

West v. Gregoire 02-26-10

A P P E A R A N C E S

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1 February 26, 2010 Olympia, Washington

2 MORNING SESSION

3 Department 1 Hon. Paula Casey, Presiding

4 Kathryn A. Beehler, Official Reporter

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6 THE COURT: well, based upon the number

7 of hearings we have had in the last few weeks to
8 try to resolve this issue of the qualified
9 executive privilege that's being asserted with
10 respect to the withheld document, you can see that
11 this issue is quite troublesome for me; and I have
12 really been trying to arrive at a fair and just
13 solution under the Public Records Act and with
14 respect to the governor's assertion of her
15 privilege.

16 Quite frankly, the argument for a qualified
17 executive privilege makes some sense to me. It
18 makes sense that our top executive within the
19 state should be able to get some written advice
20 from her trusted and closest advisors that may not
21 be subject to disclosure. But the question is, is
22 there such a privilege in the State of Washington.
23 That still remains a mystery to me.

24 It is really curious to me, as I've said
25 before, that we've had the Public Records Act in

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1 existence for 30 years now, and there has been no
2 case of any kind that really addresses whether
3 there is such an executive privilege. What we do
4 know is that there are many cases from the
5 appellate courts indicating that the Public
6 Records Act exemptions are to be strictly and
7 narrowly construed. And again, the way we get at
8 the qualified executive privilege is, there is a
9 statutory exemption for those matters that are
10 exempted specifically by statute. As I agreed at
11 our last hearing, the "statute" has been

12 determined to encompass court rules, and I believe
13 that it would also be interpreted to encompass the
14 constitution.

15 This idea of executive privilege, again,
16 arises out of separation of powers. The courts of
17 the State of Washington, despite no reference to
18 separation of powers in our state constitution,
19 have determined that there is a separation of
20 powers implied in our constitution. So we're now
21 looking at an implied constitutional principle
22 from which qualified executive privilege is also
23 implied. It may be that some court at some time
24 is going to make that determination, but no court
25 has made it yet in Washington.

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1 I'm not going to determine the issue one
2 way or the other today, because I have had an in
3 camera review of Kathleen Drew's memo. I think
4 that if there is such a privilege, there is some
5 question as to whether the privilege would extend
6 to the wide array of policy advisors within the
7 Office of Financial Management. I understand
8 there are approximately 15 advisors within that
9 office, perhaps more, that give direct policy
10 advice to the governor.

11 I have reviewed the particular document in
12 question, and I'm going to reference it by its
13 date. We know the author was Kathleen Drew,
14 because I think that was earlier disclosed, and
15 I'm sure the date was, as well. It was an

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16 April 8th memo, and I think that the year was
17 otherwise identified. It's not on the memo
18 itself.

19 In reviewing that document, I don't even
20 find any advice that was given. The memo contains
21 a recitation of what positions of different
22 entities are and what proposed legislation is
23 before the Legislature. But really, the
24 three-page memo contains no advice, and so I can't
25 imagine any circumstances under which any

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1 privilege would extend to protect this particular
2 memo.

3 If there is a qualified executive
4 privilege, because of the narrow construction of
5 the Public Records Act, I believe that the
6 privilege would apply to only advice, not any
7 piece of paper that is written from an advisor to
8 the governor. And accordingly, I'm going to find
9 that this document written by Kathleen Drew on --
10 well, actually, I don't know the date. I think
11 the date on the memo is the date of the hearing
12 for which the governor was being briefed. But the
13 document that has been withheld, I'm going to
14 order it to be disclosed.

15 Now, I don't know if the State's going to
16 be requesting a protective order pending appeal or
17 some kind of a stay pending appeal.

18 MS. HART: I would, Your Honor. I would
19 ask the court to order -- to order a stay pending
20 appeal to give the State two weeks to file an

21 appeal, and then any further stay could be
22 addressed at the appellate level.

23 MR. WEST: I have no objection, but I
24 would ask for that time period to be one week,
25 Your Honor.

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1 MS. HART: Your Honor, we've been
2 extremely accommodating to Mr. West throughout
3 this case. I will not be here next week at all,
4 and we are talking about the decision of how the
5 state will proceed from here. I think that --

6 THE COURT: I think the two-week request
7 is very reasonable.

8 MR. WEST: I waive my objection then,
9 Your Honor.

10 THE COURT: Okay.

11 MS. HART: So my assumption then,
12 Your Honor, would be that the document will remain
13 under seal in this court's file.

14 THE COURT: Yes. The document will
15 remain under seal. At this point it has not been
16 filed with the Clerk's Office; it remains in
17 chambers. But because I have ordered its
18 disclosure, and in the event of an appeal, it will
19 be lodged under seal or filed under seal with the
20 clerk.

21 MS. HART: Okay.

22 THE COURT: But it has not yet been
23 filed with the Clerk's Office.

24 MS. HART: Then if I could understand,

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just to make clear two things in my own mind,

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1 Your Honor. The court has not ruled on whether
2 there is a qualified executive privilege. It has
3 essentially ruled that I have there were one, this
4 document is not subject to it.

5 THE COURT: That's correct.

6 MS. HART: You have ordered a stay, and
7 I'm assuming -- or I will present an order to that
8 effect, and I am assuming that the court has --
9 well, let me ask. Have you, will you, or do you
10 not plan to enter the order on production of the
11 document, keeping it under seal, which we sent
12 along with the document?

13 THE COURT: Yes. I would like to enter
14 the order with respect to the in camera review.
15 And I did notice it when it came in yesterday, but
16 quite frankly, I haven't signed it yet. I will be
17 glad to sign it today.

18 Do you have any objection to the language,
19 Mr. West, or did you see it?

20 MR. WEST: I don't believe I've seen a
21 copy of that.

22 THE COURT: Well, let me just read it.

23 "Pursuant to the court's direction, a copy
24 of the memorandum with respect to which executive
25 privilege is asserted by the governor, PRR No. 71

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1 through 73, has been submitted to the court under
2 seal for in camera review only. Following in
3 camera review, the memorandum shall be sealed in
4 the court file pending further court order."

5 That seems appropriate. So I --

6 MR. WEST: I have no objections to the
7 court signing that order, Your Honor. I would
8 mention that there is some --

9 THE COURT: So it's as though I signed
10 it at the beginning of the hearing.

11 MR. WEST: Yes, Your Honor.

12 THE COURT: Because I have now ordered
13 that it be unsealed, but I'm staying my new order.

14 MR. WEST: Technically, for the
15 record --

16 MS. HART: Thank you.

17 MR. WEST: -- I'd like to point out that
18 there is some question as to what procedure a
19 court undergoes in ordering a file sealed in the
20 Public Records Act, and there may be some
21 appellate courts that think the Ishikawa
22 procedures need to be followed. I think that's
23 uncertain at this point. But I don't want to
24 waive an objection to Ishikawa proceedings. Thank
25 you.

1 THE COURT: And your objection is not
2 waived. It's my personal view that whenever
3 something is viewed in camera, that the court may
4 do that without doing the Ishikawa analysis.

5 MS. HART: Thank you, Your Honor.

6 MR. WEST: Thank you very much,
7 Your Honor. I think that is the correct analysis,
8 too, but I don't want to waive any objection.

9 THE COURT: So we are not going to enter
10 any orders today, so we need to present an order
11 at this point. Do you and Mr. West think that you
12 are going to agree to that order so it can just be
13 submitted by mail, or do we need to schedule a
14 hearing for presentation?

15 MR. WEST: I don't believe we will
16 object. I could prepare a proposed order and
17 coordinated with counsel on an agreed order.

18 THE COURT: Should we just get a date
19 for a deadline, like two weeks from today?

20 MS. HART: I believe that would be
21 advisable, Your Honor.

22 THE COURT: Okay. So I am going to put
23 a presentation hearing for two weeks from today,
24 which would be March 12th. But I'm expecting that
25 maybe counsel can agree on the language by then.

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1 MS. HART: Thank you very much.

2 MR. WEST: Thank you, Your Honor.

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4 (Conclusion of February 26, 2010, Proceedings.)

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