NO. 86384-9

SUPREME COURT OF THE STATE OF WASHINGTON

FREEDOM FOUNDATION, a Washington nonprofit corporation,

Appellant,

v.

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

Respondent.

GOVERNOR'S RESPONSE TO AMICUS CURIAE BRIEFS

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I. INTRODUCTION

This brief is filed in response to two amicus curiae briefs, filed by Allied Daily Newspapers of Washington, et al. ("Allied Amici"), and by the American Civil Liberties Union of Washington and the Institute for Justice ("ACLU Amici").

II. RESPONSE TO ALLIED AMICI

The amicus brief filed by Allied Amici rests entirely on the assumption that the Legislature exclusively controls the disclosure and production of public records for all three branches of government. Their premise is that the analysis "starts and ends with" the Public Records Act. Allied Amici at 4. Finding no "executive privilege" exemption in the Public Records Act or in any other state statute, they conclude there is no such privilege. Alternatively, they characterize the constitutional privilege claimed by the Governor as an attempt "to broaden an existing exemption for preliminary advice in RCW 42.56.280." Allied Amici at 7-8.

A. The Governor Is Asserting A Constitutional Privilege

The Governor is asserting a constitutional privilege, grounded in separation of powers under the Washington Constitution, but cognizable under the other statute provision of the Public Records Act.[1] Accordingly,

[1] A privilege may be based on the constitution, a statute, or the common law. *State v. Maxon*, 110 Wn.2d 564, 569, 756 P.2d 1297 (1988).

this case does not and cannot "start and end" with the Public Records Act. It must start with an analysis of the asserted constitutional privilege. A constitutional privilege is not dependent upon statutory approval and is not subject to statutory limitation. *See Garner v. Cherberg*, 111 Wn.2d 811, 765 P.2d 1284 (1988) (a constitutional confidentially requirement is "impervious" to legislative change).

The privilege asserted here is a qualified gubernatorial executive privilege, grounded in separation of powers under the Washington Constitution. The privilege has been widely recognized in state courts and is analogous to the constitutionally-grounded qualified presidential communications privilege recognized in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). As this case has come to this Court, that is the only privilege asserted by the Governor and the only privilege at issue. The Governor is not asserting the deliberative process exemption in RCW 42.56.280, nor attempting to broaden that exemption.[2]

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[2] The deliberative process exemption codified in RCW 42.56.280 is grounded in common law. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The qualified executive privilege asserted here, in contrast, is grounded in the constitutional separation of powers. *Nixon*, 418 U.S. at 708; *In re Sealed Case*, 121 F.3d at 745; *State ex rel. Dann v. Taft*, 109 Ohio St. 3d 364, 372, 848 N.E.2d 472 (2006) (*Dann* I). As interpreted by this Court, the deliberative process exemption ends when a final policy decision is made. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994) (*PAWS*). As applied in *Nixon* and the state cases cited herein and in the Governor's Response Brief at 15-22, executive privilege may continue after a final decision where confidentiality is necessary to serve the purposes of the privilege.

Once the Court has determined the recognition of this constitutional privilege in Washington, then it is then appropriate to turn to the Public Records Act. As explained at length in the Governor's Response Brief at 31-37, a constitutional privilege should be deemed an exemption under the "other statute" provision in RCW 42.56.070(1).

B. No Statute Specifically Mandates The Production Of The Requested Records Relating To The Alaska Way Viaduct

Allied Amici's final argument addresses by subject matter three records the Governor withheld under the claim of executive privilege. Allied Amici at 8-11. They argue that production of those records, which address the replacement of the Alaska Way Viaduct in Seattle, is mandated by three statutes. The first of these statutes, RCW 47.01.402(5), does not even purport to apply to the Governor. It reads as follows:

> (5) It is important that the public and policymakers have accurate and timely access to information related to the Alaskan Way viaduct replacement project as it proceeds to, and during, construction of all aspects of the project, specifically including but not limited to information regarding costs, schedules, contracts, project status, and neighborhood impacts. *Therefore it is the intent of the legislature that the state, city, and county departments of transportation establish a single source of accountability for integration, coordination, tracking, and information of all requisite components of the replacement project, which must include, at minimum:*
>
> *(a) A master schedule of all subprojects included in the full replacement project or program; and*
>
> *(b) A single point of contact for the public, media, stakeholders, and other interested parties.*

The italicized language was omitted in Allied Amici's discussion of this statute; they quoted only the first sentence. The omitted language sets forth the Legislature's expectation as to how "accurate and timely access to information related to the Alaska Way viaduct replacement process" is to be provided to the public and to policymakers—by requiring "state, city, and county departments of transportation" to jointly establish a single source of information that provides, at minimum, a "master schedule of all subprojects" and a "single point of contact for the public, media, stakeholders, and other interested parties." This statute contains no implied or explicit requirement that the Governor create, maintain, disclose, or produce any document related to the Alaska Way viaduct.

The present case is thus distinguishable from *Capital Information Group v. State Office of the Governor*, 923 P.2d 29 (Alaska 1996). In that case, the Alaska Supreme Court reiterated its earlier holding that a qualified executive privilege is a "privilege required under the Alaska Constitution's Separation of Powers Doctrine." *Id.*, 923 P.2d at 35 (citing *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska 1986)). The budget impact memoranda at issue in *Capital Information Group* were not protected by the privilege, however, because they were prepared at the direction of the Alaska Legislature, which also specifically directed that

they be publicly disclosed. *Id.*, 923 P.2d at 38-40. In contrast, the three records withheld by the Governor in this case were not prepared at the direction of the Legislature (under RCW 47.01.402(5) or any other statute), but reflect only internal recommendations, discussions, advice, and instructions relating to the Governor's decision-making.

The other two statutes Allied Amici cite are not specific to the Alaska Way Viaduct or its replacement. RCW 42.56.030 is a statement of legislative intent supporting the Public Records Act that does not establish any affirmative disclosure or production requirement.[3] RCW 43.21C.030, part of the State Environmental Policy Act, establishes a general requirement that the environmental impacts of a major project be presented and discussed publically before the project is undertaken. The three records at issue are not environmental review documents and are not implicated by RCW 43.21C.030. CP 25-26, ¶¶ 18-21; CP 68.

[3] RCW 42.56.030 provides that "[t]he people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." Allied Amici's reliance on language in this section suggests a certain irony, since this language was enacted by the Legislature in 1992 (Laws of 1992, ch. 139, § 2), and the Legislature itself has enacted over 300 exemptions from public disclosure. *See* Exemptions from Public Records Disclosure and Confidential Records Prepared by the Code Reviser's Office July 2011 http://atg.wa.gov/uploadedFiles/Home/About_the_Office/Open_Government/Sunshine_Committee/public_disclosure_statutes_8-22-2011.pdf (last visited Sept. 13, 2012). Initiative 276 contained a declaration of policy of full access to information about the conduct of government, but also contained exemptions based on the understanding the disclosure is not always in the public interest. *See* §§ 1, 31, and 33.

C. The Governor Reasonably Determined A Continuing Need For Confidentiality

Allied Amici at 2 suggest the privilege should no longer apply to records addressing the Alaska Way Viaduct or Columbia River Biological Opinion because those issues are settled. Factually, they are wrong. Legally, the assertion of the privilege should be assessed as of 2010 when the records were requested. As examples of their ongoing status, the federal Record of Decision and the financial plan for the Alaska Way Viaduct were not finalized until August 2011, a year after the last production of records in this case,[4] and even now the Columbia River Biological Opinion remains in litigation and is the subject of ongoing discussions between the state and the federal government.[5]

III. RESPONSE TO ACLU AMICI

The ACLU Amici notes that the term "executive privilege" has been used in other contexts to encompass several different privileges. They identify the "presidential communications privilege" as a narrow

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[4] *See* Federal Highway Administration, *Alaska Way Viaduct Replacement Project Record of Decision* (Aug. 2011), available at http://data.wsdot.wa.gov/publications/viaduct/FEISComments/AWV-ROD-08222011.pdf (last visited Sept. 14, 2012); Washington Department of Transportation, *Initial 2011 Financial Plan* (Aug. 2011), available at http://www.wsdot.wa.gov/NR/rdonlyres/82385E31-C7F5-4E93-8FC5-25B564D401DA/0/AWV_2011FinPlan_FHWA.pdf (last visited Sept. 14, 2012).

[5] *See* Opinion and Order dated Aug. 2, 2011, in *National Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, U.S. District Court, District of Oregon, No. CV 01-00640-RE, available at http://www.nwric.org/documents/lastsalmonceremony_reddenaug2011order (last visited Sept. 14, 2012).

privilege within that broad term, and then argue that it is rooted in the enumerated powers granted the President in the federal constitution. ACLU Amici at 6-13. They argue that the Washington Constitution is different and does not support the same privilege. ACLU Amici at 13-18.

A. The Governor Claims A Narrow Executive Privilege

The ACLU Amici are correct that the term "executive privilege" has been used in different contexts to cover a variety of testimonial and discovery privileges, and privileges arising in the common law, which often are codified in open government legislation, and typically held by the executive branch of government generally, especially the federal executive branch. *See, e.g.*, Paul F. Rothstein & Susan W. Crump, *Federal Testimonial Privileges: Evidentiary Privileges Relating to Witnesses and Documents in Federal Law Cases*, Chapter 5, "Executive Privileges" (2d ed. 2011) (discussing state-secrets, inter- and intra-agency deliberative communications, investigatory files and reports, and the mental-processes privileges).

But those are not the privileges asserted in this case. The only privilege at issue here is the qualified presidential (or gubernatorial) communications privilege that was identified in *Nixon*, which rests not on the common law and not on any enumerated presidential power in the federal Constitution, but on the separation of powers. It is not available to

the executive branch generally, and it exists whether or not it is codified in statute. As the Supreme Court explained, this privilege rests on two grounds, "one of which is common to all governments and one of which is peculiar to our system of separation of powers." *Nixon*, 418 U.S. at 705. The former "derive[s] from the supremacy of each branch within its own assigned area of constitutional duties." *Id.* at 705. The latter "rests on the doctrine of separation of powers." *Id.* at 706. "The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.

As developed in federal courts, the privilege protects "communications directly involving and documents actually viewed by the President," as well as documents "solicited and received" by the President or his "immediate White House advisers [with] . . . broad and significant responsibility for investigating and formulating the advice to be given the President." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004); *In re Sealed Case*, 121 F.3d at 752. The privilege covers documents reflecting "presidential decisionmaking and deliberations," and it covers the documents in their entirety. *In re Sealed Case*, 121 F.3d at 744-45. The privilege can be overcome upon a proper showing in a criminal case, *Nixon*, 418 U.S. at 713, or in a civil case upon of proper showing of alleged government wrongdoing, *see, e.g., Dellums v. Powell*,

561 F.2d 242 (D.C. Cir. 1977) (subpoena for certain Nixon tapes in action for damages alleging conspiracy to deny a class of citizens their civil rights).

This is the privilege which has been recognized and adopted as a qualified gubernatorial executive privilege in other states, *see* Governor's Response Brief at 15-22, and this is the privilege asserted in this case. As asserted, the privilege is narrow, covering communications to or from or reports intended for the Governor. The privilege thus provides the "elbow room" necessary for the Governor to obtain candid advice and recommendations from her staff and advisors, to engage in frank internal discussions and deliberations, and to explore sensitive policy and decision options with trusted advisors. As other courts have recognized, there is a significant public interest in allowing these types of confidential communications because they contribute to sound, informed gubernatorial deliberations, policymaking, and decisionmaking.[6] A governor who is constrained from asking questions, exploring options, seeking information, and looking for alternatives is unlikely to make decisions that are as well informed and well considered as a governor who conducts such inquiries.

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[6] *See, e.g., Dann* I, 109 Ohio St. 3d at 376-77; *Killington, Ltd. v. Lash*, 153 Vt. 628, 636, 572 A.2d 1368 (Vt. 1990); *Nero v. Hyland*, 76 N.J. 213, 225-26, 386 A.2d 846, 853 (1978); *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 783 (Del. Super. Ct.), *appeal dismissed*, 670 A.2d 1338 (Del. 1995). *See also Nixon*, 418 U.S. at 705 (discussing the "public interest" in allowing the President to receive "candid, objective, and even blunt or harsh opinions" during decisionmaking).

This rationale is focused on the Governor, as the person constitutionally charged with making the decisions or policy. It is a familiar rationale, perhaps because the same principles that support attorney-client confidentiality support the qualified executive privilege asserted by the Governor. *See Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990) (purpose of the attorney-client privilege "is to encourage free and open attorney-client communication by assuring the client that his communications will be neither directly or indirectly disclosed to others.") (citing *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 706 P.2d 212 (1985)); ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1032 (2005) (purpose of attorney-client privilege is to encourage persons to seek legal advice freely and to communicate candidly during consultations with their attorneys without fear that information will be revealed to others, to enable clients to receive the most competent legal advice from fully informed counsel).[7]

The claimed executive privilege also reinforces the separation of powers, integral to our tripartite governmental system. While this Court has

[7] Significantly, while the attorney-client privilege is subject to limited exceptions, "it is *not* subject to an exception simply because a private litigant, government agency, or other third party claims an important need to know what the client discussed with an attorney." ABA Task Force, 60 Bus. Law at 1032.

recognized that the three branches of government must remain partially entwined both for effective government and to maintain effective checks and balances, it also repeatedly has stressed the need to protect each branch of government from incursion by the other branches.[8] Like the legislative privilege and judicial deliberation privilege, a qualified executive privilege helps assure the independence of each branch by providing some insulation from the other branches as it performs the functions constitutionally allocated to it.[9]

B. The Qualified Executive Privilege Asserted By The Governor Is Fully Supported By The Washington Constitution

The ACLU Amici selectively quote from *Nixon* to craft an argument that the presidential communication privilege flows from the President's enumerated powers and not from separation of powers. ACLU Amicus at 7. In fact, the President's counsel urged two grounds for the

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[8] *See, e.g., Brown v. Owen*, 165 Wn.2d 706, 718, 206 P.3d 310 (2009); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 504, 198 P.3d 1021 (2009); *Carrick v. Locke*, 125 Wn.2d 129, 134-36, 882 P.2d 173 (1994). *See also Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 425, 780 P.2d 1282 (1989) ("American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power"); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 413, 63 P.2d 397 (1936) (separation of powers requires that "persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others" (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 190, 13 Otto 168, 26 L. Ed. 377 (1880))).

[9] As explained in the Governor's Response Brief at 38-42, the privilege does not preclude judicial review of documents for which the privilege is claimed, where there is a proper showing of need. This has been the Governor's consistent position in this case. The ACLU Amici's argument, at page 5 and 6, that the separation of powers doctrine does not preclude judicial review of a claim of executive privilege, therefore is surplusage.

privilege and the Court addressed both grounds. The first ground was "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," which included the "confidentiality of Presidential communications in the exercise of Art. II powers." *Nixon*, 418 U.S. at 705. This is the only ground quoted by the ACLU Amici.

"The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers." *Id.* at 706. The Court acknowledged the "public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" as a "consideration" in ultimately holding that the "privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708.[10]

As explained in the Governor's Response Brief at 15-22 and 26, numerous state court decisions have addressed a governor's assertion of a qualified executive privilege parallel to the privilege recognized in *Nixon*.

[10] The Court left room for an absolute privilege based on "a claim of need to protect military, diplomatic, or sensitive national security secrets." *Id.* at 706. These are the privileges that rest on the President's enumerated powers in article II, section 2 of the federal Constitution, addressed by the truncated quote the ACLU Amici provide.

Those courts have uniformly held that their qualified executive privilege is rooted in state constitutional separation of powers.[11]

Treating executive privilege as an executive power, rather than a privilege, the ACLU Amici next assert that any claim of executive privilege must be supported by an enumerated constitutional or statutory provision. ACLU Amici at 14. As explained in the Governor's Response Brief at 10, executive privilege is not a coercive power the executive branch wields against the other branches, but rather a defensive shield that flows from the separation of powers and the autonomy of each branch

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[11] The state courts' references to separation of powers were summarized in the Governor's Response Brief at 26 n.19. For the Court's ease of reference—and because that footnote inadvertently omitted one case (*Capital Information Group v. State Office of the Governor*, 923 P.2d 29 (Alaska 1996)), that summary is repeated here with *Capital Information Group* added:

"In *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska 1986), this court cited *Nixon* and held that the Alaska Constitution's separation of powers doctrine supported a governor's claim of executive privilege. *Id.* at 623." *Capital Info. Group*, 923 P.2d at 34-35.

"[T]he Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the executive function. This power is analogous to the qualified constitutionally-based privilege of the President, which is fundamental to the operation of government and inextricably rooted in the separation of powers." *Nero*, 76 N.J. 225 (internal quotes omitted).

"In light of the reasons underlying the privilege, and considering the express separation of powers provision in Article 8 of the Maryland Declaration of Rights, we do recognize as part of the law of this State the doctrine of executive privilege essentially as set forth in the above-cited cases." *Hamilton*, 287 Md. at 562.

"Both the constitutional and common-law roots of the privilege strongly require its recognition in Vermont." *Killington*, 153 Vt. at 636.

"The constitutional basis for the executive privilege stems from the doctrine of separation of powers." *Guy*, 659 A.2d at 782.

"The separation-of-powers doctrine requires that each branch of government be permitted to exercise its constitutional duties without interference from the other two branches of government. The gubernatorial-communications privilege protects the public by allowing the state's chief executive the freedom that is required to make decisions." *Dann* I, 109 Ohio St. 3d at 376 (footnote omitted).

within its sphere. A qualified executive privilege, like the legislative privilege and the judicial deliberation privilege, is more properly considered a protection of one branch of government from the powers of another branch. This Court has recognized that a privilege need not be supported by explicit constitutional or statutory language. *State v. Maxon*, 110 Wn.2d 564, 569, 756 P.2d 1297 (1988) (holding that a privilege may be based on the constitution, a statute, or the common law).

There is other precedent. The enrolled bill doctrine, which acts as a privilege asserted against interference by the other branches, is not explicitly set forth in the Washington Constitution, but this Court has held that doctrine to be grounded in separation of powers. *Brown v. Owen*, 165 Wn.2d 706, 722-24, 206 P.3d 310 (2009).

Of course, the principle of separation of powers itself is not explicitly set forth in the Washington Constitution, but this Court has recognized the principle as a vital part of the Constitution since statehood. *See Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994) ("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"). *Accord Brown*, 165 Wn.2d at 718.

Indeed, the inherent authority of this Court to conduct deliberations and conferences in confidence is not explicitly set forth in the Washington

Constitution. There is no explicit constitutional language that establishes any privilege from disclosure and production for Justices' notes made during deliberation and conference.[12]

This Court has never articulated the basis for a judicial deliberation privilege, but the Court presumably considers such a privilege to constitute an important element of the judicial power vested in the courts under article IV, section 1 of the Washington Constitution—and as such, it is a privilege ultimately rooted in the separation of powers.[13] At least two courts have explicitly rested the judicial deliberation privilege in the constitutional separation of powers, holding that it protects confidential communications among judges and staff). *In re Certain Complaints*, 783 F.2d 1488, 1517-20 (11th Cir. 1986), *cert. denied sub nom. Hastings v.*

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[12] Just as ACLU Amici (at 14-16) suggest article I, section 1 of the Washington Constitution forecloses any executive privilege, it could be argued that article I, section 10 ("justice in all cases shall be administered openly") forecloses any judicial deliberative privilege. *See Beuhler v. Small*, 115 Wn. App. 914, 64 P.3d 78 (2003), in which an attorney argued that article I, section 10 requires public access to a trial judge's case notes. *See also Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004) ("Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history." (interpreting Wash. Const. art. I, § 10)).

The correct answer to both arguments is that both privileges are grounded in the separation of powers—a vital and fundamental principle inherent in our Constitution—and the privileges are necessary for both branches of government to effectively and adequately fulfill their constitutional roles.

[13] As one appellate judge noted, "[e]xpress authorities sustaining [the recognition of a judicial privilege] are minimal, undoubtedly because its existence and validity has been so universally recognized." *Nixon v. Sirica*, 487 F.2d 700, 740 (D.C. Cir. 1973) (MacKinnon, J., dissenting).

Godbold, 477 U.S. 904, 106 S. Ct. 3273, 91 L. Ed. 2d 563 (1986); *Thomas v. Page*, 361 Ill. App. 3d 484, 491, 837 N.E.2d 483, 297 Ill. Dec. 400 (2005).

This Court signaled a separation of powers rationale when it rejected arguments that court case files are subject to the former Public Disclosure Act in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). The Court did not just rely on the language of the Act and the intent of the Legislature. It also invoked the courts' "inherent authority to control their records and proceedings"—a separation of powers rationale—as justification for excluding court records from the requirements of the Act. *Id.*, 107 Wn.2d at 305 (quoting *Cowles Pub'g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)).[14]

Even though the executive privilege claimed here rests on the separation of powers, it is worth noting in response to ACLU Amici that the Governor is not without enumerated powers in the Washington Constitution. As in the other states that have recognized a gubernatorial executive privilege, those powers parallel the presidential powers enumerated in article II, section 2 of the federal Constitution. The Washington Constitution vests the "supreme executive power of this state" in the Governor. Const. art. III, § 2; *State ex rel. Hartley v. Clausen*, 146

[14] In *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009), the Court affirmed *Nast* but explicitly declined to address whether a legislative attempt to bring the courts within the PRA would implicate separation of powers. *Id.* at 348 n.2.

Wash. 588, 592, 264 P. 403 (1928) ("the Governor, under our Constitution, is the highest executive authority"). The Governor "may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed." Const. art. III, § 5. She is commander-in-chief of the military of the state. Const. art. III, § 8. She has veto authority. Const. art. III, § 12. She is statutorily designated "the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States." RCW 43.06.010.

In the context of the powers and duties constitutionally reserved to the State of Washington, the powers and duties assigned to the Governor make her position and role wholly analogous to that of the President. It is no constitutional stretch to recognize a qualified gubernatorial executive privilege analogous to the presidential communications privilege.

Finally, the ACLU Amici offer a policy argument that the need for broad public disclosure is so central to our constitutional scheme that any privilege resting on the separation of powers cannot stand. They quote James Madison's well-known comment that "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." ACLU Amici, at 17

(quoting Letter from James Madison to W.T. Barry, Aug. 4, 1822, in 9 *The Writings of James Madison* 103 (1910)).

But James Madison also wrote extensively about the separation of powers. Two examples suffice:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.

James Madison, The Federalist No. 47, at 301 (Clinton Rossiter, ed., 1961).

> [T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.

James Madison, The Federalist No. 48, at 308 (Clinton Rossiter, ed. 1961). Madison was concerned with providing security for each branch of government against invasion from the others. In The Federalist No. 48, his concern was with usurpation by the legislative branch, because of it is vested with greater constitutional powers than the other branches and it is given access to the pockets of the people. *Cf. In re Salary of Juvenile Dir.*, 87 Wn.2d 232, 245-252, 552 P.2d 163 (1976) (discussing the courts' power to respond where the Legislature provides insufficient resources for the operation of the courts).

These quotations from Madison are not intended to imply in any way that the Washington Legislature has exceeded its constitutional authority in enacting the Public Records Act. Rather, they are intended to serve as a reminder of the concerns that placed the separation of powers at the center of our constitutional scheme. Madison's words are appropriately cautionary when considering statutory requirements that overlap or affect a constitutional privilege held by another branch.

In fact, in enacting and amending the Public Records Act, our Legislature has shown restraint consistent with respect for the separation of powers. As noted in the Governor's Response Brief at 47-48, the Act by its terms does not explicitly purport to apply either to the Governor or to the courts. Moreover, as suggested by several recent decisions of this Court, the "other statute" exemption in RCW 42.56.070(1) is flexible enough to accommodate constitutional privileges, as well as court rules, and federal administrative regulations. *See Yakima Cty. v. Yakima Herald-Republic*, 170 Wn.2d 775, 795, 808, 246 P.3d 768 (2011); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595-96, 243 P.3d 919 (2010); *Ameriquest Mortg. Co. v. Office of the Att'y Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010); and *O'Connor v. Dep't of Soc. & Health Sers.*, 143 Wn.2d 895, 912, 25 P.3d 426 (2001).

C. The Governor Remains Accountable To the People

We have explained previously that judicial recognition of a qualified executive privilege does not shield the Governor from public accountability. Governor's Response Brief at 45-46. The privilege is not mandatory, and the Governor can waive it or choose not to assert it. During the four-year period that has been the focus of the petitioner, 80,000 pages of documents and tens of thousands of emails were produced by the Governor's office to the public. See Brief of Respondent at 4.

The Governor is the single most visible elected official in Washington, under near-constant public scrutiny, and subject to the will of voters statewide.[1] Even with a qualified executive privilege, she remains directly accountable to the people of Washington.

IV. CONCLUSION

This Court should affirm the superior court.

RESPECTFULLY SUBMITTED this 14th day of September, 2012.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that I served a copy of the Governor's Response to Amicus Curiae Briefs, via electronic mail per agreement of the parties, upon the following:

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Sent on behalf of Alan D. Copsey, Deputy Solicitor General, WSBA 23305

Attached for filing in the above referenced matter is the Governor's Response to Amicus Curiae Briefs and Certificate of Service.

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