No. 46081-5-II

Appeal of Clark County Superior Court Case No. 14-2-00001-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TIMOTHY WHITE,

Appellant,

v.

CLARK COUNTY,

Respondent.

CLARK COUNTY'S RESPONSE TO AMICUS BRIEF FILED BY WASHINGTON COALITION FOR OPEN GOVERNMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Rules and Other Authorities:

I. INTRODUCTION

The Washington legislature has adopted a body of election laws that meets the constitutional mandate for ballot secrecy. This body of election laws serves as another statute that exempts ballots from disclosure under the Public Records Act (PRA). In its amicus brief, Washington Coalition for Open Government (WCOG) cannot and does not show otherwise.

Presumably understanding this, WCOG attempts to argue that the requested ballots should now be released because the statutory retention period has run. While review of agency action regarding public records requests is de novo, the review is still limited to the request that was actually made to the public agency and litigated below. Instead of addressing White's actual request however, WCOG's argument is based on a new issue that White never raised to Clark County or the trial court. WCOG fails to address or consider the actual issue litigated below or the applicable authority. Accordingly, Clark County asks this Court to find the WCOG's amicus brief not relevant to this appeal, and further, to find the trial court's order should be affirmed.

II. STATEMENT OF THE CASE

On November 6, 2013, the day after the general election, White unambiguously requested "copies of electronic or digital image files of all *pre-tabulated* ballots received, cast, voted, or otherwise used in the County's current Nov. 5, 2013 General Election[.]"[1] White expressly excluded "ballot image files of ballots already tabulated."[2] Clark County denied White's request[3] and White sought review.[4] At the trial court level, White sought release of the pre-tabulated ballots held at the time he submitted his request for records, which was the day after the election.[5] White never argued that the trial court should reverse Clark County's denial because the requested records could be disclosed upon the expiration of the statutory sixty day retention period.[6] As a result, the trial court did not address this issue in its Order on Show Cause.[7]

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[1] CP 36, lines 2-9.
[2] *Id.*
[3] CP 36, lines 10-18.
[4] CP 1-11.
[5] *Id.*
[6] RP 1-43; CP 54-71.
[7] RP 1-43; CP 116-126.

III. ANALYSIS

A. WCOG misinterprets RCW 29A.60.110, which is one of several Washington State election laws providing for cradle to grave security and secrecy of ballots.

WCOG first argues that RCW 29A.60.110 "merely restrict[s] access to ballots up to a particular point in time" because it does not explicitly require ballots to be destroyed at the end of the statutory retention period. *See* WCOG Amicus at 4.[8] However, "[w]hen statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself." *Chelan County v. Nykriem,* 146 Wn.2d 904, 52 P.3d 1 (2002). By requiring that ballots "be retained for at least sixty days," the plain meaning of RCW 29A.60.110 is that the county may discard them after that time period has elapsed. WCOG's strained interpretation otherwise is unpersuasive.

In addition to mischaracterizing RCW 29A.60.110, WCOG also ignores the body of Washington election laws that prohibits any "person

[8] WCOG's reliance on RCW 42.56.100 is misplaced as it fails to show how the statute's requirement to preserve requested records until an appeal has been resolved trumps the body of election laws qualifying ballots as an exemption under the PRA or requires disclosure upon a set of facts not present at the time of the denial. Contrary to WCOG's argument, RCW 42.56.100, which cautions requestors to "keep in mind that all agencies have essential functions in addition to providing public records" and "recognizes that agency public records procedures should prevent 'excessive interference' with the other 'essential functions' of the agency," supports the trial court's opinion that White's request for pre-tabulated copies of ballots interfered with the county's responsibility to comply with Washington election laws and maintain the secrecy and security of voted ballots.

except those employed and authorized by the county auditor [to] touch any ballot or ballot container." RCW 29A.60.170. Further, RCW 29A.84.540 makes it a crime to remove a ballot from a voting center. RCW 29A.84.420 prevents unauthorized examination of ballots to identify voters. RCW 29A.60.125 requires sealing "in secure storage . . . **at all times**, except during duplication, inspection by canvassing board, or tabulation." *(Emphasis added).* These election laws, including RCW 29A.60.110, which requires retention of at least sixty days, fall within the legislature's authority to enforce the constitutional mandate for ballot secrecy and security, and clearly are an attempt to carry out that mandate. See *State ex rel. Shepard v. Superior Court of King County*, 60 Wash. 370, 372, 111 P. 233 (1910) ("It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to exercise it. It follows, then, that that which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature.")

WCOG's interpretation of RCW 29A.60.110 also fails to acknowledge that the legislature omitted the running of the statutory retention period from the list of four specific circumstances that would allow for the disclosure of ballots. The omission of the retention period is

an exclusion from disclosure under the canon of statutory construction "expressio unius est exclusio alterius, … to express one thing in a statute implies the exclusion of the other." See *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) ("[o]missions are deemed to be exclusions)" citing, *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

WCOG's argument about post-denial redaction is also premised on the unsupported theory that public records requests are continuing and denials are not final. If that were case, when would a public records challenge be ripe for judicial review? Indeed, WCOG cites no legal authority for the proposition that an agency should treat a denied request as continuing and subject to changes in the law or the records status, because none exists.[9] ("Where no authorities are cited, the court may assume that counsel, after diligent search, has found none." *Grant County v. Bohne*, 89 Wn.2d 953, 958, 577 P.2d 138 (1978)).

Furthermore, WCOG ignores Clark County's Response by asserting Clark County did not explain why ballots cannot be redacted to

[9] To the extent Clark County did not address access to ballots after the secure storage period has ended, plaintiff never made such a request, he never raised the issue at the trial court and further, Washington law does not require it. Clark County, therefore, does not concede "sub silentio" or otherwise that post-denial redaction complies with the absolute secrecy and security of ballots required by the Washington legislature.

preserve secrecy.[10] WCOG does not dispute the fact that that given the available voter data and the existence of different ballot types for small, often overlapping local districts, voters could be readily identified if their ballots were to be released.[11] Nor does WCOG make any effort to demonstrate that redaction would negate the likelihood of voter identification.

The Washington legislature has determined that the right of absolute secrecy applies to all ballots and, to ensure this, has enacted election laws which provide for cradle to grave security for ballots. Contrary to WCOG's argument, RCW 29A.84.420 cannot logically be read to require release of ballots after the sixty-day retention period; instead, when read in conjunction with the other elections statutes ensuring safety and security of voted ballots, it is more appropriate to read this statute as requiring destruction after the retention period has passed. Further, WCOG has failed to demonstrate how its redaction argument would have changed the trial court's decision.

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[10] *See* Clark County's Response at pages 29-30; see also, *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994), which holds that "[r]edaction and then release is not required when an "other statute" exempts a record from disclosure under the PRA." Because the election laws governing the security and secrecy of ballots constitute an "other statute" under RCW 42.56.070(1), none of the ballots were subject to disclosure or redaction at the time of White's request.

[11] CP 76, lines 19-27; see also, RP 28-29. Clark County also notes that, given overlapping district boundaries, only a few voters may be eligible to vote in the same combination of school board, water district, and conservation district elections.

B. The evidence in the record is that Clark County would need to create a new record in order to produce images of voted ballots.

Contrary to WCOG's unsupported assertions to the contrary, Clark County presented evidence that stored scanned images are in a digital format in a proprietary binary code that only Ballot Now can read and process. This evidence has never been refuted with anything other than speculation by White. WCOG's analysis, therefore, that Clark County can simply copy a ballot image from Ballot Now without having to create a new record to do so is simply incorrect. Perhaps recognizing this, WCOG immediately then proposes that paper ballots just be scanned after the retention period has expired. While this, at least, may be physically possible, as discussed in Clark County's response brief and in the above section, it is outside the scope of the public records request made by White to Clark County and litigated at the trial court level, and further violates the Washington State election laws as codified in Title 29A RCW.

C. The Court should not consider WCOG's argument that ballots can be released after the retention period because it raises an issue not presented to the trial court.

WCOG also argues that Clark County should now disclose the requested ballots because they are no longer categorically exempt. *See*

WCOG Amicus at 2. This argument, which implicitly relies upon the hypothetical that White submitted his request after the statutory retention period and the mistaken belief that PRA requests are continuing, is raised for the first time on appeal. It should not be considered by the Court. *See* RAP 2.5; *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal."). See also, *Protect the Peninsula v. City of Port Angeles,* 175 Wn. App. 201, 217, 304 P.3d 914, 923 (2013), "[T]his court does not consider new issues raised for the first time in an amicus brief." (citing, *Ruff v. King County*, 125 Wn.2d 697, 704 n. 2, 887 P.2d 886 (1995).

White did not raise before the trial court an issue about release of ballots after the secure storage period has ended.[12] If he had, his argument would have been contradicted by *Price v. Town of Fairlee*, 190 Vt. 66, 26 A.3d 26 (2011), an out of state case White relied on for the proposition that he was entitled to obtain pre-tabulated ballots because, at the time he made his request, the statutory retention period for ballots had not yet run. Because this proposition is not the law in Washington, White was forced to rely on *Price* to argue for disclosure based upon the timing of his

[12] CP 1-11; RP 1-43.

request. White, therefore, could not have argued either at the trial court level or on appeal that PRA requests are continuing or that ballots become subject to release upon the expiration of the retention period. To do so, White would have had to concede that the pre-tabulation ballots he sought were not disclosable at the time of his request.

Likewise, WCOG's next argument, that Clark County is engaged in an "ongoing refusal" to produce records, *see,* WCOG Amicus at 10, asks this Court to ignore all the facts in the record and, instead, consider a hypothetical.

Judicial review of an agency's "show[ing of] cause why it has refused to allow inspection or copying of a specific public record or class of records" under RCW 42.56.550 is necessarily limited to the facts and laws existing at the time of the denial. *See* RAP 9.1. The controlling fact before the trial court was that White submitted his request the day after the election. The controlling law on this point is that Washington's "Public Records Act does not provide for 'continuing' or 'standing' requests." *Sargent v. Seattle Police Dep't.*, 167 Wn. App. 1, 11, 260 P.3d 1006 (2011), *reversed on other grounds,* 179 Wn.2d 376, 381, 314 P.3d 1093 (2013), *citing* the Washington State Bar Association's *Public Records Act Deskbook. Also see,* WAC 44-14-040004(4)(a) ("An agency must only provide access to public records in existence at the time of the request.")

WCOG does not dispute the facts or the law regarding the timing of requests. Thus, there is no reason to review Clark County's decision under the irrelevant and hypothetical facts implicit in WCOG's arguments. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (grounds that "are not supported by any reference to the record" will not be considered) *citing* RAP 10.3(a)(5); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority will not be considered); RAP 10.3(a).

IV. CONCLUSION

WCOG's amicus brief does not address the issue actually litigated by White at the trial court level; instead, its arguments center around a hypothetical that White submitted his request after the retention period. Because WCOG's issues were not raised before the trial court and are unsupported by any facts in the record, they should not be considered by this Court on appeal.

Given that Clark County's denial of White's requests for ballots was timely, final, and fully supported by the body of several election laws, which constitute another statute that exempts ballots from disclosure under the PRA, the Court should affirm the trial court's decision. WCOG does not establish otherwise.

RESPECTFULLY SUBMITTED this _____ day of March, 2015.

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CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify and state the following:

I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein.

On this 13th day of March, 2015, I electronically filed the foregoing *Clark County's Response to Amicus Brief Filed by Washington Coalition for Open Government* with the Court of Appeals of the State of Washington, Division II, and such e-filing will cause a true and correct copies of the foregoing to be emailed to the parties as follows:

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DATED this 13th day of March, 2015.

Thelma Kremer

CLARK COUNTY PROSECUTOR

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