—— No. 92171-7

THE SUPREME COURT
FOR THE STATE OF WASHINGTON

TIMOTHY WHITE

Petitioner,

vs.

SKAGIT COUNTY; ISLAND COUNTY

Respondents.

COUNTIES' JOINT ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

White, the petitioner, does not meet the requirements set forth in RAP 13.4(b) for the court's acceptance of a petition for review of the Court of Appeals decisions *White v. Skagit County and Island County*, No. 72028-7-I (July 13, 2015) (hereafter "Div. I Op.")

White sought electronic copies of general election ballots cast by voters in several Washington counties. All of the counties denied his request based on the Washington Constitution's ballot secrecy provision and Washington's strict ballot security statutes. White sued Skagit and Island Counties. The Snohomish County Superior Court upheld the counties' denial, concluding that constitutional and statutory provisions regarding the handling of ballots constituted an "other statute" exemption under the Public Records Act (PRA). Division One affirmed. White now seeks this Court's review.

This Court should deny review of Division One's decision because it does not conflict with a contemporaneous Division Two decision reaching the same result; it predictably and unremarkably protects ballot secrecy consistent with Article VI, section 6; it does not raise an issue of substantial public importance; and there are ample safeguards and avenues for the public to oversee elections without compromising ballot secrecy or security.

ISSUE

White has not shown review is warranted under RAP 13.4(b), but if White's Petition for Review were granted, the issue would be:

Do Article VI, section 6 of the Washington Constitution and the strict ballot security provisions in Title 29A RCW constitute an "other statute" exemption under the PRA where these provisions permit robust public oversight of elections in many ways but they do not allow anyone other than county elections officials to touch or possess voted ballots or copies of voted ballots?

STATEMENT OF THE CASE

Under the PRA, White requested "copies of electronic or digital image files of all pre-tabulated ballots received, cast, voted, or otherwise used in 2013 general election." CP 255.

There was no dispute about the counties' compliance with the statutory requirements that ballots be kept in secure storage unless removal is needed for tabulation, canvassing, or to comply with a court order. Copies, if required to be made for damaged ballots, were also maintained in secure storage and are not displayed. To tabulate votes, which necessitates scanning the ballots, the counties use computers running the Ballot Now and Tally programs. These computers "are standalone devices and are not connected to the internet or to the county's

computer system, which provides additional security for the scanned ballot images. The public does not have access to these voting devices," CP 150, 182, and cannot touch ballots, but may observe the proceedings: political parties and other organizations may designate official observers; observers and the public may observe testing of vote tallying systems; counting centers are open to the public; political party observers may call for a random check of ballot counting equipment; observers may attend any recount; and the review of questioned votes by the county canvassing board are open public meetings, with published notice and rules. Div. I Op. at 8-9.

Skagit and Island counties each denied White's request for disclosure of the requested ballots. Island County explained the ballot security and secrecy reasons for its denial in a comprehensive response, but did not itemize each of the 28,668 identified ballots. CP 234-36. Skagit County explained its reasons for denial in a two-page letter and a 2,111-page exemption log identifying approximately 35,000 voted ballots (CP 104) by serial number with a citation to the statutes and regulation that "require ballots to remain in secure storage unless opened by a court or canvassing [board] for a specific authorized purpose." CP 230, 232.

White sought review in Snohomish County Superior Court under RCW 42.56.550, which requires the counties to show cause why each had

refused to allow inspection or copying of the requested records. At the conclusion of de novo hearings on the merits, the superior court held that the ballots were exempt from disclosure under the PRA because "the legislature did not intend to subject ballots to the Public Records Act." CP 20-34, Div. I Op. at 3.

Overlaying the Snohomish County Superior Court's comprehensive memorandum decision is the court's observation that "the secrecy of a citizen's vote 'is the cornerstone of a free democratic government." Div. I Op. at 2. The Snohomish County Superior Court also held:

> The statutory scheme controlling ballots in RCW Chapter 29A is very long and complex and, therefore, how it expressly exempts ballots from public records disclosure cannot be found in just one quote from one statute. However, taken as a whole, RCW 29A expressly exempts election ballots from disclosure as public records.

CP 8. In a related decision involving the denial of White's request for identical records from Clark County, the Clark County Superior Court similarly held that:

> Taken as a whole, RCW 29A is a detailed comprehensive, regulatory scheme for the administration of public elections in the state of Washington. Chapter 29A.60 specifically includes numerous legislatively enacted policy provisions to ensure the integrity of public elections, such as sealing ballot containers, canvassing board membership, audit and

> certification of results, recounts, election observers, provisional ballots, reconciliation reports, etc.

Clark County Superior Court decision at 3 (Appendix 1).

On appeal, Division One considered "whether copies of ballots are exempt under an 'other statute" and recognized that "[a]n exemption may be found in an 'other statute' even if it is not stated explicitly." Div. I Op. at 2 *citing* RCW 42.56.070(1); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, (*PAWS II*) 125 Wn.2d 243, 263-64, 884 P.2d 592 (1994).

Division One recognized that "[t]he constitutional mandate for a secret ballot is implemented by statutes codified in Title 29A RCW." Div. I Op. at 3. Division One continued:

> In Title 29A RCW, the legislature has gone into great detail to ensure that the process of collecting, counting, storing, and ultimately destroying ballots achieves the constitutional mandate for a secret ballot. The only statutory provision for copying of ballots is found in RCW 29A.60.125. The statute permits duplication "only if the intent of the voter's marks on the ballot is clear and the electronic voting equipment might not otherwise properly tally the ballot to reflect the intent of the voter." Ballots must be duplicated by teams of two people, and those people must record their actions in writing to create and maintain an audit trail of the actions they take. RCW 29A.60.125. Original and duplicate ballots must be sealed in secure storage at all times, "except during duplication, inspection by the canvassing board, or tabulation." RCW 29A.60.125.

Div. I Op. at 6.

Division One also explained how releasing ballots, which includes the images that White requested, would thwart the constitutional mandate for ballot secrecy:

> Releasing voted ballots for general public inspection would risk revealing the identity of individual voters. According to a declaration from the Elections Director in the Office of the Secretary of State, voters sometimes place identifying marks on ballots contrary to voting instructions, for example by signing their names when making corrections or by writing comments about their intent. Each time ballots are handled, there is the potential to misplace, damage, or lose them. **And as the Elections Director explains, where there is low turnout in a small precinct, even a ballot devoid of identifying marks can be tied back to a voter by comparing it with voters credited with returning ballots on particular dates.**
>
> Releasing copies or images presents the same risk of identification of voters as disclosure of the paper ballot. To hold that a copy or duplicate or image file must be produced in response to a public records request would undermine the constitutional mandate for absolute secrecy of ballots. We conclude that the records White requests are "ballots" and they are subject to the strict statutory regulation of ballot handling and storage.

Div. I Op. at 7-8 (emphasis added).

In a similarly well-reasoned analysis Division Two held that Article VI, section 6 directed the legislature to guarantee absolute secrecy

of electors' votes and held that the legislature enacted statutes and directed the secretary of state to adopt regulations pursuant to specific statutory authority that requires strict ballot security. *White v. Clark County,* No. 46081-5-II at 10, 12 (June 30, 2015). Thus, Division Two also held that Clark County complied with the PRA because the body of election laws required withholding of ballot images.

ANALYSIS

A petition for review will be accepted only:

> (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) if the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

A. There is no conflict between the two divisions of the court of appeals and neither decision conflicts with supreme court precedent.

It is not surprising that both divisions of the Court of Appeals reached the same conclusion: the body of law directing the security and handling of ballots, including facsimiles and electronic images of ballots as defined under RCW 29A.04.008(1), effects the purpose of a

constitutional mandate for ballot secrecy and precludes disclosure of ballots under the PRA.[1]

The decisions are not in material conflict with each other. They do not change the status quo: ballots have never been subject to disclosure unless ordered by a court in an election dispute under RCW 29A.60.110(4). Nor do the principles relied upon by the courts of appeals conflict with any supreme court precedent.

The PRA must be interpreted to avoid the absurd results. *See Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). It must also "give way to constitutional mandates," *Freedom Foundation v. Gregoire*, 178 Wn.2d at 695, which our courts recognize as a force behind the argument that constitutional provisions can serve as PRA exemptions. *Herald-Republic*, 170 Wn.2d 775, 808, 246

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[1]White cites to a San Juan Superior Court case in an attempt to create a suspicion of county error in the processing of ballots. PFR at 3, 5. However, this court "cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings[.]" *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005) *citing In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003); RAP 9.11. The San Juan decision and any argument based on it should be disregarded. But even if this Court were inclined to consider it, the San Juan County case did not involve the security or disclosure of voted ballots. White's complaint was that a specific system, which allowed election officials and voters to track whether their ballots had been received and counted, had to be certified. The system did not affect the tabulation of ballots, nor was the system's efficacy challenged.

P.3d 768 (2011). Because the constitutional mandate extends to the canvassing process, *State ex rel. Doyle v. Superior Court*, 138 Wash. 488, 492, 244 P. 702 (1926), interpreting the PRA to require disclosure of voted ballots would present an absurd result. *See City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975) (A statute that conflicts with a prohibition contained in the constitution is void.)

The constitutional conflict is avoided by following precedent that allows an "other statute" to exempt records from disclosure. RCW 42.56.070(1). An "other statute" does not need to use the words "confidential" or "exempt." *See Hangartner v. City of Seattle*, 151 Wn.2d at 453 (holding that RCW 5.60.060(2)(a), protecting attorney client communication, is an "other statute" under the PRA.) Nor does an "other statute" need to expressly mention the PRA or expressly make particular records confidential. It is sufficient that disclosure conflicts with the legislative purpose of the "other statute." *See PAWS II*, 125 Wn.2d at 262 ("Given the *potential* for unfunded biomedical grant proposals to eventuate in trade secrets as broadly defined by the statute, this 'other statute' operates as an independent limit on disclosure of portions of the records at issue here that have even potential economic value.") (Italics in original.) In *PAWS II*, the court found support for this conclusion in a body of statutes, including RCW 19.108.010(4), defining a trade secret;

RCW 19.108.020(3), allowing protection of trade secrets by court order; RCW 19.108.050 (giving courts broad authority to preserve the secrecy of trade secrets); Laws of 1994, ch. 42, § 1, p. 130 (a legislative declaration of public policy for confidentiality and prevention of unnecessary disclosure); and RCW 4.24.580 (anti-harassment law geared to protect researchers). None of these statutes mentions the PRA.

Thus, Division One was correct to conclude that the Washington Constitution and the comprehensive statutory scheme requiring ballot security from cradle to grave constitute an "other statute" exemption under the PRA.

Division Two's decision does not fail or present a conflict simply because it considered a regulation under the umbrella of Article VI, section 6 and a comprehensive statutory scheme requiring ballot security. Our state constitution mandates that the legislature protect the secrecy of the vote. *See State ex rel. Empire Voting Mach. Co. v. Carroll*, 78 Wash. 83, 85, 138 P. 306 (1914) (To "guard against intimidation and secure freedom in the exercise of the elective franchise" Article VI, section 6 of the Washington Constitution admonishes the legislature to "secure to every elector absolute secrecy in preparing and depositing his ballot.") Following this mandate, the legislature directed the Secretary of State to adopt standards and procedures to "ensure the secrecy of a voter's ballots"

and to "guarantee the secrecy of ballots" to fulfill the constitutional mandate. *See* RCW 29A.04.611(11) and (34). The enacted regulations simply supplement the constitutional and statutory provisions creating a comprehensive scheme that constitutes an "other statute exemption."[2] *See Weyerhaeuser Co. v. State*, 86 Wn.2d 310, 317, 545 P.2d 5 (1976) ("regulations so adopted [at the express direction of the legislature] are 'entitled to considerable weight in determining legislative intent,' unless compelling reasons are presented sufficient to show the scheme is in conflict with the intent and purpose of the legislation.") *citing Earley v. State*, 48 Wn.2d 667, 673, 296 P.2d 530 (1956).

As the Snohomish court analyzed, "RCW 29A.60.120 and RCW 29A.60.125 contain a description of the only time when RCW Chapter 29A allows a ballot to be duplicated." CP 25. This and other restrictions bar disclosure of the digital images that White requested by not allowing their duplication. *See* Div. I Op. at 4 ("all ballots—including originals and duplicates—are maintained in a secure area from the moment they are deposited or received until they are eventually destroyed.")

Division One's opinion that the counties' explanations were sufficient to give White notice of the reasons for non-disclosure does not

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[2] The regulations are not overbroad. They are limited to voted ballots and do not, for example, exempt the Secretary of State's records from disclosure because state officials cannot take possession of voted ballots.

present a conflict either. White cannot deny that the reasons for denying one ballot apply to all of the ballots. Thus, it was just as reasonable for Island County to group the non-disclosed ballots under a three-page explanation, CP 234-36, as it was for Skagit County to give a one page explanation and briefly repeat the explanation throughout a 2,111 page exemption log. CP 230. 232. In compliance with *Sanders v. State*, 169 Wn.2d 827, 839-40, 240 P.3d 120 (2010), which disallowed "the mere identification of a document and the claimed exemption," neither county simply quoted the PRA exemption. Both counties clearly explained that the cited laws and regulations controlling the security of ballots barred disclosure. This "enabled White and ultimately the trial court to assess whether or not images of voted ballots are subject to the same provisions for secure storage as the originals." Div. I Op. at 13.

Further, White's argument that the voted ballots could have been redacted to remove stray marks does not establish a conflict or error. The Snohomish court summarized in detail why "[t]he constitutional mandate of absolute secrecy could not be adequately accomplished" by redaction. CP 29-30. Possession of voted ballots would allow anyone to isolate all of the ballots from a small precinct that may have distinctive candidates and issues. This condensed pool of potential voters could be compared with the county auditor's public report of who voted and when the ballot was

received. *See* RCW 29A.60.235. Metadata, which White sought for the ballot images, would further indicate when each ballot was scanned. Ballots could then be further segregated by machine vote, e-mail ballots, and ballots including write-in votes, possibly in distinctive handwriting. As the state's Director of Elections declared,

> This is illustrated by Washington State's least populated county. Garfield County has 1,567 registered voters. In a low 20% turnout election, only 313 votes would be cast in the entire county. Release of subtotaled votes cast by precinct, city and district boundaries could jeopardize the voter's identity.

See CP 93. Requiring disclosure of ballots, even if redacted to remove stray marks, would defeat the constitutional mandate and legislature's intent to secure absolute voter secrecy. Disclosure of all of the voted ballots in an election is categorically different from the fleeting glance that an observer might get at a ballot when watching the tabulation or canvassing process. Thus, the court of appeals correctly rejected White's argument that redaction could secure the mandated secrecy. Div. I Op. at 7 ("as the Elections Director explains, where there is low turnout in a small precinct, even a ballot devoid of identifying marks can be tied back to a voter by comparing it with voters credited with returning ballots on particular dates.")

B. White's issues do not present a significant question of constitutional law.

For the first time in the course of this litigation, White asserts that he is "seeking to ensure that the 'winner' of each election actually received the majority of the cast votes[.]" White's PFR at 3. Thus, he seeks to use the PRA to bypass the plain language in RCW 29A.60.110, which requires a court order founded on reasonable proof of a valid election dispute to disclose voted ballots.

Clearly, White cannot invade the sanctity of the ballot box when he does not even have a suspicion of a dispute. One hundred years of judicial precedent demands proof "that the election officials have failed to perform their duty" before the court will allow ballots to be disclosed. *See Quigley v. Phelps*, 74 Wash. 73, 77, 132 P. 738 (1913). Just as "[t]he argument that a contestant, though strongly suspecting malconduct, would have no means of proving it outside of the ballots themselves [did] not impress" the *Quigley* court, White's unfounded request for personal oversight of the election process should not impress this court. *See Quigley v. Phelps*, 74 Wash. at 85. *Also see State ex rel. Doyle v. Superior Court*, 138 Wash. at 492 (The sanctity of the ballot box "is not to be invaded simply because a vote is close, and it is hoped that a re-check of the work performed by the precinct officers may possibly show a change or an error.")

Because White has no evidence of a valid election dispute, he fails to identify a significant question of constitutional law that this court needs to resolve.

C. White's petition does not raise substantial public interest.

White crafted his evidence and arguments before the trial and appellate courts to avoid any allegation of fraud or misfeasance that would have triggered the necessity of a court order, under RCW 29A.60.110, to obtain copies of voted ballots. However, White now raises the specter of fraud to support his claim of a substantial public interest.

No evidence in the record supports White's current insinuations of fraud or misfeasance.[3] The articles and argument on election fraud, hacking and mistrust, PFR at 3-4, 5; vulnerabilities and inaccurate results in Kansas elections, PFR at 10-11; and the history of Initiative 276, which does not mention election records, PFR at 13; were not presented to the trial court or to the court of appeals. Thus, the court should not consider

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[3] Compliance with these statutory duties is a matter of professionalism, but the legislature also imposed significant criminal penalties and forfeiture of the election official's office for noncompliance. RCW 29A.84.720[3]; RCW 29A.84.030 (willfully violating any provision regarding the conduct of mail ballot primaries or elections is a C felony); RCW 29A.85.545. (removing a paper record produced by a direct recording electronic voting device is a C felony); RCW 29A.84.540 (gross misdemeanor to unlawfully remove a ballot from a voting center or ballot drop location); RCW 29A.84.680(2) ("Except as provided in this chapter [29A.84 RCW], a person who willfully violates any other provision of chapter 29A.40 RCW is guilty of a misdemeanor.")

these documents or the arguments they support.[4] *See State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986) (The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk, and any exhibits admitted in the trial court proceedings); *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977) (Matters referred to in a brief but not included in the record cannot be considered on appeal.)

The remainder of White's public interest argument baldly ignores the legislature's balancing of ballot security with public oversight and the counties' unchallenged compliance with that balance, including the use of voting systems approved by the Secretary of State to meet all the requirements of Title 29A RCW, RCW 29A.12.010, RCW 29A.12.020; precise direction on the counting and rejection of votes, RCW 29A.60.040, RCW 29A.12.050; and requirements for post-election audit of results, RCW 29A.60.185; systems maintenance, RCW 29A.60.090; and the inspection and handling of ballots, RCW 29A.60.110, .120, .125, .160.

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[4] When a party refers to matters in a brief that are not included in the record, the error should be brought to the appellate court's attention in a responsive pleading. *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n. 2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004 (2012)

Additionally, no evidence demonstrates that the counties failed to keep the counting centers open to the public and observers from political parties, RCW 29A.60.170(1), (2); to allow political party observers to agree to a random check of ballot counting equipment, RCW 29A.60.170(3), and to observe the post-election audit; or meet the eighteen elements for a publicly available reconciliation report. RCW 29A.60.135.

Contrary to White's insinuation, no admissible evidence shows that the counties' tabulation computers can be "hacked." There is no evidence that any county used uncertified software to tabulate ballots, an issue that White raises for the first time on appeal, or that the computer systems and programs fail to meet the statutory and regulatory requirements for security of the vote. *See* RCW 29A.12.080 (requiring that the voting device secure voter secrecy), WAC 434-335-040(3).[5] Meeting

[5] WAC 434-335-040 provides in part:

> (3) A vote tabulating system must:
> (a) Be capable of being secured with lock and seal when not in use;
> (b) Be secured physically and electronically against unauthorized access;
> (c) Not be connected to, or operated on, any electronic network including, but not limited to, internal office networks, the internet, or the world wide web. A network may be used as an internal, integral part of the vote tabulating system but that network must not be connected to any other network, the internet, or the world wide web; and
> (d) Not use wireless communications in any way.

these requirements, the Ballot Now and Tally computers are standalone set ups that are not connected to any network and a data card is used to transfer data between the two computers. CP 184.

White's new argument that the election laws merely delay access to ballots is another issue that was not raised before the superior court. Although Division Two declined to consider whether ballots could be released after the statutory retention period, Division I held that "[i]n Title 29A RCW, the legislature has gone into great detail to ensure that the process of collecting, counting, storing, **and ultimately destroying ballots** achieves the constitutional mandate for a secret ballot," Div. I Op. at 6 (emphasis added).

"Immediately after *their* tabulation, all counted ballots" must be placed in sealed containers, RCW 29A.60.110 (emphasis added), until destroyed according to retention scheduled validly enacted under RCW 40.14.050. Logically, this applies to the ballot images used to tabulate votes and serves the public interest by assuring that there will be no retaliation because of a person's vote. *See* 26 Am. Jur. 2d Elections § 307 (2012) (entitled "Necessity for Secrecy") (A secret written ballot is used "to prevent recrimination against people who vote for losing candidates.")

The public interest in the accurate counting of votes is already served by the opportunities for observation of election center activities in including the required random check of ballot counting equipment, RCW 29A.60.170(3); the post-election audit, RCW 29A.60.185, and the option of obtaining a court order for disclosure or correction of error, wrongful act, or neglect. RCW 29A.60.110, RCW 29A.68.011. White's neglect of these options defeats his public interest argument.

CONCLUSION

The laws and regulations adopted by the Washington legislature under the direction of the constitutional mandate at Article VI, section 6 of the Washington Constitution effectively satisfy the public's overriding interest in ballot secrecy while providing the opportunity for interested persons to observe election staff as they process and tabulate ballots. Lacking concrete evidence of fraud or misfeasance, which may have allowed White to obtain a court order to disclose the voted ballots, White fails to demonstrate a matter of public interest that would allow further review of the appellate decisions. The two appellate decisions do not conflict with each other or with any decision of this court and the appellate courts correctly found that White's request for disclosure of voted ballots had to be denied.

For the reasons set forth above, the Court should deny petitioners' petition for review.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

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APPENDIX 1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

TIMOTHY WHITE, **Plaintiff,** **vs.** **SKAGIT COUNTY; ISLAND COUNTY,** **Defendants.**	**No 14-2-01716-1** **ORDER ON SHOW CAUSE**

This matter came before the Court on Petitioner White's motion to show cause, and the Court having considered all pleadings on file in this cause and heard the argument of counsel and being in all matters duly advised hereby,

FINDS the following facts, which were agreed:

(1) The Petitioner made a public records request to Skagit and Island Counties on November 5, 2013, and a true and accurate copy of that request is attached to the White declaration.

(2) The Respondent Island County answered the requests as indicated in the attachment to the White declaration.

(3) The Respondent Skagit County answered the requests as indicated in the attachment to the White declaration.

Based on these agreed facts, the Court further,

FINDS AND CONCLUDES as follows,

1. **A public records request that is conditioned on the government halting use of the public record for its normal and intended government uses is not valid.** The Petitioner specifically requested images of only pre-tabulated election ballots in an electronic form readable on a regular home computer. Pursuant to statute, the Counties cannot generally create facsimiles of ballots in electronic or paper form either before or after tabulation. *See,* Section 2 *infra*. Thus, Island and Skagit Counties presented uncontroverted evidence that in their voting machine system, pre-tabulated ballots are only scanned by a special program that only saves data necessary for tabulation in a zero and ones format not readable on a home computer. The zero and ones data is then fed into a separate computer and program that tabulates or counts the votes. Petitioner's counsel at oral argument and Petitioner's written request specifically indicated Petitioner is not seeking the zero and ones images or data that is not in a readable form. According to the Counties' uncontroverted evidence, the zero and ones data cannot be used to spit out images or pictures of the original ballots as those images are not retained. The Counties state they do not have human readable copies of pre-tabulated or post-tabulated ballots. Thus, to comply with Petitioner's request for pre-tabulated copies, the Counties provided declarations stating they would have to stop the normal counting and processing of ballots during the election returns to make copies they do not already make. Based on the County's uncontroverted

declarations, I assume the zero and ones data cannot be converted to images of the original ballots and there are no other pre-tabulated electronic copies of the ballots.

There being no copies made of the ballots pre-tabulation, Petitioner's Public Records Act request is not just asking for a copy of the ballots; it is asking that all counting or tabulation of ballots cease in the middle of the election until copies of thousands of ballots can be made. While the Public Records Act gives the public access to government documents, it does not give individual members of the public the power to slow down operations or halt the normal government use of the documents by dictating the documents cannot be used before they are copied.

The Petitioner's request demands that election officials stop election tabulation and not use the ballots for their intended purpose, to be tabulated as a vote, in order to process a voluminous records request in the middle of the election. If 200 citizens all made different pre-tabulation ballot requests in a larger statewide election, this could severely impede the ability to certify election results on time. The Public Records Act allows the government at least five days to produce the documents or later if necessary. Pursuant to statute, ballots usually must be tabulated in one to three days. *See,* RCW 29A.60.160. Petitioner's demand that the ballots be copied pre-tabulation is a demand that public records request copying be accomplished in less than the five days the Public Records Act allows; it demands the copies be made before tabulation, and tabulation or counting must be done in less than three days. *Id.*

Although calling a ballot pre-tabulated versus post-tabulated sounds like two different documents, they are the same document. Pre-tabulation only means a ballot before it has been counted and post-tabulation is after it has been counted. The difference is not in the document, but timing as to whether the agency has done something with the document, i.e. counted it. If the

Petitioner meant to request a copy of ballots before there is some physical change to the ballot, like tearing off a tab, that was not the request made in this case. Such a different request may have resulted in a completely different reason given for non-disclosure, such as an explanation as to how that disclosure risks secrecy of the ballots. The court does not have the facts before it nor have the parties had a chance to address a different request.

If public records requests with a condition on use of the document were permissible, such requests could shut down aspects of government. For example, if a 10,000 page report was created for use at a special meeting, someone could make a public records request one minute before the meeting for the report "pre-presentation at the government meeting" and shut down or delay the meeting. Some record requests are voluminous and require significant redaction and may take a significant time to process. Government's use of documents is not required to cease just because the documents are the subject of a Public Records Act request. The Public Records Act does not grant requesters the power to condition requests on the government locating and making copies of the document before it is used for one of its normal government purposes unless the use physically changes the document. According to the declarations before me, the act of tabulating or counting ballots is not by itself an act that physically changes the ballots.

In this case, Petitioner's request was clear that he did not want copies made post-tabulation. He would only accept ballot copies if they were copied before the ballots were counted. I conclude, as a matter of law, a Public Records Act request conditioned on the government stopping use of the document until it is copied is not a valid request. Petitioner's demand for pre-tabulated ballots was not a valid request. The Counties had the right to reject the request for that reason alone.

2. **RCW Chapter 29A is a statutory scheme that exempts ballots and facsimiles and copies of ballots from disclosure under the Public Records Act.** RCW Chapter 29A controls precisely and completely every single movement and action that can be taken with ballots from the moment they are mailed or cast until their destruction. RCW 29A.40.160(13) provides the auditor must prevent overflow of each ballot drop box so ballots can be deposited securely. Ballots must be removed from a ballot drop box by at least two employees who must make a record regarding the removal, and must return the ballots to the county center in secured transport containers. RCW 29A.40.160. RCW 29A.40.110 provides all received return mail ballot envelopes must be placed in a secure location from the time of delivery to the county auditor until the opening. After opening and removing the ballots from the return envelopes, a statute provides the canvassing board *shall* return all ballots to secure storage until processing. *See,* RCW 29A.40.110(2). RCW 29A.40.110 expressly prohibits ballots from going anywhere else or being handled by anyone else and thus prohibits them from being taken somewhere to be duplicated before tabulation. *Id.* It provides they are only to go back in their secure container. *Id.*

RCW 29A.60.125 directly states, "[o]riginal *and duplicate ballots* must be sealed in secure storage *at all times*, except during duplication, inspection by the canvassing board or tabulation." (emphasis added). This statute expressly says except for certain circumstances controlled by other portions of the statute, ballots and all duplicates of ballots are always kept in election center secure storage. Thus, if any duplicates are made (there is a special section for duplicating damaged ballots), all duplicates must be sealed. This says duplicates statutorily cannot be released to the public. The statute does not list Public Records Act requests as one of the few special circumstances when ballots can be removed from secure storage. *Id.* RCW

29A.60.125 is an express legislative statement that ballots and all duplicates of ballots are not permitted to be released under the Public Records Act.

RCW 29A.60.110 states that *immediately* after tabulation all ballots counted must be sealed in containers. RCW 29A.60.110 (emphasis added). The sealed container can only be opened by the canvassing board in certain statutory listed special circumstances: as part of the canvass, to conduct recounts, to conduct statutory audits, or by order of the court. *See,* RCW 29A.60.110. This statute expressly states ballots are sealed and cannot be accessed by anyone except by the canvassing board for these limited purposes. It does not allow removal for duplication for public disclosure. RCW 29A.60.110 is also an express legislative statement that ballots are not obtainable by the public under the Public Records Act.

RCW 29A.60.170 states, "no person except those employed and authorized by the county auditor may touch any ballot or ballot container...." As RCW 29A.04.008 defines ballots to include any facsimile or copies of ballots as well as the original, the duplicated facsimile of a ballot is the equivalent of a ballot. RCW 29A.60.170 is an express legislative statement no one can touch ballots, which includes copies of ballots, except authorized county auditor employees. RCW 29A.60.170 and RCW 29A.04.088(1)(b) & (c) combined expressly prohibit disclosure of ballots to the public.

RCW 29A.60.120 and RCW 29A.60.125 contain a description of the only time when RCW Chapter 29A allows a ballot to be duplicated. A ballot can be duplicated only if a ballot is damaged or for some reason unreadable by the machine and the voter's intent is still clear. *Id.* Even then, the duplication process is highly controlled and "the duplicate ballots must be sealed in secure storage *at all times* except during duplication, inspection by the canvassing board or tabulation." RCW 29A.60.140 (emphasis added). Duplication must be in the presence of

witnesses and done by a team of two or more working together. The auditor must maintain an audit trail of the duplication including numerical matching markings on the original ballot and duplicate, a log, and initialing by the two persons duplicating. *See,* RCW 29A.60.120 and RCW 29A.60.125. It is inconceivable that the legislature would set up this kind of careful control for the duplication of damaged ballots, yet allow wholesale duplication of ballots as public records without mentioning or setting up any similar protections or controls.

In each of the few very limited special circumstances where ballots are allowed to be removed from secured storage, other sections of the statutes provide strict provisions to carefully continue to keep the ballots secure and unable to be accessed by anyone except election officials. *See*, RCW 29A.04.580 (providing that during a state review of county election proceedings ballots shall not leave the custody of the canvassing board); RCW 29A.60.050 (providing that where the county center has a question about validity of a vote the ballot goes to the canvassing board, but these ballots shall be preserved in the same manner as voted ballots); RCW 29A.60.095 (provides that records of votes from direct electronic voting devices must be stored and maintained for use *only* for a recount, by order of the canvassing board, by order of a court, or for statutory audits); RCW 29A.12.085 (provides that records of votes from direct electronic voting devices are subject to all the requirements for ballot handling, reconciliation transit, and storage and must be preserved in the same manner as ballots); RCW 29A.64.041 (provides that at a recount ballots shall only be handled by members of the canvassing board and that witnesses present can observe but cannot handle the ballot and may not make a record of the names, addresses, or other information on the ballots, declarations, or lists of votes except by court order).

The statutory scheme controlling ballots in RCW Chapter 29A is very long and complex and, therefore, how it expressly exempts ballots from public records disclosure cannot be found in just one quote from one statute. However, taken as a whole, RCW Chapter 29A expressly exempts election ballots from disclosure as public records.

The legislature's intent that ballots not be subject to the Public Records Act is exhibited and implemented, in large part, by defining ballots as not only the original ballot, but also every "facsimile of the content of a ballot" and any "physical or electronic record of choices of an individual voter." RCW 29A.04.008(1)(b) & (c). This definition expressly prevents getting around the strict controls over nondisclosure of original ballots via making copies of the ballots. The legislature's definition of ballots to include the facsimiles of ballots and ballots in transformed data form is a clear declaration that copies are not only to be treated similar to the original ballots, they are the equivalent of an original ballot. An original ballot cannot be released publicly or even touched by anyone except election officials. *See,* RCW 29A.60.170. By defining ballots to include all facsimiles of ballots the legislature intended to prevent exactly what is being attempted by Petitioner in this case, arguing pre-tabulated copies of ballots are not subject to the same restrictions on disclosure that apply to original ballots.

The legislature's intent that RCW Chapter 29A form a comprehensive scheme governing disclosure of all election materials is also clear from the fact that RCW Chapter 29A specifically provides that certain other non-ballot election materials controlled by RCW Chapter 29A are discloseable as public records. *See,* RCW 29A.08.720 (precinct list and current lists of registered voters are public records but to be made available for public inspection and copying under rules the county auditor and secretary of state proscribe – not the Public Records Act rules); RCW 29A.08.770 (secretary of state and county auditor shall make available for public inspection and

copying records related to implementing programs ensuring accuracy of lists of eligible voters); RCW 29A.08.810 and RCW 29A.08.835 (all records relating to voter registration are public records); RCW 29A.40.130 (any person may request a list of all voters issued a ballot and all voters who returned a ballot, which shall be handled as a public records request); RCW 29A.60.070 (precinct and cumulative election returns are public records); RCW 29A.60.195 (auditor must provide information on whether a provisional ballot was counted and if not why not on a free access system like a toll-free number or website); RCW 29A.60.235 (county auditor required to make publicly available reconciliation reports regarding the kinds and numbers of ballots). It would be superfluous to single out these specific forms of information and say they are publicly discloseable unless the rest of the statutory scheme made everything else non-discloseable. The sections indicating only certain items can be disclosed as public records indicates the legislature was carving out a few exceptions in a statutory scheme that otherwise does not permit public disclosure.

Instead of providing for public disclosure under the Public Records Act, the legislature crafted numerous provisions in RCW Chapter 29A that provide specific controlled ways for the public and election participants to check the election and voting process without risking violating the secrecy of votes and without prolonging uncertainty about election outcomes. There are specific means for citizen oversight and government checks on every single aspect of the voting process in RCW Chapter 29A. In this way, the legislature has delicately balanced the need for citizen oversight and involvement with the need for finality in elections and the need for absolute secrecy of votes.

Given the extreme detail throughout RCW Chapter 29A on how to deal with ballots and ballot images, if wholesale public disclosure of ballots were allowed, the Washington State

Legislature would have created carefully crafted procedures to protect the secrecy of the vote. Indeed, the legislature would be constitutionally required to do so. *See,* Const. art. VI, § 6. The constitutional mandate of *absolute* secrecy could not be adequately accomplished by just having government employees use their own discretion as to what is identifying on a ballot and what needs redaction. Nor are such employees even in a position to accurately ascertain what information could or could not be used to identify a vote. For example, only two citizens voted at the voting machine in this election. If someone had staked out the machines and saw who voted on them, that information combined with copies of the voting machine votes and metadata showing when they were cast could be used to identify who cast those votes. Likewise, patterns in voting data and how information can be used to identify voters may not be readily apparent to an election employee who may not have all election data before him at once or may not be a trained computer data expert. For example, disclosing a fax cover sheet separate from a fax vote would not seem problematic – unless you realized only one fax vote was cast. Likewise, a ballot with a write-in vote for John Smith may not seem on its face to identify who the voter is, unless you also know John Smith is the voter who cast the ballot. Election employees are not permitted to know who cast a ballot.

The sheer number of documents that would have to be reviewed for redaction by fallible humans without any rules or set procedures and the numerous unpredictable ways the documents could reveal voter identity are such that mistakes would be made absent clear protective rules and set procedures. If a ballot has a handwritten name is the chance someone will identify the handwriting a sufficient reason for nondisclosure? Is disclosure of a write-in vote in the same name as the voter a violation of absolute secrecy? Is a doodle on the ballot an identifying mark or not? A single mistake means the constitutional mandate for *absolute* secrecy is violated. The

Washington Constitution does not allow a scheme that provides for only substantial secrecy and that occasionally allows the identity of voters casting ballots to be mistakenly revealed. Unbridled and undirected discretion vested in numerous employees as to what is or is not too great a risk for violating secrecy would not comply with the constitutional mandate. The Constitution requires *absolute* secrecy. Const. art. VI, § 6.

If the legislature intended to allow public disclosure of copies of individual ballots it constitutionally would have crafted substantial safeguards into that process to assure absolute secrecy. RCW Chapter 29A provides no procedures to protect the secrecy of the vote upon public disclosure because public disclosure is not contemplated. The lack of any such statutory safeguards indicates the legislature had no intention that ballots be subject to public disclosure. *Compare*, RCW 29A.60.230, providing a special protection for aggregating public election results when the number of voters is so low in a precinct that separate reporting of precinct results may reveal identity).

While the Washington State Legislature could draft a statute that permits public disclosure of election ballots provided it adequately protected voter secrecy, the legislature chose not to do that. It enacted numerous alternate measures to assure the accuracy of the election process and allow citizen oversight that do not risk violating the secrecy of the vote to the same extent public disclosure of ballots would.

Petitioner argues that even if the legislature created a statute prohibiting the disclosure of ballots, the court can override that if it is unnecessary to protect an individual's privacy or any vital government function. The secrecy of a citizen's vote is the cornerstone of a free democratic government. It is essential to free elections that this secrecy and that privacy is inviolate. The ability of government to function through its elected representatives requires that election

contests and the questions of the validity of election results have some end and method of final resolution. This is vital to government function. Given the numerous and unpredictable ways ballot disclosure could be used to ascertain voters' identities, given the possibility of human error if we rely on people to individually redact thousands of ballots for identifying information, given the constitutional requirement for absolute secrecy, given the disruption to public confidence in election results that could be caused by endless private reviews of ballots, this court cannot find the protections of RCW Chapter 29A are unnecessary to individual privacy and vital government functions. The legislature created both the Public Records Act and RCW Chapter 29A. It is the legislature's right to not subject ballots to the Public Records Act and instead enact a precise careful well thought out scheme for protecting ballot security while allowing citizen oversight and government checks on election fairness and accuracy.

3. **The Counties did not have to respond to the "metadata and properties" request until Petitioner responded to the request to clarify.** It really is still not clear what Petitioner is seeking in terms of metadata and properties relating to pre-tabulated election ballots. Just saying metadata is "data about data" is not illuminating. How far forward and backward does the request go? Technically the tabulated final results of the election are data about and derived from the pre-tabulated votes. Is that metadata about pre-tabulated votes or post-tabulated votes? There may be computer or hard copy documents relating to the creation of the blank ballots that were sent out. That is data about the eventually filled out ballots. Does that fall under the request? If Petitioner is not seeking identifying information as to who has voted each ballot what is he requesting from the emails? Presumably the only thing in the email is the name, email address, and other identifying information, date of its receipt, and the filled out ballot, all potentially identifying information except for the ballot. So what is being requested from emails? This is

particularly concerning since if one matches the email identifying information with a time and date it might then be matched with the metadata of a voted ballot in email format of the same time and date. This is also true of the one faxed vote as the only fax cover sheet might be able to be matched to the only ballot appearing in a fax form via metadata.

Petitioner only wants metadata about pre-tabulated ballots, but the only data about pre-tabulated ballots is the zero and ones data which Petitioner does not want. If Petitioner does not want the zero and ones data itself, does he want data about the zero and ones data? That would be data about the data about the ballot records. Does Petitioner not want the outside envelope for paper ballots which identifies the voter, but does want the email equivalent which identifies the voter for email votes or does he want them treated alike? What are properties?

The agency does have to make a search for metadata, but it has the right pursuant to the Act to ask for clarification. This was particularly necessary here because the metadata is unusual due to unique machines and software used for voting. Determining what is specifically requested is also important because just the act of recovering metadata to comply with the record request, in and of itself, may reveal the identity of ballot voters to the persons copying the data and in that way violate constitutional secrecy requirements. The Counties cannot know how far this metadata request goes or what it means, nor make objections intelligently to the metadata request, without more clarification.

Until Petitioner responds to the request for clarification so the Counties know what he wants and the Counties then respond with what they are refusing to turn over or not, it is premature for this court to rule on whether certain metadata is exempt from the Public Records Act. Without clarification, it is also impossible for this court to determine whether the particular

metadata is an inextricably interwoven part of the ballot or could be used to identify a voter. That may be true for some metadata and not true for other metadata.

4. **The exemption log and explanation for not disclosing ballots was adequate to comply with the Public Records Act and the responses complied with the Public Records Act time requirements.** One county identified each ballot by a serial number. The other county just listed the total number of withheld ballots. Given the ballots cannot be identified by the voter, there is no logical or practical way to identify each ballot. If giving the serial number can trace to anything, that could be problematic as these may then be traced to individual names. According to the Petitioner's declaration, he himself found serial numbers with bar codes in another county violated secrecy provisions. Thus, it is hard to imagine he is requesting serial numbers as a way of identification. While the Counties could just arbitrarily number each ballot sequentially and list the numbers 1 to 28,000, this is form over substance. Demanding the Counties give each ballot an arbitrary number provides no real information about the exempted document to the requesting citizen. The Petitioner does not suggest how he thinks the ballots could have been identified individually or more specifically without providing identifying information. Given the nature of the requested documents, both Counties' responses were adequate. The explanation of the exemption to the Public Records Act was explained by both Counties with sufficient particularity to be understood and it is not necessary to repeat the same explanation thousands of times if it is the same for each ballot.

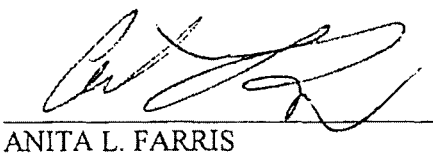
The Counties did not have to create an exemption log and provide reasons for nondisclosure of metadata until the metadata and properties request was clarified.

5. **The Counties' requests for attorney fees based on a frivolous lawsuit are denied.** The issues presented are of first impression in Washington, there is non-binding case authority going

both ways in other jurisdictions, and every point regarding adequacy of the responses was debatable. While the Counties have prevailed, this was not a frivolous lawsuit. It is further hereby,

ORDERED Petitioner's request for production of electronic copies of pre-tabulated ballots under the Public Records Act, RCW 42.56, is denied because RCW Chapter 29A exempts such records from the Public Records Act. *See,* RCW 42.56.070(1). Respondents' requests for attorney fees are denied.

DATED this 9th day of May, 2014.



ANITA L. FARRIS
Superior Court Judge

DECLARATION OF SERVICE

I, Judy Kiesser, hereby certify that on October 1, 2015, I served a copy of this document, via U.S. Mail, postage prepaid, upon the following:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed at Mount Vernon, Washington this 1st day of October, 2015.

Judy L. Kiesser

Judy L. Kiesser
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Attached for filing is:

"Counties' Joint Answer to Petition for Review"
(Certificate of service attached as last page)

Case name:

Timothy White, Petitioner vs. Skagit County; Island County, Respondents

State of Washington Supreme Court No. 92171-7

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