No. 72028-7-I

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION 1

TIMOTHY WHITE

V.

SKAGIT COUNTY and ISLAND COUNTY

APPELLANT'S RESPONSE TO WCOG'S AMICUS CURIAE BRIEF

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I. INTRODUCTION

Appellant White (hereafter "Plaintiff") generally agrees with the Washington Coalition for Open Government's (WCOG) position. The law is clear that ballots are not categorically exempt from production and that Skagit and Island Counties ("the Counties") violated the PRA. However, Plaintiff disagrees that the record on review shows factual disputes about the public records Plaintiff requested. The record provides uncontroverted evidence that the computer files Plaintiff requested exist and that copies can be produced.[1]

The Counties' response to WCOG does not show otherwise. In their response, the Counties misinterpret RCW 29A.60.110, misrepresent *Sargent v. Seattle Police Dep't*, 167 Wn. App.1. 260 P.3d 1006 (2011), *reversed*, 179 Wn.2d 376, 314 P.3d 1093 (2013), and ignore the widespread discussion of retention schedules and RCW 29A.60.110 in the record. The Court should consider WCOG's brief.

II. ARGUMENT

A. RCW 29A.60.110 Does Not Exempt the Records

Plaintiff agrees with WCOG that the first paragraph of RCW 29A.60.110 limits the application of the second paragraph. Whatever

[1] The Court is not bound by the Superior Court's factual findings. *See West v Port of Olympia,* 183 Wn. App. 306, 312 (Div. II, August 26, 2014).

limitation the second paragraph placed on handling the November 2013 ballots, those limitations expired 60-days after tabulation. RCW 29A.60.110. At a minimum, the Counties violated the PRA by continuing to withhold the requested records beyond that 60-day period, and by telling Plaintiff they can never produce the records. *See* WCOG Amicus Curiae Brief at 3-5.

Plaintiff contends, however, that the guidelines of the second paragraph of RCW 29A.60.110 do not exempt the records in the first place. The 60-day guidelines provide temporary chain-of-custody provisions for cast paper-ballots, which would not be broken by producing the digital files Plaintiff requested. RCW 29A.60.110; *see* Appellant's Reply Brief at 13-15. The Counties need not handle the cast paper ballots to produce the requested files, so there would be no conflict with RCW 29A.60.110—even during the 60-day period. *See* Appellant's Opening Brief at 4. Yet regardless of how the Court applies the second paragraph of RCW 29A.60.110 to this case, The Counties violated the PRA by withholding responsive records beyond the 60-day period.

B. The Records Exist

There is no real dispute that the records requested exist and contain "data compilations from which [images] may be obtained or translated." *See* CP 184 at lines 16-20; RCW 42.56.010(4). The essence of the

Counties' original argument against "obtaining" the ballot images from the requested digital files was that doing so would "create a new record" and therefore not their obligation. *See* CP 46 at lines11-13; CP 103 at lines 19-23; CP 210 at n. 7. The Counties now abandon that argument in their answer to WCOG. *See* Counties' Answer to Amicus Brief Filed by WCOG ("Counties' Answer to WCOG") at 8 ("the Counties have not argued that the need to create a new record by screen printing ballot images barred release..."). Because the Counties no longer take the position that they need to "create a new record," the Court should not consider that argument. *Id.*

The Court should also reject the "new record" argument for the reasons WCOG provided. WCOG Amicus Brief at 8-9 ("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.*").

Moreover, the record shows the Counties always understood Plaintiff's request as Plaintiff intended, and acknowledged the records exist, confirming no new record needed to be created. In its initial response to Plaintiff's request, Skagit County understood the request to seek "copies of electronic or digital image files of all pre-tabulated ballots" and provided a "log detailing the images" it withheld. CP 230.

Island County similarly understood the request to seek "pre-tabulated ballots *as imaged*, or digital files of pre-tabulated ballots, metadata and 'properties' associated with the electronic or digital files," and added that "[f]or each of the scanned ballots *a corresponding digital image file exists* for each side of [] each ballot..." CP 234-35 (emphasis added). It is therefore not only undisputed, but also affirmatively asserted by the Counties, that the records, as they existed before tabulation, still exist.

Those records identified by the Counties, among others, are the records Plaintiff requested when he asked for all "pre-tabulated" ballot image files and metadata. *See* CP 220. Plaintiff never insisted the Counties needed to provide the records before ballots were tabulated. *See* CP 222 ("I realize an election is your busiest most demanding time of year. I am trying to tailor my request to minimize and automate county effort without disruption of the election.").[2] The PRA obligated the Counties to produce those records "as soon as possible," whether that be

[2] Indeed in the trial court, neither county argued Plaintiff's request conditioned production on the government halting use of the records, further illustrating the Counties' true understanding of Plaintiff's request. *See* CP 44-51; 96-106; 162-180; 192-212. The Superior Court so concluded in error, with no briefing on the issue and with no supporting evidence in the record. CP 6-8. The County's post-hoc adoption of that position occurred only after the Superior Court's error. Plaintiff did not place any condition on production of the records.

immediately, after election certification, or after a 60-day statutory period. WAC 44-14-04004(1); *see* RCW 42.56.100.

C. The Counties' "No Continuing Obligation" Argument Has No Merit

The Attorney General promulgated the rule the Counties cite, which says agencies have no obligation to produce records responsive to a request that were *created* after the request was made (although agencies may choose to do so). *See* WAC 44-14-04004(4)(a) (the "no continuing obligation" rule). The PRA itself does not contain a "no continuing obligation" provision, and requires agencies provide "fullest assistance to inquirers." RCW 42.56.100. The "no continuing obligation" rule is irrelevant to the case at bar because all the records at issue were created before the request, and/or the Counties agreed to apply Plaintiff's request to all responsive records related to the November 2013 election.

1. The Counties Waived Their Argument

At the trial level, both counties agreed to waive the "no continuing obligation" rule for Plaintiff's request. CP 257-258 (asking Counties to "waive the 'no continuing obligation' provision."); CP 167, n. 1 (Island County "honored" Plaintiff's waiver request); CP 198, n. 3 (Skagit County "honored" Plaintiff's waiver request). Because both Counties granted Plaintiff's request to treat his PRA request as "continuing," this provision

is a non-issue and the Court should disregard the Counties' related arguments. Counties' Answer to WCOG at 4.

2. The Counties Misinterpret *Sargent*

Moreover, in citing to *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 260 P.3d 1093 (2011) (*reversed*, 179 Wn.2d 376, 314 P.3d 1093 (2013)), the Counties ignore the profound differences between the agencies' responses, and ignore the Supreme Court's reversal of the appellate ruling.

Even absent the Supreme Court's reversal, the Appellate Court's ruling in *Sargent* would not permit the Counties' continued withholding. In *Sargent*, the "agency ha[d] properly responded" to the PRA request, in part, by notifying the requestor when the exemption status of the records at issue would change. *Sargent*, 167 Wn. App. 1 at 10, 12. When the agency denied the requestor's PRA request, it suggested he resubmit his request "in six to eight weeks." *Id.* at 7. Then, "when the status of the records changed, [the requestor] was notified and had the opportunity to refresh his request. He did so...and the records were, with minor exceptions, properly disclosed." *Id.* at 12. In *Sargent*, the agency was transparent about its claimed exemption from the beginning, and assisted the requestor to determine when the records would be available for production. *Id.* The case at bar shares none of those facts.

Here, the Counties deprived Plaintiff of the opportunity to "refresh" his request. In denying Plaintiff's request, the Counties said nothing about the claimed exemption ending and indicated the records would *never* be available to the public. CP 224-236. That omission violated the PRA's response requirements. RCW 42.56.210(3); *Lakewood v. Koenig,* 182 Wn.2d 87, 94-95, 343 P.3d 335 (2014); WCOG Amicus Brief at 9-10.[3] When the 60-day period in RCW 29A.60.110 expired, neither county notified Plaintiff of the change in status. WCOG Amicus Brief at 9-10.

In addition, the Counties did not make this argument at the trial level, which also would have notified Plaintiff to refresh his request. *See* CP 44-51; 96-106; 162-80; 192-212; RAP 2.5. Had the Counties made this argument earlier, White could have—and would have—refreshed his request to obtain the records. Making this argument now for the first time is an ambush. The Counties' improper responses—coupled with their representation that they granted Plaintiff's request to waive the "no continuing obligation" provision—deprived Plaintiff of the opportunity to "refresh" his request. Those actions certainly do not constitute "fullest

[3] A complete explanation of the claimed exemption, including when an exemption status would change, is particularly important when an agency cites an exemption in an "other statute," like the Counties did here. *Lakewood*, 182 Wn.2d at 94-95. The Counties did not properly respond to Plaintiff's PRA request.

assistance," as required by the PRA and as the agency in *Sargent* provided. RCW 42.56.100; 167 Wn. App. 1, 260 P.3d 1093 (2011).

Furthermore, it is misleading at best for the Counties to say the *Sargent* appellate ruling was reversed "*on other grounds*." *Id.* In reversing, the Supreme Court addressed this issue and held:

> The Court of Appeals and the SPD admit that the categorical exemption was lost when the case was first referred to the prosecutor. If Sargent had submitted his request during this time frame, instead of a few weeks later when the case had been referred back to the SPD for follow-up, the SPD would have been required to prove [the elements for the exemption]. **It is nonsensical to deny Sargent access to these same documents based on the timing of his request.**

Sargent, 179 Wn.2d at 390, 314 P.3d at 1099 (emphasis added). The Supreme Court's reversal is consistent with the intent of the PRA and the requirement that agencies provide "fullest assistance" to inquirers to ensure government transparency. RCW 42.56.100. It follows from the Supreme Court's ruling that here, any exemption in RCW 29A.60.110 "was lost" after the 60-day period, and the timing of Plaintiff's request should not prevent his access to the non-exempt records after that period. *Sargent*, 179 Wn.2d at 390, 314 P.3d at 1099. The Counties mischaracterized the Supreme Court's reversal to avoid discussion of that decision. The Court should reject the Counties' "nonsensical" argument.

The consequences of the Counties' argument also highlight its absurdity, which would place an unfair burden on requestors. RCW 42.56.100. The timing of any PRA request would need to be absolutely perfect to gain access to the public records. Under the Counties' theory, they would deny a request issued 59 days after tabulation (as exempt under RCW 29A.60.110), and would then destroy the records on the 60th day. A request issued 61 days after tabulation would therefore still be denied because the records would no longer exist. To obtain access, a requestor would need to constantly issue new requests with the hope that he catches the agency in the split-second between record exemption and destruction. Such a scheme would entirely undermine the PRA's purpose of providing broad access to public records. *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 250-53, 884 P.2d 592, 597-98 (1994) ("PAWS II").

D. The Court Should Consider WCOG's Arguments

Throughout this case, the meaning of RCW 29A.60.110 and the effect of record retention schedules have been central issues. WCOG's amicus brief helps clarify these issues while attempting to "avoid repetition of matters in other briefs." *See* RAP 10.3(e). The Court granted leave for WCOG to file its brief, which will assist the Court's

understanding of these complex issues. *See* Notation Ruling (February 25, 2015). The Court should therefore consider all of WCOG's arguments.

Indeed, WCOG's brief responds to the Counties' own arguments. For example, in the Superior Court, the Counties argued they are "required" to destroy ballots "at the end of their retention period," which WCOG's arguments refute. CP 97 at lines 10-11; *see* CP 100 at lines 1-4 (arguing against any practice "that could be interpreted as allowing their release rather than their destruction."); [4] *see also* Skagit County's Response to Appellant's Opening Brief at 20 (arguing Washington's "election laws," which include RCW 29A.60.110, require destruction after a holding period has expired); *id.* at 31-33 (comparing Vermont's ballot secure-storage statute, which "is limited to a 'period of 90 days...'"); Appellant's Reply Brief at 11-12. WCOG's brief directly responds to the Counties' arguments and show why ballots must be released rather than destroyed. WCOG Amicus Brief at 3-5. The Court should therefore reject the Counties' attempt to disregard key legal issues addressed by WCOG.

[4] It is important to note that the Counties' made these arguments for the first time in their Joint Superior Court Show Cause Reply Briefs (CP 96), so to the extent the Court finds Plaintiff did not respond to these arguments in the trial court, Plaintiff did not have the opportunity to do so. In any event, it was the Counties' burden to justify withholding the records past the 60-day period, a burden they did not carry. RCW 42.56.550(1).

Respectfully submitted this 24th day of March, 2015

SMITH & LOWNEY PLLC

By _____
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 24, 2015, I served the foregoing to the following by E-mail:

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Dated this 24th day of March, 2015, ~~at~~ Seattle Washington.

Marc Zemel