IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

J. DOE, anonymously and individually, a/k/a "FloridaSupremeCourtPRR@protonmail.com,"

Petitioner,

v.

CASE NO.: 2022 CA 1902

GOVERNOR RON DESANTIS, in his official capacity as a custodian of public records, and the EXECUTIVE OFFICE OF THE GOVERNOR,

Respondents.
_____/

ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND DISMISSING COMPLAINT

This cause came before the Court upon: (1) the Petition for Writ of Mandamus, Complaint to Enforce the Public Records Act, and Ex Parte Motion for Alternative Writ of Mandamus ("Petition") filed by J. Doe, anonymously and individually, a/k/a "FloridaSupremeCourtPRR @protonmail.com" ("Petitioner"); and (2) the Response to this Court's Order to Show Cause ("Response") filed by Governor Ron DeSantis ("Governor"), in his official capacity as a custodian of public records, and the Executive Office of the Governor ("EOG")(collectively "Respondents"). This Court, having considered the Petition, the Response, Petitioner's Reply, exhibits, affidavits, statutes, and case law, and having held a hearing on December 20, 2022, finds as follows:

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

1. During an interview on August 25, 2022, the Governor stated that he asked a group of people he trusts to interview potential nominees for appointment to the Supreme Court of Florida. Pet. ¶ 6. The Governor referred to these individuals as "six or seven pretty big legal conservative heavyweights." Id. The Governor declined to identify the legal heavyweights, saying simply that "it's private." Id. Shortly thereafter, the *Sun-Sentinel* editorial board asked the Governor's staff to identify these individuals, but they declined to do so. Pet. ¶ 7.

2. On October 5, 2022, Petitioner submitted an anonymous public records request seeking communications or evidence of such communications between the Governor's office and the "legal conservative heavyweights" with whom the Governor consulted. Pet. ¶ 1. Specifically, the Petitioner requested:

> Any and all materials, on official devices or personal devices used for official business in whatever form, including but not limited to call logs, emails, or texts between or among Governor Ron DeSantis, Casey DeSantis, the governor's chief of staff, his executive or personal assistants or aides, his general counsel or anyone within the general counsel's office, the director of appointments or anyone within the director of appointment's office, and the "six or seven pretty big legal conservative heavyweights" described by the governor in an interview with Hugh Hewitt on August 25, 2022.

Pet. ¶ 8 & Ex. A; DeLorenz Aff. ¶ 18. The Governor's Office of Open Government ("OOG"), which fulfills requests for public records in EOG's custody, acknowledged receipt of the request the following day. Pet. ¶ 9 & Ex. A; DeLorenz Aff. ¶ 19.

3. On October 12, 2022, Petitioner requested an update on the status of the request. Pet. ¶ 10 & Ex. A. Christopher DeLorenz, Director of the OOG, informed Petitioner that it has a "high volume of requests" and that once documents are compiled and reviewed, they are released." Id.; DeLorenz Aff. ¶¶ 4, 21. According to DeLorenz, as of November 22, 2022, the EOG had approximately 256 pending public records requests, many with multiple subparts. DeLorenz Decl. ¶¶ 10, 11-12. This includes approximately 165 pending requests ahead of Petitioner's. Id. ¶ 29.

4. On October 15, 2022, Petitioner revised the request to seek the disclosure of the names of the conservative legal heavyweights, the dates and locations of their interviews with the now justices, and the date of the Governor's (or his agents') communications with those persons. Pet. ¶ 11 & Ex. A. On October 18, 2022, Petitioner threatened litigation and DeLorenz responded that "[i]t would be unfair if we were to prioritize your request over all our other requests." Pet. ¶ 13 & Ex. A; see also DeLorenz Aff. ¶ 23. That same day, Petitioner informed the OOG that he or she would withdraw the request entirely "if the governor's office identifies the conservative legal

heavyweights who interviewed the nominees and the vacancies for which the governor consulted them." Pet. ¶ 14 & Ex. A.

5. On October 26, 2022, DeLorenz informed Petitioner that he was conducting an investigation to identify the names of the individuals, but that further clarification was required. Pet. ¶ 16; DeLorenz Aff. ¶ 26. DeLorenz specifically inquired whether Petitioner was referring to all of the justices appointed by the Governor or only those justices up for retention election. Id. Petitioner responded that he or she would like the information for each justice appointed by the Governor, but would be amenable to a partial disclosure as soon as practicable for those justices approaching merit retention elections followed by a later disclosure of the remaining justices. Pet. ¶ 17 & Ex. A. The OOG now asserts that it is unable to satisfy Petitioner's request without confirmation of the identities of the "legal conservative heavyweights," and to prevent disclosure of their identities, the Governor has invoked the executive privilege. DeLorenz Aff. ¶ 30.

6. The day after the Petitioner clarified the request, a Petition in the name of "J. DOE, anonymously and individually, a/k/a 'FloridaSupremeCourtPRR@protonmail.com'" was filed seeking to compel Respondents to produce the requested information. The Petition includes two claims: Count I is a claim for mandamus, and Count II is a claim for declaratory relief. Petitioner also asked for entry of an alternative writ of mandamus, an immediate hearing, and an award of reasonable costs and attorney's fees.

DISCUSSION

7. This Court denies the Petition for several reasons, each sufficient standing on its own. First, this Court cannot issue a writ of mandamus, or award fees and costs, to an email account or otherwise anonymous party. Second, Petitioner is not entitled to relief as he or she failed to submit a sufficiently specific request for public records. Third, this Court cannot issue a writ of mandamus because Petitioner has not established a clear legal right and improperly seeks

to compel a discretionary duty. Fourth, this Court cannot compel Respondents to produce the information requested because it is protected by the executive privilege. In addition, Petitioner's request for declaratory relief and attorney's fees and costs is denied, and the Governor is dismissed from this action. Each of these points is addressed below.

I. A Writ of Mandamus is Not Available to an Anonymous Petitioner.

8. Petitioner seeks relief in mandamus under Rule 1.630 of the Florida Rules of Civil Procedure. Rule 1.630 requires a petition for an extraordinary writ, including a writ of mandamus, be filed "in the name of the petitioner in all cases." The Rule does not allow a request (or a grant) of mandamus to a fictional or anonymous party. The Petition fails to comply with Rule 1.630 as it was purportedly filed by "J. DOE, anonymously and individually, a/k/a 'FloridaSupremeCourtPRR@protonmail.com.'" This Court may not, however, award a writ of mandamus to an email account.

9. Rule 1.630's mandate that a party be named in "all cases" comports with the principles of mandamus as set forth in Florida case law. Grants of mandamus confer a *personal* right. See, e.g., Pace v. Singletary, 633 So. 2d 516 (Fla. 1st DCA 1994)(finding the inmate was not entitled to relief in mandamus as he lacked the personal right to receive money). To be entitled to a writ of mandamus, the *petitioner* must have a clear legal right to the requested relief. See Chapman v. State, 910 So. 2d 940 (Fla. 5th DCA 2005)(recognizing the petitioner had no "personal right to have the arrest warrant executed"). Neither Rule 1.630 nor Florida case law permit an email account to invoke this Court's jurisdiction and receive an extraordinary writ. Lawsuits are public events. Federal caselaw provides anonymity only where matters are of a highly sensitive and personal nature, there is a real risk of physical harm, or the purpose of the lawsuit is to preserve an existing form of anonymity. The risk that a plaintiff may suffer some embarrassment is not enough. See Doe v. Frank, 951 F. 2d 320, 322 (11th Cir 1992).

10. Similarly, this Court cannot award costs or attorney's fees to an email account. Because an award of mandamus operates to afford complete relief, a petition seeking the same must be brought in the name of the petitioner "in all cases." See Fla. R. Civ. P. 1.630. Mandamus "will not lie where continued judicial supervision is required." Town of Manaplan v. Rechler, 674 So. 2d 789, 790 (Fla. 4th DCA 1996); see also Stone v. Ward, 752 So. 2d 100, 101 (Fla. 2d DCA 2000). As such, this Court cannot award mandamus, or costs or attorney's fees, to an unnamed party and later attempt to correct the matter after issuance of the writ. See Fla. Agency for Health Care Admin. v. Zuckerman Spaeder, LLP, 221 So. 3d 1260, 1264 n. 5 (Fla. 1st DCA 2017) (noting the "lower court was without authority to issue mandamus relief and retain jurisdiction for computation of reasonable reimbursement costs at some future date"). Because the Petition fails to meet the express requirements of Rule 1.630, Petitioner's request for mandamus is denied.[1] See Major v. Hallandale Beach Police Dep't, 219 So. 3d 856, 858 (Fla. 4th DCA 2017) (affirming denial of requested mandamus for the petitioner's failure to strictly comply with Rule 1.630).

II. Petitioner is Not Entitled to Relief Because Petitioner Failed to Submit a Sufficiently Specific Request for Public Records.

11. Section 119.07(1)(a), Florida Statutes, provides that "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." A public record is defined by statute as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. The Florida Supreme Court has further defined a public

[1] In addition, Petitioner's attempt to proceed anonymously infringes on the public's fundamental interest in open judicial proceedings. See Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988).

record as "material prepared in connection with official business which is intended to perpetuate, communicate, or formalize knowledge of some type." Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 640 (Fla. 1980). To establish a cause of action under the Public Records Act, a party must "prove that they made a specific request for public records, the [agency] received it, the requested public records exist, and the [agency] improperly refused to produce them in a timely manner." O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036, 1040 (Fla. 4th DCA 2018) (quoting Grapski v. City of Alachua, 31 So. 3d 193, 196 (Fla. 1st DCA 2010)).

12. Petitioner has not established that it submitted a sufficiently specific request for public records. Petitioner's initial request of October 5, 2022, requested "any and all materials . . . in whatever form" showing communications between the Governor and persons in his office and the "six or seven pretty big legal conservative heavyweights." Petitioner's initial request is vague and not specific in scope or subject matter, as it does not delineate when these communications occurred, or identify the topic of the communications requested, or specify the identities of the "legal conservative heavyweights."

13. However, subsequent correspondence between Petitioner and the OOG, and Petitioner's argument at the hearing, made clear that Petitioner's request was not about obtaining a specific public record. Instead, Petitioner's request was an attempt to determine who the Governor conferred with regarding his Supreme Court appointments. Indeed, the Petitioner informed the OOG that he or she would "withdraw the request entirely if the governor's office identifies the conservative legal heavyweights who interviewed the nominees and the vacancies for which the governor consulted them." Pet. ¶ 14 (emphasis added). Moreover, the Petition asserts that Respondents have not disclosed "the 'legal conservative heavyweights' who helped the governor decide the makeup of the Supreme Court of Florida." Pet. ¶ 18. It is clear the Petitioner seeks information—the identification of the legal heavyweights—which is not a public record, but

is instead information known only to the Governor and his advisors. The mere identity of the legal heavyweights meets neither the statutory definition of a public record nor the definition set forth by the Florida Supreme Court in Shevin. In the absence of a sufficiently specific request for a public record, Petitioner is not entitled to the relief requested in the Petition.

III. Petitioner Is Not Entitled to a Writ of Mandamus Because Petitioner Has Not Established a Clear Legal Right and Seeks to Compel a Discretionary Duty.

14. Petitioner's request for a writ of mandamus is also denied because Petitioner has not established a clear legal right and improperly seeks to compel a discretionary duty. To be entitled to a writ of mandamus, the petitioner "must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." Zuckerman Spaeder, 221 So. 3d at 1263 (citations omitted). "The duty of the respondent in a mandamus action must be ministerial in nature, and not discretionary." Id. A duty is considered ministerial when "there is no room for the exercise of discretion, and the performance being required is directed by law." Id.

15. Petitioner has not met the requirements for a writ of mandamus. Petitioner's request is vague and does not seek a public record. A public records custodian has an obligation to furnish records *only after* the "person requesting them identifies the portions of the record with sufficient specificity to permit the custodian to identify the record." Woodard, 885 So. 2d at 446. Because Petitioner's request fails to identify any public record with the requisite specificity, there is no clear legal right for Petitioner to inspect or copy records. Id.; see also O'Boyle, 257 So. 3d at 1040.

16. Additionally, Petitioner does not seek to compel a purely ministerial duty. Petitioner's vague and ill-defined request requires the EOG to evaluate what potentially responsive materials exist and determine whether those materials are public record or exempt or privileged. Under the facts of this case, this is a discretionary act. While an agency has a general duty to provide access to public records, the agency's records custodian has a concomitant duty to review

and redact any exempted portions of public records. See § 119.07(1)(c), (d), Fla. Stat.; see also Zuckerman Spaeder, 221 So. 3d at 1263. Accordingly, Petitioner's right to public records is not absolute, the EOG's duty is not ministerial, and Petitioner's right is not indisputable. See Zuckerman Spaeder, 221 So. 3d at 1263 (holding the requester's right to the records was not absolute because AHCA's "duty to protect exempted information through redaction precedes its duty to provide the documents" to the requester); see also Lee Cty. v. State Farm Mut. Ins. Co., 634 So. 2d 250, 251 (Fla. 2d DCA 1994) ("Mandamus was inappropriately issued . . . because the act involved requires discretion. The [governmental entity] is statutorily required to protect the confidentiality of the records."). Petitioner's request for a writ of mandamus is therefore denied.

IV. The Identities of the "Legal Conservative Heavyweights" Are Protected by the Executive Privilege.

17. Even if Petitioner requested public records with sufficient specificity and properly stated a claim for mandamus, the Petition must still be denied because the information sought, the identities of the "legal heavyweight conservatives," which are necessary to satisfy Petitioner's request, is protected by executive privilege.

18. From the beginnings of our nation, "executive officials have claimed a variety of privileges to resist disclosure of information the confidentiality of which they felt was crucial to fulfillment of the unique role and responsibilities of the executive branch of our governments." In re Sealed Case, 121 F.3d 729, 736 (D.C. Cir. 1997). Applicable to the instant case are limited forms of the executive privilege referred to as: (1) the deliberative process privilege; and (2) the communications privilege.

19. The deliberative process privilege originated in the eighteenth and nineteenth centuries within the concept of the English "crown privilege." See Russel L. Weaver & James T.R. Jones, The Deliberative Process Privilege, 54 Mo. L. Rev. 279, 283 (1989). This common law privilege allows a chief executive to "withhold documents and other materials that would reveal

'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" In re Sealed Case, 121 F.3d at 737 (citing cases). To qualify for the deliberative process privilege, the material must be pre-decisional and deliberative. Id. The purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions by allowing government officials freedom to debate alternative approaches in private." Id. (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)).

20. The communications privilege allows a chief executive to withhold materials that reflect executive decision making and deliberations and that the chief executive believes should remain confidential. In re Sealed Case, 121 F.3d at 744; see also Trump v. Thompson, 20 F.4th 10, 25 (D.C. Cir. 2021). The privilege applies not only to materials viewed by the chief executive, but also to records solicited or received by the chief executive or his or her immediate advisers who have "broad and significant responsibility" for advising the chief executive. Trump, 20 F.4th at 25-26. The privilege is rooted in the separation of powers doctrine and "derives from the supremacy of the Executive Branch within its assigned area of constitutional responsibilities." United States v. Nixon, 418 U.S. 683, 708 (1974); see also Trump, 20 F.4th at 26. As the Supreme Court explained:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality in judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Nixon, 418 U.S. at 708. While this qualified privilege is held by the executive, it is not for the benefit of the chief executive as an individual, but "for the benefit of the public." Trump, 20 F.4th

at 26 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 449 (1977)).

21. Florida courts have likewise recognized that all three branches of government, including the executive, have unique privileges that stem from the separation of powers. For example, the Florida Supreme Court has recognized both a legislative privilege and a judicial privilege. See, e.g., League of Women Voters of Fla., 132 So. 3d at 145 (recognizing a legislative privilege based on "inherent principles of comity that exist between the coequal branches of government"); Times Pub. Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995) (holding clerks of the court, when acting under their article V powers, are not subject to oversight and control of the legislature under Florida's public records laws); State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994) (stating a judge may not be examined as to his or her thought process in making a decision).

22. More recently, the First District Court of Appeal in Florida House of Representatives v. Expedia, Inc., 85 So. 3d 517, 523 (Fla. 1st DCA 2012), suggested that the same separation of powers privileges afforded to the legislature also exist for the Governor. While addressing a legislative privilege, the court likened the application of the legislative privilege to that held by the executive branch. Id. ("Additionally, as with their counterparts in the judiciary and the legislature, public officials in the executive branch are entitled to a testimonial privilege."). The court held that "the privileges and immunities protecting all public officials, including members of the legislature, arise from the common law," and continue to exist by virtue of section 2.01, Florida Statutes, which provides that the "common law and statute laws of England which are of a general and not local nature . . . are declared to be of force in this state." Id. at 523. The court also held that the legislative privilege existed by "virtue of the separation of powers provision in the Florida Constitution," explaining that

> The power vested in the legislature under the Florida Constitution would be severely compromised if legislators were required to appear in court to explain why they voted a particular way or to describe their process of gathering information on a bill. Our state government could not maintain the proper "separation" required by

> Article II, section 3 if the judicial branch could compel an inquiry into these aspects of the legislative process.

Id. at 524.

23. Like Expedia, other Florida decisions have recognized certain protections against the disclosure of confidential information related to an executive official's discretionary and constitutional duties, albeit through different terminology.[2] See, e.g., State, Dep't of Health & Rehab. Servs. v. Brooke, 573 So. 2d 363 (Fla. 1st DCA 1991); see also Chavez v. State, 132 So. 3d 826, 830-31 (Fla. 2014) (finding the legislature, through enactment of a statute, could not exclude certain clemency materials from confidentiality as the Governor's clemency powers are derived from the Constitution); Parole Comm'n v. Lockett, 620 So. 2d 153, 158 (Fla. 1993) (finding the separation of powers prohibited the court from requiring the Parole Commission from producing investigative files compiled on behalf of the Governor related to his clemency powers); Girardeau v. State, 403 So. 2d 513, 517 n.6 (Fla. 1st DCA 1981) ("We are not, however, insensitive to the need for freedom of communication, which often means confidentiality and freedom from compelled disclosure"). For example, the Brooke Court held it was an abuse of the trial court's discretion to require the Secretary of the Department of Health and Rehabilitative Services to appear and provide information that was within the realm of the Secretary's discretionary authority related to the Department's programs and budgetary decisions. Brooke, 573 So. 2d at 370-71. Like the other cases addressed herein, the holding in Brooke was based on separation of powers:

> as in any other case involving the discretionary integrity of the respective branches of government, we will not only zealously protect the independence of the judicial branch but will, with equal vigor, guard the constitutional prerogatives of the other branches under the doctrine of the separation of powers.

[2] The Florida Supreme Court has also touched upon the executive privilege when analyzing privileges that are embedded in the Florida Constitution's separation of powers clause. See Florida League of Women Voters, 132 So. 3d at 145 (citing to the United States Supreme Court case of Nixon, which outlines the executive privilege, and commenting that "respect between the three branches is inherent in our democratic system" and that the "the privilege can be said to derive from the supremacy of each branch within its own assigned areas of constitutional duties").

Id. at 371 (emphasis added). Accordingly, Florida decisions have historically recognized certain protections afforded to each governmental branch, including the executive, rooted in common law and the separation of powers doctrine. This executive privilege is likewise recognized here.

24. Additionally, the Florida Constitution recognizes that some records are made "confidential by this Constitution," and the separation of powers principle that underlies the privilege is firmly grounded within constitutional text. See Art. I, § 24, Fla. Const.; see also Expedia, 85 So. 3d at 519 (noting the legislative privilege is "implicit" in the Florida Constitution's separation of power provision). Simply put, the absence of a subpoena is even more reason for this Court to find that the Governor should not be compelled to answer questions about the identities of advisors in the appointment process. While addressing a legislative privilege, the Florida Supreme Court held that the "strong public policy, as codified in our state constitution, favoring transparency and public access" was not conclusive, and that the doctrine of separation of powers weighed in favor of recognizing the privilege. League of Women Voters of Fla., 132 So. 3d at 144. Here, the separation of powers doctrine likewise favors enforcement of the executive privilege.[3] See Brooke, 573 So. 2d at 371 (identifying the importance of guarding the "constitutional prerogatives" of the branches of government under the separation of powers).

26. This Court also finds that the purpose underlying the executive privilege supports its recognition here. To effectively discharge his constitutional duty, the Governor must be permitted to have access to candid advice in order to explore policy alternatives and reach appropriate decisions. See Nixon, 418 U.S. at 708; see also Freedom Found. v. Gregoire, 178 Wash. 2d 686, 698 (Sup. Ct. Wash. 2013). The interest in maintaining the confidentiality of the executive is vital to the public, as it fosters informed and sound gubernatorial deliberations and

[3] Constitutional context aside, the privilege likewise arises from English common law which continues to exist today. See § 2.01, Fla. Stat. ("The common and statute laws of England which are of a general and not local nature . . . are declared to be of force in this state. . . ."); see also Expedia, 85 So. 3d at 523.

decision making. See Guy v. Judicial Nominating Comm'n, 659 A.2d 777, 783 (Sup. Ct. Del. 1995). Much like the legislative privilege discussed in Expedia, the power vested in the executive branch, and particularly in the chief executive, would be severely compromised if it were required to disclose confidential information concerning its decision making and deliberations as it relates to its constitutionally mandated duties. Expedia, 85 So. 3d at 524.

27. In this case, Petitioner seeks information related to the Governor's constitutional duty to fill judicial vacancies, and, in particular, the identity of the "conservative legal heavyweights" consulted by the Governor with respect to such appointments. The Florida Constitution assigns the power to appoint persons to fill judicial vacancies only to the Governor. Article V, section 11(a) of the Constitution specifically states:

> Whenever a vacancy occurs in a judicial office to which election for retention applies, the governor shall fill the vacancy by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission.

The Florida Supreme Court has consistently recognized that the Governor's power of appointment is a uniquely executive responsibility and an important discretionary function. See, e.g., In re Advisory Opinion, 276 So. 2d 25, 30-31 (Fla. 1973) (addressing the governor's discretion to select appointees while placing a check on the governor's authority by recognizing the power to promulgate rules of the judicial nominating commission remains with the members of the commission); In re Advisory Opinion, 551 So. 2d 1205, 1209 (Fla. 1989) (providing requested advice to the Governor on the appointment process, but expressly noting the Court's limitations and that the Court was not "venturing to advise [him] as to [his] course of action"); Pleus v. Crist, 14 So. 3d 941, 945 (Fla. 2009) ("We recognize that, in fulfilling this constitutional duty, the Governor has discretion in his selection of a nominee from the list.").

28. This Court finds that both the executive communications and deliberative process privileges apply to bar the request for mandamus here because the information sought is only available from the Governor and his staff and obtaining it would necessarily require him to divulge "deliberations compromising part of the process by which governmental decisions and policies are formulated." See In re Sealed, 121 F.3d at 737 (citations omitted). Such information likewise encompasses gubernatorial decision making and deliberations the Governor believes should remain confidential. Id. at 744. Accordingly, the information requested cannot be obtained without probing into the Governor's consultations and improperly piercing both the deliberative process and communication prongs of the executive privilege.

29. Were this Court to grant the Petition and require Respondents to turn over the requested information, it would undoubtedly impact the judicial appointment process. First, it would be contrary to the public interest. The privilege is not for the executive, but for the benefit of the public to protect the "effectiveness of the overall governmental system at stake." See Killington, Ltd. v. Lash, 572 A.2d 1368, 1374 (Vt. 1990); see also Trump, 20 F.4th at 76. Second, it would create a chilling effect on the Governor's ability to seek advice from others. See Guy, 659 A.2d at 784-85 (recognizing that the Governor's responsibility for appointing judges of high integrity and excellent legal abilities would be "compromised if the source and substance of the advice and information provided to the governor by the [judicial nominating] commission were not protected"); see also Freedom Found., 178 Wash. 2d at 698 (finding the refusal to recognize the privilege "would subvert the integrity of the governor's decision making process, damaging the functionality of the executive branch and transgressing the boundaries set by our separation of powers doctrine"). Therefore, this Court finds that the executive privilege bars Petitioner's request to compel the disclosure of the requested information and serves as a basis to deny the Petition.

V. Petitioner Is Not Entitled to Fees, and the Governor is Dismissed.

30. Petitioner's Motion seeks attorney's fees and costs under Section 119.12, Florida Statutes. Pet. ¶30. Section 119.12(1), Florida Statutes, permits an award of attorney's fees against an agency only if:

> (a) The agency unlawfully refused to permit a public record to be inspected or copied; and
>
> (b) The complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the civil action, except as provided under subsection (2).

A refusal is unlawful under the statute when "a court determines that the reason proffered as a basis to deny a public records request is improper." B&L Serv., Inc. v. Broward Cty., 300 So. 3d 1205, 1208 (Fla. 4th DCA 2020) (citation omitted). A refusal may also be unlawful if the agency "unjustifiably fails to respond to a public request by delaying until after the enforcement action has been commenced." Office of State Attorney for Thirteenth Judicial Circuit v. Gonzalez, 953 So. 2d 759, 764 (Fla. 2d DCA 2007). However, delay alone does not create liability under section 119.12. Id. at 765. Instead, an award of fees under Section 119.12 is proper only if the delay is unjustified. Consumer Rights, LLC v. Union Cty., Fla., 159 So. 3d 882, 885 (Fla. 1st DCA 2015). Stated otherwise, "reasonable delay is allowed," including the "reasonable custodial delay necessary to retrieve a record and review and excise exempt material." Siegmeister v. Johnson, 240 So. 3d 70, 73 (Fla. 1st DCA 2018) (quotation omitted).

31. Any minimal delay by Respondents here is well justified by the circumstances. The OOG promptly recognized receipt of Petitioner's request and informed Petitioner that the OOG was processing a "high volume of requests." At the time of filing the Response, Petitioner's request was one of hundreds in the queue, many of which preceded Petitioner's request.[4]

[4] The Petitioner is not entitled to skip over those requesters that precede him or her simply because he or she has the ability and means to file suit. Petitioner's rights to public records are not greater or less than

Nevertheless, the OOG began its investigation shortly after Petitioner revised his or her request to seek the identities of the conservative legal heavyweights. After the initiation of the investigation, and after Petitioner filed suit, the records custodian became aware of Respondents' desire to assert the executive privilege. Accordingly, this Court finds that there was no unlawful refusal by Respondents and denies Petitioner's request for fees and costs.

32. Moreover, because the Governor is not an "agency" Petitioner's request for fees and costs as against the Governor is denied. Section 119.12, Florida Statutes, provides for an award of fees and costs "against the responsible agency." § 119.12(1), Fla. Stat. (emphasis added). As a constitutional officer, the Governor is not an "agency" under Chapter 119. See Justice Coal. v. The First District Court of Appeal Judicial Nominating Comm'n, 823 So. 2d 185, 188 (Fla. 1st DCA 2002) ("Constitutional officers do not generally fall under the chapter 119 definition of 'agency.'"). Likewise, because the Governor is not an "agency," this public records case, which seeks to enforce Petitioner's rights under Chapter 119, is not appropriately brought against the Governor and is therefore dismissed as to Governor. See Lock v. Hawkes, 595 So. 2d 32, 36-37 (Fla. 1992) (holding that Chapter 119's definition of agency was inapplicable to the legislature and reinstating the trial court's decision which dismissed the case on grounds it was without subject matter jurisdiction under the separation of powers doctrine).

VI. Petitioner Is Not Entitled to Immediate Declaratory Relief.

33. Lastly, this Court denies Petitioner's request in the Motion that this Court "declare that Respondents violated the Public Records Act." See Pet. p. 12. Declaratory relief may not be granted in the context of an alternative writ of mandamus brought under Rule 1.630.

34. Nevertheless, Petitioner has failed to meet his or her burden to show that they are

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any other citizen. Stated differently, the fact that Petitioner filed suit does not warrant a complete toppling of the OOG's intended processing of its many pending requests. See Promenade D'Iberville, LLC v. Sundy, 145 So. 3d 980, 983 (Fla. 1st DCA 2014) ("Florida law doesn't allow public records custodians to play favorites . . .").

entitled to declaratory relief. See Rhea v. Dist. Bd. of Trs. of Santa Fe Coll., 109 So. 851, 859 (Fla. 1st DCA 2013). Section 86.011, Florida Statutes, permits this Court to "declare rights, status, and other equitable or legal relations." Petitioner has not established a "right" to any specific public record. Instead, Petitioner seeks information—the identity of the conservative legal heavyweights—which is not a public record. See § 119.011(12), Fla. Stat.; see also Shevin, 379 So. 2d at 640. This Court cannot declare that Respondents violated the Public Records Act in the absence of an appropriate public records request. See Woodard, 885 So. 2d at 445-46. Nor can this Court declare that Respondents violated the Public Records Act when there has been no improper refusal to produce any public records and the information requested is shielded by the executive privilege. See O'Boyle, 257 So. 3d at 1040 (requiring a sufficiently specific request of public records). Accordingly, Petitioner is not entitled to declaratory relief. Based on the foregoing, it is therefore **ORDERED** and **ADJUDGED:**

1. The Petition for Writ of Mandamus is **DENIED;**
2. The Complaint to Enforce the Public Records Act is **DISMISSED WITHOUT PREJUDICE;**
3. Petitioner's request for a Declaration that Respondents violated the Public Records Act is **DENIED;** and
4. Petitioner's request for attorney's fees and costs is **DENIED.**

DONE and ORDERED in Tallahassee, Leon County, Florida, on January 3, 2023.

ANGELA C. DEMPSEY
Circuit Judge

Copies to: Counsel of Record via the e-portal