

Policy Highlighter

January 13, 2010

2010 No. 1



Executive Privilege: The Phantom Exemption to the Public Records Act

By Michael Reitz

The Washington State Public Records Act (Chapter 42.56 RCW) mandates that all public records held by government agencies are to be available to the public, unless the record is specifically exempted from disclosure by law. As the Washington State Supreme Court has observed, the Act provides “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127 (1978). The Act itself states:

RCW 42.56.030. The people of this state do not yield their sovereignty to the agencies that serve them. 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.

In order to encourage broad disclosure, an agency may only deny a request for a public record by citing a specific statutory exemption found in the Public Records Act or in some other statute. RCW 42.56.030. Unless a statutory exemption protects certain records or information, the record must be disclosed.

Yet despite this guidance, the Office of the Governor frequently asserts a privilege not found in statute to shield documents from disclosure. Since 2007, Governor Gregoire’s office has asserted “executive privilege” 421 times in response to 35 records requests. This privilege has been cited to withhold records concerning the state’s tribal gambling compact, the sale and departure of the Seattle Sonics, the selection and appointment of judges, the state’s regulation of marijuana, clemency petitions of death-row inmates, and state employees’ public email accounts. (See [Appendix A](#).)

But there’s a small problem: executive privi-

Quick Summary

- *The Public Records Act requires agencies to cite a specific statutory exemption when withholding public records.*
- *The Office of the Governor frequently asserts “executive privilege”—which does not exist in statute—to shield documents from disclosure.*
- *EFF’s analysis shows that the governor’s office has invoked “executive privilege” more than 400 times since 2007.*
- *Unless the legislature codifies this phantom privilege, the governor should discontinue its use.*



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lege is not one of the 300-plus statutory exemptions to the Public Records Act.

Various communications from the governor's office provide its legal justifications for claiming executive privilege in records denials. For example, exemption logs attached to denial letters frequently state: "All documents exempted under Executive Privilege contain advice and counsel to the Governor or responses from the Governor that were used as part of her deliberative process. Executive Privilege is grounded in constitutional principles and protects deliberations of the Governor's Office."^[1]

Additionally, Martin Loesch, General Counsel to the Governor, recently wrote:

[T]he Snohomish County Superior Court, in concert with the United States Supreme Court and numerous other State courts, recently recognized executive privilege for written communications between the Governor and members of the Governor's staff, at least insofar as such documents reflect deliberative communications containing opinions, recommendations or advice about policy. *Washington State Farm Bureau Federation, et al., v. Gregoire, et al.*, Snohomish County No. 05-2-10166-99, Court's Oral Decision, January 13, 2006.

Although the claim of executive privilege at issue in the *Farm Bureau* case arose in the context of documents requested in litigation and although the Washington Supreme Court later found it unnecessary to consider executive privilege to resolve that case, Washington courts do recognize that "a privilege may be based on constitutional law, a statute, or the common law." *State v. Maxon*, 110 Wn.2d 564, 756 P.2d 1297 (1988). I have no doubt that when presented with a question requiring the Court to consider the executive privilege in Washington, our Supreme Court would follow the prevailing national consensus.^[2]

Despite these assertions, no appellate court in Washington has addressed the applicability of executive privilege to public records requests. The governor is relying on a trial court ruling, which has no precedential value, to justify her use of execu-

tive privilege.

Unfortunately, the governor's office has denied dozens of requestors access to public records on the basis of this phantom exemption. Of the records reviewed by the Evergreen Freedom Foundation, in only two instances did the Office of the Governor eventually release records after the requestors questioned the use of executive privilege. As a result, citizens who lack the resources or information to challenge the governor are denied the ability to exercise control over their government.

Recommendation

The Public Records Act clearly states that public records should only be withheld if an applicable exemption exists in statute. State agencies, including the Office of the Governor, should not frustrate the intent of the Public Records Act by citing non-statutory privileges.

If Governor Gregoire believes she is entitled to shield certain documents from public review, she should request that the Legislature consider a bill to codify the exemption of executive privilege within the Public Records Act. Such a bill would allow lawmakers and citizens to openly discuss the best policy for Washington State.

Endnotes

- [1] Public Records Request 2009-48 Privilege Log, August 4, 2009.
- [2] Letter from Martin C. Loesch, Senior Advisor and General Counsel, Office of the Governor, to Michael Reitz, General Counsel, Evergreen Freedom Foundation, August 11, 2009.

