72028-7

72028-7

NO. 72028-7-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

TIMOTHY WHITE,

APPELLANT,

v.

SKAGIT COUNTY; ISLAND COUNTY,

RESPONDENTS.

AMICUS BRIEF OF THE SECRETARY OF STATE

ROBERT W. FERGUSON
Attorney General

Rebecca R. Glasgow, WSBA # 32886
Deputy Solicitor General

PO Box 40100
Olympia, WA 98504
360-664-3027

Office ID# 91087

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes

Washington Statutes

Other State Statutes

Washington Regulations

Other State Regulations

Other Authorities

I. INTRODUCTION

The legislature has imposed strict procedures governing the processing, counting, and secure storage of voted ballots, including electronic or digital images of ballots. Washington's election statutes balance the need for precise and unhampered ballot processing that minimizes risk of accidental error, loss, or violation of ballot secrecy with the desire for robust public oversight. While the public can observe ballot processing and tabulation from start to finish, Washington's comprehensive election statutes, as well as the absolute ballot secrecy requirement in the Washington Constitution, prohibit copying and release of voted ballots or their digital images. This is especially true where, as here, the request is for production of ballot images before tabulation.[1]

II. INTEREST AND IDENTITY OF AMICUS

As Washington's chief elections officer, the Secretary of State is particularly interested in maintaining the integrity of Washington elections by promoting correct application of Washington's strict election protocols and its absolute ballot secrecy requirement, while maintaining public oversight. The Secretary of State urges this Court to affirm.

---

[1] Mr. White submitted his request to every Washington county, and it appears no county provided the records he requested. CP 217-18. Mr. White also filed a public records claim against Clark County. The superior court upheld Clark County's denial and Mr. White has appealed to Division Two. *White v. Clark County*, No. 46081-5-II.

III. ARGUMENT

A. Mr. White Cannot Now Rewrite His Request, and the Counties Presented Uncontroverted Evidence That Fulfilling the Request as Made Would Have Drastically Delayed Tabulation

This Court should reject Mr. White's attempts to rewrite his public records request. Appellant's Opening Br. at 38-39; Appellant's Reply to Respondents' Briefs at 20-21. He requested electronic or digital copies of voted ballots to be made and produced before tabulation. Mr. White submitted his public records request on the day after the 2013 general election, after ballot tabulation had already begun. *See* CP at 217. The subject line of Mr. White's email was "Public Records Act request for today's ballot image files before tabulation this afternoon." CP at 217.

He noted that his request "includes records created today which must be copied before tabulation this afternoon or shortly." Mr. White stated multiple times that he wanted to obtain electronic or digital copies of voted ballots before the ballots were tabulated. CP at 220 (intending to "obtain a . . . digital ballot image file . . . *before the ballot is tabulated*;" "My intent is to request copies of the image files of ballots . . . , *before their votes are tabulated.*") (emphasis in original). While Mr. White said he was trying to avoid disrupting the election, he plainly requested "prompt disclosure within the PRA's five-day period" because "the window to research and document a challenge is but two weeks away. . . ." CP at 221.

Significantly, Mr. White also limited his request: "I am not requesting ballot image files of ballots already tabulated." CP at 220. "I request copies of records in the same electronic or digital file formats in which they were created or received," but also "in a format viewable on an up-to-date home computer." CP at 221.

Mr. White assumed that he could simply obtain a copy of the electronic file that is transferred from the Ballot Now program to the tabulation computer. *See* CP at 221. But that data file contains no ballot images, only ones and zeros, and that file is not readable with software typically found on a home computer. CP at 184.

In sum, the superior court properly found that Mr. White's request was "only" for "pre-tabulated election ballots in an electronic form readable on a regular home computer." CP at 6 (Decision at 2). While Mr. White may now wish that he had made a different request, he cannot rewrite his request on appeal. The adequacy and correctness of the counties' responses must be measured with his actual request in mind.

It is also well-settled that public records responses must be evaluated in relation to when they are made, and public agencies need not create records in response to a public records request. *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014) (The Public Records Act does not require agencies to create a record that is

nonexistent); *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000) (no duty to provide records that did not exist at the time of the request). The superior court properly found that in order to fulfill Mr. White's request, "[the counties] would have to stop the normal counting and processing of ballots during the election returns" to create electronic copies of ballots that they do not ordinarily make. CP at 6 (Decision at 2); CP at 184. At best, creation of Word or .pdf documents would have taken an average of 25 seconds per page, and would have delayed tabulation so much that the counties could not possibly certify results within 21 days as required. CP at 184; RCW 29A.60.190.

Mr. White now points to the Hart website, but the posted Hart brochure simply reflects that the Ballot Now program allows election workers to view ballot images on screen. Appellant's Opening Br. at 4 n.2 (http://www.hartintercivic.com/sites/default/files/BallotNow_brief.pdf).[2] It does not establish that a county can export an image that is readable on a home computer without creating an entirely new electronic record.

Mr. White also relies on *Fisher Broadcasting,* 180 Wn.2d at 524, to assert that if it is at all possible to create a responsive record in a readable format, then the agency must do so. That case does not go so far. Instead, the *Fisher Broadcasting* Court recognized that "whether a particular public

[2] This "evidence" is not in the record, it was not before the superior court, and it should not be considered where the counties have not been able to present evidence explaining its context. *State v. Taplin,* 36 Wn. App 664, 667, 676 P.2d 504 (1984).

records request asks an agency to produce [an existing record] or create a [new] record will likely often turn on the specific facts of the case," especially in this modern age of data storage in electronic databases. *Fisher Broadcasting*, 180 Wn.2d at 524. This is a factual question for the trial court, and here, the trial court found it uncontroverted that Mr. White's request would have required elections officials to create thousands of Word or .pdf records they do not already make. CP at 6-7.

In sum, Mr. White cannot rewrite his request on appeal. The counties presented uncontroverted evidence that it was impossible to simultaneously respond to his request and comply with the law governing ballot tabulation and election certification.

B. The Legislature Has Provided for Public Oversight of Elections So Observers Can Quickly Identify Error, While Maintaining Strict Integrity of Ballot Processing and Tabulation

Washington's legislature has provided for citizen oversight of ballot processing and tabulation while maintaining strict protocols to minimize the risk of fraud or mistake in vote counting. The political parties and other organizations can designate official observers whom the county auditors must allow to observe the county's centralized counting center where ballots are processed. RCW 29A.40.100; RCW 29A.60.170. Before an election, observers and the public must be permitted to observe testing of vote tallying systems. RCW 29A.12.130. Once ballot processing begins,

counting centers must be open to the public. RCW 29A.60.170; WAC 434-261-010. Anyone can watch, but only employees and those specifically authorized by the county auditor can touch any ballot, ballot container, or vote tallying system. WAC 434-261-010. Political party observers can call for a random check of ballot counting equipment. RCW 29A.60.170(3). Observers may also attend any recount, though they cannot handle ballots or record information about voters or votes. RCW 29A.64.041.[3]

When election officials question the validity of a challenged or provisional ballot, or when the intent of the voter cannot be resolved, the county canvassing board determines how the votes will be counted. RCW 29A.60.050, .140. Meetings of the county canvassing board are open public meetings. Notice must be published, and the board must make any rules available to the public. RCW 29A.60.140(5); WAC 434-262-025. Where canvassing boards display a ballot, they cover any marks that could destroy absolute ballot secrecy. *See* Const. art. VI, § 6.

Finally, the county auditor must prepare and make publicly available

---

[3] While Mr. White argues that the advent of centralized counting centers somehow reduced public participation, that is incorrect. Before Washington adopted an all vote-by-mail system, poll workers were generally paid, temporary election workers. *See, e.g.*, *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now* (*C.L.E.A.N*), 119 Wn. App. 665, 674, 82 P.3d 1199 (2004). Those workers now process and tabulate ballots at a centralized counting center where public observation is invited. Mr. White has offered no evidence, nor can he, to suggest that centralized processing, under party observer and public oversight, is somehow more likely to allow fraud or mistake. Appellant's Opening Br. at 10-12. In fact, centralized processing is more accurate and dependable, especially with precise ballot reconciliation. RCW 29A.60.235; WAC 434-261-110, -140.

detailed reports that precisely reconcile the number of ballots received, counted, and rejected, including specific accounting for various ballot types (for example, provisional ballots). RCW 29A.60.235. Public oversight of ballot processing and tabulation from start to finish, along with public reconciliation reports, allow a public check on all elections.

If a registered voter believes that there has been fraud or error, he or she can contest the election under RCW 29A.68, but the contest must be filed within ten days of official certification. RCW 29A.68.011. The election contest is the singular method for challenging an election, assuring an opportunity for the correction of fraud or error, but also promoting the public interest in the finality of elections. RCW 29A.68; *Reid v. Dalton,* 124 Wn. App. 113, 122, 100 P.3d 349 (2004) ("public interest demands that any challenge to the validity of the election be speedily filed and resolved.") Thus, Washington courts have consistently upheld and applied the bright-line time limit for election contests. *Id.*; *see also State ex. rel. Quick-Ruben v. Verharen,* 136 Wn.2d 888, 898, 969 P.2d 64 (1998). Real time public observation of ballot processing and counting ensures that any registered voter can obtain the information they need to contest an election within the ten-day limit in RCW 29A.68.011.

C. Handling of Ballots and Election Software Is Precisely Regulated to Avoid Fraud and Mistake, and Election Statutes Do Not Permit Officials to Create and Disclose Electronic Copies of Ballots

RCW 42.56.070 allows an agency to deny a public records request if an "other statute" "prohibits disclosure of specific information or records." Washington's elections statutes and regulations strictly govern the handling and storage of all ballots (the statutory definition of which includes electronic or digital copies) to prevent fraud and unintentional mistakes in ballot processing and counting. Fulfilling Mr. White's request would have required elections officials to violate these statutes. Thus, they are "other statutes" prohibiting disclosure.

While exemptions cannot be implied, if another statute or statutory scheme prohibits an agency from complying with a request, that is a valid exemption under the Public Records Act. *See Progressive Animal Welfare Soc'y. v. University of Washington* (*PAWS*), 125 Wn.2d 243, 263-64, 884 P.2d 592 (1994). In fact, the *PAWS* Court found that an anti-harassment statute was an "other statute" prohibiting disclosure even though it did not specifically state that certain records were confidential or private. *PAWS,* 125 Wn.2d at 263-64. Instead, the anti-harassment statute more generally protected animal researchers. So long as a statutory protection is properly invoked, it can justify non-disclosure even if it does not specifically invoke the Public Records Act or personal privacy. *See id.*; *see also Northwest Gas*

Ass'n v. UTC, 141 Wn. App 98, 168 P.3d 443 (2007) (upholding an exemption based on the vital government interest in protecting against terrorism, but unrelated to personal privacy). Washington's election laws prohibit copying or disclosure of voted ballots to preserve election integrity, a vital government interest.

1. "Ballot" is defined to include electronic or digital copies

The legislature has adopted a broad definition of "ballot" that includes not just paper copies of ballots: "'Ballot' means. . . [a] physical or electronic record of the choices of an individual voter in a particular primary, general election, or special election." RCW 29A.04.008(1)(c). Electronic or digital copies of ballot are "ballots" within the meaning of Washington's election statutes and regulations. RCW 29A.04.008(1)(c). This broad definition of ballot alone distinguishes Washington from other states White discusses, including California, Colorado, and Minnesota. Cal. Elec. Code (West 2014) § 301; Minn. Stat. §200.02 (2014) (no definition).[4]

Mr. White attempts to limit the definition of "ballot" to only the original voted ballot, reading "or" in RCW 29A.04.008 as an "exclusive disjunctive." *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010) (exclusive disjunctive appears, for example, when someone offers "tea or coffee," meaning "not both"). However, the

[4] As Skagit County has noted, this definition incorporating electronic ballot images distinguishes *Marks v. Koch*, 284 P.3d 118, 123 (Colo. App. 2011), where the court had to turn to a dictionary definition of "ballot."

Washington Supreme Court has also read "or" as an "inclusive disjunctive," meaning one or more unlike things are included: he has not seen "'wolves or bears . . . in that part of the country.'" *Lake*, 169 Wn.2d at 528. (quoting Webster's Third New International Dictionary 1585 (2002)).

To read "or" in the definition of "ballot" as exclusive, thereby excluding copies of ballots, would not be consistent with the overall context of the ballot security statutes. For example, where a ballot is damaged or where votes are cast using something other than a ballot, election statutes and regulations provide for a precise ballot duplication process so that votes can be read by scanning machines. RCW 29A.60.125; WAC 434-261 -005(2), -045, -075. In those circumstances, both the original and duplicate are "ballots" requiring secure storage. RCW 29A.60.125; WAC 434-261-045. Thus, read in context, "or" in the definition of "ballot" is inclusive, especially for purposes of applying security requirements.

Mr. White seeks acceptance of newly submitted evidence and asserts, for the first time in his reply, that Pierce County has publicly released "ballot image reports" and this supports his reading of the statutes. Reply at 8-9. Even if this court were to consider this argument, it is incorrect. Pierce County's web posting shows a series of numbers, not ballot images, for example: "00001970000631580000001005000 00002001000011900; 00001970000631580000001005000000200200000

0001; 00001970000631580000001005000002003000000001. . . ." http://www.piercecountywa.org/Document_Center/View/6983. Thus, even if Mr. White's newly submitted evidence were accepted into the record, it fails to establish that electronic or digital copies of ballots do not meet the statutory definition of "ballot."

2. Strict statutes and regulations requiring ballot security do not allow elections officials to create electronic copies of ballots during processing and tabulation for purposes of responding to a public record request

Washington's election statutes and regulations prohibit copying scanned ballots during ballot processing and tabulation. Skagit County's Response Brief accurately recites the Washington laws that strictly govern the handling of ballots from the moment they are placed in a drop box or received in the mail to the moment they are secured in sealed containers for the statutory secure storage period prior to destruction. Skagit County's Resp. Br. at 13-15. When ballots are not (1) being taken from their envelopes and manually checked, (2) duplicated for proper scanning (under RCW 29A.60.125 or WAC 434-261-075), (3) inspected by the canvassing board, or (4) tabulated, they must remain at all times in secure storage. RCW 29A.40.110(2); 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.").[5] "Secure storage must employ the use of numbered seals and logs, or other security measures that will detect any inappropriate access." WAC 434-261-045. "Ballots *and ballot images* may only be accessed in accordance with RCW 29A.60.110 and 29A.60.125." WAC 434-261-045 (emphasis added).[6]

These strict protocols necessarily prohibit election workers from taking any other action affecting ballots, especially during processing and tabulation. This legislative judgment makes sense because each time ballots are handled, there is the potential to misplace, damage, or lose some ballots, something that occurred in the historically close 2004 Gregoire/Rossi election. CP at 93-94. The same risk of loss or deletion of electronic files would arise from manipulation of election machine software or hardware to accomplish a collateral task like creating readable images of ballots to respond to a public records request, not to mention the severe delay in tabulation this task would cause. CP at 94, 186. This interest in following

[5] Mr. White asserts that rejected ballots that are not counted are not subject to the sealing requirements, but that is incorrect. Appellant's Opening. Br. at 28 n.29. All ballots, including any duplicates, must be held in secure storage unless they are being processed or tabulated. RCW 29A.60.125; WAC 434-261-045,-120. Rejected ballots would not be removed from storage for tabulation, but they remain in secure storage through the statutory secure storage period. *See* WAC 434-261-120.

[6] The Washington legislature has specifically delegated to the Secretary of State the authority, as the state's chief election officer, to make reasonable rules for the orderly, timely, and uniform conduct of elections. RCW 29A.04.611. The Secretary must create rules establishing standards and procedures "to ensure the accurate tabulation and canvassing of ballots," "to prevent fraud," to ensure the security of ballots, and to "guarantee the secrecy of ballots" in all circumstances. RCW 29A.04.611(9), (11), (13), (33), (34), (39). Where the legislature has specifically delegated this authority, the resulting regulations carry the weight of the legislative delegation. Thus WAC 434-261-045 can serve as a legitimate source of the prohibition against disclosure.

precise procedures goes beyond simply preserving a chain of custody to preserving the integrity of the election itself.

Elections officials are subject to criminal penalties if they violate election laws, including laws requiring ballot security. RCW 29A.84.680 (gross misdemeanor to willfully violate RCW 29A.40, setting protocols for processing ballots and requiring secure storage). *See also* RCW 29A.84.420(2) (disclosing information allowing a person to identify who voted a ballot); .540 (improperly removing a ballot from a voting center or ballot drop location); .560 (tampering with voting machine or device).

Because Mr. White plainly asked for electronic or digital copies of ballots to be made pre-tabulation, but Washington's election statutes and regulations do not allow for such copying, this court can end its analysis here and affirm the superior court. Chapters 29A.40, 29A.60, and 29A.84 RCW are "other laws" that prohibit elections officials from making electronic copies of ballots, "in a format viewable on an up-to-date home computer," "*before the ballot is tabulated.*" CP at 220-21; *see also* RCW 42.56.070; *PAWS*, 125 Wn.2d at 261-64. Further, the Public Records Act does not require agencies to create records that do not already exist. *Fisher Broadcasting*, 180 Wn.2d at 522.

3. Secure ballot storage and destruction requirements prevent post-tabulation release of ballots

Even if this court were to interpret Mr. White's request to ask that

electronic copies be created post-tabulation, Washington's election statutes and regulations require *immediate* secure storage of ballots and ballot images after tabulation, leaving no room for creation of copies of ballots. RCW 29A.60.110; WAC 434-261-045. Ballots are then destroyed as soon as they are removed from secure storage months or years later. Allowing for release or private re-tabulation would defeat the legislature's interest in quickly resolving election contests to promote election finality.

"Ballots *and ballot images* may only be accessed in accordance with RCW 29A.60.110 and 29A.60.125." WAC 434-261-045 (emphasis added). RCW 29A.60.110 provides that "*[i]mmediately after their tabulation*, all ballots counted at a ballot counting center must be sealed in containers that identify the primary or election and be retained for at least sixty days or according to federal law [22 months for ballots cast for federal elections], whichever is longer." RCW 29A.60.110 (emphasis added); 52 U.S.C. § 20701; WAC 434-262-200. The definition of "ballot" includes electronic or digital copies. RCW 29A.04.008(1)(c). By statute, the containers may only be opened by the canvassing board in four specific circumstances: "[1] as part of the canvass, [2] to conduct recounts, [3] to conduct a random check under RCW 29A.60.170, or [4] by order of the superior court *in a contest or election dispute*." RCW 29A.60.110 (emphasis added). Mr. White has not shown, nor can he, that any of these circumstances justified breach of secure

storage to respond to his request.

This court must evaluate whether the counties properly denied Mr. White's request when it was made. *See Smith v. Okanogan County,* 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000). Unlike the requesters in Vermont and Michigan that Mr. White refers to, Mr. White made his request before the end of the statutory secure storage period. *Price v. Town of Fairlee,* 26 A.3d 26, 32; 190 Vt. 66 (Vt. 2011) (explaining that ballots could not have been released had a public record request been made within Vermont's 90-day statutory preservation period); Op. Att'y Gen. 7247 (Mich. 2010), 2010 WL 2710362, at *8 (Michigan ballots could not be released within the statutory period during which ballots must be kept in secure, sealed containers).[7] Thus, even in states where the legislature has permitted disclosure of voted "ballots," disclosure can occur only where a request is made after the statutory sealing period has expired.

Once the statutory sealing period is over, Washington ballots are destroyed according to retention schedules validly created pursuant to RCW 40.14.050. The State's interest in the finality of elections and in ballot secrecy prevent release of voted ballots even after the statutory sealing period. But this court need not reach that issue because the question before

[7] While Mr. White asserts that Minnesota provides public access to voted ballots, the adopted regulation that White refers to applies only to challenged ballots in recounts, and the regulations simply permits, but does not require, the election official to make photocopies. Minn. R. 8235.0800(2014).

the court is whether the counties properly denied Mr. White's public record request at the time when it was made.

4. Neither RCW 42.17A nor RCW 29A.04.230 makes electronic copies of ballots disclosable

Mr. White points to RCW 42.17A.001 to assert that the legislature intended ballots to be made public to promote transparency. Reply at 2-3. However, RCW 42.17A addresses political campaign and lobbying contributions. RCW 42.17A.001(1). RCW 42.17A does not discuss the handling or treatment of ballots at all.

Mr. White also asserts that RCW 29A.04.230 requires public disclosure of ballot images. Reply at 7-8. But Mr. White's reading of the statute misunderstands its plain language, which places a duty on the Secretary of State, not counties. RCW 29A.04.230 ("The secretary . . . shall keep records of elections held for which . . . she is required by law to canvass the results [and] make such records available to the public upon request.") The secretary's role in canvassing the results of statewide and multi-county elections is simply to aggregate results submitted by the counties. RCW 29A.60.250; .260; RCW 29A.04.013 ("canvassing" includes examining subtotals and cumulative totals to determine official returns). Under no circumstances does she take possession of ballots or ballot images. RCW 29A.04.230 does not establish digital copies of ballots are disclosable.

In sum, Washington's election statutes are other statutes that prevent elections officials from creating new electronic copies of voted ballots during tabulation. Secure ballot storage and ballot destruction requirements, along with principles of election finality, prevent later copying and release. The counties properly denied Mr. White's request.

D. Article VI, section 6 Requires Absolute Secrecy of the Ballot, and Redaction Alone Would Not Eliminate the Risk of Improper Disclosure of a Voter's Identity

Article VI, section 6 of the Washington Constitution guarantees every voter "*absolute* secrecy in preparing and depositing his ballot," the strictest language found among state constitutions at the time of its adoption. Const.art. VI, §6. (emphasis added).[8] Dictionaries existing in 1889 defined "absolute" as "not subject to exception."[9] The purpose of this provision was to procure ballot secrecy, regardless of the form of the ballot. *See State v. Carroll,* 78 Wash. 83, 85-86, 138 P. 306 (1914).

Washington's election statutes also require absolute ballot secrecy. RCW 29A.04.611(11), (34), (39) (requiring regulations to preserve ballot secrecy in all circumstances, but especially where a small number of ballots are counted or where small precinct returns might sacrifice secrecy); RCW 29A.08.625 (secrecy of provisional ballots); RCW 29A.60.230 (small

---

[8] *See also* Erik Van Hagen, *The Not-So-Secret Ballot: How Washington Fails to Provide a Secret Vote for Impaired Voters as Required by the Washington State Constitution*, 80 Wash. L. Rev. 787, 801-03, n.115-n.120 (2005) (listing examples).

[9] "[P]lain meaning of 'absolute' secrecy, according to dictionaries in use at the time of ratification, is secrecy . . . not subject to exceptions." *Id.* at 799.

precincts or precincts with limited returns); RCW 29A.60.160 (county auditors must exercise discretion in counting to preserve secrecy); RCW 29A.12.080 (requiring voting systems to preserve voter secrecy); RCW 29A.40.110 (requiring absolute secrecy for military and overseas voters' faxed or emailed ballots).

Mr. White requested that he be provided copies of ballots made prior to their tabulation. *E.g.*, CP at 220 ("I am not requesting ballot image files of ballots already tabulated."). County elections officials could not simultaneously respond to Mr. White's request and be sure they were complying with the absolute ballot secrecy requirements discussed above. Uncontroverted evidence in the record reflects that "releasing copies of ballots prior to election day or the certification of the election would compromise . . . ballot secrecy [of] voters." CP at 92. When a particular voter from a particular precinct has returned his or her ballot, that information is public, and lists of voters who have voted are requested frequently during an election. RCW 29A.40.130. For example, in Washington's least populated county, in a low 20 percent turnout election, only 313 votes would be cast in the entire county. CP at 93. Thus, release of subtotaled votes cast by precinct, city, and district boundaries, in conjunction with release of lists of voters who have returned their ballots, could risk connection of a voter to a particular ballot. CP at 93.

Significantly, this problem would not be apparent to an election official who is simply reviewing ballot pages for redaction.

Moreover, it is not uncommon for voters to make marks on ballots, making it possible to trace the ballot back to the voter, including comments, explanations of voter intent, initialing corrections, or writing themselves in as a candidate. CP at 93. It would be impossible for elections officials to review the tens of thousands of pages necessary to redact records that Mr. White requested, pre-tabulation, and certify the election on time. *E.g.*, CP at 217 ("request for today's ballot image files before tabulation this afternoon"). In sum, the counties could not have complied with Mr. White's request as it was written, without sacrificing absolute ballot secrecy. Thus, Washington's laws requiring absolute protection of voter secrecy are also "other statutes" justifying the counties' denial of Mr. White's request. RCW 42.56.070.

E. Mr. White Has the Burden to Show Lack of Vital Government Interest Supporting the Ballot Security and Secrecy Provisions

Mr. White also asserts that under RCW 42.56.210(2), the counties must show that these exemptions are necessary to protect an individual's right of privacy or a vital government function. But under RCW 42.56.210, it is the requester's burden to convince the superior court that the asserted exemption is unnecessary to serve one of these interests. *See Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 567–68, 618 P.2d 76 (1980) (burden

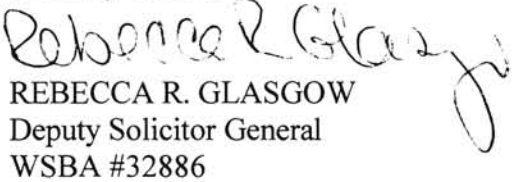
on the party seeking disclosure to establish exemption is clearly unnecessary). Here, the counties provided evidence that complying with Mr. White's request would require them to violate ballot secrecy and security requirements, both of which are vital to the integrity of elections. CP at 92-95, 149-51,181-85. Mr. White did not provide any evidence to show that application of ballot security and secrecy laws did not serve a vital government interest. *See* CP at 21 (finding the counties provided uncontroverted evidence). Thus, RCW 42.56.210(2) does not warrant reversal of the superior court.

IV. CONCLUSION

This Court should affirm the superior court and conclude that the counties properly denied Mr. White's request for electronic or digital copies of ballots created and produced before tabulation.

RESPECTFULLY SUBMITTED this 2nd day of December 2014.

ROBERT W. FERGUSON
Attorney General



REBECCA R. GLASGOW
Deputy Solicitor General
WSBA #32886
PO Box 40100
Olympia, WA 98504
360-664-3027
RebecaG@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via United State Postal Service and electronic mail, a true and correct copy of the Amicus Brief of The Secretary of State, upon the following:

Knoll D. Lowney
Marc Zemel
Smith & Lowney, P.L.L.C
2317 East John Street
Seattle, WA 98112
knoll@igc.org
marcz@igc.org

Daniel B. Mitchell
Island County Prosecuting Attorney
PO Box 5000
Coupeville, WA 98239
D.mitchell@co.island.wa.us

Arnie O. DENNY
Skagit County Prosecuting Attorney
605 South Third Street
Mount Vernon, WA 98273
arned@co.skagit.wa.us
melindam@co.skagit.wa.us

DATED this 2nd day of December 2014, at Olympia, Washington.

Stephanie N. Lindey
Legal Secretary