

No.

SUPREME COURT  
OF THE STATE OF WASHINGTON

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TIMOTHY WHITE

Petitioner,

vs.

CLARK COUNTY,

Respondent.

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PETITION FOR REVIEW

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## I. INTRODUCTION

Division Two's published opinion in this case (hereafter "Published Opinion," Appendix A) threatens both the Public Records Act and election integrity in the State of Washington.

In *John Doe A. v., Wash. State Patrol*, 185 Wn.2d 363 (2016), this Court recognized that the Public Records Act would be jeopardized by an expansive application of the "other statute" exemption under RCW 42.56.070(1). The Court therefore adopted a strict standard that allows that exemption to apply "only when the legislature has made it explicitly clear that that a specific record, or portions of it, is exempt or otherwise prohibited from production." *Id.*, 185 Wn.2d at 373. Courts of Appeals have since embraced that standard in several published opinions.

The Published Opinion fundamentally conflicts with the Court's policy in two ways.

*First*, the Published Opinion departs from established precedent to hold, for the first time, that a state agency can exempt records from public disclosure through administrative rule. RCW 42.56.070(1) only allows an exemption to be based upon a "statute," not a "statute or rule." This Court emphasized this in *Washington State Patrol*, holding that the "other statute" exemption only applies "when the *legislature* has made it explicitly clear..." that a record or information is exempt from disclosure.

Yet, for the first time, the Published Opinion states that an agency regulation can also constitute an “other statute” exempting public records from disclosure. This precedent, if allowed to stand, would mean that an agency can exempt its own documents from disclosure, which is antithetical to the PRA and decades of PRA jurisprudence.

*Second*, the Published Opinion departs from the rule adopted in *Wash. State Patrol* that the “other statute” exemption only applies when the statute is “explicitly clear” that the record is exempt or prohibited from disclosure. The Published Opinion adopts the exact opposite standard, stating that the documents in question – images of voted ballots in past elections -- cannot be released because the relevant statute does not authorize such release. The Published Opinion adopts a rule that is diametrically opposed to the “explicitly clear” standard adopted by the Supreme Court and other Courts of Appeals decisions.

This Court should grant review to correct Division II’s ominous expansion of the “other statute” exemption, which, if allowed to stand, could quickly become an exemption that swallows the rule.

In addition, the Court should grant review because the Published Opinion harms election integrity by preventing academics, journalists, and citizens from watchdogging the election process.

At this moment in United States and Washington State history,

mistrust in government and in election integrity in particular is at all-time highs, and reasonably so. We face a barrage of official intelligence and media reports that foreign governments are actively seeking to interfere with elections systems and election outcomes. Indeed, just last week we learned that Russian hackers sought to break into Washington's election systems. This is the time to increase trust in our election systems with increased public oversight; but the Published Opinion does the opposite.

Public oversight of our elections is vital to preserving the integrity of and public trust in our election system. But if the Published Opinion is allowed to stand, it will preclude the critical role that journalists and academics play in protecting our election integrity. For example, the Published Opinion would forever prevent the type of investigation that the media conducted in the aftermath of the *Bush v. Gore* recount, which can prove crucial to uncovering and correcting weaknesses to our election systems and improving public trust in electoral outcomes. Given recent history, unconditional trust is neither warranted nor healthy for our democracy. It is far better for our democracy to allow and encourage academics, journalists, and citizen watchdogs to scrutinize the system with an eye and a nose to uncovering interference and system weaknesses. Moreover, there is no evidence in the record whatsoever suggesting that allowing public access to ballot images long after an election is completed



would cause any harm to the election system or compromise the secrecy of any voter's ballot choices.

The Court should accept review of this important issue.

## **II. IDENTITY OF PETITIONER**

Petitioner is Washington resident Timothy White.

## **III. COURT OF APPEAL'S PUBLISHED OPINION**

On July 25, 2016, Division Two issued a published opinion affirming the trial court's denial of Petitioner's relief under the PRA. *White v. Clark County*, Published Opinion, No. 49599-6-II (Wash. Ct. App. Div. 2, July 25, 2016).

## **IV. ISSUES PRESENTED FOR REVIEW**

1. Did the Published Opinion err in holding, for the first time, that a state agency regulation can constitute an "other statute" under RCW 42.56.070(1) and thereby allow an agency to exempt public records from disclosure?
2. Did the Published Opinion err in rejecting the *Wash. State Patrol* standard requiring the statute be "explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production," and instead adopting a flexible and vague standard?
3. Did Clark County violate the PRA by refusing to produce electronic election records that would facilitate an analysis of election-system accuracy and security while posing no threat to the secret ballot?
4. Must Clark County produce the anonymous records because public access to election records furthers the public interest in a well-functioning democracy?
5. Is Petitioner a prevailing party, entitling him to recovery of his reasonable attorney fees and costs, and should Clark County pay daily

penalties for violating the Act?

## **V. STATEMENT OF THE CASE**

Petitioner is an election advocate seeking to ensure that the certified winner of each election actually received the most cast votes and that the public trusts that this is so. In an earlier case, Petitioner succeeded in enhancing election integrity by proving that Washington counties had implemented uncertified software to track ballots, and obtaining a state-wide injunction against continued use of that system. *See White, Rosato, et al. v. Henley*, San Juan County Super. Ct., Nos. 06-2-05166-2, 10-2-05002-8, Stip. Order Granting Permanent Injunction (Sept. 27, 2013) (J. Eaton).<sup>1</sup> This appeal continues Petitioner's efforts to enhance election integrity.

One of the greatest sources of public mistrust in elections is the use of computerized software systems that automate vote-counting and determine election outcomes. This concern is reasonable considering that hackers have recently tried to hack election systems around the country, and have stolen data from what should be the most secure institutions, including

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<sup>1</sup> The Court may take judicial notice of this Superior Court case and injunction. A copy of this injunction is attached as Appendix B.

the federal government,<sup>2</sup> the largest banks,<sup>3</sup> commercial websites<sup>4</sup> and others.<sup>5</sup> Given the millions of dollars spent on campaigns, it is only natural to believe that software vulnerabilities in election systems will eventually be exploited. These reasonable fears alone “drive[] honest citizens out of the democratic process...Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5 (2006).

Simple direct “groundproofing” is the gold standard to confirm the accuracy of the software tabulation system—and to ensure public trust in this system, allowing the public, academics and the press to compare the computer generated copies of the cast ballots with the final election outcome. Computer experts, academics, and election advocates like Petitioner have participated in such efforts, even if few ordinary citizens ever would.<sup>6</sup> The proven result of such work—like Petitioner’s previous

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<sup>2</sup> Mark Mazzetti, et al., *U.S. Fears Data Stolen by Chinese Hacker Could Identify Spies*, N.Y. TIMES, July 24, 2015, at A1, available at <http://nyti.ms/1LDN7Fu>.

The Court may take judicial notice of all these widely-reported events, including those cited *infra*.

<sup>3</sup> Matthew Goldstein, et al., *Neglected Server Provided Entry for JPMorgan Hackers*, N.Y. TIMES, December 23, 2014, at B1, available at <http://nyti.ms/1CsJMcm>.

<sup>4</sup> Danny Yadron, *Hackers Post Stolen User Data From Ashley Madison Breach*, WALL ST. J., August 19, 2015, <http://on.wsj.com/1JsiUTt>.

<sup>5</sup> Hannah Kuchler, *Cyber Insecurity, Hacking Back*, FIN. TIMES, July 27, 2015, <http://on.ft.com/1Mwalxk>.

<sup>6</sup> See e.g., Associated Press, *Wichita State Mathematician Says Kansas Voting Machines Need Audit*, WICHITA EAGLE, July 20, 2015, <http://www.kansas.com/news/politics-government/article27951310.html>.

lawsuit—is to remove or fix faulty election hardware and software *before* it causes (intentionally or accidentally) the certified outcome of an election to diverge from the votes cast.<sup>7</sup>

The Published Opinion eliminates oversight of our elections through the PRA, hamstringing one of the best organs we have to prevent such election errors and/or fraud and to enhance public trust. It precludes Petitioner, the press, or academics from obtaining the information necessary to ferret out problems and initiate timely legal challenges to correct faulty ballots, ballot lines and tallies. The fact that officials bought and implemented uncertified election software shows that sometimes blind trust is not enough. Without the vigilance of Petitioner and other election advocates, such illegal software would continue in use today.

Here, Petitioner requested anonymous digital image files of scanned paper ballots (indisputably public records under the PRA) after the election was long over. CP 16-17. The request for ballot images does not involve the cast paper ballots, which by statute must be secured in sealed containers immediately after tabulation. RCW 29A.60.110. The requested documents

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<sup>7</sup> See e.g., Kim Zetter, Unique Transparency Program Uncovers Problems with Voting Software, WIRED, December 8, 2008, <https://www.wired.com/2008/12/unique-transpar/>, in which citizens inspecting Humboldt County, CA ballot images posted online "discovered that the Premier system had dropped a batch of 197 ballots from its tabulation software."

are mere scans—like many of us deal with every day. Once scanned, the original can be filed or sealed, and eventually destroyed, while the electronic copy is stored on a computer and can be viewed or reprinted. *Id.*

The County refused to product any copies of ballot images. CP 14, ¶¶ 3-4. As Division Two previously found, Clark County “provided no evidence that production of the ballot images White requested would compromise voter secrecy.”<sup>8</sup>

On October 13, 2015, Plaintiff commenced a PRA case to compel the County to provide copies of the withheld records. *See* CP 1-5. In withholding the requested ballots and ballot-image files, the County cited no authority specifically exempting the records from public access at this point—almost two years after tabulation, certification and expiration of the statutory retention period. CP 20; RCW 29A.60.110. The County instead asked the court to imply a new exemption from the Constitution, broad election regulations of Title 29A RCW, and administrative code.

Following a show cause hearing, the trial court denied relief to Plaintiff. *See* CP 513-18. Division Two issued a published opinion affirming the trial court on June 25, 2016.

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<sup>8</sup> *White v. Clark County*, 188 Wn.App. 622, 632 (2015)

## VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### A. This Court should accept review under RAP 13.4 (b)(1) because the Published Opinion’s decision that an agency rule can constitute an “other statute” exempting PRA disclosure conflicts with Supreme Court precedent.

The Published Opinion unambiguously holds for the first time that a state agency’s rule can constitute an “other statute” exempting records from disclosure. 199 Wn.App. at 937. (“WAC 434-261-045 also provides an ‘other statute’ exemption to the PRA.”) The Published Opinion conflicts with the Supreme Court’s clear precedent that only the Legislature can create a PRA exemption and thereby fundamentally undermines the PRA.

The Supreme Court instead has held that an “other statute” exemption can be found “*only when the Legislature* has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production.” Wash. State Patrol, 185 Wn.2d at 373 (emphasis added). In reaching this conclusion, Wash. State Patrol quoted *Progressive Animal Welfare Soc’y v. Univ. or Wash.*, 125 Wn.2d 243, 252-53 (1994) (“PAWS II”) for the proposition that the Legislature “does not want judges any more than agencies to be wielding broad and malleable exemptions.”

Yet, the Published Opinion allows agencies “to wield broad and malleable exemptions” by exempting their own documents from disclosure

merely by issuing a regulation – which can even be adopted and take effect immediately and without public notice. RCW 34.05.350 (emergency rules). Indeed, if a rule can constitute an “other statute,” then perhaps so could an agency order or opinion.

As this Court has held, “Leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 131 (1978).

The threat to the PRA is not weakened by the Published Opinion’s suggestion that a regulation can create an “other statute” exemption as long as the agency provide a sufficient pretense in promulgating the rule. The Published Opinion states that regulation can create the exemption because, the Secretary of State, rather than creating a PRA exemption, was “implementing regulations to ensure ballot security and secrecy.” 199 Wn.App, at 938.

Empowering agencies to exempt records (through WACs) encourages agencies to promulgate rules merely to remove records from public access that could be embarrassing or worse.

On several occasions, this Court has made clear that “The PRA’s purpose of open government remains paramount, and thus, the PRA directs that its exemptions must be narrowly construed.” *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 432 300 P.3d 376 (2013),

*republished as amended* 327 P.3d 600 (2014); *see also e.g. PAWS II.*, 125 Wn.2d at 260 (“the Legislature takes the trouble to repeat three times that exemptions...should be construed narrowly.”). *See also* RCW 42.56.030 (“This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.”). *See also PAWS II*, 125 Wn.2d at 262 (the PRA “does not allow a court ‘to imply exemptions but only allows specific exemptions to stand.’”).

The Court should accept review and reverse the published opinion’s ruling that an agency can exempt records from the PRA through regulation.

**B. This Court should accept review under RAP 13.4 (b)(1) and (b)(2) because the Published Opinion applies a standard for the “other statutes” exemption that conflicts with Supreme Court and Court of Appeals precedent.**

In addition to allowing agency rules to constitute an “other statute,” the Published Opinion contradicts *Washington State Patrol* by diluting the strict standard for when the “other statute” exemption applies. In *Washington State Patrol*, the Court held that the “other statute” exemption “applies only to those exemptions explicitly identified in other statutes; its language does not allow a court ‘to imply exemptions but only allows specific exemptions to stand.’” 185 Wn.2d at 372. “[I]f the exemption is not found within the PRA itself, we will find an ‘other statute’ exemption



only when the legislature has made it *explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production in response to a public records request.*” 1854 Wn.2d at 373 (emphasis added). The Court held that:

The PRA, and our caselaw surrounding it, demands that an ‘other statute’ exemption be explicit. Where the legislature has not made a PRA exemption in an ‘other statute’ explicit, we will not. Thus, “the lack of prohibitory language ... or explicit exemption” means that a statute does not qualify as an “other statute “exemption.

185 Wn.2d at 384. The Court concluded that “*An ‘other statute’ exemption must be explicit, this court may not imply one. Because the legislature did not make it explicit, we hold that RCW 4.24.550 is not an “other statute” under the PRA* and reverse the trial court.” 185 Wn.2d at 387 (emphasis added).

The Court cited approvingly of *Belo Management Services Inc. v. Click! Network*, 184 Wn.App. 649, 653-54 (2014) for its holding that the “other statute” exemption does not apply because the enactment “did not ‘specifically state that the [documents at issue] are confidential and protected from disclosure.’”

Other cases from the Courts of Appeal have followed this standard. For example, *SEIU 775 v. Washington*, 198 Wn.App. 745 (Div. II, Feb. 2017) confirms that to qualify as an exemption, the “other statute” “must expressly prohibit the release of public records.” *Id.* at 751. The Court

held that the statute in question “is not concerned with the privacy or confidentiality of specific records or information, and it does not explicitly prohibit the release of records of information ... Accordingly, we hold that the PECBA does not provide an ‘other statute’ exemption to the PRA under RCW 42.656.070(1).”

Here, the Published Opinion ignores the “explicitly clear” standards adopted by the Supreme Court and Courts of Appeal. It instead applies a flexible and vague standard that could allow virtually any statute or rule to qualify, giving agencies a multitude of excuses to avoid producing public records.

Indeed, the Published Opinion states that WAC 434-261-045 constitutes a qualifying “other statute” *because it was not explicit* – the exact opposite standard that the Supreme Court requires. 199 Wn.App. at 938 (the WAC qualifies because it “does not regulate disclosure or interpret the disclosure requirements of the PRA.”)

Neither of the enactments relied upon by the Published Opinion for an “other statute” exemption come anywhere near meeting this Court’s “explicit” standard. First, the Court of Appeal relied upon RCW 29A.60.110 which is only about the security of physical ballots during the election process, allowing the sealed containers holding the ballots to be opened in only certain situations. Rather than looking for an explicit

exemption or prohibition of release, the Court did the exact opposite, stating that disclosure is prohibited even years after the election because “Nothing in the language of RCW 29A.60.100 suggests that the ballots need only be kept secure for 60 days.” 199 Wn.App. at 938.

Neither the statute nor the regulation relied upon as “other statute” contained the explicit exemption or prohibition of release meeting the *Washington State Patrol* standard. Rather, they both focus on ensuring that nobody tampers with the paper ballots during the election or prior to a potential recount. Security provisions for records do not equate to secrecy of those records. Moreover, RCW 29A.60.110 is about original physical documents, not the copies of electronic images that Petitioner was seeking.

The digital images sought by Petitioner – long after the election was certified and final – have nothing to do with the security of the sealed containers of paper ballots at issue in RCW 29A.60.110. Those images are stored on computers and never were in sealed containers. Thus, the statute does not contain any statement about the release of copies of ballot images, and certainly not an “explicitly clear” exemption or prohibition of their public release. Rather, the Published Opinion improperly “implies” an exemption, which is prohibited. *Wash. State Patrol*, 185 Wn.2d at 387.

By eliminating the Supreme Court’s “explicitly clear” standard, the Published Opinion fundamentally undermines the PRA.

**C. This Court should accept review under RAP 13.4(b)(1) and (b)(4) because the Published Opinion conflicts with precedent and important public policy about the release of ballot images.**

The Published Opinion misconstrues Supreme Court precedent and undermines important public interest in its decision about burden of proof and the agency's need to redact information to facilitate public disclosure.

RCW 29A.60.110 on its face applies to the *paper ballots* that “must be sealed in containers” to ensure that they are secure and thereby protect election integrity. It does not apply to ballot images stored on computers. Even if it did, this would be a situation where the release of the documents should be required under RCW 42.56.210(2), because “the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital government function.” There has been no showing that the release would implicate privacy concerns, and the release of years' old ballots for academics or journalism does not jeopardize vital government function. Certainly if voted ballots could be released to academics and journalists after *Bush v. Gore* without negative consequences, the same is true here.

The Published Opinion essentially nullifies RCW 42.56.210(2) by placing an insurmountable burden on Petitioner. While election secrecy is a vital government interest, but the release of digital images long after an election is not necessary to protect that interest.

**D. This Court should accept review under RAP 13.4(b)(4) because the Published Opinion hampers public oversight of our elections and undermines voter confidence.**

In Washington, we recognize a public interest in “preserving electoral integrity” by “promoting transparency and accountability in the electoral process, which...is essential to the proper functioning of a democracy.” *Doe v. Reed*, 561 U.S. at 198 (internal quotation marks omitted); *see also, Purcell*, 549 U.S. at 4 (“Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.”).

When other states have analyzed these same issues, they have ruled in favor of transparency and permit public access to ballot-image files—and even to the ballots themselves. *See Marks v. Koch*, 284 P.3d 118 (Colo. App. 2011), *cert. dismissed as improvidently granted*, No. 11SC816 (June 21, 2012); *Price v. Town of Fairlee*, 2011 VT 48, 190 Vt. 66, 26 A.3d 26 (2011). Given the widespread use of computer systems in Washington that foment suspicion, and the public policy of our state favoring transparency, Washington deserves the same level of public access enjoyed by other states.

**1. Access to the requested election records is critical for public confidence in close elections and to fix problems.**

As codified, it is the policy of the State of Washington that:

[P]ublic confidence in government at all levels is essential and must be promoted by all possible means...[including] *full access to public records so as to assure continuing public confidence of fairness of elections...*

RCW 42.17A.001(5) (emphasis added); *see also id.* at .001(11).<sup>9</sup> In the “electronic age,” these policies require that the public be allowed to use the PRA to access anonymous election records stored electronically.

Washington has a unique experience with a historically close gubernatorial election in 2004 between Dino Rossi and Christine Gregoire. Close and contested elections happen, and it is essential that we ensure that electronic tabulation systems are working properly and that the public has confidence in their operation—*before* contested elections occur. There is evidence from other jurisdictions that electronic voting systems have vulnerabilities and can produce inaccurate results.<sup>10</sup> Access to the anonymous records Petitioner seeks can help deter fraud, identify problems

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<sup>9</sup> This declaration of policy is rooted in Initiative Measure No. 276, approved November 7, 1972—the same measure through which the PRA was originally adopted.

<sup>10</sup> *See e.g.* Edward Tenner, Op-Ed, *The Perils of High-Tech Voting*, N.Y. TIMES, February 5, 2001, available at <http://www.nytimes.com/2001/02/05/opinion/the-perils-of-high-tech-voting.html> (“Those in the business are all too familiar with the ways electronic systems can malfunction...”); David Dill, et al., *Electronic Voting Systems: A Report for the National Research Council* (Verified Voting Foundation), November 22, 2004, available at [https://openvotingconsortium.org/files/project\\_evoting\\_vvf.pdf](https://openvotingconsortium.org/files/project_evoting_vvf.pdf); Ford Fessenden, *Counting the Vote: The Machine*, N.T. TIMES, November 19, 2000, available at <http://www.nytimes.com/2000/11/19/us/counting-the-vote-the-machine-new-focus-on-punch-card-system.html>; Adam Cohen, Op-ed, *Rolling Down the Highway, Looking Out for Flawed Elections*, N.Y. TIMES, August 8, 2004, available at <http://www.nytimes.com/2004/08/08/opinion/editorial-observer-rolling-down-the-highway-looking-out-for-flawed-elections.html>.

with the system, and correct them before it is too late. Unaddressed, these potential problems “drive[] honest citizens out of the democratic process and breeds distrust of our government.” *Reed*, 561 U.S. at 197 (quoting *Purcell*, 549 U.S. at 4).

**2. Contrary to state policy, the Published Opinion effectively forfeits the public’s oversight role as sovereign.**

By denying the public its right to access the anonymous public records at issue, the Court of Appeal tells Washington voters they must trust the system without question. But the Public Record Act was born from an inherent distrust of being kept in the dark about important democratic issues, including the workings of elections. Under the PRA:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. *The people insist on remaining informed so that they may maintain control over the instruments they have created.*

RCW 42.56.030 (emphasis added). The PRA is a safety valve because would-be voters place greater trust in elections that are transparent and subject to public oversight. The Published Opinion makes that impossible because the public has no access to the electronic files used to determine election outcomes. Secrecy feeds public distrust and prevents academics, the press, and citizens from scrutinizing and ensuring the integrity of election systems. This is contrary to the public’s intent in passing the PRA





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**Date and Time:** Monday, September 25, 2017 1:17:00 PM EDT

**Job Number:** 53902754

## Document (1)

1. [White v. Clark County, 199 Wn. App. 929](#)

**Client/Matter:** Secret Ballot

**Search Terms:** white and "clark county"

**Search Type:** Terms and Connectors

**Narrowed by:**

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Cases

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Court: Washington



Neutral

As of: September 25, 2017 5:17 PM Z

## White v. Clark County

Court of Appeals of Washington, Division Two

May 26, 2017, Oral Argument; July 25, 2017, Filed

No. 49599-6-II

### Reporter

199 Wn. App. 929 \*; 2017 Wash. App. LEXIS 1730 \*\*; 2017 WL 3381068

TIMOTHY **WHITE**, Appellant, v. **CLARK COUNTY**, Respondent.

**Prior History:** [**\*\*1**] Appeal from Clark Superior Court. Docket No: 15-2-02827-1. Judge signing: Honorable David E Gregerson. Judgment or order under review. Date filed: 12/22/2016.

[White v. Clark County, 2016 Wash. LEXIS 1210 \(Wash., Nov. 2, 2016\)](#)

### Core Terms

ballots, exemption, tabulated, election, records, disclosure, sealed, containers, secrecy, images, redaction, argues, storage, days, secretary of state, public record, applies, vital, show cause, pretabulated, regulations, canvassing, inspection, processing, provides, requires, voters, votes

### Case Summary

#### Overview

**HOLDINGS:** [1]-The denial of appellant's show cause motion and dismissal of his Public Records Act, Wash. Rev. Code ch. 42.56, action were proper because he was not entitled to disclosure of the requested records since both [Wash. Rev. Code § 29A.60.110](#) and [Wash. Admin. Code § 434-261-045](#) created an "other statute" exemption that applied to election ballots even after the minimum 60-day retention period after tabulation; [2]-Whether concerns about jeopardizing the secrecy of the vote could have been addressed by redacting certain information was immaterial because the "other statute" exemption applied to the entire ballot; [2]-[Wash. Rev. Code § 42.56.210\(2\)](#) did not override that exemption because appellant was unable to show that withholding

the ballots was clearly unnecessary to protect the vital government interest in preserving the voters' right to absolute secrecy of their votes.

### Outcome

Judgment affirmed.

### LexisNexis® Headnotes

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Governments > Legislation > Interpretation

[HN1](#) [↓] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

The Public Records Act (PRA), Wash. Rev. Code ch. 42.56, mandates the broad disclosure of public records. Therefore, an agency has an affirmative obligation to disclose records requested under the PRA unless a specific exemption applies. And courts must liberally construe the PRA in favor of disclosure and narrowly construe its exemptions, [Wash. Rev. Code § 42.56.030](#). The agency bears the burden of establishing that an exemption to production applies, [Wash. Rev. Code § 42.56.550\(1\)](#). A requesting party denied disclosure may move for a show cause hearing, at which the burden of proof is on the agency to show that its denial was proper, [§ 42.56.550\(1\), \(3\)](#).

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

[HN2](#) [↓] **Standards of Review, De Novo Standard of**

**Review**

Agency's actions are reviewed de novo, [Wash. Rev. Code § 42.56.550\(3\)](#).

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

**[HN3](#) Standards of Review, De Novo Standard of Review**

An agency may lawfully withhold production of records if a specific exemption applies. There are three sources of Public Records Act, Wash. Rev. Code ch. 42.56, exemptions: (1) enumerated exemptions contained in the PRA itself, (2) any other statute that exempts or prohibits disclosure, and (3) the Washington Constitution. The "other statute" exemption is found in [Wash. Rev. Code § 42.56.070\(1\)](#) and courts will find an "other statute" exemption only when the legislature has made it explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production. The statute does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records. Whether a statute is an "other statute" under [§ 42.56.070\(1\)](#) is a question of law that is reviewed de novo.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

**[HN4](#) Standards of Review, De Novo Standard of Review**

Whether a statute is an "other statute" under [Wash. Rev. Code § 42.56.070\(1\)](#) is a question of law reviewed de novo.

Governments > Local Governments > Elections

**[HN5](#) Local Governments, Elections**

[Wash. Rev. Code § 29A.60.110](#) unambiguously requires that tabulated ballots be kept in sealed containers and can be opened by the canvassing board only in one of four specified situations.

Governments > Local Governments > Elections

**[HN6](#) Local Governments, Elections**

Nothing in the language of [Wash. Rev. Code § 29A.60.110](#) suggests that the ballots need only be kept secure for 60 days. [Section 29A.60.110](#) contains no time limit for keeping the ballots in sealed containers. Therefore, under the plain statutory language, the agency has two choices once the 60-day period ends: the ballots must be kept in sealed containers indefinitely unless one of the four specified situations arises or the ballots must be discarded. Neither choice allows the ballots to be disclosed to a requesting person.

Governments > Local Governments > Elections

**[HN7](#) Local Governments, Elections**

Certain non-ballot election records may be disclosed to the public.

Governments > Local Governments > Elections

**[HN8](#) Local Governments, Elections**

[Wash. Rev. Code § 29A.60.110](#) does not simply require sealed storage; it also includes unambiguous language stating that the sealed containers may only be opened in four specific situations. It is that restriction on accessing the ballots that creates the exemption.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public

Disclosure > Statutory Exemptions

all times, except during duplication, inspection by the canvassing board, or tabulation."

Governments > Local Governments > Elections

### [HN9](#) [↓] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

The provisions of [Wash. Rev. Code § 29A.60.110](#) are inconsistent with disclosing copies of tabulated ballots under the Public Records Act, Wash. Rev. Code ch. 42.56. Therefore, [Wash. Rev. Code § 29A.60.110](#) constitutes an express "other statute" exemption for tabulated ballots.

Governments > Local Governments > Elections

### [HN12](#) [↓] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Although an agency cannot be allowed to determine what records are exempt from the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, the secretary of state did not attempt to regulate disclosure or interpret the disclosure requirements of the PRA when promulgating [Wash. Admin. Code § 434-261-045](#). Instead, the secretary of state implemented regulations to ensure ballot security and secrecy during processing, pursuant to the express enabling provisions of [Wash. Rev. Code § 29A.04.611](#).

Governments > Local Governments > Elections

### [HN10](#) [↓] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

In addition to [Wash. Rev. Code § 29A.60.110](#), [Wash. Admin. Code § 434-261-045](#) also provides an "other statute" exemption to the Public Records Act, Wash. Rev. Code ch. 42.56. The legislature has required the secretary of state to make rules regarding election standards and procedures to guarantee the secrecy of ballots, [Wash. Rev. Code § 29A.04.611\(34\)](#). Under that authority, the secretary of state enacted [Wash. Admin. Code § 434-261-045](#).

Governments > Local Governments > Elections

### [HN13](#) [↓] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

Governments > Local Governments > Elections

### [HN11](#) [↓] **Local Governments, Elections**

The provisions of [Wash. Admin. Code § 434-261-045](#) are inconsistent with disclosing copies of tabulated ballots under the Public Records Act (PRA), Wash. Rev. Code ch. 42.56. This regulation can qualify as an "other statute" for PRA purposes. Therefore, [Wash. Admin. Code § 434-261-045](#) constitutes an express "other statute" exemption for tabulated ballots and ballot images.

[Wash. Admin. Code § 434-261-045](#) unambiguously requires that ballots be kept in secure storage at all times other than during processing, duplication, inspection, and tabulation and states that they can only be accessed in accordance with [Wash. Rev. Code §§ 29A.60.110](#) and [29A.60.125](#). [Wash. Rev. Code § 29A.60.110](#) allows for access only in four specified situations. And [Wash. Rev. Code § 29A.60.125](#) provides procedures for handling damaged ballots, and expressly states that ballots must be sealed in secure storage at

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Governments > Local Governments > Elections

## [HN14](#) [↓] Defenses & Exemptions From Public Disclosure, Statutory Exemptions

Tabulated ballots are exempt in their entirety from disclosure under the Public Records Act (PRA), Wash. Rev. Code ch. 42.56. [Wash. Rev. Code § 29A.60.110](#) and [Wash. Admin. Code § 434-261-045](#) provide categorical exemptions, not conditional ones. As a result, whether the ballots can be redacted to address specific secrecy concerns is immaterial. If a type of record is exempted, then meaningful redaction generally is impossible, unless redaction will transform the record into an entirely different type of record. The ballots are exempt from production without qualification.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

## [HN15](#) [↓] Defenses & Exemptions From Public Disclosure, Statutory Exemptions

[Wash. Rev. Code § 42.56.210\(2\)](#) states that the release of specific records that are otherwise exempt from disclosure may be permitted if the superior court in the county in which the record is maintained finds, after a hearing that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function. Such a finding overrides the Public Records Act (PRA), Wash. Rev. Code ch. 42.56, exemption and requires the agency to produce the requested records.

Constitutional Law > Elections, Terms & Voting

Governments > Local Governments > Elections

## [HN16](#) [↓] Constitutional Law, Elections, Terms & Voting

[Wash. Const. art. VI, § 6](#) provides voters absolute secrecy in their votes. Washington statutes and regulations also protect this right and ensure that ballots are secure. Preserving the integrity and secrecy of votes and the security of election ballots clearly is a vital government function.

Administrative Law > ... > Sanctions Against Agencies > Costs & Attorney Fees > Grounds for Recovery

## [HN17](#) [↓] Costs & Attorney Fees, Grounds for Recovery

[Wash. Rev. Code § 42.56.550\(4\)](#) provides that any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded reasonable attorney fees.

## Headnotes/Syllabus

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### Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** A citizen sought to enforce a public records request for a county to produce certain general election ballots more than 60 days after they were tabulated.

**Superior Court:** The Superior Court for **Clark County**, No. 15-2-02827-1, David E. Gregerson, J., on December 22, 2016, entered a judgment in favor of the county, ruling that the ballots were statutorily exempt from production.

**Court of Appeals:** Holding that the ballots are statutorily exempt from production and that the exemption is categorical, the court *affirms* the judgment.

### Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

[WA\[1\]](#) [↓] [1]

Elections > Ballot > What Constitutes > Electronic Image.

Under [RCW 29A.04.008\(1\)\(c\)](#), an electronic image of a ballot constitutes a “ballot.”

[WA\[2\]](#) [↓] [2]

Open Government > Public Disclosure > Exemptions > Application.

Under the Public Records Act (ch. 42.56 RCW), an

agency may lawfully withhold production of a public record if a specific exemption applies.

[WA\[3\]](#) [3]

Open Government > Public  
Disclosure > Exemptions > Burden of Proof > Governmental Body.

Under [RCW 42.56.550\(1\)](#) and [\(3\)](#), an agency withholding a public record from production under the Public Records Act has the burden of proving that an exemption from production applies.

[WA\[4\]](#) [4]

Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Statutory Source > Sufficiency.

A court may find that a public record is exempt from production under the “other statute” exemption of [RCW 42.56.070\(1\)](#) if the legislature has made it explicitly clear in another statute that a specific record, or portion thereof, is exempt or otherwise prohibited from production. The other statute does not need to expressly address the Public Records Act, but it must expressly prohibit or exempt the release of records.

[WA\[5\]](#) [5]

Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Statutory Source > Question of Law or Fact > Review > Standard of Review.

Whether a statute qualifies as an “other statute” within the meaning of [RCW 42.56.070\(1\)](#) and exempts public records from production under the Public Records Act is a question of law that is reviewed de novo.

[WA\[6\]](#) [6]

Elections > Ballot > Security and Secrecy > After  
Tabulation > Statutory Provisions > Scope.

[RCW 29A.60.110](#) expressly addresses the security and secrecy of tabulated ballots and requires that tabulated ballots be kept in sealed containers and may be opened by a canvassing board only in one of four specified situations.

[WA\[7\]](#) [7]

Elections > Ballot > Security and Secrecy > After

Tabulation > Statutory Provisions > 60-Day  
Requirement > Effect.

The 60-day provision in [RCW 29A.60.110](#) specifies only how long sealed ballots must be retained. Sealed ballots may be discarded after 60 days. The provision does not indicate that ballots become available for public release after 60 days.

[WA\[8\]](#) [8]

Elections > Ballot > Security and Secrecy > After  
Tabulation > Statutory Provisions > 60-Day  
Requirement > Disposition of Ballots.

Under [RCW 29A.60.110](#), an agency has two choices once the 60-day ballot retention period ends: (1) the ballots must be kept in sealed containers indefinitely unless one of the four specified situations arises or (2) the ballots must be discarded. Neither choice allows the ballots to be disclosed on request.

[WA\[9\]](#) [9]

Elections > Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Election Ballots > Posttabulation > Statutory Provisions.

[RCW 29A.60.110](#), which provides for the security of tabulated ballots, constitutes an express “other statute” under [RCW 42.56.070\(1\)](#) that exempts tabulated ballots from production under the Public Records Act.

[WA\[10\]](#) [10]

Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Administrative Rules > Sufficiency.

An administrative rule can be an “other statute” under [RCW 42.56.070\(1\)](#) that can serve to exempt a public record from production under the Public Records Act.

[WA\[11\]](#) [11]

Elections > Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Election  
Ballots > Posttabulation > Administrative Rules.

[WAC 434-261-045](#), which provides for the security of tabulated ballots, constitutes an express “other statute” under [RCW 42.56.070\(1\)](#) that exempts tabulated ballots from production under the Public Records Act.



[WA\[12\]](#) [12]

Elections > Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Election Ballots > Posttabulation > Scope of  
Protection.

The exemptions that [RCW 29A.60.110](#) and [WAC 434-261-045](#) provide against producing tabulated ballots under the Public Records Act are categorical, not conditional. Consequently, whether ballots can be redacted to address specific secrecy concerns is immaterial. Ballots are exempt from production without qualification.

[WA\[13\]](#) [13]

Open Government > Public  
Disclosure > Exemptions > “Clearly Unnecessary”  
Exception > Burden of Proof.

Under [RCW 42.56.210\(2\)](#), a court may allow for the inspection and copying of a public record that is statutorily exempt from production if the court finds that the exemption is “clearly unnecessary” to protect any individual's right of privacy or any vital government function. The burden is on the party seeking disclosure to establish that an exemption is clearly unnecessary.

[WA\[14\]](#) [14]

Elections > Ballot > Security and Secrecy > Secretary of  
State's Rules > Purposes.

Under [Const. art. VI, § 6](#) and various statutory and regulatory provisions, preserving the integrity and secrecy of votes and the security of election ballots is a vital government function.

[WA\[15\]](#) [15]

Open Government > Public Disclosure > Attorney  
Fees > Prevailing Party > Necessity.

[RCW 42.56.550\(4\)](#) does not support an award of attorney fees to a nonprevailing party in litigation under the Public Records Act.

MAXA, A.C.J., delivered the opinion for a unanimous court.

Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Election Ballots > Posttabulation > Statutory  
Provisions.

Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Election  
Ballots > Posttabulation > Administrative Rules.

Open Government > Public  
Disclosure > Exemptions > Other Statutory  
Exemptions > Election Ballots > Posttabulation > Scope of  
Protection.

**Counsel:** *Eric D. “Knoll” Lowney and Marc Zemel (of Smith & Lowney PLLC)*, for appellant.

*Anthony F. Golik, Prosecuting Attorney, and Jane E. Vetto, Deputy*, for respondent.

*Rebecca R. Glasgow, Assistant Attorney General*, on behalf of the Secretary of State, amicus curiae.

**Judges:** Authored by Bradley Maxa. Concurring: Linda Lee, Lisa Sutton.

**Opinion by:** Bradley Maxa

## Opinion

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[\*931]

¶1 MAXA, A.C.J. — Timothy [White](#) submitted a [Public Records Act \(PRA\)](#)<sup>1</sup> request to [Clark County](#), requesting production of ballots cast in the November 2013 election. After the County declined to produce the ballots, [White](#) [\*932] filed a PRA action and a motion to show cause to compel production. [White](#) appeals the trial court's ruling that the ballots were exempt from disclosure under the PRA.

¶2 [White](#) previously had submitted – a day after the election – a PRA request to the County for *pretabulated* ballot images from the November 2013 election. This court held that the County was not required to produce [\*\*2] pretabulated ballots because [article VI, section 6 of the Washington Constitution](#), various sections of Title 29A RCW, and secretary of state regulations together constituted an “other statute” exemption to the PRA under [RCW 42.56.070\(1\)](#) for those ballots. [White v. Clark County](#), 188 Wn. App. 622, 631, 637, 354 P.3d 38 (2015) ([White](#) I), *review denied*, 185 Wn.2d 1009 (2016). Division One of this court issued a similar ruling regarding [White](#)'s identical PRA requests to two other counties. [White v. Skagit](#)

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<sup>1</sup> [Ch. 42.56 RCW](#).

[County](#), 188 Wn. App. 886, 898, 355 P.3d 1178 (2015) (*White II*), review denied, 185 Wn.2d 1009 (2016).

¶3 We acknowledge that these cases do not directly control *White*'s current PRA request because he now is requesting ballots more than 60 days after they were tabulated. But we hold *White* is not entitled to disclosure of the requested records because (1) both [RCW 29A.60.110](#) and [WAC 434-261-045](#) create an “other statute” exemption that applies to election ballots even after the minimum 60-day retention period after tabulation, (2) whether concerns about jeopardizing the secrecy of the vote could have been addressed by redacting certain information is immaterial because the “other statute” exemption applies to the entire ballot, and (3) [RCW 42.56.210\(2\)](#) does not override this exemption because *White* cannot show that withholding the ballots is “clearly unnecessary” to protect the vital government interest in preserving the voters' right to absolute secrecy of their votes.

¶4 Accordingly, we affirm [\*\*3] the trial court's denial of *White*'s motion to show cause and dismissal of *White*'s PRA action.

#### [\*933] FACTS

[WA1](#)[↑] [1] ¶5 On July 2, 2015, *White* sent a PRA request to the County for election records relating to the November 2013 general election, including paper ballots and images of ballots “received, cast, voted, or otherwise used.”<sup>2</sup> Clerk's Papers (CP) at 16. The County responded that it could not release the ballots because the records were subject to the Washington Constitution's mandate of absolute secrecy of the vote. The County also cited both the *White I* and *White II* decisions as support for its conclusion that the ballots were exempt from disclosure. The County did release almost 9,000 pages of other election records.

¶6 *White* filed a complaint alleging that the County had violated the PRA and seeking to compel production of the requested ballots. At the same time, *White* filed a motion under [RCW 42.56.550\(1\)](#) requiring the County to show cause why the trial court should not order production of the requested ballots. The court ruled that “voted ballots are exempt from production under the PRA and *Clark County*'s refusal to provide copies of the requested ballots is proper based on the applicable

constitutional, statutory and case law.” CP at 518. Therefore, [\*\*4] the court concluded that the County complied with the PRA in its response to *White*'s request, denied *White*'s motion to show cause, and dismissed *White*'s PRA complaint.

¶7 *White* appeals the trial court's denial of relief under the PRA.

#### ANALYSIS

##### A. PRA EXEMPTION FOR TABULATED ELECTION BALLOTS

¶8 *White* argues that the County wrongfully failed to produce the ballots he requested because the “other statute” [\*934] exemption for pre-tabulated ballots does not apply to a request for tabulated ballots made more than 60 days after tabulation. We hold that both [RCW 29A.60.110](#) and [WAC 434-261-045](#) provide an “other statute” exemption for tabulated ballots even beyond 60 days after tabulation.

##### 1. Legal Principles

[WA2,3](#)[↑] [2, 3] ¶9 [HN1](#)[↑] The PRA mandates the broad disclosure of public records. [John Doe A v. Wash. State Patrol](#), 185 Wn.2d 363, 371, 374 P.3d 63 (2016). Therefore, an agency has an affirmative obligation to disclose records requested under the PRA unless a specific exemption applies. *Id.* at 371-72. And we must liberally construe the PRA in favor of disclosure and narrowly construe its exemptions. [RCW 42.56.030](#); [John Doe A](#), 185 Wn.2d at 371. The agency bears the burden of establishing that an exemption to production applies. [RCW 42.56.550\(1\)](#); [Sargent v. Seattle Police Dep't](#), 179 Wn.2d 376, 385-86, 314 P.3d 1093 (2013).

¶10 A requesting party denied disclosure may move for a show cause hearing, at which the burden of proof is on the agency to show that its denial was proper. [\*\*5] [RCW 42.56.550\(1\)](#), (3). [HN2](#)[↑] We review the agency's actions de novo. [RCW 42.56.550\(3\)](#).

¶11 [HN3](#)[↑] An agency may lawfully withhold production of records if a specific exemption applies. [White I](#), 188 Wn. App. at 630. There are three sources of PRA exemptions: (1) enumerated exemptions contained in the PRA itself, (2) any “other statute” that exempts or prohibits disclosure, and (3) the Washington Constitution. *Id.* at 630-31.

[WA4,5](#)[↑] [4, 5] ¶12 The “other statute” exemption is found in [RCW 42.56.070\(1\)](#): “Each agency, in accordance with published rules, shall make available for public inspection and copying all public records,

<sup>2</sup>We refer to both paper ballots and ballot images collectively as “ballots.” Electronic images of ballots constitute “ballots” under [RCW 29A.04.008\(1\)\(c\)](#). [White I](#), 188 Wn. App. at 632.

unless the record falls within the specific exemptions of ... this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” We will find an [RCW 42.56.070\(1\)](#) “other statute” exemption “only when the legislature has made it [**\*935**] explicitly clear that a specific record, or portions of it, is exempt or otherwise prohibited from production.” [John Doe A, 185 Wn.2d at 373](#). The statute “does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records.” [Id. at 372](#). [HN4](#) [↑] Whether a statute is an “other statute” under [RCW 42.56.070\(1\)](#) is a question of law that we review de novo. [Id. at 371](#).

## 2. Limited Holding of [White](#) I

¶13 [White](#) is correct that [White](#) I does not directly control the resolution of this case. In [**\*\*6**] [White](#) I, we noted that [RCW 29A.40.110\(2\)](#) addresses ballot security for the period between receipt of the ballot and the beginning of ballot processing, and [RCW 29A.60.110](#) addresses ballot security after tabulation. [188 Wn. App. at 633-34](#). [White](#)'s request for pretabulated ballots in [White](#) I involved a “gap” in ballot security for the period from the beginning of processing until tabulation. [Id. at 634](#). We held that an “other statute” exemption existed for pretabulated ballots based on these statutes and applicable secretary of state regulations. [Id. at 637](#).

¶14 But we did not address in [White](#) I whether an exemption existed for tabulated ballots, stating only that ballot images must be kept secure until “at least” 60 days after tabulation. [Id. at 637](#).

## 3. “Other Statute” Exemption Under [RCW 29A.60.110](#)

[WA/6](#) [↑] [6] ¶15 [RCW 29A.60.110](#) expressly addresses the security and secrecy of tabulated ballots:

Immediately after their tabulation, *all ballots counted at a ballot counting center must be sealed in containers* that identify the primary or election and be retained for at least sixty days or according to federal law, whichever is longer.

In the presence of major party observers who are available, ballots may be removed from the sealed containers at the elections department and consolidated into one sealed container for [**\*\*7**] storage purposes. *The containers may only be opened [**\*936**]* 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 a contest or election dispute.

(Emphasis added.) [HN5](#) [↑] This statute unambiguously requires that tabulated ballots be kept in sealed containers and can be opened by the canvassing board *only* in one of four specified situations.

[WA/7,8](#) [↑] [7, 8] ¶16 [White](#) makes three arguments against treating [RCW 29A.60.110](#) as an “other statute” exemption. First, he argues that once the 60-day retention period required by [RCW 29A.60.110](#) has expired, the ballots must become available for public release pursuant to a PRA request. But the 60-day period does not apply to keeping the tabulated ballots in sealed containers. That period applies to how long the sealed ballots must be *retained*. In other words, the sealed ballots may be discarded after 60 days.

¶17 [HN6](#) [↑] Nothing in the language of [RCW 29A.60.110](#) suggests that the ballots need only be *kept secure* for 60 days. [RCW 29A.60.110](#) contains no time limit for keeping the ballots in sealed containers. Therefore, under the plain statutory language, the agency has two choices once the 60-day period ends: the ballots must be kept in sealed containers [**\*\*8**] indefinitely unless one of the four specified situations arises or the ballots must be discarded. Neither choice allows the ballots to be disclosed to a requesting person.

¶18 Second, [White](#) argues that Title 29A RCW explicitly exempts at least six types of documents from the PRA, but there is no explicit exemption for tabulated ballots. He claims that this omission indicates that the legislature did not intend for ballots to be exempt from the PRA. But as Division One noted in [White](#) II, the legislature has also “specified that [HNT](#) [↑] certain *nonballot* election records may be disclosed to the public.” [188 Wn. App. at 897](#) (emphasis added). The court noted that it would be superfluous for the legislature to single out specific types of elections records as [**\*937**] subject to disclosure unless they were viewed as exceptions to the general rule of nondisclosure. [Id.](#) Further, because under [RCW 29A.60.110](#) it is clear that tabulated ballots must remain sealed, there was no reason for the legislature to include an explicit exemption.

¶19 Third, [White](#) argues that if simply requiring secure storage of records amounts to an exemption, then most records would be exempt from disclosure under the PRA. He notes that [RCW 40.14.020\(4\)](#) requires the state archivist to maintain the security [**\*\*9**] of all state

public records but does not thereby exempt all state public records from disclosure. However, White overlooks that [HN8](#) [↑] [RCW 29A.60.110](#) does not simply require sealed storage; it also includes unambiguous language stating that the sealed containers may only be opened in four specific situations. It is that restriction on *accessing* the ballots that creates the exemption.

[WA9](#) [↑] [9] ¶20 [HN9](#) [↑] The provisions of [RCW 29A.60.110](#) are inconsistent with disclosing copies of tabulated ballots under the PRA. Therefore, we hold that [RCW 29A.60.110](#) constitutes an express “other statute” exemption for tabulated ballots.

#### 4. “Other Statute” Exemption Under [WAC 434-261-045](#)

¶21 [HN10](#) [↑] In addition to [RCW 29A.60.110](#), [WAC 434-261-045](#) also provides an “other statute” exemption to the PRA. The legislature has required the secretary of state to make rules regarding election “[s]tandards and procedures to guarantee the secrecy of ballots.” [RCW 29A.04.611\(34\)](#). Under that authority, the secretary of state enacted [WAC 434-261-045](#), which provides:

*Received ballots and ballot images must be maintained in secure storage except during processing, duplication, inspection by the canvassing board, or tabulation. Secure storage must employ the use of numbered seals and logs, or other security measures that will detect any inappropriate access to the secured materials. Ballots [\*\*10] and ballot images may only be accessed in accordance with [RCW 29A.60.110](#) and [29A.60.125](#).*

(Emphasis added.)

[\*938]

¶22 [HN11](#) [↑] [WAC 434-261-045](#) unambiguously requires that ballots be kept in secure storage at all times other than during processing, duplication, inspection, and tabulation and states that they can *only* be accessed in accordance with [RCW 29A.60.110](#) and [29A.60.125](#). As discussed above, [RCW 29A.60.110](#) allows for access only in four specified situations. And [RCW 29A.60.125](#) provides procedures for handling damaged ballots, and expressly states that “ballots must be sealed in secure storage at all times, except during duplication, inspection by the canvassing board, or tabulation.”

[WA10](#) [↑] [10] ¶23 White argues that [WAC 434-261-045](#) cannot be an “other statute” because state

administrative rules cannot provide a PRA exemption. But in White I, this court considered and rejected this argument. [188 Wn. App. at 636](#). The court noted that [HN12](#) [↑] although an agency cannot be allowed to determine what records are exempt from the PRA, the secretary of state did not attempt to regulate disclosure or interpret the disclosure requirements of the PRA when promulgating [WAC 434-261-045](#). *Id.* Instead, the secretary of state “implemented regulations to ensure ballot security and secrecy during processing, pursuant to the express enabling provisions of [RCW 29A.04.611](#).” *Id.*

[WA11](#) [↑] [11] ¶24 [HN13](#) [↑] The provisions of [WAC 434-261-045](#) [\*\*11] are inconsistent with disclosing copies of tabulated ballots under the PRA. Under White I, this regulation can qualify as an “other statute” for PRA purposes. [188 Wn. App. at 635-36](#). Therefore, we hold that [WAC 434-261-045](#) constitutes an express “other statute” exemption for tabulated ballots and ballot images.

#### 5. Redaction Is Immaterial

¶25 White argues that even if the ballots are subject to an exemption to protect the identity of individual voters, the County was required to produce the ballots because it [\*939] could have redacted any identifying marks that could identify individual voters. We disagree.

[WA12](#) [↑] [12] ¶26 As discussed above, we hold that [HN14](#) [↑] tabulated ballots are exempt in their entirety from disclosure under the PRA. [RCW 29A.60.110](#) and [WAC 434-261-045](#) provide categorical exemptions, not conditional ones. See [Resident Action Council v. Seattle Hous. Auth.](#), [177 Wn.2d 417, 434, 327 P.3d 600 \(2013\)](#) (noting categorical exemptions limit a particular type of information or record). As a result, whether the ballots can be redacted to address specific secrecy concerns is immaterial. See *id. at 433, 437* (“if a type of record is exempted, then meaningful redaction generally is impossible,” unless redaction will transform the record into an entirely different type of record). The ballots are exempt from production without qualification.

¶27 Here, [RCW 29A.60.110](#) and [WAC 434-261-045](#) govern handling of “ballots,” which means that their exemptions apply to the ballots in their entirety. And no amount of redaction [\*\*12] will transform the ballots into some other type of record. Therefore, we reject White’s redaction argument.

#### B. DISREGARDING THE PRA EXEMPTION

¶28 **White** argues that even if the ballots are subject to an “other statute” PRA exemption, the County was required to produce them under [RCW 42.56.210\(2\)](#) because nondisclosure is not necessary to protect privacy or a vital government function. We disagree.

[WA\[13\]](#) [13] ¶29 [HN15](#) [RCW 42.56.210\(2\)](#) states that the release of specific records that are otherwise exempt from disclosure “may be permitted if the superior court in the county in which the record is maintained finds, after a hearing ... , that the exemption of such records is *clearly unnecessary* to protect any individual's right of privacy or any vital governmental function.” (Emphasis added.) Such a finding overrides the PRA exemption and requires the agency to produce the requested records. [White I, 188 Wn. App. at 637](#).

[\*940]

¶30 **White** argues that exempting ballots three years after the election in which they were cast is unnecessary to protect privacy and vital government interests. He asserts that production would pose no risk to ballot anonymity and that there is no risk of election fraud or tampering when the election is over. He also points out that images of individual ballots [\*\*13] have been displayed on election-related websites without revealing voter identity. However, **White** fails to show that withholding the ballots is “clearly unnecessary” to protect any individual's right to privacy or any vital governmental function. [RCW 42.56.210\(2\)](#).

[WA\[14\]](#) [14] ¶31 [HN16](#) [Article VI, section 6 of the Washington Constitution](#) provides voters “*absolute secrecy*” in their votes. (Emphasis added.) Washington statutes and regulations also protect this right and ensure that ballots are secure. See [White I, 188 Wn. App. at 638](#). “Preserving the integrity and secrecy of votes and the security of election ballots clearly is a vital government function.” *Id.*; see also [White II, 188 Wn. App. at 898](#).

¶32 Accordingly, we reject **White's** argument that the PRA exemption for election ballots should be disregarded under [RCW 42.56.210\(2\)](#).

#### C. ATTORNEY FEES

[WA\[15\]](#) [15] ¶33 **White** seeks recovery of his reasonable attorney fees for work performed in the trial court and on appeal. [HN17](#) [RCW 42.56.550\(4\)](#) provides that any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record shall be awarded reasonable attorney fees. Because **White** is not a

prevailing party, he is not entitled to attorney fees either in the trial court or on appeal.

#### [\*941] CONCLUSION

¶34 We affirm the trial court's denial of **White's** show cause motion and dismissal of **White's** PRA action. [\*\*14]

LEE and SUTTON, JJ., concur.

## References

Washington Administrative Law Practice Manual  
Annotated Revised Code of Washington by LexisNexis

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SEP 27 2013

JOAN P. WHITE  
SAN JUAN COUNTY, WASHINGTON

STATE OF WASHINGTON  
SAN JUAN COUNTY SUPERIOR COURT

TIMOTHY WHITE, ALLAN  
ROSATO, LINDA ORGET,  
ARTHUR GRUNBAUM  
individuals, and GREEN PARTY  
OF SAN JUAN COUNTY,

Plaintiffs,

v.

KIM WYMAN, individually and in  
her capacity as Secretary of State for  
the State of Washington, MILENE  
HENLEY, in her capacity as San  
Juan County Auditor and SAN  
JUAN COUNTY,

Defendants.

NO. 06-205166-2  
NO. 10-2-05002-8

STIPULATED ORDER  
GRANTING PERMANENT  
INJUNCTION  
~~PROPOSED~~

THIS MATTER comes before this Court on the parties' proposed stipulation for a permanent injunction.

On May 3, 2013, the Court granted summary judgment to Plaintiffs and held that the Mail in Ballot Tracker system ("MiBT") is part of the voting system and therefore cannot be used unless it is certified by the Secretary of State. Secretary of

1 State Wyman sought reconsideration of this ruling and this Court denied that motion  
2 on June 25, 2013.

3 State law prohibits the use of voting system components which have not been  
4 certified by the Washington Secretary of State. See RCW 29A.12.050 and WAC 434-  
5 335-010.

6 Therefore, based upon the record supporting the Court's grant of summary  
7 judgment on the MiBT certification requirement, the state law cited above, and the  
8 stipulation of the parties, the Court grants the following permanent injunction.

9 1. San Juan County is hereby enjoined from using MiBT unless it is  
10 certified by the Washington Secretary of State.

11 2. For the next three years, San Juan County shall retain one copy of the  
12 VoteHere (MiBT) program CDs, documentation manual and patch procedure, and the  
13 electronic files of past elections in the VoteHere folder, currently located on the  
14 computer of the elections supervisor, Doris Schaller. If San Juan County locates  
15 additional information about MiBT, it shall retain such information during this period.

16 3. The Secretary of State is enjoined from subsidizing the purchase of  
17 MiBT for county or local government use, or authorizing county or local government  
18 use of MiBT, unless MiBT is first certified by the Washington Secretary of State in  
19 compliance with Washington law.

20  
21 DATED this 27 day of September, 2013.

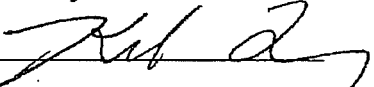
22  
23 **Donald E. Eaton**  
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JUDGE DONALD E. EATON


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San Juan County



**SMITH & LOWNEY**

**September 25, 2017 - 2:15 PM**

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