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 APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

In this appeal, Timothy White (hereinafter "White") attempts to circumvent the sanctity of the ballot that is required by Washington Constitution Art. VI, Sec. 6, and Title 29A RCW. Washington law mandates that since voters are entitled to the right of absolute secrecy of the vote, it is the policy of the State of Washington to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud. RCW 29A.04.206; RCW 29A.04.205. To achieve these goals, the legislature has determined that the right of absolute secrecy applies to all ballots, including images of ballots used to tabulate votes. See RCW 29A.04.008(1)(c). *(Emphasis added.)*

In his ongoing attempt to acquire records under the Public Records Act that are preempted from disclosure by another statute, White alleges that the trial court made numerous errors. The records do not support White's characterization of the trial court's findings, nor does the law support his claim that voted ballots are disclosable public records. For the reasons that follow, the trial court's order should be affirmed.

II. RESPONSE TO ASSIGNMENT OF ERRORS

1. The Superior Court correctly denied White's request for voted ballots pursuant to the Public Records Act.

2. The Superior Court correctly determined the doctrine of *Espressio Unius Est Exclsuio Alterius* is applicable in this case.

3. The Superior Court correctly denied White's assertion that he is entitled to obtain redacted voted ballots.

4. The Superior Court correctly denied White's request to disregard the applicable exemptions and ignore the vital governmental interest in upholding Washington law protecting individual privacy.

5. The Superior Court correctly concluded that White was not entitled to costs incurred, and further, applied the correct calculation for the award of attorney's fees.

III. STATEMENT OF THE CASE

This appeal stems from a public records request submitted by White for copies of electronic or digital image files of "pre-tabulated" ballots. Clark County properly withheld the requested ballots from production. White challenged the County's withholding of the ballots and the trial court agreed with the County that the requested records were exempt from production.

To provide some background on the County's electoral process, Clark County maintains its ballot counting center through the office of the

Clark County Auditor.[1] Voting devices, scanners and computers, which use programs called "Boss," "Ballot Now," and "Tally" provided by Hart Intercivic, Inc., are used to create and process ballots.[2] They are stand-alone devices that are not accessible to the public and are not connected to the internet or to the county's computer system or to one another.[3]

After ballots are created and printed, they are mailed to registered voters, who may then mail their ballots back to the Clark County Auditor, deposit them in secure drop boxes located around the county, or deliver them to the counting center.[4] Ballots retrieved from the secure drop boxes or received through the mail or at the voting center are immediately secured and are accessible only by election staff for the purposes of processing the ballots.[5]

After receipt and verification, the ballots are scanned and digitally communicated to a computer running the "Ballot Now" program.[6] The scanned images are converted to a proprietary format that only Ballot Now can read and process.[7] Once this conversion occurs, the images <u>do not</u>

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[1] CP 73, page 2 lines 1-2.
[2] CP 73, lines 2-4.
[3] CP 73, lines 5-7.
[4] CP 73, lines 8-13.
[5] CP 73, lines 13-15.
[6] CP 73, lines 17-20.
[7] CP 73, lines 21-22.

exist as separate photographic image files that can be viewed and read by people, or printed out as viewable photographic images.[8]

After this initial processing, data from the "Ballot Now" program is transferred to a second computer.[9] This second computer runs the "Tally" program, which tabulates the votes and occurs after the ballots are scanned into the "Ballot Now" program.[10] To preserve the integrity of the election process, RCW 29A.60.110 requires all paper ballots to be sealed and secured immediately after scanning and tabulation.[11] All ballots are maintained in a locked, inaccessible bin from the moment they are scanned into the voting device until the statutory retention date has passed.[12] After the mandated retention period has passed, the ballots are then destroyed by shredding.[13]

Timothy White, a resident of San Juan County, Washington, has a long history of making Public Records Requests to Clark County for its citizens' voted ballots.[14] First, in October 2010, following a primary election, White made a public records request for ballot "images" captured during ballot tabulation, all metadata associated with electronic or digital

[8] CP 73, lines 22-24.
[9] CP 74, lines 6-7.
[10] CP 74, lines 7-9.
[11] CP 74, lines 12-13.
[12] CP 74, lines 20-21.
[13] CP 74, lines 22-23.
[14] CP 35-53.

tabulation, and all other enclosure images captured during ballot tabulation.[15] This request was denied, pursuant to RCW 29A.60 and RCW 42.56.070.[16] On August 8, 2012, again following a primary election in Clark County, White submitted an identical request, and since the law had not changed, his request was denied on the same grounds.[17]

On November 12, 2013, White filed a third public records request with Clark County with identical terms to his previous requests, except that this request sought copies and digital images of "pretabulated" ballots.[18] Because whether a ballot is tabulated or not, it is still not releasable without a court order, the County wrote to White informing him that he was using the wrong process to access the requested information.[19] Specifically, the County informed White, "the process for citizens getting copies of other citizen's ballots, in any format, is statutory. If the law is still the same, the Public Records Act is not the proper forum for getting a release of those kinds of documents."[20]

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[15] CP 35, lines 22-24.
[16] CP 35, lines 24-26.
[17] CP 35, lines 26-27; CP 36, lines 1-2.
[18] CP 36, lines 2-9.
[19] CP 36, lines 10-18.
[20] CP 36, lines 15-18.

Clark County notes that White sent the same request as his November 12, 2013 request to all 39 counties in Washington State.[21] None of the counties provided the requested records.[22] White then sued three of those counties, Skagit, Island and Clark under the Public Records Act.[23] In the Clark County matter, White filed an Ex Parte Motion to Show Cause why images of "pretabulated" ballots held by the Clark County Auditor's Office for the 2013 general election should not be produced by Clark County.[24] In response to White's Motion to Show Cause, Clark County submitted briefing and declarations regarding both the applicable statutory authority and the process by which ballots are tabulated and maintained in Clark County.[25] Oral argument was heard on February 20, 2014, and on February 27, 2014, the trial court issued an order denying White's motion to show cause.[26] White now appeals the trial court's decision.

IV. ARGUMENT

Washington law mandates the absolute secrecy and security of ballots until such time as they are destroyed. Washington law defines

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[21] CP 35, Exhibit 2; see also RP 31-32.
[22] RP 32.
[23] RP 32.
[24] CP 1-11.
[25] CP 54-71.
[26] RP 1-43; CP 116-126.

"ballots" as any media reflecting the choice of an individual voter, including electronic images and copies of those images. Despite this clear mandate however, plaintiff persists in attempting to obtain records that are exempted by the Washington State Constitution and the voting laws from disclosure under the Public Records Act ("PRA"). Because the applicable law does not support his contentions in this matter, this court should uphold the superior court's order.

A. Standard of Review.

A public agency's decision to withhold records is reviewed de novo. *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 201, 172 P.3d 329 (2007). In reviewing a PRA request, the appellate court stands in the same position as the superior court. *Lindeman*, 162 Wash.2d at 200, 172 P.3d 329. Where the record consists of only affidavits, memoranda of law and other documentary evidence, the superior court's factual findings on disputed issues do not bind the appellate court. *DeLong v. Parmelee*, 157 Wn. App. 119, 143, 236 P.3d 936 (2010). "In construing the PRA, we [must] look at the Act in its entirety in order to enforce the law's overall purpose." *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 536, 199 P.3d 393 (2009).

Whether to award costs and attorney fees is also reviewed de novo. See *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d

*89,97,*117 P.3d 1117, 1121(2005). However, the amount of the award in PRA cases is reviewed for abuse of discretion. *Sanders v. State,* 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010).

B. The Superior Court Correctly Denied White's Request for Voted Ballots Pursuant to the Public Records Act.

1) The records requested by White are ballots under the statutory definition of RCW 29A.04.008(1) and Washington case law and are exempt from disclosure.

In this appeal, White asserts that his request is not to obtain ballots, because he is seeking "ballot images." RCW 29A.04.008(1)(c) defines a "ballot" to include "a physical or electronic record of the choices of an individual voter in a particular primary, general election or special election." Under the statute, therefore, a ballot is not just a paper ballot, but any electronic record of the choice of a voter. White's "and/or" argument is misplaced: the statute provides that any medium that shows the choice of an individual voter is a 'ballot," whether that is in the form of a paper or electronic record. It is the content of the medium, not the format, that determines if it is ballot. If the medium contains or reflects a vote of an individual, it is a ballot. Here, the pretabulated ballots requested by White reflected the votes of individuals and meet Washington's statutory definition of "ballot." Thus, White's request for

digital images of ballots is nothing other than a request for a voted ballot, and, as discussed infra, is not subject to disclosure under the Public Records Act.

Further, regarding White's request for "metadata," in *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 147, 240 P.3d 1149 (2010), the court adopted the concept that "metadata in an electronic document is part of the underlying document [and] does not stand on its own." *O'Neill v. City of Shoreline*, 170 Wn.2d at 147, quoting, with approval, *Lake v. City of Phoenix*, 222 Ariz. 547, 555, 218 P.3d 1004 (2009). As held by the *O'Neill* court, metadata "could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom." *O'Neill v. City of Shoreline*, 170 Wn.2d at 147.

It follows from the *O'Neill* court's conclusions and the legislature's determination that an image of a ballot is a ballot, that any metadata associated with the ballot cannot be released, when the ballot itself cannot be released, as it is impossible to disclose metadata without also disclosing the ballot itself. Additionally, providing metadata would require manipulation of the machines and programs after the ballots have

been scanned, which is not permitted under the absolute secrecy and security mandates of Wash Const. Art.VI, Sec. 6 and Title 29A RCW. [27]

2) Preserving voter secrecy and the security of ballots, while ensuring accurate, accessible, and transparent elections is of utmost importance to elections officials across the State.

In Washington, voters are entitled to "[t]he right of absolute secrecy of the vote." RCW 29A.04.206(2). Further, "[i]t is the policy of the state of Washington . . . to protect the integrity of the electoral process by providing equal access to the process, while guarding against discrimination and fraud." Wash Constitution Art. VI, Sec. 6, RCW 29A.04.205. To achieve these goals, the legislature has determined that the right of absolute secrecy applies to all ballots, including images of ballots used to tabulate votes. See RCW 29A.04.008(1)(c) ("Ballot means" . . . "a physical or electronic record of the choices of an individual voter in an election.") Also see *State ex rel. Empire Voting Machine Co. v. Carrol*, 78 Wash. 83, 85, 138 P. 306 (1914):

> . . . We think that the framers of the constitution had in mind the substance rather than the form of the ballot; the object to be attained, rather than the manner of attaining it. The object of all constitutional provisions and laws

[27] White's request for "pretabulated" ballots does not changes the nature of his request. Tabulation, or "pretabulation," refers only to the counting process and does not change the nature of the records requested, which reflect the choice of individual voters. All ballots, pre- or post-tabulation, are exempt from disclosure.

> providing for a vote by ballot is primarily to procure secrecy and this the legislature is admonished to do in the section and article above quote. Any ballot, therefore, however cast, that will guard and protect this secrecy and guard against intimidation and secure freedom in the exercise of the elective franchise, is a secret vote by ballot within the ordinary and accepted meaning of those words when used in our election laws. . .

Failure to perform any duty under the provisions of any law relating to elections or knowingly or fraudulently violating any provisions of law relating to such duty is classed as a felony and leads to forfeiture of the person's office. See RCW 29A.84.720.[28]

Balancing ballot secrecy and security with public scrutiny, the legislature allows authorized persons to observe the canvassing of ballots, but does not allow them to touch a ballot. RCW 29A.60. 170(2) ("no persons except those employed and authorized by the county auditor may touch any ballot or ballot container or operate a vote tallying system.") If someone wants to obtain a ballot, a court order is needed. RCW

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[28] RCW 29A.84.720 ("Every person charged with the performance of any duty under the provisions of any law of this state relating to elections, including primaries, or the provisions of any charter or ordinance of any city or town of this state relating to elections who willfully neglects or refuses to perform such duty, or who, in the performance of such duty, or in his or her official capacity, knowingly or fraudulently violates any of the provisions of law relating to such duty, is guilty of a class C felony punishable under RCW 9A.20.021 and shall forfeit his or her office.") Also see *State ex rel. Hanson v. Wilson*, 113 Wash. 49, 53, 192 P. 913 (1920) ("The performance by the election officers of the duties imposed upon them can be reasonably well secured by providing a penalty for failure so to do.")

29A.60. 110 ("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, <u>or by order of the superior court in a contest or election dispute</u>.") *(Emphasis added.)*

While White disputes the fact that release of voted pretabulated ballots creates a risk of violating the ballot secrecy required by Article VI, Sec. 6 of the Washington Constitution, the facts on record show otherwise. For example, although White asserts that "there is no evidence that Clark County is a small precinct,"[29] the county's election districts are divided into precincts, which can vary from thousands of voters to less than twenty.[30] The evidence of record shows that when there is low turnout in a small precinct, a copy of a ballot could be tied back to a voter by comparing the ballot with voters credited with returning ballots from particular precincts on particular dates.[31] Furthermore, if the County Auditor subtotals the ballots during the eighteen-day period through certification, the votes of an individual could be identified when compared to the publically available list of ballots returned each day.[32] This could result in a chilling effect both on voter choices and turnout.

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[29] Opening Brief page 18.
[30] CP 76, lines 19-22; see also RP page 28-29.
[31] CP 76, lines 19-22
[32] CP 76, lines 24-27.

Releasing copies of ballots before tabulation would require a county to violate RCW 29A.40.110(1), which prohibits release of election results prior to 8 p.m. on Election Day. Clearly, this could affect both voting decisions by those who have not yet voted and the decision by people on whether to vote at all.

Apparently recognizing this issue, White now contends he was not really seeking pretabulated ballots. While this is completely contradicted by the evidence on record, whether a ballot is tabulated or not, it is still protected by the security and secrecy provision in Washington law.

The legislature has imposed specific duties on the handling of ballots that effectively expanded the concept of the ballot box to protect ballot security and secrecy from the moment a voter places his or her ballot in the ballot drop box (or it is received at the elections office) until the ballot and all electronic versions are destroyed. These laws severely limit who can touch or have access to any ballot and for what purpose:

(1) Prohibiting any "person except those employed and authorized by the county auditor [to] touch any ballot or ballot container." RCW 29A.60.170.

(2) Securing ballots at voting centers or ballot drop locations. RCW 29A.84.540 ("Any person who, without lawful authority, removes a ballot from a voting center or ballot drop location is guilty of a gross

misdemeanor punishable to the same extent as a gross misdemeanor[.]")

(3) Securing ballots during transport from drop boxes to the counting center. RCW 29A.40.160 ("Ballots from drop boxes must be returned to the counting center in secured transport containers.").

(4) Securing all received return envelopes from receipt, to opening, to processing. RCW 29A.40.110:

> All received return envelopes must be placed in secure locations from the time of delivery to the county auditor until their subsequent opening. After opening the return envelopes, the county canvassing board shall place all of the ballots in secure storage until processing. Ballots may be taken from the inner envelopes and all the normal steps may be performed to prepare these ballots for tabulation.

(5) Preventing unauthorized examination of ballots to identify the name of a voter and how the voter voted; to determine how a known voter voted; or to identify the name of the voter who voted in a known manner. RCW 29A.84.420.

(6) Sealing "[o]riginal and duplicate ballots" in secure storage ... at all times, except during duplication, inspection by canvassing board, or tabulation." RCW 29A.60.125.

(7) Requiring an audit trail for duplicate ballots. RCW 29A.60.125.

(8) Sealing ballots after tabulation. RCW 29A.60.110 (Sealed ballot containers may only be opened by the canvassing board (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 an election contest or dispute.)

Additionally, the legislature provided for the destruction of ballots "60 days after date of certification" for non-federal elections, by authorizing the "destruction of official public records pursuant to a schedule approved by the records committee established under RCW 40.14.050." RCW 40.14.060(1). Also see *Bldg. Indus. Ass'n of Wash. v. McCarthy,* 152 Wn. App. 720, 737, 218 P.3d 196 (2009)("destruction of public records authorized when pursuant to state approved schedule.") *citing,* RCW 40.14.060-.070; RCW 40.14.030(1).

Thus, ballot secrecy and security is mandated throughout the election process.

White also argues that the change to mail-in voting removed layers of the citizen oversight that existed under the laws of 2005 and that "[p]roducing digital copies of the records is simply the electronic age equivalent of fulfilling the traditional public observation."[33] This argument ignores the reality of past election practices.

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[33] Opening Brief page 12.

Precinct election officers, if used, were appointed by the county auditor, took an oath, and were paid to canvass ballots.[34] Thus, when they counted ballots, they were not fulfilling a public oversight role. Further, before 2011, precinct officers were drawn from lists provided by political parties, former RCW 29A.44.410, and the public did not have the right to observe when they handled ballots.

In contrast, current law delegates to political parties the appointment of observers and the public may view the canvassing of ballots.[35] Canvassing board meetings, where the board resolves sometimes difficult questions of voter intent, are also open public meetings.[36] The 2011 amendments to the voting code, therefore, both further the mandate for ballot secrecy and provide for more public oversight than existed before 2011.

3) Clark County's denial of White's request for images of voted ballots was required by both RCW 42.56.070 and RCW 29A.

The PRA explicitly states that "other statute[s]" can prohibit disclosure of public records. Specifically, RCW 42.56.070(1) provides:

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[34] Former RCW 29A.44.410.49, .530 (2005).
[35] See RCW 29A.60.110 (major party observers may be present for consolidation of ballots into one sealed container); RCW 29A.60.170 (allowing for political, campaign, organization, and public observers and random checks of the ballot counting equipment).
[36] CP 77, lines 17-18.

> "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of . . . other statute which exempts or prohibits disclosure of specific information or records. *(Emphasis added.)*

The county properly denied plaintiff's request under this "other statute " exemption. As discussed in section B(2) of this brief, Title 29A RCW, clearly prohibits disclosure of ballots unless pursuant to RCW 29A.60.110. Thus, the release of ballots, in the absence of a court order issued under RCW 29A.60.110, would have violated the sanctity of the ballot that is mandated by Washington Constitution Art. IV, Sec. 6 and Title 29A RCW, which governs the handling of the ballots requested by White. Indeed, application of the "other statute" exception allows the court to avoid a conflict between the PRA and constitutional mandate for ballot secrecy and the election laws that implement that mandate. See *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975) ("A statute or ordinance which is void as being in conflict with a prohibition contained in the constitution is of no force and effect."); *Dep't of Transp. v. Mendoza de Sugiyama*, Slip Op. No. 43859-3-II at 13, filed July 29, 2014 ("we endeavor to interpret the PRA specifically to avoid absurd results"), *citing, Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004) ("We will also avoid absurd results.")

In *Deer v. DSHS*, 122 Wn. App. 84, 93 P.3d 195 (2004), the court of appeals recognized that an entire statutory scheme can qualify as an "other statute" that prevents disclosure under the PRA. In *Deer*, the court held that chapter 13.50 RCW was a comprehensive body of laws and regulations that balanced access to sensitive records and exempted juvenile dependency records from disclosure under the PRA. *Deer* is instructive because chapter 13.50 RCW does not mention or reference the PRA and the PRA does not specifically exempt juvenile dependency records. In finding that chapter 13.50 RCW, which governs the release of dependency records, is an "other statute" within the meaning of the PRA, the *Deer* court held:

> This interpretation of chapter 13.50 RCW [that it governs the release of dependency records] is consistent with the PDA's purpose of exempting from its purview only those "public records most capable of causing substantial damage to the privacy rights of citizens." Chapter 13.50 RCW resolves the potential conflict between the disclosure of juvenile records and concerns for the privacy of the juvenile and of his or her family by strictly limiting the types of juvenile records that an agency may release and the parties to whom it may release them, thereby preserving "anonymity and confidentiality.

Deer v. DSHS, 122 Wn. App. at 91-92 *(citations omitted)*.

The *Deer* court then held that chapter 13.50 RCW did not conflict with the PRA because "chapter 13.50 RCW contains an alternative means of requesting and seeking juvenile dependency records that balances and protects the privacy needs of the juvenile and his or her family[.]" *Deer* at 91.

Ballots, like juvenile dependency records, are accorded anonymity and confidentiality. This follows from Washington's constitutional mandate for their absolute secrecy. [37] White's attempt to distinguish *Deer* is not persuasive. Like the protection given to juvenile records under chapter 13.50 RCW, which was analyzed in *Deer*, ballots are protected by a body of constitutional provisions, statutes, and regulations. This body of laws and regulations effectively supplements the Public Records Act by providing specific exemptions for who can handle and access a voted ballot. It also provides an explicit process for obtaining direct access to ballots. Thus, the cited statutes and regulations constitute an "other statute" that "exempts or prohibits" disclosure of particular documents to particular people under [the Act]. *Deer* at 94.

4) <u>White incorrectly asserts to this Court that the superior court relied on a Washington Administrative Code in denying White's request for voted ballots pursuant to the Public Records Act.</u>

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[37] Also see *Buckley v Valeo*, 424 U.S. 1,237; 96 S Ct 612; 46 L Ed 2d 659 (1976) (Burger, C.J., concurring in part and dissenting in part) ("secrecy and privacy as to political preferences and convictions are fundamental in a free society. For example, one of the great political reforms was the advent of the secret ballot as a universal practice.") Also see 29 C.J.S. Elections § 322 (2012) (entitled "Secrecy in Voting") ("Privacy casting one's ballot is a sacred rule of law."); 26 Am. Jur. 2d Elections§ 307 (2012) (entitled "Necessity for Secrecy") (A secret written ballot is used "to prevent recrimination against people who vote for losing candidates."); 26 Am. Jur.2d Elections§ 307 (2012) ("Secrecy after casting a ballot is as essential as secrecy in the act of voting and should also be protected as vigorously.")

In its response to White's summary judgment motion, Clark County submitted a declaration from its election supervisor, which described in detail the process the elections department uses in receiving, tabulating and storing ballots.[38] The elections supervisor cited WAC 434-261-045 when describing how ballots are stored. In its order, the superior court also discussed the ballots storage process and cited the same WAC. The superior court judge explicitly based his decision, however, on the statutory authority he found that preempted ballots from disclosure under the Public Records Act.[39]

Further, White has not presented authority that a court may not consider a WAC, in addition to the enabling statute, when deciding a PRA issue. Instead, White provides comments to WAC 44-14-060 which, when read in full, in no way preclude a court from citing to or considering a WAC.[40] Thus, while it is clear from the record that both the County and court cited to WAC 434-261-045 as background information regarding ballot storage, there is no basis for White's assertion that in fact a court could not also consider a WAC provision.[41]

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[38] CP 72-83.
[39] CP 116-126.
[40] Opening Brief page 25.
[41] The legislature delegated to the Secretary of State's Office the responsibility to create WACs that devise uniform procedures for elections officials statewide to comply with. To the extent that regulations are adopted pursuant to this direction from the legislature,
Footnotes continued on the next page.

5) <u>The proper method for White to obtain ballots is through RCW 29A.60.170, which permits a citizen to seek a court order in a contested or disputed election.</u>

As discussed above, the <u>only</u> exception to the mandate for absolute secrecy of ballots requires a court order founded upon a supportable basis for an election contest or dispute:

> 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 (emphasis added).

The court's decision in *Quigley v. Phelps*, 74 Wash. 73, 77, 132 P. 738 (1913), in which the plaintiff sought to have ballots unsealed and admitted as evidence at trial, is instructive in that the court affirmed the need for an election contest or dispute before ballots could be disclosed:

> ". . . before these ballot boxes are opened and ordered to be counted, to submit some proof to

they too can support exemption, particularly if a ballot security regulation is targeted at achieving compliance with state or federal law.

> satisfy the court in a reasonable way that there is a just ground to believe that the election officials have failed to perform their duty."

Quigley v. Phelps, 74 Wash. at 77. "The argument that a contestant, though strongly suspecting malconduct, would have no means of proving it outside of the ballots themselves [did] not impress [the court]." *Quigley v. Phelps,* 74 Wash. at 85.

The court extended "[t]he sanctity of the ballot box" to the canvassing process and emphasized that it "is not to be invaded simply because a vote is close, and it is hoped that a re-check of the work performed by the precinct officers may possibly show a change or an error." *State ex rel. Doyle v. Superior Court,* 138 Wash. 488, 492, 244 P. 702 (1926).

Although White either denies or ignores this fact throughout his opening brief, it is clear from the record that White requested ballots from all counties so that he could challenge the election.[42] Thus, he needed to first obtain a court order to obtain the ballots. See RCW 29A.60.110 ("The containers may only be opened by . . . order of the superior court in

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[42] White wrote in his November 6, 2013, public records request:

> "The value of these requested records is time-sensitive. In the case of requested overseas and military voter registrations received electronically up to an including Election Day, the window to research and document a challenge is but two weeks, I believe. Prompt disclosure within the PRA's five-day period is requested."

CP 8, Exhibit 2.

a contest or election dispute.") As he was informed by Clark County on three separate occasions, White was aware of and should have used the procedure the legislature set out for the release of ballots, rather than the Public Records Act.

C. The Superior Court Correctly Determined the Doctrine of *Expressio Unius Est Exclusio Alterius* is Applicable in this Case.

In Title 29A RCW, the Washington legislature provided a careful balance for voter privacy and ballot security. The statute allows some records to be released, but retains strict control on ballots. The exceptions for ballots, including a specific judicial remedy available to those who can justify a need for the ballots, are few and contained expressly within that statute.

In its ruling on White's show cause motion, the superior court found that the requested images were ballots under the statutory definition and RCWs cited in section B(3) of this brief.[43] The court also found that RCW 29A.40.130 provides a specific legislative exception for voter lists, as it states they "shall be handled as public records requests pursuant to chapter 42.56 RCW."[44] The court noted, however, that while the

[43] CP 122.
[44] CP 120.

legislature specifically provides for the release of voter registration lists under the PRA, it provides no similar provision for the release of ballots.[45]

Citing *State v Kelley*, 169 Wn 2d 72, 226 P.2d 773 (2010), the superior court concluded that Washington law recognizes the maxim of *expressio unius est exclusio alterius;*[46] that is, the expression of one thing in a statute excludes the implication of others. The court then found Section 130's specific reference to voting lists as a PRA item, with corresponding silence as to ballots, suggests deliberate legislative intent to not include ballots for disclosure under the PRA.

Contrary to White's assertion, the court's ruling does not contradict the holding in *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) (*PAWS* II). In *PAWS II*, the court set out the analysis to determine whether a law or body of laws established an exemption from disclosure under the PRA:

> . . . Thus, if another statute (1) does not conflict with the Act, and (2) either exempts or prohibits disclosure of specific public records in their entirety, then (3) the information may be withheld in its entirety notwithstanding the redaction requirement. . . .

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[45] *Id.*

[46] CP 120; see also *Wash. Natural Gas v. PUD No.1 of Snohomish Co*, 77 Wn.2d 94, 98, 459 P.2d 633, 637 (1969) "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication."

Here, the trial court found that because the statute did not include ballots as records that can be released, they are exempt. To read *PAWS* II to require an exhaustive list of both what may and may not be released would take that court's holding to an unworkable extreme. Instead, by specifically stating what election related records are non-exempt and, thus, are disclosable public records, the legislature exempted all other records not specifically named. In short, the Washington State Constitution provides that these ballots are secret, and within that context of special protection the legislature has stated specifically what voting records are exempt from that protection of secrecy. Thus, the trial court's application of a maxim recognized as a legitimate tool in statutory interpretation in Washington State was correct.

Further, in addition to finding ballots are exempt under the "other statute" rule, the trial court also based its ruling on its determination that under Washington law the county has no duty to create a record in response to a public records request which does not already exist. White asserts that because unvoted ballots can be printed by election staff with "off the shelf" printers prior to being mailed out, this means that once they are scanned, ballot images exist as readable ballot images and can be

printed as well.[47] The evidence in the record however, is that stored, scanned "images" White refers to are binary codes, not humanly readable, images of ballots. The evidence in the record is that after the ballots are scanned and digitally communicated to a computer running the "Ballot Now" program, the images are converted to a digital proprietary format that only "Ballot Now" can read and process.[48] Contrary to White's assertion, which is based only on excerpts of an unverified, undated product catalog his counsel found on the internet and which does not address printing voted, scanned ballots,[49] the evidence of record is that the Hart Intercivic programs do <u>not</u> allow images that have been scanned to be collated into a separate digital document consisting of photographic ballot

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[47] The language White refers to namely, "[b]allots may be printed in-house (on demand) using standard paper sizes and off the shelf printers" clearly refers to elections staff printing unvoted ballots for mailing out to voters. This is apparent from the very next sentence, not cited by the Plaintiff, which reads,

> "[R]eturned ballots are scanned and processed using the same 100% digital technology as the eScan. Accurate. Efficient. Secure." *Id.*

[48] CP 73, lines 20-22.

[49] CP 211-214. County further notes that this "evidence" was first submitted in a Motion for Reconsideration filed after the court ruled in County's favor on White's Motion to Show Cause. In its reply brief to White's Motion for Reconsideration, Clark County objected to the submission of both the catalog and the affidavit of the Skagit County elections supervisor, as it was clear from the record that plaintiff had both documents, or access to them, at the time of Clark County's Show Cause hearing. Neither of these submissions was considered in the Clark County show cause hearing, and there is no indication from the court order denying reconsideration that the superior court ever considered them. <u>If plaintiff wanted to rely on these pieces of evidence on appeal, therefore, he was required to have included in this appeal, as an assignment error, the trial court's denial of his motion for reconsideration.</u> As he did not, his references to the Skagit County declaration, as well as to the undated, unverified catalog his attorney found on the internet should be disregarded by this Court. See *CP 151-161; 162-177.* Further, Clark County notes that the declaration relied on by White does not state that a photographic image of a scanned voted ballot can be printed.

images. [50] The data cards that are used to transfer data from the computer running the "Ballot Now" program to the computer running the Tally program, where the tabulation takes place, stores binary code, not ballot images.[51]

In order to even create a viewable raw digital image of a voted ballot, an employee would need to search each individual serial number of a ballot and print it.[52] Again, while plaintiff asserts that this will pull up a photographic image, there is simply no evidence in the record to support this other than his counsel's inference and speculation. The evidence on record is that after scanning, any image will appear as binary code, not a photograph of the ballot.[53]

Further, regarding plaintiff's assertion that pulling up ballots by serial number will result only in "administrative inconvenience," again the evidence on record shows that this would have been impossible, not merely "inconvenient," to complete by the deadline for election certification in Clark County.[54] Election officials' work in tallying the ballots cannot be delayed by a diversion to create new versions or copies of ballots. Further, this process would entail county employees creating a

[50] CP 75, lines 22-24.
[51] CP 75, lines 25-27.
[52] CP 76, lines 1-7.
[53] CP 75, lines 19-27
[54] CP 76, lines 3-7.

new document from existing data, which, the issue of "convenience" aside, under applicable Washington law, Clark County has no obligation to do.

It is well-settled law in Washington that "an agency has no duty to create or produce a record that is nonexistent." *Bldg. Indus. Assn of Wash. v. McCarthy (BIAW)*, 152 Wn. App. 720, 734, 218 P.3d 196 (2009) (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 969 P.3d 1012 (2004)). In *Smith v. Okanogan County*, 100 Wash App. 7, 994 P2d 857 (2000), the court addressed the same situation as in the present case. In *Smith*, the plaintiff requested indexes and charts that did not exist, but which could have been prepared from existing information. Even though the county had the information, the Court still held since the request was for indexes, the County had no duty to prepare something it didn't already have, even if based on information the county did possess. *Smith* at 862-863.[55]

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[55] White's reliance on *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515 (2014), to rebut Smith is misplaced, as the facts in *Fisher* are distinguishable. In *Fisher*, plaintiff sought police videos that existed in two different databases. The *Fisher* court expressly stated that mining data from two distinct systems and creating a new document "is more than the PRA requires." *Fisher* at 692. Because the Fisher court found that the agency had the capacity to produce some of the requested records without creating a new record, however, it held the defendant was obligated to produce the records it already had.

D. The Superior Court Correctly Denied White's Assertion that he is Entitled to Obtain Redacted Voted Ballots.

While White attempts to separate the concept of privacy mandated by Washington law from the concept of "redaction," in this case, these really are part of the same issue. First, as discussed in Section B(3), ballots are exempt from release in their entirety under the "other statutes" provision of the Public Records Act, and, therefore, do not require redaction.

As discussed in Section C, in order to comply with White's requests, Clark County would have to first create a record, which it is not required to do under applicable Washington case law. By requesting the county to redact the records it created in response to the request, White asks this court to order the county to take an even further step away from applicable law. There is absolutely no basis in Washington law for the contention that the county should create images it does not have and then redact them.

Furthermore, Washington's strict ballot security provisions dictate the way that voted ballots are handled from the moment they arrive in the county's control until they are destroyed pursuant to statute.[56] No person,

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[56] CP 74.

other than an election official employed by the county auditor, may touch any ballot or ballot container or operate any vote tallying system. RCW 29A.60.170. Moreover, strict election processes do not allow manipulation of electronic ballot images or vote tallying software for any other purpose before or during the process of tabulation. WAC 434-261-045 (referring to RCW 29A.60.125, which allows only limited use of ballots and ballot duplicates).

E. The Superior Court Correctly Denied White's Request to Disregard the Applicable Exemptions and Ignore the Vital Governmental Interest in Upholding Washington Law's Protection of Individual Privacy.

1) The Court should decline White's invitation to follow precedent and practices from other states.

White argues in the alternative that Washington law is simply wrong and this Court should ignore it and follow voting laws in other states that are based on totally different state constitutions and voting acts. Other states' decisions are not binding on this Court. *West. v. Thurston Co.*, 168 Wn. App. 162, 183, 275 P.3d 1200, 1212 (2012). Nonetheless, White asks the court to follow judicial decisions from Vermont and Colorado. However, the election laws and practices in those states are significantly different from Washington's and are inapplicable to the issue presented here.

2) Colorado's elections laws and decisions are not persuasive.

Marks v. Koch, 284 P.3d 118, 122, 2011 Colo. App. 1556 (2011), is not authority for the production of electronic ballot images under Washington law. *Marks* is absolutely distinguishable, on both the law and facts. In *Marks*, following a mayoral election, the unsuccessful candidate requested digital copies of 2,500 ballots cast in her race. Clark County notes that Colorado uses "Trueballot," which, unlike "Ballot Now," saves each ballot as a TIFF file, rendering photographic copies of each ballot in its system, rather than storing them as unreadable, non-separated binary codes. Further, on election night, the photographic images of all the ballots were shown on public video monitors, in accordance with the laws of Colorado. Thus, in the *Marks* case, the plaintiff was requesting photographic images which had already been displayed to the public.

In finding the ballot images were releasable, the Court relied on several distinguishing aspects of Colorado law. First, Colorado's constitution requires "secrecy in voting," but not absolute secrecy of ballots.[57] Second, Colorado law does not include electronic images created from a paper ballot in the definition of a ballot. *See CRS 1-1-*

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[57] *See* Appendix A.

104(1.7) ("'Ballot' means the list of all candidates, ballot issues, and ballot questions upon which an eligible elector is entitled to vote at an election.") This definition allowed the *Marks* court to find that electronic images are not ballots under Colorado law. Finally, the practice of Colorado's election officials was to display the electronic "TIFF files wholly or partially to the public through multiple media." *Marks* at 123.

In contrast, Washington's constitution requires "absolute secrecy" of the ballot and the legislature defines "ballots" to include electronic images. See RCW 29A.04.008(1)(c) ("Ballot means" . . . "a physical or electronic record of the choices of an individual voter in an election.") Further, unlike the practice in Colorado, Clark County election staff does not publically display any sort of ballots, whether paper or electronic. Release of any type of ballot requires a court order. Finally, as discussed above, the evidence on record indicates that Clark County, pursuant to the laws of the State of Washington, does not make, keep or store photographic copies of ballot images.

3) <u>Vermont's elections laws and decisions are not persuasive.</u>

Price v. Town of Fairlee, 190 Vt. 66, 26 A.3d 26 (2011), is also not authority for production of ballot images under Washington law.

First, Vermont's constitution does not mandate any level of ballot secrecy.[58] Second, while Vermont laws require that ballots must be "securely sealed" in containers and that the town clerk "shall safely store them, and shall not permit them to be removed from his or her custody or tampered with in any way," 17 V.S.A. § 2590(a), (c), the period of secure storage for Vermont ballots is limited to a "period of 90 days from the date of the election, after which time they **may** be destroyed[.]" 17 VSA § 2590(d) *(emphasis added)*.

The *Price* court held that because the Vermont legislature did not mandate that ballots be maintained under seal beyond 90 days and did not, thereafter, require destruction, Vermont ballots were amenable to release:

> . . . In the absence of a clear statutory provision or purpose requiring that these election materials remain under seal if not destroyed, we are constrained to construe the provision narrowly to permit the disclosure promoted by the PRA. . . .

Price v. Town of Fairlee, 190 Vt. at 74 (2011).

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[58] See Appendix A.

More importantly, however, the *Price* court held that requests for ballots submitted during the mandatory 90-days of sealed storage should be denied.

> Therefore, had plaintiff or any other interested citizen filed a public-records request seeking access to ballots during the statutory ninety-day preservation period for an election challenge, we would have no difficulty finding the records to be confidential "by law" under the PRA, and so exempt from disclosure during that period.

Price v. Town of Fairlee, 190 Vt. at 73-74.

In contrast to Vermont's laws, Washington election officials are required to maintain ballots under seal until destroyed. [59] (Directing destruction of "[a]ll voted ballots of any kind" sixty days after a non-federal election is certified.)[60]

Further, White submitted his request on November 6, 2013, the day after Election Day and well within any calculation of the time Washington requires secure storage for ballots. Therefore, if *Price* were persuasive, the records White requested – pretabulated ballots – could not be released to him at the time he requested. See *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 11, 260 P.3d 1006 (2011) ("As the Washington State Bar Association's *Public Records Act Deskbook* comment states, '[t]he Public Records Act does not provide for 'continuing' or 'standing'

[59] CP 74, lines 20-23.
[60] The November 2013 election was a non-federal election.

requests.'") *reversed on other grounds*, 179 Wn.2d 376, 381, 314 P.3d 1093 (2013).

4) White's footnote reference to opinions and practices from other states is not persuasive.

In a footnote at page 13 of his Opening Brief, White cites to irrelevant opinions and practices from other states. The opinion of the Michigan Attorney General cited by White relies on Michigan law, which in no way corresponds to Washington election laws. First, the Michigan constitution does not require "absolute secrecy" of ballots.[61] Second, the Michigan Secretary of State is empowered to "authorize the release of all ballots." MCL 168.847.

White erroneously implies that RCW 29A.04.230[62] requires the Washington Secretary of State to release ballots "to the public upon request."[63] However, Washington's Secretary of State does not maintain ballots or the requested ballot images. "Such records" in RCW 29A.230 refers to the Secretary of State's canvassing records. See RCW

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[61] *See* Appendix A.

[62] RCW 29A.04.230 ("The secretary of state, through the election division, shall be the chief election officer for all federal, state, county, city, town, and district elections that are subject to this title. The secretary of state shall keep records of elections held for which he or she is required by law to canvass the results, make such records available to the public upon request and coordinate those state election activities required by federal law.")

[63] Opening Brief at page 19.

29A.60.250 ("the secretary of state shall canvass and certify the returns of the general election as to candidates for statewide offices, the United States Senate, Congress, and all legislative and judicial candidates whose districts extend beyond the limits of a single county"); WAC 434-262-100[64]; *In re Recall of Reed*, 156 Wn.2d 53, 60-61, 124 P.3d 279 (2005) ("By contrast, the secretary of state's statutory duties are limited to compiling county election returns on a statewide basis.")

Because the Washington Secretary of State cannot release what she does not control and no similar statute applies to ballots held by county auditors, the Michigan opinion is inapplicable to this Washington State matter.

Likewise, the practices of election officials from California and Minnesota[65] referred to by White in the same footnote are neither persuasive nor amenable to consideration by the court. White is obligated to provide the court with pertinent authority and meaningful analysis. See

[64]WAC 434-262-105. Upon receipt of a complete copy of the county canvass report from a county auditor, the secretary of state shall proceed to include the results from that abstract in the official canvass of the primary, special, or general election. This shall be accomplished by adding the certified returns from each county abstract of votes in order to determine the final results for those offices and issues he or she is required by law to certify. The secretary of state shall accept the official abstract of votes from each county as being full, true, and correct in all respects. The secretary of state may include in the official canvass, a narrative which details or describes any apparent discrepancies discovered during the canvassing procedure and may notify the county or counties involved of such discrepancies.

[65] Neither state's constitution mandates "absolute secrecy" of the ballot. Minnesota's constitution does not even require secrecy. See Appendix A.

RAP 10.3; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). White cannot and does not provide any analysis or authority that explains how the underlying California and Minnesota laws are applicable to the present matter.

F. The Superior Court Correctly Concluded that White was Not Entitled to Costs Incurred and, Further, Applied the Correct Calculation for the Award of Attorney Fees.

The amount of the attorney fee award in PRA cases is reviewed for abuse of discretion. *Sanders v State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010). In awarding White $1,500.00 in attorney fees for the county's untimely but final response denying production of ballots, the trial court relied on RCW 42.56.560(4) which provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.[66]

The trial court found that while White prevailed on the issue that Clark County did not timely finalize its denial to produce ballots, the county is the prevailing party on the major issue regarding production, and

[66] CP 123-124.

White, therefore, was not entitled to costs or a daily penalty. [67] Assessment of penalties or attorney fees, if any, is a function of the superior court. *Nissen v. Piece County*, No 44852-1-II at page 15 (See also *O'Neil v. City of Shoreline*, 170 Wn2d 138, 152 (2010).)

Sanders v State, 169 Wn2d. 827 (2010), cited by White, is factually distinguishable from the present matter. In *Sanders*, the court determined that the AG's office had wrongfully withheld records. In the present case, while the timeliness of county's denial to produce was found to be defective, the court specifically found that the White did not prevail on the issue of withholding the requested ballots. Indeed, in Washington, courts have assessed penalties only where a defendant has been found to have improperly withheld records. See *Nissen v. Piece County*, No 44852-1-II (2014). In the present case, the trial court's award was within his discretion, and was merited by the facts in this matter.

V. CONCLUSION

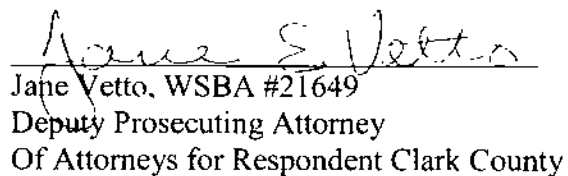
Plaintiff demands that Clark County produce copies of records which are exempted from disclosure under the Public Records Act by RCW 29A.60 and RCW 42.56.070(2) and production of which would, therefore, be illegal, unconstitutional, and further, require the County

[67] CP 124-125.

itself to first attempt to create the requested images. As addressed above, the Washington Legislature requires that the secrecy and security of the ballot extend to images and digital data of ballots. This conclusion is plain and unambiguous. Despite this clear mandate, however, plaintiff persists in attempting to obtain records that are exempted by the Washington State Constitution and the voting laws from disclosure under the Public Records Act. As the applicable law does not support plaintiff's contentions in this matter, this Court should uphold the superior court's order.

Respectfully submitted this 18th day of September, 2014.

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington



Jane Vetto, WSBA #21649
Deputy Prosecuting Attorney
Of Attorneys for Respondent Clark County

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 17th day of September, 2014, I electronically filed the foregoing *Clark County's Response to Appellant's Opening Brief* with the Court of Appeals of the State of Washington, Division II, and such e-filing will cause a true and correct copy of the foregoing to be emailed to the party as follows:

Attorney for Appellant White:

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DATED this 17th day of September, 2014.

APPENDIX A

Washington Constitution, Article VI, section 6:

> BALLOT. All Elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

Minnesota Constitution, Article VII, sec. 5:

> All elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen.

California Constitution, Article 2, section 7:

> Voting shall be secret.

Colorado Constitution, Art. VII, sec. 8:

> Elections by ballot or voting machine. All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

Vermont Constitution, Article 8th:

> Elections to be free and pure; rights of voters therein. That all elections ought to be free and without corruption, and

> that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution.

Michigan Constitution, Article II, section 4:

> The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

CLARK COUNTY PROSECUTOR

September 18, 2014 - 1:39 PM

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