NO. 95441-1

SUPREME COURT OF THE STATE OF WASHINGTON

THE ASSOCIATED PRESS; NORTHWEST NEWS NETWORK; KING-TV; KIRO 7; ALLIED DAILY NEWSPAPERS OF WASHINGTON; THE SPOKESMAN-REVIEW; WASHINGTON NEWSPAPERS PUBLISHERS ASSOCIATION; SOUND PUBLISHING, INC.; TACOMA NEWS, INC.; and THE SEATTLE TIMES,

Respondents/Cross-Appellants,

v.

THE WASHINGTON STATE LEGISLATURE; THE WASHINGTON STATE SENATE; THE WASHINGTON STATE HOUSE OF REPRESENTATIVES; WASHINGTON STATE AGENCIES; SENATE MAJORITY LEADER MARK SCHOESLER; HOUSE SPEAKER FRANK CHOPP; SENATE MINORITY LEADER SHARON NELSON; and HOUSE MINORITY LEADER DAN KRISTIANSEN,

Appellants/Cross-Respondents.

AMICUS CURIAE MEMORANDUM OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, INVESTIGATEWEST and WASHINGTON COALITION FOR OPEN GOVERNMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

This Court should decline the invitation to rewrite the Public Records Act and subvert the will of the voters. The Public Records Act (the "Act") does not give special treatment to individual legislators, the House, the Senate or the Legislature. By its plain terms, the Act limits disclosure obligations only for the offices of the House chief clerk and the Senate secretary. Those two offices did not receive the records requests at issue and are not part of this case. Based on the plain language of the Act, its presumption of access, and the requirement to interpret it in favor of disclosure, this Court should hold that the Legislature, House, Senate and legislators' offices are subject to the Act's disclosure requirements to the same extent as other state and local agencies. The Act's strong policy of public accountability allows no other outcome.

II. INTEREST AND IDENTITY OF AMICUS PARTIES

The American Civil Liberties Union of Washington ("ACLU-WA") is a statewide, nonpartisan, nonprofit organization with over 135,000 members and supporters. ACLU-WA is dedicated to the principles of liberty and equality embodied in the Constitution and federal and state civil rights laws. It works in the courts and legislative

arena to protect basic rights, including the right of the people to be fully informed about their government.

InvestigateWest is a Seattle-based, nonprofit news organization covering the Pacific Northwest with a commitment to independent, in-depth, nonpartisan and fact-based reporting. InvestigateWest often uses public records to investigate matters of public interest. InvestigateWest has reported on controversies and issues involving the Legislature.

The Washington Coalition for Open Government ("WCOG") is a nonprofit, nonpartisan organization dedicated to promoting and defending the public's right to know about the conduct of government and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an informed citizenry.

ACLU-WA, InvestigateWest and WCOG ("Amici") are interested in this case because it will determine whether elected state lawmakers are accountable to the people of Washington. Amici believe that the people need access to legislative records in order to understand how and why policy decisions are made, and to have a meaningful role in policymaking. Also, Amici are concerned that if legislative agencies are shielded from public scrutiny, they can hide sexual harassment,

backroom dealing, misuse of tax dollars and other breaches of public trust. In general, Amici share a strong interest in enforcing the Act as a means of exposing scandals and maintaining public control of government.

III. STATEMENT OF THE CASE

Amici adopt the Counterstatement of the Case on pages 2-7 of the Opening Brief of The Associated Press, et al. ("Media"). They note that the public records requests at issue were made to the Legislature, Senate, House and individual legislators, and not to the offices of the House Chief Clerk and Secretary of the Senate. Media Op. Br., p. 3.

IV. ARGUMENT

A. The Term "State Agency" Must Be Liberally Construed to Promote the Public Interest in Disclosure.

At its core, this case involves interpretation of the term "state agency" in RCW 42.56.010(1). As a starting point, RCW 42.56.030 requires liberal construction of the Act to promote its policy of government disclosure. RCW 42.56.030 says:

> 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. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

Id. Thus, in determining if legislators, the House, Senate and Legislature fall within the Act's definition of "state agency," this Court must construe the definition liberally in order to promote accountability to the public. *Id*.; *Lyft Inc. v. City of Seattle*, 190 Wn.2d 769, 779, 418 P.3d 102 (2018) (the policy promoted by RCW 42.56.030 is "to keep Washington residents informed and in control over the instruments they have created"). *See also Am. Civil Liberties Union v. Blaine Sch. Dist. #503*, 86 Wn. App. 688, 693, 937 P.2d 1176 (1997) (courts should "view with caution" any interpretation that frustrates the PRA purpose of disclosure); RCW 42.52.550(3) (directing courts to "take into account the policy…that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others").

B. The Plain Meaning of "State Agency" Includes Legislators, and the House, Senate and Legislature.

When construing a statute, the court must ascertain and give effect to the Legislature's intent. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004). The parties' briefing focuses on the

legislative history of the Act in addressing the intent behind RCW 42.56.010(1), the definition of "agency." *See, e.g.*, Media Op. Br. pp. 7-25; Leg. Op. Br. pp. 3-10. Amici agree with the Media's analysis of the legislative history and do not repeat it here. But this Court need not rely on legislative intent to interpret the Act: where, as here, the meaning of the statutory language is plain on its face, courts must give effect to that plain meaning as an expression of what the legislature intended. *Zink v. City of Mesa*, 162 Wn. App. 688, 709, 256 P.3d 384 (2011), *review denied*, 173 Wn.2d 1010 (2012). The plain meaning of RCW 42.56.010(1) supports disclosure of legislative records, regardless of legislative history.

RCW 42.56.010(1) says:

> 'Agency' includes all state agencies and all local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

The question here is whether individual legislators, the House, Senate and Legislature fall within the broad definition of "State agency," such that they are subject to the Act's disclosure requirements. Given the requirement for liberal construction, the only reasonable answer is yes.

When given their common meaning and interpreted in favor of disclosure, the words "office" (especially), "department," "division," "bureau" and "board" simply cannot be read to exclude legislative agencies.

1. The list of agencies is not exclusive.

The Legislature argues that "State agencies" are limited to offices, departments, divisions, bureaus, boards and commissions because those agencies are explicitly listed in RCW 42.56.010(1). Leg. Op. Br., p. 18. The Legislature misreads *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). In that case, this Court held that the Persistent Offender Accountability Act, chapter 9.94A RCW, included as sentencing "strikes" only those offenses specifically listed. *Delgado* at 725. The list in *Delgado* was deemed exclusive because the statute ended with "limiting language."[1] *Id*. at 725-726. Here, by contrast, RCW 42.56.010(1) ends with *unlimited* language, saying: "'State agency' includes every state office, department…**or other state agency**." (emphasis added). Unlike the statute in *Delgado*, RCW 42.56.010(1) uses the open-ended phrase "or other" to indicate that the list is merely illustrative rather than exclusive. For that reason, and because RCW

[1] The statute listed qualifying crimes in the first subsection, and then referred back to the "listed" offenses in the second subsection. *Delgado* at 726.

42.56.010(1) must be construed liberally to promote public accountability, the term "state agencies" includes government entities that are similar to offices, departments, divisions, bureaus, boards and commissions, regardless of what they are called.[2]

2. "Agencies" can be legislative or administrative and encompass any part of government.

The Act uses the terms "office, department, division, bureau, board [and] commission" as examples of state and local agencies without defining the terms. RCW 42.56.010(1). Thus, in analyzing whether the Legislature, House, Senate and individual legislators are agencies, it is important to ascertain the legislative intent in listing these examples. Courts "may use a dictionary to discern the plain meaning of an undefined statutory term." *Nissen v. Pierce County*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). Here, dictionary definitions make it clear that RCW 42.56.010(1) is meant to include policymaking bodies like the Legislature and not just administrative organizations.

[2] *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) ("We interpret the [Act] liberally to promote full disclosure of government activity that the people might know how their representatives have executed the public trust placed in them and so hold them accountable."

a. "Office" is any position of authority.

Dictionaries generally define "office" as a position of authority.[3] It cannot be disputed that legislators, the House, Senate and Legislature are vested with authority to make the laws of this State. Leg. Op. Br., p. 15 (citing the Legislature's "full plenary power to enact and amend laws"). Thus, each is an "office" based on the plain meaning of the term as a position of authority. *Nissen*, 183 Wn.2d at 881 (using dictionary definitions to interpret the Act).

Appellants seem to argue – without any basis in law – that an "agency" cannot have constitutional authority and can only have powers delegated by the Legislature. Leg. Op. Br., pp. 14-16. But RCW 42.56.010(1) makes no such distinction, expressly or impliedly. Moreover, this Court has recognized that the governor is generally subject to the Act notwithstanding that the governor also derives authority from the State Constitution. *Freedom Foundation v.*

[3] *See* https://en.oxforddictionaries.com/definition/office ("position of authority or service, typically one of a public nature" or "[t]he quarters, staff, or collective authority of a particular government department or agency"); https://www.merriam-webster.com/dictionary/office ("a special duty, charge, or position conferred by an exercise of governmental authority and for a public purpose: a position of authority to exercise a public function and to receive whatever emoluments may belong to it"); https://www.dictionary.com/browse/office ("a position of duty, trust, or authority, especially in the government, a corporation, a society, or the like"); https://dictionary.cambridge.org/dictionary/english/office ("a position of authority and responsibility in a government or other organization" such as "elective office").

Gregoire, 178 Wn.2d 686, 703-708, 310 P.3d 1252 (2013) (refusing to recognize an "absolute privilege" to avoid the Act while finding a limited "gubernatorial communications privilege" operating as an exemption to the Act). Given the plain meaning of "office" and the requirement for liberal construction, "office" must include any position of authority regardless of whether that authority comes from the Constitution. *Id.*; RCW 42.56.030.

b. *"Board" is any controlling group.*

Including "board" in RCW 42.56.010(1) shows a legislative intent for the Act to apply to policymakers – such as the House and Senate - and not just administrative agencies. Dictionaries generally define "board" as a group controlling an organization.[4] Thus, by its very nature, a board is a decision-making body rather than an administrative agency. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 211, 189 P.3d 139 (2008) (courts use dictionary definitions to give the Act's terms their plain meaning).

[4] *See* https://en.oxforddictionaries.com/definition/board ("group of people constituted as the decision-making body of an organization"); https://www.merriam-webster.com/dictionary/board ("group of persons having managerial, supervisory, investigatory, or advisory powers"); https://dictionary.cambridge.org/dictionary/english/board ("group of people who are responsible for controlling and organizing a company or organization"); https://www.dictionary.com/browse/board?s=t ("group of people who officially administer a company, trust, etc." or "any other committee or council").

The House, Senate and Legislature are the groups whose decisions control the state government, as all parties acknowledge. Leg. Op. Br. p. 15 (the Legislature establishes and regulates agencies and enacts the laws of the state). In that sense, they are no different than city councils and county commissions, which are undeniably subject to the Act. *See, e.g., O'Neill v. City of Shoreline*, 170 Wn.2d 138, 150-151, 240 P.3d 1149 (2010) (applying the Act to a council member). Accordingly, although the House, Senate and Legislature do not call themselves "boards," they cannot reasonably argue that their governing role shields them from the Act. On the contrary, it makes disclosure of legislative records even more important. RCW 42.56.030 ("The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know").

c. *"Department" is any part of government*.

The term "department," another example of an "agency" in RCW 42.56.010(1), is broadly defined in dictionaries as a part of government.[5] Construing the term liberally as required, "department"

[5] *See* https://en.oxforddictionaries.com/definition/department (a "division of a large organization such as a government, university, or business, dealing with a specific area of activity"); https://dictionary.cambridge.org/dictionary/english/department ("a part of an organization such as a school, business, or government that deals with a particular area of study or work" or "any of the divisions or parts of esp. a school, business, or government");

is broad enough to encompass legislators' offices, the House, Senate and Legislature because they are undeniably part of the state government. RCW 42.56.030. They are a legislative department, whether they choose to call themselves that or not.

The Act makes no distinction between administrative and legislative agencies. RCW 42.56.010(1). It would have been easy enough to add the word "executive" or "administrative" to the definition of "agency" if the intent was to exclude policymaking organizations such as the Legislature. In the absence of such an express limitation, the Act applies equally to legislative and administrative agencies. *Morgan v. Johnson*, 137 Wn.2d 887, 892, 976 P.2d 619 (1999) (courts assume the Legislature "means exactly what it says" in the Act).

Under the Legislature's logic, an agency could avoid the Act's disclosure requirements simply by changing its name from "department" to "unit" or another similar term not listed in RCW 42.56.010(1). Courts will not interpret the Act in a manner leading to such absurd results. *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

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https://www.dictionary.com/browse/department?s=t ("one of the principal branches of a governmental organization").

d. *"Bureau" and "division" are any government organizations.*

"Bureau" and "division" are similarly broad terms used in the definition of "agency." RCW 42.56.010(1). Dictionaries generally define "bureau" as a government department or organization.[6] A "division," meanwhile, is simply part of an organization.[7] In essence, "bureau" and "division" mean the same thing as "department" in this context. Because legislators' offices, the House, Senate and Legislature are government organizations or parts thereof, they are subject to the Act. RCW 42.56.010(1); RCW 42.56.030 (the Act's terms must be interpreted in favor of disclosure).

C. The Disclosure Statutes Make No Exception for Legislators, the House, Senate and Legislature.

The Legislature asserts that its disclosure obligations are defined solely by RCW 42.56.010(3), which says:

> 'Public record' includes any writing containing information relating to the conduct of government or the

[6] *See* https://dictionary.cambridge.org/dictionary/english/bureau ("a government organization" or "a department of government, or a division that performs a particular job"); https://www.dictionary.com/browse/bureau?s=t ("a division of a government department or an independent administrative unit"); https://en.oxforddictionaries.com/definition/bureau ("a government department").

[7] *See* https://en.oxforddictionaries.com/definition/division (a "major section of an organization, with responsibility for a particular area of activity" or "part of a county, country, or city defined for administrative or political purposes"); https://dictionary.cambridge.org/dictionary/english/division ("a unit of an organization").

> performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. *For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means* legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(Italics added). Leg. Op. Br. p. 28. More specifically, the Legislature argues that "inclusion of the Secretary and Chief Clerk's offices within this definition" signifies that "these two offices were meant to fulfill the public records obligations of the full Legislature" and therefore "the whole of the Legislature" is exempt from the Act except for the limited obligations of the Senate secretary and House clerk. *Id*. In other words, the notion is that limiting records available from two specific offices somehow removes every other legislative office from the overall scope of the Act. This interpretation conflicts with the plain language of the Act including RCW 42.56.070(1) and RCW 42.56.080(2).

1. RCW 42.56.010(3) is not a disclosure statute.

First, the Legislature is incorrect to argue that RCW 42.56.010(3) reflects the entirety of its disclosure obligations. RCW

42.56.010(3) merely defines the term "public records" and does not, by itself, mandate disclosure of records. *Id*. Instead, the operative language mandating disclosure is contained in RCW 42.56.070(1) and RCW 42.56.080(2).

2. The Act's disclosure mandates apply to *all* agencies.

The obligation to disclose public records arises from two statutes. RCW 42.56.070(1) says:

> *Each agency*, in accordance with published rules, *shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records*. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(Italics added). RCW 42.56.080(2) says in relevant part:

> *Public records shall be available for inspection and copying, and agencies shall, upon request for identifiable public records, make them promptly available to any person* including, if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure.

(Italics added). These two statutes – not RCW 42.56.010(3) – contain the operative language requiring agencies to disclose records upon request. RCW 42.56.070(1); RCW 42.56.080(2); RCW 42.56.010(3).

Of critical importance, these disclosure statutes apply equally to **all agencies.** RCW 42.56.070(1) ("each agency…"); RCW 42.56.080(2) ("agencies shall…"). The disclosure statutes **do not distinguish among legislative agencies.** They do not single out the Senate secretary and House clerk as uniquely subject to the mandate, nor do they say that other legislative offices (such as the House, Senate, individual legislators, the Office of the Code Reviser, the Office of the State Actuary and the Legislative Ethics Board) are *not* subject to the mandate.[8] RCW 42.56.070(1); RCW 42.56.080(2). Rather, the disclosure statutes treat all agencies – legislative or otherwise –the same. *Id*. Thus, under the plain language of the Act, individual legislators, the House, Senate and Legislature have the same duty as other agencies to disclose "public records" upon request. The fact that the Senate secretary and House clerk have a unique definition of "public records" simply has no bearing on the obligations of the Legislature, House, Senate and legislators to disclose their own public

[8] See http://leg.wa.gov/legislature/Pages/LegislativeAgencies.aspx.

records when asked. RCW 42.56.070(1); RCW 42.56.080(2); RCW 42.56.010(3).

3. When viewing the Act as a whole, the only reasonable interpretation is that legislators, the House, Senate and Legislature are covered.

When construing the Act, courts "look at the Act in its entirety to enforce the law's overall purpose." *Rental Housing Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009). Courts have a duty to harmonize statutes if possible. *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 534, 326 P.3d 688 (2014). Here, the Act as a whole shows that: a) its overall purpose is to hold government accountable to the people; b) all agencies must disclose public records upon request unless a specific exemption applies; c) agencies include any part of government (i.e., department, division or bureau), any position of government authority (i.e., office) and any government decision-making body (i.e., board); and d) public records are defined differently for the House clerk and Senate secretary than for other agencies. RCW 42.56.010(1) and (3); RCW 42.56.030; RCW 42.56.070(1) (access is presumed unless an exemption applies; RCW 42.56.080(2); RCW 42.56.550(3). *See also* footnotes 3 to 6. When reading these and other provisions together, there is only one

reasonable interpretation of RCW 42.56.010(1), the definition of "agency." That is, all legislative agencies are included. No other interpretation can harmonize the Act's purpose of accountability with the plain language of its provisions.

An examination of the Act's disclosure exemptions illustrates the absurdity of the argument that "agencies" cannot be legislative. If that is true, then many of the Act's exemptions – which apply only to "agencies" – would not apply to public records of the House clerk and Senate Secretary. For example:

- RCW 42.56.230 protects "personal information in files maintained for employees, appointees, or elected officials of any public *agency* to the extent that disclosure would violate their right to privacy." (Italics added). If no part of the legislative branch is an "agency," as appellants claim, the House clerk and Senate secretary could not redact personal information under this exemption when asked to disclose personnel and payroll records under RCW 42.56.010(3).

- Similarly, RCW 42.56.250(4) protects home addresses, home phone numbers, personal email addresses, social security numbers and certain other "information held by any public *agency* in personnel records." (Italics added). If no part of the legislative branch is an

"agency," as claimed, the House clerk and Senate secretary would have to release the information otherwise covered by this exemption when disclosing personnel and payroll records.

- RCW 42.56.290 protects certain attorney records "that are relevant to a controversy to which an *agency* is a party." (Italics added). If no part of the legislative branch is an "agency," the House clerk and Senate secretary could not invoke this exemption for privileged records when asked to provide "investigatory" records under RCW 42.56.010(3) and RCW 40.14.100.

It is unlikely the Legislature intended to strip the House clerk and Senate Secretary of these exemptions, yet that is the necessary effect of interpreting "agencies" to exclude the legislative branch entirely.

The Legislature attempts to use a serpentine history of amendments to establish that it really intended something different than what the law actually says. Leg. Op. Br. pp. 3-10. Such internal thinking is legally irrelevant. *SEIU Healthcare 775 NW v. State*, 193 Wn. App. 377, 399, 377 P.3d 214 (2016) (courts "do not rewrite unambiguous statutory language under the guise of interpretation"). If the Legislature wants to remove itself and its members from the Act's disclosure

mandate, it must pass a bill changing the definition of agency (which currently does not distinguish between the House clerk and Senate secretary and other legislative agencies). RCW 42.56.010(1). Or it must pass a bill removing itself and its members from the disclosure mandates (which also do not distinguish between the House clerk and Senate secretary and other legislative agencies). RCW 42.56.070(1); RCW 42.56.080(2). Because the Legislature has not altered the Act as necessary to carry out its claimed intentions, this Court should hold that *all* legislative agencies must disclose public records upon request.

D. There is No Separation of Powers Problem.

This case does not threaten an invasion of legislative powers by the judicial branch. The Act is entirely a creation of the legislative branch, originating with voter approval of Initiative 276 in 1972 and sustaining various amendments by the Legislature over the ensuing decades.[9] Voters "act in their legislative capacity" when enacting statutes through the initiative process. *Robbins Geller Rudman & Dowd LLP v. Office of Att'y Gen.*, 179 Wn. App. 711, 720, 328 P.3d 905 (2014). Thus, this case is not like *Nast v. Michels*, 107 Wn.2d 300, 304, 730 P.2d 54 (1986), which

[9] Initiative 276 continues to "serve as an important guide in determining the intended effect of the operative sections" of the Act. *Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 709, 354 P.3d 249 (2015), quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978).

involved the judicial branch's "supervisory power over its own records" and held that the Act does not apply to court files. This case involves the legislative branch **requiring itself** to disclose its own records. The courts are simply interpreting the Act, not imposing it unilaterally on another branch. Therefore, separation of powers is not implicated, contrary to the Legislature's arguments.

V. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's holding that individual legislators must disclose public records and reverse the trial court's holding that the House, Senate and Legislature are not subject to the Act.

Dated this 26th day of April 2019

Respectfully submitted,

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