No. 46081-5-II

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION 2

TIMOTHY WHITE

V.

CLARK COUNTY

APPELLANT'S RESPONSE TO WCOG'S AMICUS CURIAE BRIEF

Knoll D. Lowney, WSBA No. 23457
Marc Zemel, WSBA No. 44325
Smith & Lowney, P.L.L.C.
2317 East John St.
Seattle, WA 98112
(206) 860-2883

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 Clark County 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]

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 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, Clark County 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.

[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).

Plaintiff contends, however, that the guidelines of the second paragraph of RCW 29A.60.110 are not a PRA exemption 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 Second Revised Reply Brief at 11-13. Clark County need not handle the cast paper ballots to produce the requested files. *Id.* Yet, regardless of how the Court applies the second paragraph of RCW 29A.60.110 to this case, Clark County violated the PRA by withholding responsive records beyond the 60-day period.[2]

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 243 at lines 16-20; RCW 42.56.010(4). The essence of Clark County's argument against "obtaining" the ballot images from the requested digital files is that doing so would "create a new record" and therefore not its obligation. *See* Clark County Response Brief at 28.

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[2] WCOG also prefers not to reach the question as to whether WAC 434-261-045 alone could exempt records under the PRA. *See* WCOG Brief at 4, n.1. Plaintiff agrees the Court need not reach this question, however; it is clear that administrative code cannot exempt records from production under the PRA. *See* Appellant's Opening Brief at 25-26 (citing *Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995); WAC 44-14-06002(1)).

WCOG has submitted an *amicus curiae* brief in a similar appeal in Division I, explaining the County's error on this point.[3] *See Amicus Brief of WCOG*, No. 72028-7-I; Appendix.

As WCOG explained:

> [T]he counties admit that [ballot] 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. WCOG does not dispute the counties' factual assertion that such a process would have taken weeks to complete, and could not be done [before certification] without delaying the election. However, the counties erroneously assert, without citation to authority, that screen printing ballot images would have required election staff to "create a new record." 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.

Appendix (internal citations and footnote omitted) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P2d 857 (2000)). WCOG's explanation is equally applicable to the case at bar.

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[3] WCOG's *amicus curiae* brief in that Division I case is nearly identical to WCOG's brief in this (Division II) case, but contains some additional language. A portion of WCOG's Division I brief is attached hereto as an appendix to provide some of the pertinent additional language.

Moreover, following his request, Clark County clarified to Plaintiff that "[T]here is electronic metadata that shows any corrections made [to the ballot-image files] in the tabulation process, **so that the integrity of the original** and any tabulation change **is preserved.**" CP 30 (emphasis added). It is therefore not only undisputed, but also affirmatively asserted by the County, that the records, as they existed before tabulation, still exist. Those are the records Plaintiff requested when he asked for all "pre-tabulated" image files. *See* CP 26. Plaintiff never insisted the County needed to provide the records before ballots were tabulated. *See* CP 28 ("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.").

III. APPENDIX

Appendix: *Portion of Amicus Curiae Brief of Washington Coalition for Open Government* (February 12, 2015) filed in *White v. Skagit County and Island County*, No. 72028-7-I.

Respectfully submitted this 12th day of March, 2015

SMITH & LOWNEY PLLC

By _____
Marc Zemel, WSBA No. 44325

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 13th, 2015, I served the foregoing to the following by E-mail:

Jane Vetto
Clark County Prosecuting Attorney
Civil Division
1300 Franklin Street, Suite 380
Vancouver, WA 98666-5000
jane.vetto@clark.wa.gov

Rebecca R. Glasgow
Deputy Solicitor General
PO Box 40100
Olympia, WA 98504
Email: RebeccaG@atg.wa.gov; StephanieL1@atg.wa.gov

William John Crittenden
300 E. Pine Street
Seattle, WA 98122
Email: wjcrittenden@comcast.net

Dated this 13 th day of March, 2015, at Seattle Washington.

Jessie C. Sherwood
Jessie C. Sherwood

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

William John Crittenden, #22033
Attorney at Law
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972
wjcrittenden@comcast.net

Patrick D. Brown, #23033
Seattle University School of Law
901 12th Avenue
Seattle, Washington 98122
(206) 398-4121
brownp@seattleu.edu

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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

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

William John Crittenden
WSBA No. 22033

William John Crittenden
Attorney at Law
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972
wjcrittenden@comcast.net

Patrick D. Brown
WSBA No. 23033

Patrick D. Brown, J.D., Ph.D.
Scholar in Residence
Seattle University School of Law
901 12th Avenue
Seattle, Washington 98122
(206) 398-4121
brownp@seattleu.edu

Attorneys for Amicus Curiae Washington Coalition for Open Government

APPENDIX

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:

Via Email (by agreement)

Marc Zemel
Smith & Lowney, PLLC
2317 East John St.
Seattle WA 98112-5412
marcz@igc.org

Rebecca R Glasgow
Washington Attorney General
PO Box 40100
Olympia WA 98504-0100
RebeccaG@atg.wa.gov
StephanieL1@atg.wa.gov

Via Email (PDF) and US Mail

Daniel B Mitchell
Island County Prosecutor
PO Box 5000
Coupeville WA 98239-5000
d.mitchell@co.island.wa.us
p.switzer@co.island.wa.us

Melinda B Miller
Skagit County Prosecutor
605 S. 3rd St
Mount Vernon WA 98273-3867
melindam@co.skagit.wa.us

By: _____

William John Crittenden
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972

APPENDIX