72028-7

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No. 72028-7

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TIMOTHY WHITE,

Appellant,

v.

SKAGIT COUNTY; ISLAND COUNTY,

Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON COALITION FOR OPEN GOVERNMENT

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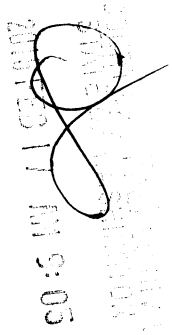

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONS

REGULATIONS

I. IDENTITY AND INTEREST OF AMICUS

WCOG is an independent, nonpartisan organization dedicated to promoting the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to foster open government processes, supervised by an informed citizenry, which is the cornerstone of democracy. WCOG's interest in this case stems from the public's strong interest in timely access to accurate information concerning the conduct of government and in maintaining government accountability to the people of the state of Washington. WCOG and its members believe that state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent manner. Access to public records under the Public Records Act, Chapter 42.56 RCW ("PRA") is an essential tool of transparency that should be protected and encouraged. WCOG is the state's freedom of information association, Washington citizens' representative organization on the National Freedom of Information Coalition, and a champion of the public's right of access in its educational programs and in court. WCOG has a legitimate interest in assuring that the Court is properly briefed on important issues involving the PRA.

II. STATEMENT OF THE CASE

WCOG generally relies on the facts set forth in the parties' briefs. There are two factual disputes that bear on WCOG's analysis of the legal issues.

First, the parties disagree about whether the computer running the Ballot Now program creates digital images of scanned ballots that can be downloaded later in response to a PRA request. *See App. Br.* at 3-4; *Resp. Br. (Skagit)* at 4, 8. If such images are created then such images should be disclosed after the election (see Argument section A), subject to redaction (see Argument section B).

Second, the parties disagree about whether White's request for "pretabulated" ballots could be satisfied by producing copies of the ballots after the election. *See App. Br.* at 39; *Resp. Br. (Skagit)* at 6, 38; *Reply Br.* at 20. However, the counties unambiguously informed White that there was no way to provide him with copies of the ballots before or after the election. CP 230, 235. At a minimum, the counties wrongfully withheld the records from White after the retention period was over because the ballots were not exempt at that time and should have been provided to White.

III. ARGUMENT

A. Ballots are not categorically exempt from disclosure, and no statute *requires* the counties to destroy ballots after the retention period provided by RCW 29A.60.110 has ended.

The counties' declarations describe a canvassing process in which it is not possible to scan or copy ballots in response to a PRA request either during or immediately after an election. The counties cite a number of statutes for the proposition that this tightly-controlled canvassing process is required by law. Assuming, *arguendo*, that there is no earlier point in the canvassing process at which a county could scan or copy ballots in response to a PRA request, the counties are still required to produce copies of ballots after an election is over because ballots are not categorically exempt from disclosure and no statute *requires* the counties to destroy ballots after the election.

The last step in the canvassing process described by the counties is governed by RCW 29A.60.110, which provides:

> Immediately 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, whichever is longer.
>
> In the presence of major party observers who are available, ballots may be removed from the sealed containers at the elections department and consolidated into one sealed container for storage purposes. The containers may only be opened by the canvassing board as part of the canvass, to conduct recounts, to conduct a random check

> under RCW 29A.60.170, or by order of the superior court in a contest or election dispute. If the canvassing board opens a ballot container, it shall make a full record of the additional tabulation or examination made of the ballots. This record must be added to any other record of the canvassing process in that county.

RCW 29A.60.110. This section is ***not*** an "other statute which exempts or prohibits disclosure of specific information or records" for purposes of RCW 42.56.070(1). Rather, this statute merely restricts access to ballots up to a particular point in time. The restrictions in the second paragraph only apply during the retention period required by the first paragraph. The counties cannot argue that the restrictions in the second paragraph continue to apply ***after*** the retention period because those restrictions do ***not*** authorize the destruction of ballots after an election and the counties admit that their normal practice is to destroy ballots after the retention period. *Resp. Br. (Skagit)* at 5.[1]

The counties have not cited any statute that prohibits the disclosure of ballots after the retention period provided by RCW 29A.60.110 has ended. Consequently, the counties rely on the erroneous argument that they are authorized or required to destroy ballots after an election even if those ballots are the subject of a PRA request. *Resp. Br. (Skagit)* at 15.

[1] Similarly, WAC 434-261-045 provides that ballots may only be accessed in accordance with RCW 29A.60.110 and RCW 29A.60.125 (relating to damaged ballots). Like RCW 29A.60.110, the WAC rule does not address the disposition of ballots after the retention period and does not prohibit the disclosure of ballots after the election is over.

But the PRA explicitly prohibits the destruction of public records until a request for such records is resolved. RCW 42.56.100. And the counties have not cited any other statute that would allow or require the destruction of ballots despite this prohibition.

RCW 40.14.060 does not require or even authorize the destruction of public records that are the subject of a pending PRA request. That section merely permits the destruction of public records under certain circumstances and requires such destruction to occur pursuant to an approved schedule. *Building Indus. Ass'n of Washington v. McCarthy (BIAW)*, 152 Wn. App. 720, 737-740, 218 P.3d 196 (2009), cited by the counties, holds only that an agency has no duty to produce public records that were destroyed ***before*** a PRA request was made. *BIAW* correctly notes that RCW 42.56.100 prohibits the destruction of public records that are the subject of a PRA request even if the records are lawfully scheduled for destruction. 152 Wn. App. at 740. Under RCW 42.56.100 and *BIAW*, the counties have no legal right to destroy the requested ballots pursuant to RCW 40.14.060 after White made his PRA request.

In sum, ballots are not categorically exempt from disclosure and no statute *requires* the counties to destroy ballots after the retention period provided by RCW 29A.60.110 has ended. Consequently, the counties violated the PRA by wrongfully withholding the ballots from White.

B. The ballot secrecy required by Wash. Const. art. VI, § 6 can be achieved by redaction.

WCOG does not dispute the basic proposition that Const. art. VI, § 6 gives each voter the right to "absolute secrecy in preparing and depositing his ballot." But the required voter secrecy can be achieved by redaction of identifying marks or other information that could be tied to a particular voter.

The counties argue that ballots are entirely exempt from public disclosure because the counties are required to destroy ballots after an election. *Resp. Br. (Skagit)* at 20. As explained in section (A), ballots are not categorically exempt from disclosure, and there is no requirement that ballots be destroyed after an election is over.

The counties have not explained why copies of ballots could not be redacted after an election is over. The counties thus concede, *sub silentio*, that redaction of identifying marks or other information that could be tied to a particular voter would achieve the voter secrecy required by Wash. Const. art. VI, § 6.

The Secretary of State (SOS) makes a similar concession in its amicus brief. The SOS asserts that effective redaction of ballots would be difficult and time consuming, and that a county could not review and redact thousands of pages of ballots to preserve voter secrecy and still

certify an election on time. *Amicus Br. of SOS* at 17-19. This argument applies only to the pre-certification release of records, not the post-certification release of records. Like the counties, the SOS thus concedes, *sub silentio*, that the voter secrecy required by Wash. Const. art. VI, § 6 could be achieved by redaction after an election is over.

C. Scanning or copying ballots, or converting existing electronic images to a different format, does *not* require the counties to "create" a new record.

Responding to White's request would not require the counties to create new records, which agencies have no obligation to do. *See Smith v. Okanogan County*, 100 Wn. App. 7, 994 P2d 857 (2000) (agency has no duty to create records that do not already exist). WCOG would agree that the PRA does not require the counties to recreate images of individual ballots from raw voting data. But White did not ask the counties to recreate images of ballots from such data. Rather, White asserts that scanned images are already created by the scanning process and that the counties simply need to produce such images in a readable format. *App. Br.* at 37, 40. As noted in section II, the counties assert that such images are not actually created by the Ballot Now computer program. *Resp. Br. (Skagit)* at 4, 8. WCOG takes no position on the parties' factual dispute.

Assuming, *arguendo*, that such images are created by the Ballot Now program, then the copying of such records, including any necessary

conversion of the image data to a usable electronic format, is required by the PRA and does not amount to the creation of new records under *Smith, supra*. *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 523-524, 326 P.3d 688 (2014) (agency was not required to correlate information from different systems to create a new document, but agency should have produced partially responsive existing documents); *see* WAC 44-14-050. Conversely, if such images are not created during the Ballot Now scanning process then the counties can respond to White's PRA request by scanning the paper ballots after the retention period provided by RCW 29A.60.110 has ended. Scanning paper records to create PDF files is the modern equivalent of making photocopies, and does not constitute the creation of a new record for purposes of *Smith, supra.*

While the parties disagree about whether retrievable digital images of ballots are created and stored by the Ballot Now program, the counties admit that such images exist temporarily on the Ballot Now computer(s), and that it would be possible to "screen print" such images from the Ballot Now program and save them as Word or PDF files.[2] *Resp. Br. (Skagit)* at 8; CP 184. WCOG does not dispute the counties' factual assertion that such a process would have taken weeks to complete, and could not be

[2] Print Screen is a key on most computer keyboards, and on most modern computers that key will save a bitmap image of the computer screen that can be pasted into a file. *See* http://en.wikipedia.org/wiki/Print_screen (last visited February 5, 2015).

done without delaying the election. *Id.* However, the counties erroneously assert, without citation to authority, that screen printing ballot images would have required election staff to "create a new record." *Id.* It is unclear whether the counties intended this comment to be a statement of fact or a legal argument.

This Court should unambiguously reject any erroneous suggestion that making a Print Screen image of a public record on a computer screen amounts to the creation of a new record for purposes of *Smith, supra.* The electronic image displayed on a government computer monitor is clearly a "writing" under the broad definition in RCW 42.56.010(4) and therefore a "public record" subject to the PRA. Print Screen is just one way for an agency to translate such images into a file that can be produced in response to a PRA request. *See* WAC 44-14-050.

D. The counties violated the PRA by failing to explain why ballots would be exempt and by withholding non-exempt records.

As noted in Section II (above), the parties disagree about whether White's request for "pretabulated" ballots could be satisfied by producing copies of the ballots after the election. *See App. Br.* at 39; *Resp. Br. (Skagit)* at 6, 38; *Reply Br.* at 20. However, the counties unambiguously informed White that there was no way to provide him with copies of the ballots before or after the election. CP 230, 235. At a minimum, the

counties wrongfully withheld the records from White after the retention period was over because the ballots were not exempt at that time and should have been provided to White.

An agency has the duty to provide the fullest assistance to requesters and the most timely possible responses. RCW 42.56.100. In this context, the counties had a duty to provide redacted copies of ballots as soon after the election as possible. They did not do so. Furthermore, in *City of Lakewood v. Koenig*, __ Wn.2d __, __ P.3d ___ (December 11, 2014), the Supreme Court confirmed that agencies have a duty under RCW 42.56.210(3) to explain why records are exempt from public disclosure, and that an agency's failure to provide an adequate explanation of exemption claims is a separate violation of the PRA for which an award of attorney fees is required. Finally, the counties have the burden to prove that their ongoing refusal to provide the requested records even after the election is over "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1). The counties have not carried their burden of proof, and the requested ballots have been wrongfully withheld from White.

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RESPECTFULLY SUBMITTED this 12th day of February, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies that on 12th day of February, 2015, true and correct copies of this pleading and the *Motion for Leave to File Brief of Amicus Curiae* were served on the parties as follows:

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