



National Freedom of
Information Coalition

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NFOIC joins other nonprofits, newspapers in amicus brief

At issue are Washington Gov. Chris Gregoire's claims of executive privilege to conceal records.

COLUMBIA, Mo. (August 27, 2012) – The National Freedom of Information Coalition (NFOIC) has joined media associations and good government groups in asking the Washington state Supreme Court to limit Gov. Gregoire's authority to withhold documents from public scrutiny.

The case grew out of a lawsuit filed in April 2011 by the Olympia, Wash.-based Freedom Foundation, an NFOIC member organization in Washington state, over the governor's claims of "executive privilege" as a basis for shielding records from disclosure.

At issue in the case are Gov. Gregoire's claims of executive privilege to conceal records regarding a controversial, \$2 billion proposed tunnel along the Seattle downtown waterfront to replace the elevated Alaskan Way Viaduct, in addition to other documents.

Other organizations supporting the Freedom Foundation's position in amicus briefs filed in the lawsuit are Allied Daily Newspapers of Washington, the Washington Newspaper Publishers Association, the American Civil Liberties Union, the Institute for Justice and the Washington Coalition for Open Government (WCOG), also an NFOIC member organization.

The Freedom Foundation and its supporters say the governor should only be able to shield records from disclosure under the provisions of the state Public Records Act (PRA), which includes a "deliberative process" exemption. Gregoire's attorneys say she is neither seeking to invalidate the PRA nor claim general immunity from it. They contend, however, that the constitutional separation-of-powers doctrine gives her additional authority to withhold documents in some instances.

Gregoire is not the first Washington governor to invoke the doctrine of executive privilege. But the Freedom Foundation lawsuit alleges she has invoked it more frequently than any previous governor.

A trial court judge ruled in the governor's favor in June 2011, holding that executive privilege can act as an exemption to the Public Records Act and that a governor who asserts executive privilege can withhold records from the public. Freedom Foundation and its

supporters are asking the state Supreme Court to overturn that ruling. The court agreed to hear the case last April.

Toby Nixon, president of the Washington Coalition for Open Government, said that the law is clear on the matter, and "public officials, including the governor, don't have the right to decide what is good for the people to know and what is not good for them to know."

"Neither our constitution nor laws grant the governor any sort of executive privilege," Nixon continued, "and the governor can't whip one up out of thin air to keep secret whatever politically uncomfortable records she doesn't want released."

Organizations involved are concerned that, if an implied executive privilege is recognized for the governor of Washington, many other government executives at the state and local level will invoke the alleged privilege to evade the Act's disclosure requirements.

The amicus brief filed last Tuesday, August 21, said recognizing a more expansive privilege than what is permitted under the public disclosure law would damage the PRA "by inviting executives at all levels of state and local government to claim that their preliminary deliberations are equally deserving of broader secrecy."

"We certainly recognize there are times when a government executive may need to consult with aides in private and to receive confidential information and advice," said Kenneth Bunting, Executive Director of the NFOIC. "But the Washington PRA has always provided adequate protections for that. It is disheartening to see a highly respected Democratic governor embracing a Nixon-era legal doctrine that has its very origins in power abuses and cover ups."

The National Freedom of Information Coalition is a national network of state freedom of information advocates, citizen-driven nonprofit freedom of information organizations, academic and First Amendment centers, journalistic societies and attorneys. NFOIC also administers the Knight FOI Fund, a half-million-dollar perpetual legal fund to assist litigants and appellants who advocate for open government in important and meritorious legal cases.

NFOIC's primary mission is fostering government transparency at the state and local level. A unit of the Missouri School of Journalism, the NFOIC is an affiliate of the Donald W. Reynolds Journalism Institute, and is based at the University of Missouri, home to the nation's oldest FOI Center. For more, visit <http://www.nfoic.org/>.

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