



Welcome to the Administrative Law Section's E-Newsletter!

**We hope you enjoy
our newsletter and
encourage your feedback.**

Please forward our newsletter to your colleagues and encourage them to join the Section if they find the newsletter informative! We also welcome your suggestions for topics for future newsletters.

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Upcoming Elections for the Section's Executive Committee

By *Bill Pardee*

In October, the Section's Executive Committee will need to fill **3 vacant At-Large Positions**, and **3 Officer positions** of *Treasurer, Secretary, and Chair-Elect*. Keep an eye out for an invitation from the WSBA to apply to become a Section leader in the coming months.

2019 Frank Homan Award goes to Katy Hatfield, assistant attorney general

By *Bill Pardee*



In a reception on Dec. 9, 2019, at Mercato Ristorante in Olympia, preceding the Faithless Electors Mini-CLE successfully presented by Section President Robert Krabill, Frank Homan Award Section Committee Chair Lea Dickerson presented Katy Hatfield, assistant attorney general, with the Section's 2019 Frank Homan Award. The Frank Homan Award is presented annually to an individual who has demonstrated an outstanding contribution to the improvement or application of administrative law. Katy's family, friends, and colleagues were in attendance.

Congratulations Katy!

WSBA Administrative Law Section Executive Committee Officers & At-Large Members

2019-2020

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*Non-voting member

The Administrative Law Section welcomes articles and items of interest for publication. The editors and Executive Committee reserve discretion whether to publish submissions.

Send submissions to: Bill Pardee
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This is a publication of a section of the Washington State Bar Association. All opinions and comments in this publication represent the views of the authors and do not necessarily have the endorsement of the Association or its officers or agents.

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Recap of the 2019 Legislative Session

By *Richard Potter*

During the 2019 session of the Washington Legislature, the Administrative Law Section's Legislative Committee reviewed 93 bills (not counting companion bills). Twenty-two of these bills were enacted. The text of bills is available on the Legislature's website at <https://apps.leg.wa.gov/billinfo/>. When the 2020 session concludes, the Section will provide an update on the activity during that session as well.

Bills affecting the Administrative Procedure Act ("APA")

House Bill 1753 amends RCW 34.05.310 (Prenotice inquiry—Negotiated and pilot rules) of the APA to specify that "this section applies to all rules adopted by the department of health or a disciplining authority specified in RCW 18.130.040 that set or adjust fees affecting professions regulated under chapter 18.130 RCW" (i.e., the health professions). Chapter 303, 2019 Laws. Effective date 7/28/2019.

Senate Bill 5581 concerns the collection of sales tax by out-of-state sellers and sets forth "clarifying and simplifying nexus provisions." It includes an amendment to RCW 34.05.328(5)(b)(v) (Significant legislative rules, other selected rules) of the APA to exempt from this rulemaking provision "any rules of the department of revenue adopted under the authority of RCW 82.32.762(3)." That RCW 82.32 section is titled "Remote seller nexus—Streamlined sales and use tax agreement or federal law conflict with state law," and it is amended by this bill. It also includes an amendment to RCW 34.05.010 (10) of the APA to, in the definition of "mail" or "send," replacing "(electronic mail or facsimile mail)" with "email or fax." Chapter 8, 2019 Laws. Effective date 3/14/2019.

Bills Affecting the Public Records Act ("PRA")

House Bill 1071 deals with security breaches and the duties and liabilities of affected record holders. It includes an amendment to RCW 42.56.590 in the PRA regarding the notification duties of government agencies. It also adds a new section to the PRA concerning agencies that are covered by the federal health insurance portability and accountability act of 1996, Title 42 U.S.C. Sec. 1320d et seq. Chapter 241, 2019 Laws. Effective date 3/1/2020.

House Bill 1295 concerns public works contracting procedures. It includes an amendment of RCW 42.56.270 of the PRA that exempts from disclosure financial information by persons applying to qualify to bid under the "alternative public works contracting procedures as required by RCW 39.10.200 through 39.10.905." Chapter 212, 2019 Laws. Effective date 7/28/2019.

House Bill 1302 creates a self-exclusion program for problem gamblers. It includes an amendment of RCW 42.56.230 of the PRA that excludes personal information of participants from public disclosure requirements. Chapter 213, 2019 Laws. Effective date 7/28/2019.

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House Bill 1385 amends RCW 42.56.380 of the PRA to exempt from disclosure United States Food and Drug Administration (FDA) nonpublic information that has been obtained by the Washington State Department of Agriculture from the FDA pursuant to an FDA contract or commissioning agreement. Chapter 337, 2019 Laws. Effective date 7/28/2019.

House Bill 1399 concerns paid family and medical leave. It includes an amendment of RCW 42.56.410 of the PRA to exempt from disclosure records of the Employment Security Department, under a new section created by the bill, that are provided to another individual or organization for operational, research, or evaluation purposes. Chapter 13, 2019 Laws. Effective date 7/28/2019.

House Bill 1505 concerns confidential information of child victims of sexual assault. It includes an amendment of RCW 42.56.240(5) of the PRA to further describe information of this nature that is exempted from disclosure, including identifying information of both alleged and proven child victims of sexual assault. Chapter 300, 2019 Laws. Effective date 7/28/2019.

Senate Bill 5526 concerns the creation of new standardized health plans offered on the state's insurance exchange. It includes adding a new section to the PRA to exempt from disclosure certain information that would be submitted to state government under this bill. Chapter 364, 2019 Laws. Effective date 7/28/2019.

House Bill 1537 concerns recommendations of the "Sunshine Committee." It amends RCW 42.56.250 of the PRA to remove from that disclosure exemption applications for "vacancies in elective office." It also repeals RCW 42.56.340 and 2005 c 274 s 414, which has the effect of deleting the disclosure exemption for lists of members or owners of timeshare projects, subdivisions, camping resorts, condominiums, land developments, and associated communities. Chapter 229, 2019 Laws. Effective date 7/28/2019.

Senate Bill 5332 concerns the administration of records of vital statistics. It creates a new chapter in Title 70 RCW (Public Health and Safety), three sections of which refer to 42.56 RCW (the PRA) and state that certain records are not subject to disclosure under it. The bill also includes adding a new section to the PRA providing that records involved in this vital statistics records system

"are not public records and are not subject to public inspection and copying under this chapter." Chapter 148, 2019 Laws. Effective date 7/28/2019.

House Bill 1652 concerns "stewardship programs" to address the disposal of house paint. It adds a new chapter in Title 70 RCW (Public Health and Safety), which mentions the PRA in three sections, one of which (section 13 in the bill) addresses records confidentiality, requiring notice to a records provider of disclosure requests and allowing the provider to, within 10 days, seek a court injunction barring disclosure. It also includes an amendment to RCW 42.56.270 of the PRA to delete "or to a portal under RCW 21.20.883" from subsection (22) regarding financial information supplied to the department of financial institutions, and to add a disclosure exemption: "(31) Records filed with the department of ecology under chapter 70. — RCW (the new chapter created in section 17 of this act) that a court has determined are confidential valuable commercial information under section 13 of this act." Chapter 344, 2019 Laws. Effective date 7/28/2019.

House Bill 1667 concerns the administration of public records requests. It (1) amends RCW 42.56.570 of the PRA to delete the expiration dates of the attorney general's and state archivist's consultation and training programs regarding responding to public records requests and public records retention practices; (2) amends RCW 40.14.026 regarding the preservation and retention of public records to delete said expiration date and to make changes to agencies' tracking of public records request information; and (3) amends RCW 36.22.175 effective June 30, 2020 to have county auditors collect one dollar for every recorded document, to be deposited in the "local government archives account" and used to support said attorney general's and archivist's programs, as well as "the competitive grant program in RCW 40.14.026." Chapter 372, 2019 Laws. Effective date 7/28/2019.

House Bill 1673 concerns information relating to the regulation of explosives. It amends RCW 42.56.460 of the PRA to exempt from disclosure records and reports submitted per the State Explosives Act, chapter 70.74 RCW. It also adds a new section to the PRA to require the Sunshine Committee to submit to the Legislature by 12/1/23 a recommendation on whether this new exemption should be retained or not—or modified. Chapter 125, 2019 Laws. Effective date 7/28/2019.

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House Bill 1692 adds new sections to the PRA concerning disclosure requests for records of agency employee complaints about workplace sexual harassment or stalking, including a notification and injunction process, as well as setting forth civil liabilities for certain unauthorized disclosures. The bill also requires the attorney general to create model policies by Jan. 1, 2020, for the implementation of this act. Chapter 373, 2019 Laws. Effective date 7/1/2020.

House Bill 2020 concerns records of investigations of government employee discrimination complaints. It amends RCW 42.56.250(6) of the PRA to expand the disclosure exemption for records in an ongoing and active investigation, and to cover investigations into violations of an agency's internal harassment and discrimination policies. It also eliminates a public disclosure exemption for salary and benefit information for maritime employees collected for the Marine Employees' Commission salary survey. Chapter 349, 2019 Laws. Effective date 7/28/2019.

Senate Bill 5439 makes several amendments and additions to Chapter 50.13 RCW, Unemployment Compensation, Records And Information—Privacy And Confidentiality, which create an agency privacy officer within the Employment Security Department, require development of a personal information minimalization plan, require a signed release for disclosure of information to a third party acting on behalf of an individual or employer, and increase the penalty for misuse or unauthorized disclosure of private information. The bill also amends RCW 42.56.410 of the PRA to add the following to the employment security information that is exempt from disclosure: "Any inventory or data map records created under section 79(1)(b) of this act that reveal the location of personal information or the extent to which it is protected."

Senate Bill 5955 makes numerous statutory changes related to the operation of the Department of Children, Youth and Families, which the Legislature created in 2017 to, among other things, take over the functions of several prior agencies. The bill includes an amendment to RCW 42.56.230 of the PRA to add "substitute caregivers who are licensed or approved to provide overnight care of children by the department of children, youth, and families" to the list of persons

whose personal information is exempt from disclosure under the PRA. Chapter 470, 2019 Laws. Effective date 7/28/2019.

Senate Bill 6025 amends RCW 42.56.230 of the PRA to exempt from disclosure the names, addresses, or other personal information of individuals who participated in the bump-stock buy-back program under RCW 43.43.920. Chapter 239, 2019 Laws. Effective date 4/30/2019.

Misc. Bills of Interest to the Practice of Administrative Law

Senate Bill 5151 concerns the Growth Management Hearings Board (GMHB), which is part of the Environmental and Land Use Hearings Office (ELUHO). The bill requires the ELUHO to make GMHB rulings, decisions, and orders available to the public through online searchable databases. To ensure uniformity and usability of searchable databases and websites, ELUHO must coordinate with GMHB, the Department of Commerce, and other interested stakeholders to develop and maintain a rational system of categorizing rulings, decisions, and orders. The website must allow a user to search GMHB decisions and orders by topic, party, and geographic location or by natural language. All rulings, decisions, and orders issued before Jan. 1, 2019, must be published by June 30, 2021. (Note that this bill does not refer to or amend the existing duty of GMHB as a state agency to maintain and make available indexes of decisions "that contain an analysis or decision of substantial importance to the agency in carrying out its duties." See RCW 42.56.070(5) of the Public Records Act and the articles on this topic in the Administrative Law Section Fall 2018 and Winter/Spring 2019 newsletters.)

Senate Bill 5017 was introduced at the request of the Uniform Law Commission. It makes numerous statutory changes in order to expand the applicability of the Uniform Unsworn Foreign Declarations Act to both domestic declarants and those that are outside the boundaries of the United States, thereby adopting the Uniform Unsworn Declarations Act. It repeals the state statute addressing unsworn declarations and updates cross-references throughout the code. Chapter 232, 2019 Laws. Effective date 7/28/2019.

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Senate Bill 5083 allows certain records, documents, proceedings, and published laws of federally recognized Indian tribes to be admitted as evidence in courts of Washington state. Chapter 37, 2019 Laws. Effective date 7/28/2019.

Help us Make this Newsletter MORE RELEVANT to Your Practice.

If you come across federal or state administrative law cases that interest you and you would like to contribute a summary (approx. 250 – 500 words), please email Bill Pardee at Bill.Pardee@bta.wa.gov.

CLE Stuff

Oregon and Washington Administrative Law Conference | October 25, 2019

Section CLE Committee Co-Chairs Eileen Keiffer and Robert Krabill partnered with WSBA CLE in developing this year's Oregon and Washington Administrative Law Conference at the SeaTac Conference Center! Recorded sessions from the program are now available for individuals to purchase via the WSBA CLE store for on-demand CLE credit. We encourage you to reach out to your fellow section members to let them know.

0.75 Ethics, 5.50 L&LP, \$275.00

The conference brought together practitioners, ALJs, and trial and appellate court judges from Washington and Oregon to explore administrative law topics and practice issues that span both states, including:

- Multi-State Occupational Licensing—Growing Trend and Current Experiences
- Cross-Border Administrative Law: Inter-Local, Interstate Compacts, Bi-National, and Global
- Judicial Review
- Ex Parte Communication—An ALJ's Perspective
- View from the OAH Bench
- The Interaction of Administrative and Criminal Law
- Due Process for Everyone!

Link to register: www.mywsba.org/PersonifyEbusiness/CLEStore/Oregon-and-Washington-Administrative-Law-Conference/ProductDetail/17133368.

Specific sessions recorded from the conference are available on the WSBA CLE Store for individual purchase as well.

Save the Date

The Administrative Law Section is also busy planning the following CLEs:

04/2/2020 **Public Records Act (PRA) CLE** at the WSBA offices. It will be a full day CLE on topics such as: dealing with abusive requestors, PRA case law update, etc.

05/2020 **Cougar Den CLE** in central Washington. Exact date and place TBD, but we have speakers lined up from both the ALJ and the tribal perspective.

Case Law Update

Preserve Responsible Shoreline Management, et al. v. City of Bainbridge Island, Division I COA Unpublished Op. (2019), 2019 WL 6699975

By Eileen Keiffer

In early December 2019, the Court of Appeals (Division I) affirmed the superior court's denial of a motion to supplement the administrative record in an appeal to the City of Bainbridge Island's (City) Shoreline Master Program.

In July 2014, the City adopted a new Shoreline Master Program, and received approval from the Washington State Department of Ecology (DOE). Preserve Responsible Shoreline Management (PRSM) filed a petition for review with the Growth Management Hearings Board (GMHB). That petition did not include constitutional theories, as the GMHB lacks jurisdiction to adjudicate such theories. The GMHB dismissed PRSM's appeal.

PRSM appealed further, filing a petition for review in Kitsap County Superior Court, raising a number of constitutional issues under the APA and the Uniform Declaratory Judgment Act (UDJA). After the superior court dismissed the UDJA causes of action, PRSM moved to supplement the administrative record on matters relevant to its constitutional theories. The superior court denied that motion, finding that the supplementary evidence was unnecessary to determine the disputed issues. The Court of Appeals granted PRSM's motion for discretionary review; upholding the trial court's denial of PRSM's motion to supplement the record.

The Court of Appeals first rejected PRSM's theory that the trial court erred by failing to exercise its original jurisdiction and accepted evidence outside of the APA's restriction to the record. The court noted PRSM's lack of cited authority and found that the procedural requirements of the APA limit evidence to that introduced before the administrative agency, or allowed by the trial court consistent with the narrow exceptions provided in RCW 34.05.562.

The Court of Appeals further rejected PRSM's theory that RCW 34.05.562(1)(b) authorized supplementation of the administrative record. RCW 34.05.562 provides three narrow circumstances under which the superior court may order supplementation of the agency record:

1. The court may receive evidence in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding:
 - (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
 - (b) Unlawfulness of procedure or of decision-making process; or
 - (c) Material fact in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

PRSM alleged that the RCW 34.05.562(1)(b) exception applied. However, PRSM's offered evidence was alleged to support disputed issues on the constitutionality of the Shoreline Master Program. As PRSM did not allege that the evidence was necessary to decide whether the GMHB violated due process, the APA, or another procedural statute or regulation, the Court of Appeals held section (1)(b) provision to be inapplicable.

The Court of Appeals also rejected PRSM's allegation that it needed to develop the factual record to support its constitutional claims (despite the fact that PRSM did not allege RCW 34.05.562(1)(c) applied). The court first dismissed PRSM's argument that additional evidence was required to support its First Amendment theory, citing *City of Seattle v. Webster*,¹ which held that facts are not essential for a court to consider a facial challenge to an ordinance or statute based on First Amendment theories. The court also found that PRSM had failed to explain why the record evidence was insufficient for PRSM to argue its First Amendment theories. The court also rejected arguments by PRSM that additional evidence was necessary to support its taking theory. The court explicitly noted that PRSM did not explain why it needed additional testimony to decide a disputed issue that PRSM previously briefed before the GMHB, nor how the offered supplementary evidence differed from the exhibits in the administrative record.

Finally, the Court of Appeals rejected PRSM's contention that the trial court abused its discretion by refusing to supplement the record to support PRSM's claim that the Shoreline Master Program contains

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“vague and contradictory provisions rendering it indecipherable to the average citizen.” The court held that PRSM’s constitutional vagueness challenge is likely not ripe for adjudication because PRSM’s challenge is a facial challenge, not an as-applied challenge.

¹ 115 Wn.2d 635, 640, 802 P.2d 1333 (1990).

Kilduff v. San Juan County (en banc), ___ Wn.2d ___, 453 P.3d 719 (2019), 2019 WL 6766019

By Eileen Keiffer

Kilduff sued San Juan County (County) for alleged violations of the Public Records Act (PRA), Ch. 42.56 RCW, claiming that the County failed to perform a reasonable search for responsive records. The County denied the allegations but also raised a defense that Kilduff failed to exhaust administrative remedies required by the county code. The San Juan County Code provides that “(a)ministrative remedies shall not be considered exhausted until the prosecuting attorney has made a written decision, or until the close of the second business day following receipt of the written request for (the prosecuting attorney’s) review of the action of the public records officer, whichever occurs first.” SJCC 2.108.130(C). It also prohibits the initiation of any lawsuit until administrative remedies set forth in the county code are exhausted. SJCC 2.108.130(D). The trial court dismissed Kilduff’s claims on the basis that the County never issued a final decision on Kilduff’s request and that there was no final decision for the court to review. The Washington Supreme Court invalidated SJCC 2.108.130, finding that local governments have no authority to create any additional layers of administrative process prerequisite to filing suit.

The court rejected the County’s theory that a denial pursuant to RCW 42.56.520(4) does not occur until the prosecutor receives a request to review the public records officer’s decision. It instead found that to do so would:

allow agencies to rewrite the statute so that a failure to produce records is not truly a denial for the purposes of judicial review until a secondary layer of review has occurred. Indeed, it is

questionable whether an agency could be held liable for silently withholding records under this reading of the statute.

The court further distinguished the case from *Hobbs v. Washington State Auditor’s Office*,¹ as the facts in that case were different. In that case, the agency informed Hobbs their request would be processed in installments, and Hobbs filed suit days after receiving the first installment. While Hobbs argued that a requestor could file suit before an agency’s denial and closure of a records request, the *Hobbs* court rejected that theory and found that a denial occurs when it reasonably appears that an agency will no longer provide responsive records. In contrast, it was reasonably apparent that San Juan County would no longer provide responsive records due to a communication to Kilduff stating, “this email response and attachment fulfills your public records request.”

The court also rejected the County’s theory that it never actually refused Kilduff’s request because he could have always asked for more. In addition to RCW 42.56.520, the court also cited *Progressive Animal Welfare Society v. University of Washington*,² which stands for the proposition that regardless of internal review, initial decisions become final for purposes of judicial review after two business days.

The court also found the County’s administrative exhaustion requirement incompatible with RCW 42.56.100’s mandate that agencies provide the fullest assistance to requestors and the most timely possible action on requests for information. The court found the County’s administrative exhaustion requirement to be an impediment to requestors, and would allow agencies to draw out what is supposed to be an expeditious process.

The court also rejected the County’s request to apply the doctrine of administrative remedies to the PRA. The court found such doctrine to be inapplicable to PRA claims, because it is appropriate instead where an agency possesses expertise in areas outside of the conventional expertise of judges, citing *Cost Mgmt. Servs., Inc. v. City of Lakewood*.³ The court found that producing public records does not involve special expertise that is beyond the experience of judges.

The court also rejected the County’s claim that RCW 42.56.040, requiring agencies to publish rules

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implementing the PRA, authorized it to create an administrative exhaustion requirement. The court instead found that the purpose of RCW 42.56.040 is to impose a duty on agencies to publish rules and procedures, but does not delegate authority to agencies to create another layer of review. Finally, the court found persuasive the *Washington State Bar Ass'n, Public Records Act Deskbook: Washington's Public Disclosure and Open Public Meetings Laws*, citing the explanation in the deskbook that "a requestor cannot be required to use an agency's internal review process or agree to allow an agency to take more than two days to review its original denial."⁴

The court concluded by finding that San Juan County's attempt to create an administrative exhaustion requirement undermines the purpose of the PRA, which is to further the interests of the people to full access to information relating to the conduct of government.

The court also found the trial court's award of costs to the County was improper under RCW 4.84.185 because the trial court did not find the entire suit frivolous. The court also invalidated the trial court's award of CR 11 sanctions relating to Kilduff's dismissed quo warranto claim, because the court found he brought such suit in good faith. Finally, the court found Kilduff was not yet entitled to attorneys fees because the merits of the PRA claim have not yet been resolved by the trial court.

¹ 183 Wn. App.925, 335 P.3d 1004 (2014).

² 125 Wn.2d 243, 884 P.2d 592 (1994).

³ 178 Wn.2d 635, 641, 310 P.3d 804 (2013).

⁴ § 6.9(2), at 6-58 to 59 (2d ed. 2014).

Assoc. of Washington Business v. Dep't of Ecology, January 16, 2020, Wash Sup. Ct. (2020)

By Bill Pardee

5-member majority opinion by C.J. Stephens

In 2008 the legislature enacted RCW ch. 70.235, "Limiting Greenhouse Gas Emissions," which encouraged the Department of Ecology (Ecology) to take swift action to address climate change, allowing "actions taken using existing statutory authority to proceed prior to approval of the greenhouse gas reduction plan." Following this enactment, the

legislature's progress in addressing climate change stalled, declining in 2009 and 2015, to pass two major bills designed to further regulate and reduce greenhouse gas emissions. Following this, Governor Jay Inslee directed Ecology to reexamine its statutory authority to curb greenhouse gas emissions by setting emission standards. In response, Ecology promulgated the clean air rule (Rule), ch. 173-442 WAC. Relying on Ecology's authority under the Washington Clean Air Act (Act), ch. 70.94 RCW, the Rule creates greenhouse gas emission standards for three types of businesses: (1) certain stationary sources; (2) petroleum product producers and importers; and (3) natural gas distributors. The Rule requires most of these businesses to reduce their greenhouse gas emissions by 1.7 percent every year.

The Rule gives covered businesses two nonexclusive options reducing their greenhouse gas emissions: (1) Businesses can modify their operations at their facilities to lower their actual emissions; or (2) They can acquire and submit "emission reduction units," which are accounting units representing the reduction of one metric ton of carbon dioxide or its equivalent. Covered businesses can obtain emission reduction units in 3 ways: (1) by reducing their actual greenhouse gas emissions below the reduction requirement for a given compliance period; (2) undertaking recognized projects, programs, or activities that reduce emissions in real, specific, quantifiable, permanent, and verifiable ways; or (3) by purchasing emission reduction units in greenhouse gas emission markets outside of Washington.

As promulgated, the Rule covers roughly 68 percent of all the greenhouse gas emissions in Washington. Of those emissions covered by the Rule, approximately 74 percent are generated by the combustion of products sold by natural gas distributors and petroleum product producers and importers. Because these businesses only sell products but do not control the amount of fuel or gas burned, Ecology acknowledges these businesses cannot make direct emission reductions. The emission reduction unit program therefore provides the sole mechanism through which natural gas distributors and petroleum product producers and importers can address the emissions generated by the products they sell. Essentially, the Rule requires these businesses to pay to offset the emissions caused by third parties using their products.

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Soon after Ecology promulgated the Rule in 2016, the Association of Washington Business joined with seven other industry trade organizations (collectively AWB) and filed a petition for review under the Administrative Procedure Act (APA), RCW ch. 34.05. Among other things, AWB argued Ecology lacked statutory authority under the Act to promulgate the Rule. Four utility companies that distribute natural gas throughout Washington also filed a petition for review. The two petitions were consolidated into a single challenge to the Rule. The trial court permitted the Washington Environmental Council and two other environmental organizations (collectively WEC) to intervene in defense of the Rule.

In 2017, the trial court ruled that Ecology's authority under the Act is limited to entities who introduce contaminants into the air, not entities who sell commodities. The trial court subsequently held that the Rule was invalid under the APA because the Rule exceeds the statutory authority of the agency conferred by law. The trial court also denied Ecology's request to sever the portions of the Rule that were held invalid. Ecology and WEC filed notices of direct review with the Washington Supreme Court, and the latter granted review.

The heart of this case is whether the plain meaning of the Act empowers Ecology to use emission standards to regulate businesses that do not emit greenhouse gases. Ecology responds that it has the authority to promulgate the Rule regulating nonemitters through emission standards under the Act generally, and RCW 70.94.331(2)(c) and .030(12) in particular. Ecology argues that the Rule is a valid exercise of its authority under the Act because it is a "requirement that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis" "based upon a system of classification by types of emission," per RCW 70.94.030(12), .331(2)(c). Ecology is mistaken because although the Act grants Ecology significant authority to regulate emissions in the manner it deems best, Ecology cannot exercise this authority outside the scope delineated by the legislature. RCW 34.05.570(2)(c).

The plain meaning of the Act's "emission standards" definition limits the scope of Ecology's authority to promulgate emission standards to those entities that actually emit air pollutants. RCW 70.94.030(12).

The crux of Ecology's argument is that because the Rule is based on a type of emission—greenhouse gases—it can cover businesses that do not directly emit greenhouse gases, but whose products eventually do.

An emission standard is "a requirement ... that limits the quantity, rate, or concentration of emissions of air contaminants on a continuous basis." RCW 70.94.030(12). The Act defines "emission" as "a release of air contaminants into the ambient air." RCW 70.94.030(11). Reading these definitions together, an emission standard is best understood as a limit on how and when regulated entities can release air contaminants into the ambient air. If an emission standard regulates the release of air contaminants, it naturally follows that emission standards are intended to regulate those entities that directly cause such releases.

Another indication that emission standards are meant to regulate only actual emitters is the fact that the definition in RCW 70.94.030(12) applies to both "emission standard" and "emission limitation," and the Act uses the term "emission limitation" exclusively in reference to direct sources of emissions. Because "emission standard" is synonymous with "emission limitation," emission standard cannot reasonably be interpreted more broadly than emission limitation. Because the term emission limitation is used exclusively in reference to direct sources of emissions strongly suggests that the related term emission standards also applies only to direct sources of emission.

Ecology argues that by holding emission standards apply only to sources that directly emit contaminants into the air, the trial court "gave effect to only one clause in the definition" and ignored the importance of examples that could be read to apply to nonemitters. But an example illustrating a definition should not be read to expand the definition. A "requirement (to) ... limit ... emissions of air contaminants" is just what it says: a rule requiring covered entities to limit their emissions. RCW 70.94.030(12). The definition's inclusion of some examples that *could conceivably* apply to nonemitters does not prove the legislature intended the Act to authorize Ecology to regulate more than direct emissions. We do not defer to agency interpretations of their own authority because their interpretation *could* have been what the legislature intended.

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At oral argument, Ecology suggested that the only limit on its rule-making reach is the practical ability to measure and assess indirect impacts. But the Act's direction to use "all known, available, and reasonable methods to reduce, prevent, and control air pollution" is not an invitation to regulate every entity whose activities may eventually contribute to quantifiable emissions. RCW 70.94.011. The plain meaning of "emission standard" in the Act applies only to actual emitters of air pollution. RCW 70.94.030(12).

The legislature has not empowered Ecology to do whatever Ecology deems best for the environment. To the contrary, the legislature has provided Ecology with a variety of tools to fulfill its environmental responsibilities. One such tool is an air quality standard. Another tool is emission standards, which govern sources that directly emit air contaminants into the atmosphere. Emission standards govern what is emitted, while air quality standards govern permissible levels of a given air contaminant in the air as a whole.

Ecology claims its Rule is an emission standard and an emission standard only, but rather than regulate identified sources of greenhouse gases—as an emission standard ought to do—the Rule attempts to curb the overall effect of greenhouse gases by "requiring certain companies that sell, distribute, or import petroleum products and natural gas to . . . internalize some of the environmental costs associated with the products from which they profit." Forcing businesses to internalize the environmental costs of their customers' action may indirectly help limit the aggregate concentration of greenhouse gases in the atmosphere, but it does not actually regulate the release of those contaminants. By doing this, the Rule creeps beyond the scope of an emission standard and into the realm of an air quality standard. Although we need not decide today whether the Rule would have been properly promulgated as an air quality standard, we do conclude that it is an improper emission standard when applied to businesses that do not directly emit greenhouse gases.

There may be other options open to Ecology, now or in the future, for addressing the impact of petitioner businesses and utilities on climate change. But regulating them as so-called "indirect emitters" under the Act is not statutorily authorized. We therefore hold that the Rule exceeds Ecology's authority under the Act and is invalid to the extent it purports to regulate via emission standards businesses that do not directly

emit greenhouse gases, but whose products ultimately do.

As to whether the remaining provisions of the Rule survive without the invalid provisions (i.e., is severable), the Rule contains an express severability clause, WAC 173-442-370, and Ecology asks us to preserve those portions of the Rule, including its application to actual emitters, that are a valid exercise of its regulatory authority. While we have not before addressed severability in the context of an administrative rule, we have recognized with regard to statutes that the presence of a severability clause "may provide the assurance that the legislative body would have enacted the remaining sections even if others are found invalid," though it "is not necessarily dispositive on that question." *McGowan v. State*, 148 Wn.2d 278, 294-95, 60 P.3d 67 (2002). We examine the challenged statute as a whole to determine whether the legislature could have intended to enact valid sections alone and whether those valid sections alone work to achieve the legislature's goals. *Id.* When evaluating the severability of regulations, the United States Supreme Court looks to similar questions of intent and workability. *See K Mart Cor. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1181, 100 L.Ed. 2d 313 (1988).

Like the United States Supreme Court, we believe the test for severability of regulations should be governed by the concepts of intent and workability that inform our test for the severability of statutes. To determine whether an invalid portion or aspect of a regulation is severable, we ask (1) whether the authorized and unauthorized portions of the regulation are so intertwined that the agency would not have believably promulgated one without the other and (2) whether the invalid portion is so intimately connected with the purpose of the regulation as to make the severed regulation useless to advance the purpose of the statute under which it is promulgated. Applying this test here, we conclude that the portions of the Rule applying to natural gas distributors and petroleum product producers and importers are severable from the remainder of the Rule, which will continue to advance the purpose of the Act even without these provisions.

First, Ecology argues it would have adopted a clean air rule creating an emission standard applicable only to direct emitters. While AWB and the trial court are correct that most of the Rule's benefits were expected from the provisions we invalidate

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today, this does not show that the unauthorized provisions are so intertwined with the authorized provisions that Ecology would not have reasonably promulgated a rule without these provisions. To the contrary, the Rule regulates covered entities on an individual basis, and the unauthorized regulation of any particular nonemitter does not bear on the authorized regulation of any particular emitter. The Rule's structure is such that one does not depend on the other – the regulation of each entity is independent of any other. We believe Ecology would have reasonably promulgated a clean air rule without the unauthorized provisions we invalidate today.

Second, Ecology argues that a severed version of the Rule would still advance the purpose of the Rule and the Act as a whole by requiring annual emission reductions from the state's 48 largest stationary sources of greenhouse gas emissions. We agree that regulation of these sources alone marks significant progress in Washington's efforts to curb greenhouse gas emissions and combat climate change. A less effective regulation can still advance the purpose of the statute under which it is promulgated, particularly where—as here—the unauthorized portions of the Rule can be severed without impact on the operation of the remainder of the Rule.

Because Ecology would have reasonably promulgated a rule regulating only direct emitters of greenhouse gases and such a rule would still advance the purposes of the Act, we hold that the unauthorized portions of the Rule are severable from its validly authorized provisions.

4-member dissenting opinion by Justice Owens

We are asked to decide whether Ecology may establish and enforce greenhouse gas emission standards as applied to natural gas distributors and petroleum product producers and importers, which sell products that generate greenhouse gases when combusted by end users. The plain meaning of RCW 70.94.030(12), defining "emission standard" and "emission limitation," unambiguously evinces that "emission standards" may apply to either or both direct or indirect emitters.

"When passing laws that protect Washington's environmental interests, the legislature intended those laws to be broadly construed to achieve the statute's goals." *Quinalt Indian Nation v. Imperium Terminal Servs., LLC*, 187 Wn.2d 460,470, 387 P.3d 670 (2017). The

Act's public policies and purpose section states that "it is the purpose of this chapter to ... provide for the use of all known, available, and reasonable methods to reduce, prevent, and control air pollution." RCW 70.94.011.

The majority concludes by combining the definitions of "emission standards" and "emission" in the Act that because emission standards regulate air contaminants, "it naturally follows" that emission standards serve as regulations for entities "that directly cause such releases." This conclusion does not follow. At no point do these provisions state that only entities *directly* emitting air contaminants may be regulated under the Act. Rather, the plain language of RCW 70.94.030(12) reflects that "emission standards" need only be a requirement that limits the concentration of emissions; it does not reflect that "emission standards" be a requirement that limits the concentration of emissions *from direct sources*. We have historically found that when passing laws that protect Washington's environmental interests, the legislature intended those laws to be *broadly construed* to achieve the statute's goals. *Quinalt Indian Nation*, 187 Wn.2d at 470 (emphasis added). Therefore, since the Act's focus is to reduce emissions across the state from various sources, this potential ambiguity under the Act should be broadly construed to encompass both direct and indirect emission sources.

The Act's public policies and procedures section states that "it is the purpose of this chapter to ... provide for the use of *all* known, available, and reasonable methods to reduce, prevent, and control air pollution." RCW 70.94.011 (emphasis added). The Act also emphasizes that the state's policy under the Act is to reduce emissions from "thousands of small individual sources." *Id.* Regulating the producers and distributors of products that generate significant emissions when combusted "by thousands of small individual sources" is not only reasonable ... but doing so may well be the "most feasible" way to reduce emissions from myriad small sources. RCW 70.94.331(2) (c) (authorizing Ecology to establish emission standards based on types of emissions or types of sources, or a combination, depending on what the Department determines "most feasible for purposes of this chapter").

Because the Rule properly constitutes an emission standard as applied to natural gas distributors and petroleum product producers and importers, the

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Department did not exceed its statutory authority in promulgating the Rule.

Associated Press v. Washington State Legislature, December 19, 2019, ___ Wn.2d ___, 454 P.3d 93 (2019), 2019 WL 6905840

By Bill Pardee

4-member lead opinion by Justice Owens

Between January 25 and July 26, 2017, members of the news media submitted 163 requests under the Public Records Act (PRA), RCW ch. 42.56, to the state senate, house of representatives, and the legislature as a whole, as well as the offices of individual state senators and representatives. Senate and house counsel responded to the news media's PRA requests on behalf of the chambers' chief administrative officers, the secretary of the senate (Secretary) and the chief clerk of the house of representatives (Clerk). In response to some requests, senate and house counsel stated that the legislature did not possess responsive records in light of the definition of "public records" applicable to the legislature. In response to other requests, senate and house counsel and certain individual legislators voluntarily provided limited records. Some records provided contained redactions, though no PRA exemptions were identified.

Not satisfied with the responses to their PRA requests, on July 26th, members of the news media collectively submitted, via counsel, identical PRA requests to the senate, the house, and all individual legislators. The July 26 requests stated that if the recipients failed to adequately respond, the news media would "be forced to file a lawsuit addressing the PRA violations." House counsel again responded in a limited capacity, citing the "specific definition of 'public records' (that) applies to the Legislature."

On September 12, 2017, a coalition of news media outlets (collectively News Media Plaintiffs) filed a complaint against the institutional legislative bodies and four individual legislative leaders in their official capacities (collectively Legislative Defendants). In response to the News Media Plaintiffs' allegation that the Legislative Defendants violated the PRA by withholding public records, the Legislative Defendants responded that the PRA set out a narrower public records disclosure mandate specific to the legislative

branch, which they argued exempted both its institutional bodies and individual legislators' offices from the PRA's general public disclosure mandate binding on "agencies."

In November 2017, the parties filed cross motions for summary judgment. The trial court requested that the Attorney General's Office (AG) file a brief offering its analysis of the issue. The AG amicus brief proffered that individual legislators' offices are "agencies" subject to the PRA's general public records disclosure mandate, while the institutional legislative bodies are not. On January 19, 2018, the trial court granted in part and denied in part each party's motion for summary judgment, ruling in line with the AG's analysis. The trial court then granted a joint motion to certify questions of law to this court. Our Commissioner granted first the stay and later the motions for direct discretionary review.

The court summarized the issues as: (1) Whether individual legislators' offices are "agencies" for purposes of the PRA and therefore subject to the PRA's general public records disclosure mandate; and (2) whether institutional legislative bodies are "agencies" for purposes of the PRA and therefore subject to the PRA's general public records disclosure mandate.

The PRA's general public records disclosure mandate requires that "(e)ach *agency* ... shall make available for public inspection and copying all public records." RCW 42.56.070(1) (emphasis added). The PRA defines "agency" as including "all state agencies." RCW 42.56.010(1). The PRA defines "state agency" in turn as including "every state office, department, division, bureau, board, commission, or other state agency." *Id.* The PRA does not expressly define "state office" or the terms enumerated in the definition of "state agency." Neither does the PRA expressly indicate whether individual legislators or the senate, the house, and the legislature as a whole are "agencies" for purposes of the PRA.

The PRA provides an exception to the general public records disclosure mandate for the Secretary and the Clerk. RCW 42.56.010(3). Additionally, the PRA distinguishes the Secretary and the Clerk from "agencies" by repeatedly referring to an "agency, the office of the secretary of the senate, or the office of the clerk of the house of representatives." RCW 42.56.070(8), .100, and .120. In effect, the PRA establishes a narrower public records disclosure mandate for the Secretary and the Clerk. But the PRA

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does not expressly indicate whether that mandate encompasses records generated by individual legislators' offices and/or the institutional legislative bodies. However, the Secretary and the Clerk serve as the chief administrative officers for their respective chambers, responsible for classifying, arranging, maintaining, and preserving legislative records. RCW 40.14.130; RCW 40.14.140. Because the offices of the Secretary and the Clerk exist to support the legislature's administrative functions, their narrower public records disclosure mandate clearly attaches to the legislative entities in some capacity.

The issues before us thus boil down to which legislative entities are subject only to the narrower public records disclosure mandate by and through the Secretary and the Clerk, and which, if any, legislative entities are "agencies" subject to the PRA's general public records disclosure mandate.

Individual legislators' offices are plainly "agencies" for purposes of the PRA in light of a closely related statute, former RCW 42.17A.005 (2011). Former RCW 42.17A.005 is the definitions section of the campaign disclosure and contribution law (CDC), RCW ch. 42.17A. The laws that are today the CDC and the PRA were enacted via initiative in 1972 as a single law, the Public Disclosure Act. For 35 years, the CDC and the PRA were codified together within an omnibus chapter, former RCW ch. 42.17 (2002). The CDC and the PRA thus exemplify "related statutes." *Campbell & Gwinn*, 146 Wn.2d at 11.

The CDC and the PRA continue to share identical definitions of "agency" and "state agency": "'Agency' includes all state agencies (and) 'State agency' includes every state office." Former RCW 42.17A.005(2); RCW 42.56.010(1). The CDC also defines "state office" as including "state legislative office," and "legislative office" as including "the office of a member of the state house of representatives or the office of a member of the state senate." Former RCW 42.17A.005(44), (29). Thus, the offices of individual legislators are "agencies" under the CDC. Given that former RCW 42.17A.005 is closely related and discloses legislative intent about the provision in question, we conclude that individual legislators' offices are plainly and unambiguously "agencies" for purposes of the PRA as well.

In 2005, the legislature recodified the public records disclosure provisions into a separate chapter, the PRA. Rather than establishing independent

definitions for the newly minted PRA, however, the legislature incorporated by reference the definitions in the omnibus chapter, RCW Ch. 42.17. In 2007, the legislature amended the PRA to add a definitions section, eliminating the incorporation by reference of the omnibus chapter's definitions, and importing word for word into the PRA the omnibus chapter's definition of "agency," which remains unaltered, but the rest of the definitional chain was not imported. RCW 42.56.010.

The Legislative Defendants argue that the 2005 and 2007 amendments divested individual legislators' offices of the PRA's general public records disclosure mandate. Because the meaning of "agency" as pertains to individual legislators' offices is plain, the Legislative Defendants' reliance on legislative history is premature and does not support their claim. Rather House bill reports were clear that the 2005 recodification of the PRA effected "no substantive change," and "no exemptions (we)re modified, deleted, or added." The PRA specifically included individual legislators' offices in the definitional chain of "agency" before and after the PRA was separated into its own chapter. Neither the 2005 nor 2007 amendments broke that chain.

The PRA and the CDC are profoundly related. For more than three decades, the PRA and the CDC were one law. Until 2007, they shared common definitions. Today they remain housed in the same title and their definitions of "agency" remain identical. Though the legislature ended the PRA's express incorporation of the omnibus chapter's definitions in 2007, rules of statutory interpretation direct us to consider related statutes for purposes of discerning the plain meaning of a provision. *Campbell & Gwinn*, 146 Wn.2d at 11. Here, the CDC is closely related and clarifies the PRA's plain meaning of "agency."

If, as the Legislative Defendants argue, individual legislators' offices were not "agencies" subject to the PRA's general public records disclosure mandate, then ostensibly neither would be the governor's office or the eight other executive branch entities enumerated in the CDC's definitional chain of "agency" because, like legislative offices, they are not expressly included in the PRA's definition of "agency." Such an interpretation of the PRA would be untenable given long-standing practice regarding the PRA's applicability to executive branch offices.

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In sum, we conclude that under the plain meaning of the PRA, individual legislators' offices are "agencies" subject to the PRA's general public records disclosure mandate. Accordingly, we hold that the News Media Plaintiffs are entitled to judgment as a matter of law on this issue.

Institutional legislative bodies, on the other hand, are not "agencies" for purposes of the PRA in light of closely related former RCW 42.17A.005 and relevant legislative history. Instead, we conclude that institutional legislative bodies are subject to the narrower public records disclosure mandate via the Secretary and the Clerk. Unlike individual legislators' offices, the senate, the house, and the legislature are not included in the definitional chain of "agency" memorialized in the closely related CDC. Former RCW 42.17A.005 (2), (29), (44). Unlike offices of individual legislators and the governor, which are specifically listed as "agencies" subject to the PRA's general public records disclosure mandate, institutional legislative bodies are not. Citing *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) for the principle of *expressio unius est exclusio alterius*.

Although the News Media Plaintiffs argue that institutional legislative bodies should be considered "agencies" for purposes of the PRA in light of the chapter governing ethics in public service wherein RCW 42.52.010(1) defines "agency" as including "the state legislature," in contrast to the CDC, RCW ch. 42.52 is not closely related to the PRA for purposes of disclosing legislative intent about the meaning of "agency." Whereas the PRA and the CDC were enacted in a single initiative and codified together in an omnibus chapter for 35 years, RCW ch. 42.52 was enacted independently in 1994 and codified separately from the omnibus chapter. RCW 42.52.010(1) only demonstrates that the legislature knew how to include its institutional bodies in a statutory definition of "agency" and chose not to do so in the PRA or CDC. We thus conclude that institutional legislative bodies are plainly not "agencies" for purposes of the PRA. Unlike individual legislators' offices, the senate, the house, and the legislature were never included in the definitional chain of "agency" set out in the omnibus chapter, indicating that the institutional bodies are not subject to the PRA's general public records disclosure mandate. Former RCW 42.17.020(1), (39) (1995).

Instead, the 1995 amendment set out a narrower scope of public records for each chambers' chief administrative officer. The senate bill report stated that the "(p)ublic disclosure statutes are amended to specifically address access to and production of public records in the possession of the Senate and the House of Representatives."

We conclude that the narrower public records disclosure mandate incumbent on the Secretary and the Clerk inures to the institutional legislative bodies and comprises the extent of their PRA obligations. We find that the senate, the house, and the legislature as a whole are subject to the PRA through the Secretary and the Clerk, who fulfill the institutions' public records disclosure duties as chief administrative officers for their respective chambers.

3-member concurrence/dissent by Justice Stephens

Because I would hold the legislature remains an "agency" subject to the PRA, I respectfully dissent.

In reviewing the PRA, we must "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." RCW 42.56.550(3). In 1972, Washingtonians enacted the public disclosure act (PDA), former RCW ch. 42.17, now recodified as the PRA, by initiative. "Where the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation (or construction).'" *Amalg. Transit*, 142 Wn.2d 205.

The people described the public policy underlying the PDA with reference to all levels of government. LAWS OF 1973, ch. 1, § 1(2), (5), (6), (11). For example, the people made clear that "full access to information concerning the conduct of government *on every level* must be assured as a fundamental and necessary precondition to the sound governance of a free society." *Id.* § 1(11) (emphasis added). The people defined "agency," as it remains today, to "include all state agencies and all local agencies." *Id.* § 2(1). And they defined "state agency" to "include every state office, public official, department, division, bureau, board, commission or other state agency." *Id.*

Besides the obvious breadth of the definitions of agency, the use of the word "include" generally "signal(s) that the list is meant to be illustrative rather

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than exhaustive.” *Samantar v. Yousuf*, 560 U.S. 305, 317, 130 S. Ct. 2278, 176 L.Ed. 1047 (2010). Finally, the catchall phrase “or other state agency” further signals that the people intended the list to be nonexhaustive. Although the PDA does not specifically reference the legislature or either bicameral body in the definition of “state agency,” it does not exempt the coordinate “branches” of government from the nonexhaustive list therein. Absent a plain exemption of the legislature from the definition of “state agency,” its reach is ambiguous at most. Because a particular state agency could be one of the types of governmental entities listed, but also some “other state agency” not listed, the lead opinion’s reliance on the *expressio unius canon* is misplaced. Given the people’s instruction that the PDA “shall be liberally construed,” there is only one tenable conclusion we may reach: the PDA as originally enacted intended to apply to the legislature, including the house and the senate, as well as to individual legislators and their respective offices.

In 1995 the legislature determined that the Secretary and Clerk were responsible for preservation of only seven classes of legislative records. RCW 40.14.100. But all other classes of public records in the legislature’s possession are still plainly subject to the general definition of “public record.” Adding the sentence delegating responsibility to the Secretary and Clerk for preservation of certain classes of *legislative* records in no way worked to narrow the general responsibility of agencies subject to the general public records requirements of the PDA. If the legislature, including its bicameral bodies and other offices, had intended to exempt itself in its institutional capacity from responsibility for all other classes of public records except for legislative records, it did not say so. All it said was that the Secretary and Clerk were now responsible for the preservation of certain classes of *legislative* records.

I agree with the lead opinion’s analysis about individual legislators’ offices. The 2007 legislative amendments did not work to break the definitional chain, and individual legislators’ offices are “agencies” subject to the PRA’s broad public records disclosure mandate. But I disagree that the legislature, including its bicameral bodies and other offices, are not “agencies” subject to the PRA. The lead opinion loses sight of the fact that this was an initiative originally drafted by the people. We must interpret the PRA as the “average informed lay voter”

would. *Am. Legion*, 164 Wn.2d at 585. The failure of the electorate to name the legislature explicitly in its broad, nonexhaustive list of governmental entities is not dispositive. But the failure of the legislature to subsequently exempt itself from the broad, nonexhaustive list is more telling. In point of fact, the legislature attempted most recently during the 2018 legislative session to exempt itself from the PRA (ESB 6617), but failed. Thus, in keeping with the original intent of the electorate, I would hold that the legislature and its bicameral bodies and other offices are “agencies” subject to the PRA.

Our case law supports that the definition of “state agency” is not cabined by the classes of entities listed in its definition. For example, we have held a nongovernmental, private entity may be subject to the PRA if it is found to be the “functional equivalent” of a public “agency.” *Fortgang*, 187 Wn.2d at 512-13. Generally, a nongovernmental, private entity would not fit into one of the listed categories of “state agency,” such as “state office, department, division, bureau, board, (or) commission.” RCW 42.56.010(1). But such entities could fit in the “other state agency” category. It would be absurd to conclude that a nongovernmental, private entity can be subject to the PRA but the legislature cannot simply because it is not listed in the open-ended definition of “state agency.” To hold that the legislature is not, at least, the functional equivalent of a “state agency” would be absurd.

The lead opinion concludes that by adding one sentence to the definition of public records, which specifies only that the Secretary and Clerk are responsible for certain classes of legislative records, the legislature dramatically narrowed the scope of general public records requirements and relieved itself of further obligations under the PRA. I disagree. To begin with, the Secretary and Clerk do not possess *all* of the legislature’s public records. Instead, they possess only the legislative records (defined in RCW 40.14.100) members of the legislature’s various committees and subcommittees provide. RCW 40.14.130. Thus, the Secretary and the Clerk are currently responsible for compiling and preserving a much narrower subset of public records—legislative records—than the PRA’s broad public disclosure requirements encompass. However, there are other legislatively created records, like the ones requested by the Associated Press in response to incidents of

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alleged sexual harassment and misconduct, which fall outside the definition of “legislative records” but must still be recognized as “public records.” RCW 40.14.100; RCW 42.56.010(3). I would hold the Secretary and Clerk’s responsibilities under the PRA are currently limited to the administration of legislative records, and the legislature, as an “agency,” is still obliged to provide all other documents that meet the definition of “public records” under the PRA.

2-member concurrence/dissent by Justice McCloud

The clear language of the law that the people passed, but that the legislature amended, shows that the legislature chose narrower disclosure requirements for itself than for PRA-defined “agencies.” I agree with the lead opinion that the legislature is not such an “agency,” but rather the legislative branch of government, and is subject to the more limited disclosure requirements the PRA places on that branch. But I disagree with the lead opinion’s conclusion that individual legislators constitute “agencies” that are subject to the broader public disclosure requirements of other parts of the PRA. The lead opinion’s conclusion on that point is based on a definition of “agency” in a separate statute in a different chapter of the code.

Under the PRA definition, “(a)gency includes all state agencies” and “‘state agency’ includes every *state office*, department, division, bureau, board, commission or other state agency.” RCW 42.56.010(1) (emphasis added). An individual legislator does not become a “state office” simply because the legislator has an office as a work space or because the legislator has a legislative aide. That logic would make countless individual state employees their own “agencies” separate and apart from the state agencies that employ them. Instead, the terms in RCW 42.56.010(1) all refer to entities that have the power to act on behalf of the state—or a local government entity—by setting policy or transacting business. This context shows that an “agency” is a public entity (or a private entity acting in a public role, see *Fortgang v. Woodland Park Zoo*, 187 Wn.2d 509, 512-13, 387 P.3d 690 (2017)) that has the power to transact business or take action on behalf of the government. An individual legislator has no such power. Thus, under the PRA’s definition of “agency,” an individual legislator is not a “state office” and, by extension, not an “agency.”

This reading is bolstered by the fact that the PRA clearly differentiates between “agencies,” on the one hand, and the legislature, or legislators, on the other, by imposing specific, more limited disclosure obligations on the legislature’s records custodians, the Secretary and Clerk.

Rather than look to the other provision of the PRA for context, in holding that legislators are “agencies,” the lead opinion relies on the definitions section of the CDC, RCW ch. 42.17A, a “closely related” statute that the legislature has since taken steps to divorce from the PRA. But nothing in the text of the PRA suggests that its provisions should be read in light of the CDC. In fact, the legislature suggested just the opposite when it found that the PRA and CDC cover “discrete subjects” and created the PRA as its own freestanding enactment. RCW 42.56.001. There are two problems with the lead opinion’s decision to rely on the fact that CDC and PRA were joined at the hip for 35 years to justify using the CDC to interpret the PRA now.

The first problem is that the lead opinion is resorting to legislative history to augment the plain language of the PRA, when the PRA is not ambiguous about its own definition of “agency.” That is not how we interpret statutes—if the statute’s text is not ambiguous, we do not resort to the legislative history. *Spokane County v. Dep’t of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018). The second problem is that the lead opinion draws the wrong conclusion from the intertwined history of the PRA and CDC, because the legislature’s decision to separate those statutes in 2005 into their own chapters must be interpreted as a legislative intention to separate those statutes.

In 2007, the legislature supplied the PRA with its own definitions section and removed the cross-reference to the CDC entirely. Those amendments had an effect. Although they imported the FCPA’s definition of “agency” into the PRA word for word, they left behind other definitions, including the definition of “state office.” We have to presume that the legislature intended to change the law by passing the amendment. *Jane Roe TeleTech Customer Care Mgmt. (Colo.) LLC*, 171 Wn.2d 736, 751, 257 P.3d 586 (2011) (“A new legislative enactment is presumed to be an amendment that changes a law rather than a clarification of the existing law.”) The lead opinion’s decision to read such a cross-reference into the PRA anyway flouts basic rules of statutory interpretation.

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The CDC definition of “state office” is not context for the PRA. Instead the context for a portion of the PRA is the rest of the PRA. The context shows that the PRA distinguishes an “official”—like a legislator—from an “agency.” For example, RCW 42.56.060 protects every “public agency, public official, public employee, (and) custodian” from liability if that individual “acted in good faith in attempting to comply with the provisions of” the PRA. Legislators are certain “public official(s),” one of the categories listed, which suggests that they are not also “agencies,” a separate category listed. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (“Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.”). In addition, if individual legislators were “agencies,” the accommodation in RCW 42.56.100 for legislative records custodians to “adopt reasonable procedures” to effectuate the aims of access, preservation, and efficiency, but permitting them to do so by “allowing for the time, resource, and personnel constraints associated with legislative sessions,” would impose full PRA obligations on individual legislators, while simultaneously relaxing obligations on those same legislators’ appointed records custodians, despite the expressed intent to accommodate those legislators’ time, resources, and personal constraints.

Under the usual rules of statutory interpretation, the Secretary and Clerk cannot be called into court, as “agencies” can be under RCW 42.56.550 for providing unreasonable estimates of time or charges. This intentional differentiation would be undermined by subjecting individual legislators, as “agencies,” to the entirety of RCW 42.56.550.

For the Secretary and Clerk, a “public record is limited to certain administrative records, official reports, and the records identified under cross-referenced RCW 40.14.100. RCW 42.56.010(3). RCW 40.14.100 basically covers the records of the legislature’s committees and subcommittees. It explicitly excludes, however, “reports or correspondence made or received by or in any way under the personal control of the individual members of the legislature.” RCW 40.14.100. RCW 40.14.110 reinforces that exclusion by giving individual legislators the option to donate their personal papers or, conversely, keep them to themselves. Turning legislators into “agencies” would frustrate this narrow

definition that applies to the legislature, making the entirety of legislators’ writings “public records” subject to the PRA.

Top Cat Enterprises, LLC v. City of Arlington, January 6, 2020, Division I COA Published Op. (2020), 2020 WL 57513

By Bill Pardee

In 2012, Washington voters approved Initiative 502 (I-502), a regulatory system for the production, processing, and distribution, of limited amounts of marijuana for recreational use by adults. The Washington State Liquor and Cannabis Board (WSLCB) used a lottery system to award 334 retail licenses. Licenses granted under the lottery system were jurisdiction specific. In 2015, the Cannabis Patient Protection Act (CPPA) merged the preexisting medical marijuana program with the recreational marijuana retail stores established under I-502. The CPPA also directed the WSLCB to reopen the application period for retail stores and issue additional licenses addressing the needs of the medical market. The WSLCB increased the number of retail licenses by 222. Rather than implement a lottery system similar to I-502, the CPPA prioritized new marijuana applications as either Priority 1, Priority 2, or Priority 3, which distinguished between applicants’ degree of experience and qualifications in the marijuana industry. Former RCW 69.50.331 (2015); former WAC 314-55-020 (2015). Because of the large number of applicants, only Priority 1 applicants were able to move forward with the licensing process. In addition to Priority 1 applications, the CPPA allowed licensees from I-502’s lottery that were barred from opening retail stores because of local bans to transfer their license to jurisdictions without local bans on marijuana sales.

RCW 69.50.331 requires both I-502 licensees and Priority 1 CPPA applicants to meet statutory requirements before the WSLCB grants a retail license. One of the requirements prohibits WSLCB from licensing a retail business within 1,000 feet of the “perimeter of the grounds of” a school. RCW 69.50.331(8)(a).

Top Cat was originally selected in the I-502 lottery for a retail location in the City of Marysville. Top Cat completed the licensee process and received a

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license for a retail business in Marysville on November 12, 2014. During the licensing process, Marysville enacted a ban on marijuana retailers, which prevented Top Cat from opening its store. On January 29, 2016, Top Cat applied to move its retail license from Marysville to Arlington. At the time, there was only one retail license available in Arlington.

Previously, 172nd Street Cannabis applied for a marijuana retail license for leased property located at lot 500B on the Arlington Municipal Airport property (Airport property) in Arlington under the CPPA's priority system and received a Priority 1 designation on December 8, 2015. The Airport property is approximately 1,200 acres in size and is partitioned into over 100 distinct parcels that are available to lease. Arlington School District No. 16 leases lot 301 of the Airport property for Weston High School. A cyclone fence fully encloses lot 301 for security.

The WSLCB measured the distance between 172nd Street Cannabis's lot 500B and Weston High School's lot 301 and concluded that the lots are over 1,600 feet apart from one another and thus consistent with the 1,000-foot separation requirement. The WSLCB then issued the only retail license in Arlington to 172nd Street Cannabis and closed licensing in Arlington. The WSLCB then offered Top Cat the opportunity to remain in Marysville or relocate to another jurisdiction with retail licenses still available.

Top Cat requested an administrative hearing and the case was assigned to an ALJ at the Office of Administrative Hearings. Top Cat objected to the approval of 172nd Street Cannabis's license on the basis that the retail location was less than 1,000 feet from the Airport property where Weston High School is located. Specifically, Top Cat contended that Weston High School is located within the larger Airport property and because the Airport property is immediately diagonal from the proposed retail store for 172nd Street Cannabis and separated by only 120 feet, 172nd Street Cannabis's location did not meet the 1,000 foot separation requirement. The WSLCB responded that the lease lots are distinct parcels, that those boundaries are depicted on the Airport Property Boundary and Lease Lot map, and that it correctly measured the distance between lot 500B and lot 301. The ALJ affirmed the approval of 172nd Street Cannabis's license and concluded that "property line" in WAC 314-55-050(10) is not ambiguous and its usual and ordinary meaning is "those lines which

separate one's lot from adjoining lots or the street." The ALJ explained that the lease lot lines for the Airport property were property lines within the meaning of WAC 314-55-050(10). Top Cat filed a petition for review of the initial order to the WSLCB. The WSLCB issued a final order affirming the initial order and adopting the ALJ's findings of fact and conclusions of law. Top Cat petitioned for review by the Snohomish County Superior Court. The superior court affirmed WSLCB's final order. Top Cat appeals.

On appeal, Top Cat contends that the WSLCB erred in concluding that the term "property line" within WAC 314-55-050(1) includes not only formal, recorded, boundary lines, but also lease lines and lot lines. Top Cat challenges whether the WSLCB's final order contained an erroneous interpretation or application of the law.

The WSLCB is prohibited from issuing "a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school." RCW 69.50.331(8)(a). The legislature also empowered the WSLCB to adopt regulations regarding retail outlet locations. RCW 69.50.341(1)(f). In response the WSLCB promulgated WAC 314-55-050(10), which states in part: "The distance shall be measured as the shortest straight line distance from the property line of the proposed building/business location to the property line of the entities listed below: (a) Elementary or secondary school."

Top Cat contends that the term "property line" means the legal description from a deed that describes the boundaries of real property. We disagree. The WSLCB concluded that "property line" is not an ambiguous term and its usual and ordinary meaning is "those lines which separate one's lot from adjoining lots or the street." We agree. Because we agree with the WSLCB that the term property line is unambiguous we do not consider the regulatory history of WAC 314-55-050(10).

The WSLCB's decision was guided by *Mall v. City of Seattle*, 108 Wn.2d 369, 373, 375, 739 P.2d 668 (1987), where the court held that property line is commonly understood as "those lines which separate one's lot from adjoining lots or the street." The WSLCB also found that the dictionary definitions of property line were consistent with *Mall's* interpretation of property line. We agree with the WSLCB. Under *Mall* and the dictionary definitions the WSLCB relied upon,

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“property line” is a term that includes the boundary lines delineating different types of property interests, including a lease lot line. The key is that the property boundary separates the property from other lots or properties. Here, the school’s lease is on lot 301—one of numerous lease lots on the larger Airport property. The school property is distinct and separate from other lots within the Airport property, including lot 500B.

We also agree that the WSLCB’s interpretation of the term property line is consistent with the stated legislative purpose of ensuring marijuana businesses are physically located at least 1,000 feet away from the “perimeter of the grounds” of any elementary or secondary school or other restricted entity.

RCW 69.50.331(8)(a). The statute does not mention “property line”—only that a marijuana business must be 1,000 feet from the “perimeter of the ground” of a restricted entity. The second sentence of WAC 314-55-050(10) explains how to measure the distance between the licensed business and prohibited entity by measuring the shortest distance between the two property lines. WAC 314-55-010(28) also defines “perimeter” as “a property line that enclosed an area.” Read together, the WSLCB cannot issue a license for a location that is within 1,000 feet of the property line that enclosed an area of the grounds of any restricted entity. As the WSLCB concluded in part: “What is important, and what is required by statute and regulation, is the physical separation of at least 1,000 feet between the perimeter of the school grounds and the premises of a marijuana retail business.” We agree.

Therefore, the WSLCB did not err in determining 172nd Street Cannabis’s location (lot 500B) was over 1,000 feet from Weston High School (lot 301).

Heritage Grove v. Dep’t of Health, December 10, 2019, ___ Wn. App. 2d ___, 453 P.3d 1022 (2019), 2019 WL 6710847

By Bill Pardee

Washington created the certificate of need (CN) program (the Program). The Department of Health (DOH) administers the Program. RCW 70.38.105(1). Health care providers may open certain health care facilities, including nursing homes, only after receiving

a CN from DOH. RCW 70.38.025(6), .105(4)(a). RCW 70.38.115(13)(b) provides that “(w)hen an entire nursing home ceases operation, the licensee or any other party who has secured an interest in the beds may reserve his or her interest in the beds for eight years or until a (CN) to replace them is issued, whichever occurs first.” This procedure is referred to as “banking” beds. The statute and regulations then allow the party who has banked their beds to “unbank” them in a new facility. For providers filing a CN application seeking to unbank beds, assuming certain conditions are met including that the new beds are located in the same planning area where they were before they were banked, the applicant does not need to prove the “need” criterion, WAC 246-310-21, in their CN application. RCW 70.38.115(13)(b); WAC 246-310-396.

Until October 15, 2009, Heritage Grove operated a 97-bed nursing home. The facility closed, and Heritage Grove sent a letter to DOH requesting to bank its beds. DOH granted Heritage Grove’s request and stated that Heritage Grove’s reservation of the beds would expire on October 15, 2017, unless it issued a CN before then.

In December 2014, Heritage Grove submitted an application for a CN and sought to build a facility and unbank its 97 beds. The Program received public comments on Heritage Grove’s application, including those by Respondent Nursing Homes, and held a public hearing. On July 15, 2015, the Program conditionally approved Heritage Grove’s CN application, provided that Heritage Grove agreed to five conditions. Heritage Grove accepted all five conditions, and shortly thereafter, in August, the Program approved Heritage Grove’s CN application. The document the program sent stated: “ISSUANCE OF THIS (CN) IS BASED ON THE DEPARTMENT’S RECORD AND EVALUATION.”

Respondent Nursing Homes then requested an adjudicative proceeding to contest the CN approval. After a hearing, a health law judge affirmed the Program’s approval of the CN. Respondent Nursing Homes then administratively appealed the decision. On August 25, 2017, at the end of the administrative appeal process, the Secretary of DOH, via a designee, issued the Final Order denying the CN because the application failed both the financial feasibility and cost containment criteria. Heritage Grove did not petition the Secretary’s designee to stay the Final Order. On Sept. 21, 2017, Heritage Grove sought judicial review of the Final Order in superior court. Heritage

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Grove did not file a petition to stay the Final Order before October 15, 2017, which was eight years from when Heritage Grove “banked” its beds. On August 16, 2018, the superior court affirmed the Final Order on the merits. It also dismissed the petition on mootness grounds. Heritage Grove appeals.

The parties’ mootness arguments involve two issues. First, they dispute whether, under RCW 70.38.115, DOH “issued” a CN to Heritage Grove within eight years. If we conclude that DOH did not issue a CN to Heritage Grove within eight years, then they next dispute whether RCW 34.05.574 of the Administrative Procedure Act (APA) enables this court to order specific performance and require that DOH overturn the Final Order and reinstate the Program’s initial approval of Heritage Grove’s CN application.

It is undisputed that Heritage Grove’s CN application failed to prove “need.” Heritage Grove’s CN application relied on the RCW 70.38.115(13)(b) exception so that its application did not have to prove the “need” criterion. And if DOH never “issued” Heritage Grove a CN within eight years, then Heritage Grove’s need-exempt status expired. RCW 70.38.115(13)(b). Therefore, if Heritage Grove’s need-exempt status expired and we are bound to remand to the agency for it to reconsider the Final Order, DOH would simply deny Heritage Grove’s CN application because the application failed to prove “need” and, in turn, failed to prove all of the requisite CN application criteria.

Heritage Grove contends that DOH issued a CN when the Program approved Heritage Grove’s application in August 2015, and that the issuance of the CN is simply in the appeals process. We disagree. A party’s reservation of beds expires after eight years unless they are “issued” a CN within those eight years. Here, the only way Heritage Grove was “issued” a CN within eight years is if the Program’s August 2015 initial approval of Heritage Grove’s CN application counted as such.

We conclude that the Program’s initial approval of Heritage Grove’s CN application did not constitute the issuance of a CN for the purpose of RCW 70.38.115(13)(b). The principles of finality illustrate our conclusion. “An administrative determination is not a final order where it is a mere preliminary step in the administrative process, but it becomes final when a legal relationship is subsequently fixed upon ‘consummation of the administrative process.’” *Lewis*

County v. Pub. Emp’t Relations Comm’n, 31 Wn. App. 853, 862, 644 P.2d 1231 (1982). Here the initial approval was merely a preliminary step in the administrative process. Thus, Heritage Grove could not justifiably rely on the subordinate order because that order was appealable, was in fact appealed, and was later overruled. Additionally, the appeal to the superior court and to this court is from the Final Order, not the subordinate order. Although we recognize that the subordinate order contained language indicating it was the “issuance” of a CN, the nomenclature used in that subordinate order does not overrule the fact that the subordinate order was appealable and thus subject to be overturned, which it later was.

Furthermore, Heritage Grove did not file a stay of the Final Order as permitted under the APA. RCW 34.05.467. It had approximately two months, from the time the Final Order issued and the time its banked-bed status expired, to do so. Accordingly, we conclude that DOH did not issue a CN to Heritage Grove within eight years from when Heritage Grove banked its beds. Therefore, Heritage Grove’s reservation of beds expired.

Heritage Grove argues that this court can nonetheless provide meaningful relief because it has the authority under RCW 34.05.574 to correct the Final Order’s errors and reinstate the Program’s initial approval of the CN. We disagree. Under RCW 34.05.574(1), a court “shall not itself undertake to exercise the discretion that legislature has placed in the agency.” The dispositive question here is whether the issuance of a CN is within the DOH’s discretion. We conclude that the legislature has vested the discretion to issue CNs solely with DOH. Accordingly, we will not and cannot exercise the agency’s discretion on its behalf. Because Heritage Grove’s CN application is based on a now-expired exception to showing the “need” criterion, on remand, DOH would not consider granting the CN application. In other words, agreeing substantively with Heritage Grove that the Final Order was unlawful would not provide Heritage Grove meaningful relief. We conclude that this case is moot.

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