No. 86384-9

IN THE SUPREME COURT OF WASHINGTON

FREEDOM FOUNDATION,

Appellant,

v.

CHRISTINE O. GREGOIRE, in her official capacity as Governor,

Respondent.

AMICUS CURIAE BRIEF OF ALLIED DAILY NEWSPAPERS OF WASHINGTON, WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION, NATIONAL FREEDOM OF INFORMATION COALITION AND WASHINGTON COALITION FOR OPEN GOVERNMENT IN SUPPORT OF APPELLANT

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I. INTRODUCTION

> *The Public Records Act allows intrusion not by the Legislature, or any other branch of government, but by the public. A policy of open government does not infringe on the independence of governmental branches.*

Those words were written two decades ago by the Supreme Court of North Carolina.[1] They apply equally here and now.

People in Washington have a compelling interest in the governor's communications directing state programs and policies. Evaluating the governor's performance includes understanding the political, financial, scientific or other information considered or overlooked in making decisions. Unlike state legislators and council members who receive staff reports and public testimony in open hearings, the governor has no open public process for receiving advice. The only window into what shapes her decisions is the Public Records Act (PRA), Chap. 42.56 RCW.

In this case, Gov. Christine Gregoire is concealing records bearing on how or why she supported a controversial plan to build a $2 billion tunnel replacing the Alaskan Way Viaduct. This was a matter of strong public interest, as evidenced by numerous requests for the governor's

[1] *News and Observer Publishing Co., Inc. v. Poole*, 330 N.C. 465, 484, 412 S.E.2d 7 (1992) (emphasis added)(holding that preliminary draft reports of a commission must be disclosed pursuant to the state's disclosure law) .

records related to the tunnel debate as well as intensive media coverage.[2] Yet she claims an "executive privilege" - which has never been countenanced by voters, the Legislature or the courts – to permanently hide advice she received and notes she made when less costly alternatives to the tunnel were still possible.

Disclosing what the governor's policy advisor wrote in 2008-09, or what notes were jotted by the governor in 2007, could not possibly harm the decision-making process at this point because the process is done. The tunnel debate is over. State work crews are digging up the earth.[3] Nor is anything to be gained from concealing the other records at issue in this case, including those relating to the governor's communications with federal officials about a Columbia River Biological Opinion issued years ago.[4] To hide these records now, long after the governor's tunnel and Columbia River positions were settled, will accomplish nothing except to remove the governor from public scrutiny.

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[2] Documents in this case were requested "multiple times." Brief of Respondent, p.4. Also illustrating strong public interest in the governor's position, a search of the Seattle Times Web site, www.seattletimes.com, using the key words "Gregoire," "tunnel" and "viaduct" produces hundreds of hits.

[3] See August 4, 2012 article, "Launch pit heralds start of Highway 99 drilling," at http://seattletimes.nwsource.com/html/localnews/2018851097_99tunnelpit05m.html.

[4] According to the Web site of the National Marine Fisheries Service, the biological opinion was issued in 2008 and supplemented in 2010. See https://pcts.nmfs.noaa.gov/pls/pcts-pub/pcts_upload.summary_list_biop?p_id=124302 .

To enforce disclosure, on the other hand, is to place the governor exactly where she belongs - in the bright light that shines on all elected officials in Washington. Government accountability includes allowing the public to evaluate the wisdom, timeliness, thoroughness and accuracy of the information used by elected leaders in making important decisions. It has long been this state's policy - enforced since the 1978 *Hearst Corp. v. Hoppe* decision[5] - that once decisions are made, the benefit to the public from disclosing pre-decisional records outweighs any benefit from keeping the decision-making process confidential. The governor offers no compelling reason to depart from this policy and from the strict disclosure requirements of the PRA. In sum, if the PRA is to remain an effective tool for assessing a governor's performance, the trial court must be reversed.

II. IDENTITY AND INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) is a trade association representing 120 weekly community newspapers throughout Washington. The National Freedom of Information Coalition (NFOIC) is a 501(c)(3) non-profit organization, located at the University of Missouri School of Journalism, that works to protect the public's right to oversee its

[5] *Hearst Corp. v. Hoppe*, 90 Wn.2d 123 (1978).

government. The Washington Coalition for Open Government is a statewide nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. These organizations ("Amici") regularly advocate for access to records in order to inform the public about matters of public concern. Their members frequently use government records as sources of information about the performance of elected officials such as Governor Christine Gregoire.

Amici are interested in this case because the governor's records must be open in order to assess her effectiveness as the state's top executive. Also, Amici are concerned that if Washington courts recognize an executive privilege that is more expansive than the statutory deliberative process exemption (RCW 42.56.280), it will be invoked by executives at every level of state and local government to evade disclosure requirements, effectively nullifying the voter-approved Public Records Act.

III. DISCUSSION

A. The Analysis Starts and Ends with the PRA.

When the people of Washington exercised their initiative powers to enact what is now the PRA, they expressly stated that ***all*** state records

would be open to inspection unless specifically exempted by a statute.[6] If the voters had wanted to exclude the governor from this mandate, they would have said so. There is no such exclusion. RCW 42.56.070(1) ("each agency" must make requested records promptly available); RCW 42.56.010(1) ("agency" includes "all state agencies" and "every state office"). The governor of Washington is just as accountable to the public as any other state or local government official, agency or department.

In fact, Gov. Gregoire agrees that she is subject to the PRA and that the PRA frames the analysis in this case. Brief of Respondent, p. 1. (the "central issue" is whether a constitutionally based executive privilege operates "as an exemption under the Public Records Act"); and p. 2 (she is "not challenging the constitutionality of the Public Records Act or seeking immunity from it"). Thus, the first question is whether the PRA permits Gov. Gregoire to withhold the six pre-decisional records at issue and any others she may choose. Based on the plain language of the statute, the strong underlying policy of accountability, and the danger of creating a loophole large enough to swallow the PRA, the answer must be no.

B. Exemptions are For the Legislature to Decide.

Under the PRA:

[6] *Hearst*, 90 Wn.2d at 128 (quoting Initiative 276 voters' pamphlet).

> Each agency…shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of…this chapter, *or other statute* which exempts or prohibits disclosure of specific information or records.

RCW 42.56.070(1) (italics added). In a PRA suit, "[t]he burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with *a statute* that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1) (italics added). In requiring agencies to rely on a specific "statute" – a legislative enactment – when withholding records, the PRA evinces an intention for the Legislature to control exemptions. This is consistent with the PRA policy of promoting full disclosure, because as this Court has noted, allowing agencies to decide the PRA's reach "would be the most direct course to its devitalization." *Hearst*, 90 Wn.2d at 131.

In Washington, privileges are found in the laws and rules of court evidence, and limit types of persons who shall not be "examined" or "compelled to testify" for evidentiary purposes. RCW 5.60.060; ER 501 (listing privilege statutes). In withholding records in this case, the governor relies on a separation of powers doctrine which is not expressly stated in the Washington Constitution, and an "executive privilege" allegedly derived from that doctrine which has never even been codified as

a law of evidence, let alone adopted as a statutory exemption to the PRA.[7] In short, the alleged privilege is not a "statute" permitting non-disclosure pursuant to RCW 42.56.070(1) and RCW 42.56.550(1).

Accordingly, if Gov. Gregoire is not attacking the constitutionality of the PRA, as she claims, then she must cede to the authority vested in the legislative branch by RCW 42.56.070(1) and RCW 42.56.550(1) to decide which records her office must disclose. She cannot argue that her alleged constitutional privilege trumps the PRA's disclosure requirements without attacking the fundamental premise of the PRA that officials or agencies cannot make up their own disclosure rules. In acknowledging that she and her office are subject to the PRA, Gov. Gregoire implicitly concedes that requiring public accountability is not an unconstitutional intrusion by the Legislature on any function of the executive branch. *Brown v. Owen*, 165 Wn.2d 706, 718 (2009) (the separation of powers doctrine serves to "ensure that the fundamental functions of each branch remain inviolate"). In sum, because the PRA requires reliance on a statutory exemption in order to strictly limit secrecy and the governor is not attacking the

[7] A testimonial privilege does not automatically operate as a PRA exemption. The Legislature could reasonably decide that when a privilege is held by the government – an instrument of the people – the public's interest in disclosure outweighs any interest in fostering uninhibited written communications by keeping them secret. This is particularly true when the communications at issue relate to final government decisions which affect the cost or efficacy of public services, as in this case.

constitutionality of that requirement, but is attempting to broaden an existing exemption for preliminary advice in RCW 42.56.280, her argument must fail. It should be left to the Legislature to decide by statute when the governor's records are exempted from disclosure.

C. The Legislature Has Balanced Competing Interests in Favor of Disclosure.

The Legislature has passed at least three statutes reflecting a policy that the public's interest in learning about the decision-making process for the Seattle tunnel project is paramount. In 2009, when a decision to build the tunnel was still tentative due to a pending environmental review, the Legislature passed a statute requiring the state government to fully inform the public about the project "as it proceeds to" construction.

> 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.

RCW 47.01.402(5). Thus, the Legislature placed "the public and policymakers" on an equal footing in acquiring information pertinent to the project decision.

Also relevant is the State Environmental Policy Act (SEPA), RCW 43.21C.030, which requires all state agencies to publicly discuss "to the

fullest extent possible" the probable environmental impacts of major projects such as the Seattle tunnel and to explore all reasonable alternatives before making a final decision. Given the high level of pre-decisional detail required to be publicly discussed under SEPA and its federal counterpart, the National Environmental Policy Act, 42 USC 4321 et seq., it makes no sense to shield from public view what one advisor told the governor three or four years ago. The project's impact statement, completed in 2011, necessarily explored every significant environmental, scientific and logistical consideration relevant to deciding how to replace the Alaskan Way Viaduct.[8] Because SEPA and NEPA are designed to ensure that the decision-making process for such major projects is not secret and fully involves the public, there is no public interest to be served by concealing this particular deliberative process.

And finally, the PRA itself expresses a strong policy favoring disclosure of the records at issue. RCW 42.56.030 says:

> The 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. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

[8] The Final Environmental Impact Statement for the tunnel project was issued in July 2011 and the Federal Highway Administration issued its final decision approving the tunnel alternative – Gov. Gregoire's preferred option – in August 2011, according to the State Department of Transportation Web site. See http://www.wsdot.wa.gov/projects/viaduct.

This case is a stark example of a public servant deciding arbitrarily what the public should know, contrary to the PRA and in the absence of an exemption.

An opinion of the Alaska Supreme Court, *Capital Information Group v. State Office of the Governor*, 923 P.2d 29 (1996), is somewhat instructive here. Unlike Washington, Alaska had recognized an "executive privilege" based on constitutional separation of powers. *Id*. at 33. And the Court found that the records at issue – budget impact memoranda submitted to the budget office before the governor proposed an annual state budget – fell within the privilege because they were pre-decisional and part of the governor's deliberative process. *Id*. at 39. Nevertheless, the Court held that the budget memoranda should have been publicly disclosed because the Legislature had passed a statute saying so. *Id*. The Court said that when the Legislature has already found that the public's need for disclosure "outweighs any risk of lack of candor" in the deliberative process, "[t]his determination is entitled to significant weight, given the legislature's constitutional power to allocate executive department functions and duties among the offices, departments and agencies of the state government." *Id*. at 40. Thus, although Amici do not believe that the Washington Constitution supports creation of an executive

privilege for the reasons explained in the appellant's briefs, even if it did, the Legislature's enactments in favor of disclosure still should prevail.

D. The PRA Adequately Addresses the Governor's Concerns.

The governor's reason for asserting an alleged constitutional privilege is that, in her opinion, the existing statutory exemptions are not "sufficient to protect the documents at issue here." Brief of Respondent, p. 24. More specifically, she argues that RCW 42.56.280 – the deliberative process exemption - is insufficient because this Court "has held that the exemption…ends when a final policy decision is made." *Id.*[9] She cited *Hearst*, 90 Wn.2d at 133, which said, "Because the exemption is intended to safeguard the free exchange of ideas, recommendations and opinions prior to decision, the opinions or recommendations actually implemented as policy lose their protection when adopted by the agency."

The governor's explanation as to why she needs a *permanent* exemption, enabling her to conceal preliminary advice even after she has culled through it and decided her position, is remarkably thin. First, this Court is asked to believe that Gov. Gregoire finds it "exceedingly difficult" to know when her own policy decisions are implemented. Brief of Respondent, p. 25. Even if it was plausible that the governor cannot tell

[9] RCW 42.56.280 exempts "preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended."

when she has taken a final position, that is a problem with the governor, not RCW 42.56.280.

To embrace her reasoning would be to permit secrecy any time a government agency claims that its decisions are subject to waffling, so that instead of protecting only "preliminary" discussions while they are underway, RCW 42.56.280 would indefinitely remove from public scrutiny all deliberative communications related to any topic which might be revisited somehow. If disclosure depended on overcoming this nebulous notion of never-ending uncertainty, as the governor advocates, government officials would have an incentive to label every decision as tentative, and to avoid adopting clear positions which could open their decision-making to scrutiny.

In reality, it is easy to tell when a governor's policy decision is implemented. It happens most obviously when the governor's position on an issue is presented in a legislative or rulemaking proposal, or is otherwise stated publicly, such as in an agreement, executive order, speech or press release. The fact that a decision is incremental or sequential is immaterial. Thus, it is simply not true that RCW 42.56.280 is insufficient because of the governor's purported inability to detect finality.

The governor's other stated concern is that post-decision disclosure of preliminary advice "may markedly interfere with the governor's ability to undertake the additional negotiation and compromise that may be necessary to implement the decision." Brief of Respondent, p. 25. Gov. Gregoire does not explain this puzzling assertion. Presumably, once a decision is made, the governor implements it faithfully. A "decision" is, by its very nature, not subject to "additional negotiation and compromise," but reflects an adopted policy which the governor is expected to carry out.[10] It appears that the governor is confusing a decision with a proposal.

Moreover, the governor points to no specific evidence of any actual harm caused by a post-decision disclosure of preliminary advice. In fact, RCW 42.56.280 adequately protects the public's interest in allowing the governor to have frank discussions with advisors while formulating policies. The very purpose of the statute is to "protect the give and take of deliberations necessary to formulation of agency policy." *Progressive Animal Welfare Society (PAWS) v. University of Washington*, 125 Wn.2d 243, 256, 884 P.2d 592 (1995). The governor does not claim that the alleged "insufficiency" of RCW 42.56.280 has prevented her from

[10] To negotiate or compromise is inconsistent with implementation. According to www.dictionary.com, "implement" is defined as "to fulfill; perform; carry out: *Once in office, he failed to implement his campaign promises"* or "to put into effect according to or by means of a definite plan or procedure." (Italics in original).

formulating policies. In sum, the governor offers no compelling reason to create an executive privilege as a broader alternative to RCW 42.56.280.

E. An Implied Privilege To Withhold Records is a Slippery Slope.

Amici agree with the arguments of Freedom Foundation that there is no constitutional basis to create an implied executive privilege in Washington. An additional reason to reject such a privilege is the danger of eviscerating 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 than RCW 42.56.280 permits. If this Court holds that public scrutiny of pre-decisional advice and communication is an unconstitutional intrusion on executive decision-making, even years after executives have made their decisions, the entire executive branch – including state department heads - could try to permanently withhold almost any public record that was considered in a decision-making process. Given the vast array of decisions made by state and local executives concerning programs and policies affecting the public, an implied executive privilege could embolden agencies to deny much of what is now available. Because an informed democracy depends on the public's ability to assess government performance, and because

deliberative communications already have sufficient protection to permit agencies to formulate policies, the existing balance must be maintained.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and hold that the governor of Washington must abide by the existing disclosure laws which apply to all other public officials.

Dated this 21st day of August, 2012.

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