClatchy and Crosscut in an email that "any requestor has the ability to challenge any redactions under the Public Records Act in court, and the courts make a legal determination if those redactions were appropriate under the law."

However, Dean argued, "members are not individually liable as they are acting in their official capacity as a legislator and are treated similarly to other public agencies."

Ultimately, the Washington Supreme Court will have to decide if state lawmakers have the right to invoke the privilege as it pertains to deliberative documents.

The future of the Public Records Act is facing some uncertainties in other ways too, according to George.

In addition to the claim of legislative privilege by lawmakers, George noted that the Public Records Exemptions Accountability Committee, also known as the Sunshine Committee, has not had any of their recommendations passed in the Legislature since the 2019 ruling. This year lawmakers did not introduce any legislation based on recommendations from the committee at all, she said.

"It's basically ceased to have any impact since the Legislature became subject to the Public Records Act," George added. "And I don't think that's a coincidence."

The purpose of the committee, said Rep. Larry Springer, D-Kirkland, is to "review all the exemptions from the Public Records Act to determine whether they should be

maintained, eliminated or changed." He said there are hundreds of exemptions dating back decades.

"The task of going through those is onerous, tedious and in most cases, relatively boring," he said. Springer acknowledged that the bills suggested by the committee "don't get traction" in the Legislature. The lawmaker has sponsored some of the committee's bill's in previous years, he said.

In a letter to Inslee's Deputy General Counsel, Linda Krese, chair of the Sunshine Committee, said she would not be seeking reappointment to the position because she didn't want to continue volunteering for a "purposeless committee."

"If the legislature has no interest in the work of the Public Records Exemptions Accountability Committee, they should pass legislation to abolish it," Krese said in the letter. "If there is a sincere interest in considering repealing or modifying public records exemptions, then the committee should be properly funded and there should be statutory provisions that at least ensure the report gets considered by the legislature."

On Monday night, WashCOG announced on Twitter that the Sunshine Committee's Feb. 28 meeting agenda was revised to include a new item: "Should the Sunshine Committee consider whether to recommend modification or repeal" of the statute that created the panel?

About this report

This report is based on a review of nearly 3,000 pages of redacted and unredacted documents released in the last two months by the House and Senate in response to records requests by McClatchy and Crosscut. It is based on court filings, broadcasts of public meetings, as well as interviews with lawmakers, two former Senate counsels, current legislative officials, legal scholars and advocates for open government.