

No. 46081-5-II

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION 2**

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**TIMOTHY WHITE**

**V.**

**CLARK COUNTY**

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**APPELLANT'S CORRECTED OPENING BRIEF**

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Appellant Timothy White (hereafter “Plaintiff”) respectfully submits this Opening Brief in support of his appeal of the Clark County Superior Court’s ruling denying relief under the Public Records Act.

### **I. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in denying Plaintiff’s requested relief, where no Public Records Act exemptions exist for the documents Plaintiff requested—including digital ballot images and associated metadata and properties from the November 2013 election.
2. The Superior Court erred in its use and application of the maxim *expressio unius est exclusio alterius* to imply an exemption to production under the Public Records Act.
3. In the alternative, the Superior Court erred in denying Plaintiff’s requested relief where redaction of the requested documents would remove any exempted information.
4. In the alternative, the Superior Court erred in denying Plaintiff’s requested relief where any applicable Public Records Act exemptions are unnecessary to protect any individual’s privacy or any vital government interest.
5. The Superior Court erred in denying Plaintiff recovery of his costs incurred related to his action, and in failing to conduct a lodestar analysis to determine the reasonableness of Plaintiff’s attorney fees for the claims on which Plaintiff prevailed in the Superior Court.

### **II. STATEMENT OF THE ISSUES**

1. Did Clark County meet its heavy burden to identify an explicit exemption to the Public Records Act for the requested records?
2. Did the Superior Court err in implying an exemption to the Public Records Act in Washington’s election law, Title 29A RCW?
3. Did the Superior Court err in its use and application of the maxim *expressio unius est exclusio alterius*?

4. Did the Superior Court err in relying on administrative code for a Public Records Act exemption?
5. Are the requested records “ballots” under RCW 29A.04.008(1)?
6. If certain information in the requested records is exempt from production under the Public Records Act, must Clark County still produce the requested records with the exempted information redacted?
7. Regardless of whether there is an applicable exemption, must the documents still be produced because public access to election documents furthers the public interest and would not irreparably damage any person’s privacy or vital government interest?
8. Is Plaintiff a prevailing party, entitling him to full recovery of his reasonable attorney fees and costs? And should Clark County pay a daily penalty for its Public Records Act violations?

### **III. STATEMENT OF THE CASE**

This is an appeal from a ruling of the Clark County Superior Court which denied Plaintiff’s Public Records Act (“PRA” or the “Act”) action. Plaintiff’s suit sought to compel production of records which Plaintiff requested under the Act, recovery of reasonable attorneys fees and costs, and the imposition of a daily penalty for Clark County’s PRA violations.

Plaintiff contends that the public records he requested from Clark County (the “county”)—digital images of ballots cast in the November 2013 election and associated file metadata and properties, among others—are not exempt under the PRA, and that Clark County is compelled by law to provide copies of those records.

Mr. White is a longtime open-elections advocate. Clerk's Papers ("CP") 109-110. Mr. White understands that openness in the election process is a public good, gets citizens involved, and provides oversight against error, fraud and abuse. *Id.* To further those goals, Mr. White requested copies of ballot images and associated file metadata and properties, which Clark County created in connection with the November 2013 election. CP 25-28.

As in all Washington counties, Clark County conducts its elections predominantly by mail. CP 73 at lines 8-13. Clark County voters typically receive paper ballots in the mail, record their preferences on their ballot from home, and mail the marked ballot back to the County. *Id.* Once received, the County scans the ballots with an "off the shelf" commercial scanner (CP 251), which digitally images the paper ballots for storage as digital files on a computer, and for use with Hart Intercivic, Inc. verification and tabulation software.<sup>1</sup> CP 73 at lines 2-3, 19-20; CP 74 at lines 6-8.

After being scanned, the ballots themselves are immediately stored in a sealed ballot box and election officials need not handle them to

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<sup>1</sup> Many other counties in Washington also use the Hart Intercivic, Inc. system, including Skagit and Island counties. *See* CP 240 at lines 1-3; *Id.*, CP 246 at lines 27-30.

resolve ballot images,<sup>2</sup> tabulate them, or canvass the election. CP 74 at lines 20-23. The Hart Intercivic “Ballot Now” and “Tally” programs read the scanned digital images of the ballots to verify and count the images. *Id.* at lines 6-9. Clark County can use the “Ballot Now” program to retrieve any of the ballot-image files it created, and view the ballot image on a computer monitor—without needing to handle the ballots again.<sup>3</sup> The county further maintains the ability to print copies of the ballot images and save them as PDFs or Microsoft Word documents.<sup>4</sup>

On November 6, 2013, under the PRA, Plaintiff White requested copies of the digital ballot image files created and used in the November 2013 election and all metadata and properties associated with those

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<sup>2</sup> The “ballot resolve” process allows election officials to view images of ballots that contain markings that the tabulation program cannot interpret, but from which a human viewing the ballot image could clearly understand the intent of the voter (i.e. a circle around a candidate’s name instead of a filled-in box next to it, among other examples). *See* CP 73-74 at lines 2:25-3:04.

<sup>3</sup> CP 251 (Ballot Now info sheet) (providing for “On-screen ballot adjudication”); CP 272, 277 (Ballot Now Audit Tool 1.0 Operations Manual) (“Images of individual ballots...can then be retrieved, reviewed and audited in the Ballot Now application”) (one can choose ballots in the “Resolve” window of Ballot Now “to show the ballot”); CP 264, figure 6-6 (Ballot Now Operations Manual) (showing sample Ballot Now screen image of scanned ballot during ballot “Resolve” process).

Counties do this during the “ballot resolve” process. *See* note 2, *supra*.

<sup>4</sup> CP 243 at lines 17-20 (indicating ability to print the requested images or save them as Word documents or PDFs).

county-created files, among other records.<sup>5</sup> CP 25-28. On November 12 and 13, 2013, the county responded to Plaintiff's request via email, but did not deny or comply with Mr. White's request.<sup>6</sup> CP 29-33. Plaintiff never received any of the public records he requested under the Act. CP 111.

On January 2, 2014, Plaintiff commenced this PRA case to compel the county to comply with the PRA and provide copies of the records. *See* CP 1-7. Through this litigation, Plaintiff learned Clark County withheld over 185,000 digital images<sup>7</sup> responsive to Plaintiff's request, as well as file metadata and properties associated with each image. CP 73 at ¶ 4. In doing so, the county cited no authority explicitly exempting the requested records from production and instead asked the court to imply a new exemption from the Constitution, the broad election regulations of Title 29A RCW, and administrative code.

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<sup>5</sup> Plaintiff also requested ballots and ballot declarations, attachments and the emails themselves for votes received by e-mail; ballots and ballot declarations and sheets received by fax or other electronic transmission; and, scanned images of ballots not counted. CP 29-33. Clark County withheld these documents as well, in violation of the PRA.

<sup>6</sup> The final correspondence Mr. White received from the county indicated the county would look into his request and "be in touch on or before November 22," which never occurred. CP 29-33.

<sup>7</sup> The scanning produces two images for each ballot, one image for each side of the ballot. CP 243 at line17.

Following briefing from both parties, the Superior Court held a show cause hearing on February 20, 2014<sup>8</sup> and denied all relief related to production of the public records by written ruling on February 27, 2014. *See* CP 116-126. This appeal followed.

#### IV. STANDARD OF REVIEW

Under the PRA, there is a strong presumption for full access to public records. American Civil Liberties Union of Wash. v. Blaine School Dist. No. 503, 86 Wn.App. 688, 693, 937 P.2d 1176 (Div. 1 1997) (“The statement of public policy in the law creates the presumption that there will be full access to public records.”); Zink v. City of Mesa, 140 Wn.App. 328, 337, 166 P.3d 738 (Div. 3 2007) (The Act “establishes a strong presumption in favor of full disclosure of public records.”). Clark County bears the heavy burden to overcome this presumption. RCW 42.56.550(1).

The PRA demands the Act be liberally construed to promote the enumerated policy of public control and transparency, and requires its exemptions be narrowly construed:

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

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<sup>8</sup> The Superior Court heard no testimony during the hearing, and the record was limited to documentary evidence and affidavits. *See* Report of Proceedings (“RP”) I-43.

control over the instruments that they have created. 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. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030.<sup>9</sup> See also Resident Action Council v. Seattle Housing Auth., 300 P.3d 376, 382 (2013) (“**The PRA’s purpose of open government remains paramount**, and thus, the PRA directs that its **exemptions must be narrowly construed.**” (emphasis added)). For emphasis, “the Legislature takes the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly.” Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wn.2d, 243, 260, 884 P.2d 592 (1994) (“PAWS II”) (citing the Public Disclosure Act).

The language of the Act “**does not allow a court ‘to imply exemptions** but only allows *specific* exemptions to stand.” PAWS II, 125 Wn.2d at 262 (quoting Brouillet v. Cowles Pub’g Co., 114 Wn.2d 788, 800, 791 P.2d 526 (1990)) (emphasis added). Administrative code or policies may not exempt records from production either. Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995); WAC 44-14-

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<sup>9</sup> The PRA (formerly the Public Disclosure Act) was passed by popular initiative in 1972 to preserve “the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions,” by ensuring public access to government documents and records. Progressive Animal Welfare Soc’y v. Univ. of Wash., 125 Wn.2d, 243, 251, 884 P.2d 592 (1994).

06002(1).<sup>10</sup> “[I]n the event of a conflict between the [Public Records] Act and other statutes, the provisions of the Act govern.” PAWS II, 125 Wn.2d at 262 (citing Public Disclosure Act, RCW 42.17.920); *see also* RCW 42.56.030.

Appellate review of the Superior Court’s ruling is de novo. Limstrom v. Ladenburg, 136 Wn.2d 595, 612, 963 P.2d 869 (1998) (“Where, as here, a trial court’s order is based solely on documentary evidence, affidavits and memoranda of law, our review is de novo.”); RCW 42.56.550(3).

#### **V. INTRODUCTION AND SUMMARY OF ARGUMENT**

Plaintiff asserts that Clark County is required to provide copies of the digital ballot images, associated file metadata and properties and the other records under the PRA. Agencies, including counties, must produce copies of records on request, unless one of the limited exemptions to the Act applies. Agencies bear the heavy burden to show a specific exemption applies to each requested record; none of the exemptions contained in the Act or in other statutes apply to the records at issue here.

The mandate to produce ballot image files under the PRA is a matter of first impression in Washington, but other jurisdictions looking at

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<sup>10</sup> The reasoning behind this rule is that in order for the PRA to be effective, agencies must not be able to determine for itself which of its documents it will provide to the public and which documents will remain hidden. Servais, 127 Wn.2d at 834

this duty rule in favor of production. See Marks v. Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No. 11SC816 (July 16, 2012);<sup>11</sup> Price v. Town of Fairlee, 26 A.3d 26, 190 Vt. 66 (Vt., 2011).<sup>12</sup> Given the especially strong law favoring production in Washington State, the same result should happen here. Clark County has not met its heavy burden and the Superior Court erred in implying exemptions from Washington’s election law and administrative code.

## VI. ARGUMENT

### A The Image Files are Public Records Subject to the PRA and There Is Great Public Interest in Production.

The PRA defines “public record” broadly, “regardless of physical form or characteristics,” and includes the records here. RCW 42.56.010(3). “Public records” under the Act include:

handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic punched cards, discs, drums, diskettes, sound recordings and any other document including existing **data compilations from which information may be obtained or translated.**”

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<sup>11</sup> A copy of the Marks decision (as provided by Lexis Nexis) is at Appendix A.

<sup>12</sup> A copy of the Price decision (as provided by Lexis Nexis) is at Appendix B.

RCW 42.56.010(4) (emphasis added). The Act provides this broad definition to ensure the public maintains control over the instruments it created and to protect the public interest. RCW 42.56.030. The PRA highlights the importance of government transparency and provides a safeguard against agency abuse. Such transparency is especially important in the context of elections. *See Doe v. Reed*, 561 U.S. 186, 198, 130 S. Ct. 2811 (2010) (agreeing with Washington that transparency in the electoral process is essential to the proper functioning of a democracy).

Here, the public interest clearly warrants production of the requested ballot images and associated file metadata and properties. Production of these records would increase public oversight of (and involvement with) this fundamental instrument of democracy and facilitate civic engagement. Such transparency will also promote public confidence in the election process by permitting efficient public verification of election results. Indeed, disclosure of anonymous ballot images will restore the longstanding tradition of truly public processing and counting of elections.

Before the days of voting by mail, email and fax, thousands of volunteers and public observers mobilized to canvass every election at thousands of neighborhood precinct polling places. *See generally* 2005 Washington Code, Title 29A. Each precinct was overseen by one

inspector and two citizen judges, former RCW 29A.44.410 (2005), plus such additional persons as were necessary, former RCW 29A.44.420 (2005), and were watched over by additional political observers. Former RCW 29A.60.110 (2005). Citizen election officers formed each precinct board which debated and ruled on unclear or disputed ballots or votes, former RCW 29A.60.050 (2005); former RCW 29A.60.060 (2005), and citizens did the counting. Former RCW 29A.44.450 (2005). All this was out in the open, former RCW 29A.44.250 (2005), and those volunteers stayed to the wee hours if needed. Former RCW 29A.60.030 (2005).

Now, with the final 2011 consolidation and mandatory remote voting, for budgetary reasons the legislature permanently dismantled the in-person election-day poll sites, but retained the goal of public oversight. *See* SB 5124, 62nd Leg., Reg. Sess., 2011 Laws 10 (effective July 22, 2011) (repealing 96 election statutes and amending 83 others).<sup>13</sup> All precinct volunteer positions have been discontinued and their functions assigned to a small group of officials and temporary workers operating a highly mechanized and centralized electronic canvass at each county's counting center. *Id.* Elections now run for weeks or months to count tens of thousands of ballots on one vendor's voting system as the ballots trickle in by mail, with few or no public observers actually watching.

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<sup>13</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5124-S.SL.pdf>

Yet, the Legislature retains the desire to make elections accountable to the public with observers. *See* RCW 29A.60.170(2) (counting center must be open to observation, proceedings open to the public). The only statutory restraints on open observation relate to touching ballots or their containers, or operating the tabulation machine. *Id.* Producing digital copies of the requested records is simply the electronic-age equivalent of fulfilling the traditional openness to public observation. Public access to the images does so while respecting the enumerated proscriptions: hands-off the ballots, ballot containers and tallying equipment. Ballots have always been processed, canvassed and counted in public. The digital ballot images created by the Hart Intercivic voting system merely provides the opportunity to more efficiently reaffirm the power of oversight for the public.

**1. The Court Should Follow the Lead of Colorado and Vermont.**

While there is no Washington precedent directly on point for this matter, appellate decisions with similar laws and facts in other jurisdictions favor production of requested ballot images. *See* Marks v. Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No. 11SC816 (July 16, 2012); Price v. Town of Fairlee, 26 A.3d 26 (Vt. 2011). The Court should follow the lead of Colorado and Vermont and order

production of the image files and other records requested.<sup>14</sup> Marks provides a strikingly similar case where a citizen requested copies of digital ballot images under the Colorado Open Records Act (CORA), a similar statute to the PRA. 284 P.3d at 119. Price is also similar, where the court ordered citizen access to cast ballots themselves. Price, 26 A.3d at 35.

In Marks, the City of Aspen used a corporation, like Clark did here, which provided a similar service as Hart Intercivic, Inc. to tabulate ballot images using tabulation software. Marks, 284 P.3d at 120. Paper ballots were similarly scanned with the resulting digital images stored electronically, and the agency initially denied the records request on

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<sup>14</sup> See also, Michigan—Access to Ballots Voted at an Election, Op. Mich. Att’y Gen. No. 7247 (May 13, 2010) (“Voted ballots, which are not traceable to the individual voter, are public records subject to disclosure under the Freedom of Information Act...”) (Available at <http://www.ag.state.mi.us/opinion/datafiles/2010s/op10324.htm>); California—Humboldt County scans all ballots for each election and posts the images online. See Humboldt County Election Transparency Project, <http://www.humtp.com/ballots.htm>; Minnesota—copies of ballots in Franken-Coleman 2008 U.S. Senate election are posted online. MPR News, Challenged Ballots: You Be the Judge, [http://minnesota.publicradio.org/features/2008/11/19\\_challenged\\_ballots/round1/](http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/round1/). See also Minnesota Secretary of State, Statement of Need and Reasonableness, Proposed Permanent Rules Relating to Election (November 16, 2009), available at [www.sos.state.mn.us/Modules/ShowDocument.aspx?documentid=8571](http://www.sos.state.mn.us/Modules/ShowDocument.aspx?documentid=8571) (election official is permitted “to make photocopies of the challenged ballots, because making copies...gives the public access...while still keeping the original challenged ballot secure and safe from tampering, damage or loss.”).

similar grounds. *Id.*<sup>15</sup> The Appellate Court rejected the agency’s arguments and ordered production of the images requested. *Id.* at 121-24.

First, the Colorado court found “the Colorado Constitution’s secrecy in voting requirement extends only to protect the identity of a voter and not the contents of his or her ballot—assuming the voter’s identity could not be discerned from the content of the ballot.” *Id.* at 121. While the texts of the Washington and Colorado Constitution’s ‘secrecy in voting’ requirements are not identical, the purpose of each provision is the same. *Compare*, Washington Constitution Art. 6, sec. 6 *with* Colorado Constitution Art. 7, sec. 8. Washington law further guarantees that a voter’s identity cannot be discerned from the content of the ballot (or any other record). RCW 29A.08.161.<sup>16</sup>

Second, the Colorado court held the digital images are “not ballots” and that “releasing them would not be contrary to [Colorado’s] ballot storage and destruction provision.” Marks, 284 P.3d at 122. The Colorado court did not apply the “ballot storage and destruction provision” at all because the requested images were not “ballots.” *Id.* The court left

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<sup>15</sup> The agency asserted (1) the images were “in fact ballots themselves,” (2) releasing the images would violate the Constitution’s secrecy in voting requirement, and (3) releasing the images would violate Colorado’s “ballot storage and destruction provision.” Marks, 284 P.3d at 120.

<sup>16</sup> “No records may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter’s ballot...”

open whether those provisions would exempt production if the images were in-fact “ballots.” *Id.*

In Marks, the images were not “ballots” because the “files were created after voters had used paper ballots to indicate their voting preferences...” 284 P.3d at 122. The image files “were used solely by election officials who, after having created them, retained exclusive possession of them. In contrast with how voters must use paper ballots to indicate their preferences, pursuant to the [Colorado Code], the voters in [the] election did not use the [image] files for any purpose whatsoever.” *Id.*

The same is true here. The images and data Plaintiff requested were created after voters used paper ballots to indicate their preference and after election officials scanned those ballots. CP 57. Clark County voters did not use the image files or data for any purpose whatsoever. *Id.* Like in Colorado, the digital copies are not “ballots” because they are not the item on which an individual voter records his or her choices in an election. *See* RCW 29A.04.008(1)(d) (“‘Ballot’ means...The physical document on which the voter’s choices are to be recorded.”).

The ruling in Price is also instructive. There, the Vermont Supreme Court ordered production of cast ballots under the Vermont PRA, even though Vermont law mandated ballots “must be ‘securely

sealed' in containers...[and kept with] the town clerk, who shall safely store them and shall not permit them to be removed from his or her custody or tampered with in any way.”<sup>17</sup> Price, 26 A.3d at 30. Citing nearly identical language as that used in Washington PRA precedent, the Vermont court held “any doubts should be resolved in favor of disclosure.” *Id.* at 31. “With that in mind, there [was] no support for the broad exception [the agencies] claim[ed],” and the court permitted public access to the ballots. *Id.*

The Court should follow Colorado and Vermont’s lead and require production of the records requested. The PRA’s demand that all exemptions be narrowly construed requires a ruling upholding openness.

**B. The Superior Court Erred in Implying an Exemption under the PRA**

In ruling on this matter, the Superior Court misread *security* directives as *secrecy* mandates in citing to Title 29A RCW as an implied PRA exemption, and improperly relied on administrative code as legal authority under the Act. The county has failed to meet its heavy burden to show any explicit exemptions apply to the records requested, especially in light of the strong presumption of public access to public records.

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<sup>17</sup> This Vermont statute is nearly identical to Washington’s RCW 29A.60.110, on which Clark County and the Superior Court mistakenly relied for a PRA exemption.

Without any specific exemption on point, the Superior Court erroneously “implic[ed]” an exemption from an “inference.” CP 120 at lines 19, 22.

**1. The Constitutional Right to Ballot Secrecy Does Not Create an Exemption**

In this case, the Washington Constitution does not provide a PRA exemption. For Article 6, sec. 6 to operate as an exemption the county needed to carry its burden to identify specific responsive records which would eliminate ballot anonymity, which it did not. The county has made no assertion, or provided any evidence, that any of the records Plaintiff seeks contain any information destroying the anonymity of any ballot. Indeed, under state law, the county is prohibited from creating or maintaining any record that permits voter-identification. RCW 29A.08.161.<sup>18</sup>

In arguing that release of the images could destroy ballot anonymity, the county relies on remote hypothetical scenarios—all absent here—which fall short of their burden under the Act. *See* CP 76-77 at ¶¶ 11-12 (voicing concerns where voter-placed markings could identify voters—without asserting any of the requested images contain such

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<sup>18</sup> “No record may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter’s ballot.” *See also* RCW 29A.36.111(1) (requiring ballot uniformity and that “No paper ballot or ballot card may be marked by or at the direction of an election official in any way that would permit the identification of the person who voted that ballot.”)

markings; and where there is a low turnout in a small precinct—without asserting Clark County is a small precinct or that there was a low turnout in November 2013).<sup>19</sup>

To the extent the Court gives weight to those hypothetical assertions (which it should not since they are inapplicable), there are measures in place to prevent ballot identification in those unusual situations. The county can—indeed must—redact voter-placed markings before producing copies, and election-administration procedures (mandated by law) render the other concerns baseless. *See* RCW 29A.04.611(11), (34), and (39) (Secretary of State must make rules governing procedures to ensure ballot secrecy when a small number of ballots are counted, to aggregate precinct results to avoid jeopardizing ballot secrecy, and to guarantee the secrecy of ballots in general); RCW 29A.60.230 (the election administrator should aggregate results from multiple precincts if a single precinct's results could jeopardize anonymity); RCW 29A.60.160(3) (county auditor must use discretion to decide when to process ballots and canvass votes to protect secrecy); CP 112-115.

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<sup>19</sup> The county also references a problem if ballot images are produced before 8:00pm on Election Day. CP 77 at ¶ 12. This is of no concern here, where Mr. White made his request after polls closed. CP 25-28 (request issued November 6, 2014, the day after Election Day).

The Court must presume officials followed these statutes and administered the November 2013 election to maintain ballot anonymity. *See Washington v. J.A.B.*, 98 Wn.App. 662, 991 P.2d 98, n.4 (Div. 1 2000) (quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960) (A “presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.”)). The Court must also presume, as a matter of law, that the county does not maintain any information that links any ballot to an individual voter, in compliance with RCW 29A.08.161. *Id.* Thus production of the images requested should not compromise ballot anonymity. The county has not met its burden to rebut this presumption.

In addition, the Washington Constitution does not place a general veil of secrecy over the election process, as the county claims. The election process is meant to be open and subject to public oversight as it always has been. *See* RCW 29A.60.170(2) (counting centers are open to public observation); RCW 29A.64.041 (recounts open to public observation); RCW 29A.40.130 (the record of voters who were issued ballots and who returned a ballot is public); RCW 29A.04.230 (Secretary of State, as chief election officer, **shall make elections records “available to the public upon request.”**). The county’s claim that

production would violate a broad constitutionally mandated secrecy over elections is unsupported and wrong.

Finally, even if Clark County had identified information in the requested records which would permit voter identification (which it did not), Clark must still produce the images with such identifying information redacted. Resident Action Council, 300 P.3d at 379 (“the PRA requires redaction and disclosure of public records insofar as all exempt material can be removed.”); RCW 42.56.070(1). By failing to do so, Clark County violated the PRA.

## **2. Statutes Providing for Ballot Security Do Not Create an Exemption.**

The county improperly relies on the ballot-security chapters of Title 29A RCW, which are designed to ensure that people do not tamper with ballots, not to exempt scanned images and associated metadata and properties from production under the PRA.<sup>20</sup> The county has failed to meet its burden to show that those statutes contain an “explicit exemption” under the Act and the Superior Court erred in implying one.

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<sup>20</sup> See RCW 29A.40.160(13) (ballots transported in secure containers); RCW 29A.40.110(2) (ballots stored in “secure locations”); RCW 29A.60.125 (duplicated damaged ballots kept in “secure storage”); RCW 29A.60.110 (after tabulation, ballots are sealed in containers until destruction); see also RCW 29A.04.611 (Secretary of State shall make rules governing “Standards and procedures to prevent fraud and to facilitate accurate processing and canvassing of ballots...”); CP 61 (“[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.*” (quoting RCW 29A.04.205) (emphasis added)).

First, The Superior Court's use of the maxim *expressio unis est exclusio alterius* blatantly implied an exemption from Title 29A RCW. See CP 120 at lines 12-25.<sup>21</sup> In doing so, the Superior Court ignored the presumption of public access afforded to public records under the Act and ignored relevant portions of Title 29A RCW. A statute need not specify that records should be treated as public records under the PRA; treating public records as such is the default under the PRA itself. RCW 42.56.070(1). In converse, exemptions to the PRA, which may overcome such presumption, must be "explicitly identified." PAWS II, 125 Wn.2d at 262. By concluding that Title 29A's "silence" about handling ballots as public records shows a PRA exemption (CP 120 at line 22), the Superior Court improperly imputed a presumption *against* public access, in direct violation of the Act.<sup>22</sup>

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<sup>21</sup> The Superior Court even overtly stated it implied the exemption: "the expression of one thing in a statute *implies exclusion of others*..." (CP 120 at line 19); "corresponding silence about ballots, would *seem to suggest a fair inference* of deliberate legislative intent to not include ballots for disclosure under the PRA." CP 120 at line 22.

<sup>22</sup> The case on which the Superior Court relied for this maxim, State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010), does not support the Superior Court's conclusion either. Kelley is not analogous to this case because there, the statute at issue expressly excluded certain items not otherwise listed in the statute. *Id.* at 79 ("The firearm enhancements in this section shall apply to all felony crimes **except the following**: [and then listed the exceptions]."). The election statutes at Title 29A do not contain a similarly clear statement about all election materials being exempt from the PRA except for identified items. See Title 29A RCW. The PRA requires an opposite presumption—that there are no exemptions, unless they are clearly stated. The Superior Court therefore erred in its application of the maxim.

If use of the *expressio unis* maxim were appropriate in this context, it would weigh in favor of public access. Title 29A RCW explicitly exempts at least six types of documents from production under the PRA but does not do so for ballots (or digital images). *See* RCW 29A.08.710(1),<sup>23</sup> RCW 29A.08.710(2),<sup>24</sup> RCW 29A.08.720,<sup>25</sup> RCW 29A.32.100,<sup>26</sup> and RCW 29A.56.670.<sup>27</sup> Title 29A RCW lacks any similarly worded exemption for ballots or ballot images.<sup>28</sup> The Legislature knows how to exempt specific records from the PRA, and even did so under Title 29A, but did not for ballots or ballot images.

Second, the county has made no assertion, nor provided any evidence, that production of copies of images now would expose ballots to tampering or fraud—nor can they. The requested records are mere

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<sup>23</sup> Exempting voter registration forms.

<sup>24</sup> Exempting voter registration records other than those identified.

<sup>25</sup> Exempting the identity of the office or agency where an individual registered to vote and any record of an individual's choice not to register, including any related information. *See also* RCW 40.24.060 (exempting name and address of victim confidentiality program participant from list of registered voters available to public).

<sup>26</sup> Exempting the argument or statement submitted to the secretary of state for the voter's pamphlet at certain times.

<sup>27</sup> Exempting nominating petitions.

<sup>28</sup> *See* Appendix C for examples of explicit PRA exemptions found in "other statutes." No similarly worded statute exists which would exempt ballots or digital ballot image files and associated metadata and properties. No PRA exemption exists for the records requested.

scanned images of ballots. CP 57. The paper ballots themselves are in secure storage and will remain there until destruction. *Id.* To comply with Plaintiff's request, the county need not handle the original ballots at all and may simply print ballot images from the stored data. *See* CP 76 at line 2 (election staff can find a scanned ballot on a computer "and print it out"); CP 243 at lines 17-20 (Mr. Cunningham went through the process of "screen printing" a ballot image without opening the ballot box and converted the image to a Word document). And significantly, the November 2013 election has already been certified, eliminating any such risk. CP 76 at line 7.

In fact, producing the requested records could help expose election errors, tampering or fraud, and inform additional safeguards for future elections. Metadata and properties for ballot images may show the date the file was created and the date of any subsequent alteration—information which may expose tampering. *See O'Neill v. City of Shoreline*, 170 Wn.2d 138, 143, 240 P.3d 1149 (2010).<sup>29</sup> Making that information public furthers the goal of fair elections through additional oversight.

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<sup>29</sup> Metadata is defined as "data about data" or hidden information about electronic documents created by software programs." **This includes "information about whether a document was altered..."** *O'Neill*, 170 Wn.2d at 147 (emphasis added). Metadata are public records subject to the PRA. *Fisher Broadcasting*, No. 87271-6, Slip. Op. at 10.

Finally, the general mandate to provide secure storage for certain records does not alter the PRA's strongly worded obligation for agencies to provide public access and copies. Practically all public records are stored in secure locations by law to ensure authenticity, yet agencies must still produce them when requested under the PRA. *See, e.g.*, RCW 40.14.020(4) (The state archivist shall “**insure the maintenance and security of all state public records** and to establish safeguards against unauthorized removal or destruction.” (emphasis added)); RCW 42.56.070. If the Court accepts the county and Superior Court's application of “secure storage” provisions as PRA exemptions, it would emasculate the PRA's ability to ensure public access to public records. RCW 40.14.020(4) provides for security of *all* public records, which under the Superior Court's reading would exempt *all* public records. In reality, there is nothing remarkable about providing for the security of public records, which is not a PRA exemption; agencies must produce records even if they store them securely.<sup>30</sup> The county has not met its burden. RCW 42.56.550(1).

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<sup>30</sup> The County's reference to criminal penalties for unauthorized removal of ballots also shows nothing. *See* CP 61-62 at lines 8:23-9:02; *id.* at note 4. Those statutes provide for penalties when ballots are removed “without lawful authority,” or “without authorization,” authorization which the PRA provides. RCW 29A.84.540; 29A.85.545. In addition, similar penalties are provided for unlawful removal of *any* public record (RCW 40.16.010) but the PRA authorizes public access to and copies of public records, with no risk of criminal penalties.

### **3. Administrative Code and Policies Cannot Provide Exemptions**

Furthermore, Administrative Code, general administrative policies, or declarations about agency practices cannot provide exemptions under the PRA. “[T]he scope of exemptions is determined exclusively by statute and case law,” so the Court must disregard the Administrative Code at WAC 434-261-045 and the bulk of Cathie Garber’s declaration, cited by the county. WAC 44-14-06002(1); Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995) (“Leaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization.” (internal quotation marks omitted)). The Superior Court erroneously relied on the administrative code in finding a PRA exemption and denying Plaintiff’s requested relief. *See* CP 120 at lines 5-7 (quoting WAC 434-261-045). WAC 434-261-045 and general agency practices cannot be exemptions under the PRA.

### **4. The Purported Exemptions Do Not Apply Because the Records are Not “Ballots”**

Each voter has only one ballot per election, not many. The paper ballot on which each voter records his/her choice is the legal “ballot,” not the digital image files requested here. Because the image files are not “ballots,” none of the statutes regulating the handling of ballots are applicable to Plaintiff’s request in the first place.

The use of “either/or” language in the statutory definition confirms that ballots are singular. In other words, each voter has only one ballot.

“Ballot means, **as the context implies, either...** (c) a physical **or** electronic record of the choices of an individual voter in a particular [election]; **or** (d) **The physical document on which the voter’s choices are to be recorded.**” RCW 29A.04.008(1) (emphasis added).

“Statutes must be interpreted and construed so that all language used is given effect, with no portion rendered meaningless or superfluous.” Prison Legal News, Inc. v. Dep’t of Corrections, 154 Wn.2d 628, 643-44, 115 P.3d 316 (2005). The Court must therefore give effect to the unambiguous “either/or” language<sup>31</sup> of the “ballot” definition and find that there is only one ballot of record.<sup>32</sup> The Court must also give effect to the clause “as the context implies” and consider the context here, where

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<sup>31</sup> See Cerrillo v. Esparza, 158 Wn.2d 194, 204, 142 P.3d 155 (2006) (“This court has consistently read clauses separated by the word ‘or’ and a semicolon disjunctively.”) (citing State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996) (“in interpreting statutory language, ‘or’ serves a disjunctive purpose and does not mean ‘and.’”)) (additional citation omitted).

<sup>32</sup> The different forms a “ballot” can take under the laws of Washington relate to the different forms used for the various “methods of voting” provided by the Legislature—not to each and every copy of a ballot or record of cast votes. By providing several options at RCW 29A.04.008(1) for what a “ballot” could be, the Legislature merely provided local authorities the flexibility to determine which method of voting they prefer in the modern age. See State ex rel. Empire Voting Machine Co. v. Carrol, 78 Wash. 83, 85, 138 P. 306 (1914). Such methods could be an analog voting machine, a digital voting machine, or paper ballots, among others (and the corresponding “ballot” depends on the *context*).

voters record their choices on a physical paper ballot, which is subsequently mailed to the county where the county scans and images it. In this context, the ballot is the “physical document on which the voter’s choices are to be recorded,” not the digital image, created by the county after scanning the real ballot.<sup>33</sup> RCW 29A.04.008(1)(d).<sup>34</sup> Because the requested images are not “ballots” under this definition,<sup>35</sup> none of the county’s purported exemptions pertaining to “ballots” apply to these

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<sup>33</sup> When facing this issue, the Marks court concluded that scanned ballot images were not “ballots” under the similar laws of Colorado. 284 P.3d at 122-24. As a practical matter, treating every single duplicate or short-term record of election choices as an official ballot— subject to the verification, tabulation and secure storage requirements of the election process (among others)— would be unworkable.

<sup>34</sup> The Court should also not apply the definition at RCW 29A.04.008(1)(b) to any of the requested records because Clark County never identified any ballots received by facsimile in the November 2013 election *See* CP 38-53 (Clark Response e-mails and Garber Decl.); RCW 29A.04.008(1)(b) (“a facsimile of the contents of a particular ballot”). To the extent the Court identifies evidence in the record showing ballots were received by facsimile, the definition at RCW 29A.04.008(1)(b) should not apply to any of the other ballots received by mail (or in person).

Even if the Court interprets Washington’s “ballot” definition to permit multiple “ballots” and concludes Plaintiff requested access to legal “ballots,” Washington’s election laws do not provide a PRA exemption for “ballots” either, for the reasons explained in this submission.

<sup>35</sup> It is also worth noting that although administrative code cannot create a PRA exemption, the language of WAC 434-261-045 helps illustrate that digital ballot images are not “ballots” under Washington’s election law, as discussed. The Code treats “ballots” and “ballot images” as two distinct items. WAC 434-261-045 (listing “ballots and ballot images”). If ballot images were the same as “ballots,” listing them separately would be entirely redundant and have no meaning.

records in the first place.<sup>36</sup> Those statutes do not exempt the records requested.

#### **5. The County Has Not Identified If any Images Show “Damaged” Ballots**

The county further relied on RCW 29A.60.125, which provides unique instructions for “damaged” ballots; but the county did not disclose whether any of the withheld records are in fact copies of “damaged ballots.”<sup>37</sup> CP 62 at lines 14-15. First, failure to identify “damaged ballots” (if any) in the county’s response emails violated the PRA’s strict “identification” and “explanation” requirements. *See* CP 29-33; PAWS II, 125 Wn.2d at 270; RCW 42.56.210(3). Second, the county does not meet its burden by failing to identify any “damaged ballots” among the images withheld.<sup>38</sup> In order to show that RCW 29A.60.125 is an explicit exemption applying to any of the records withheld—which Plaintiff

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<sup>36</sup> Compare to RCW 29A.12.085, which specifies “paper records produced by direct recording electronic voting devices are subject to all the requirements of chapter 29A.60 RCW for ballot handling, preservation, reconciliation, transit and storage.” Washington statute contains no comparable provision for the handling of scanned ballot images of paper ballots, showing such provisions do not apply to those digital images. But as discussed, even if the records were handled like ballots, those handling statutes are not exemptions.

<sup>37</sup> “Damaged” ballots are either “physically damaged” or “otherwise unreadable or uncountable by the tabulating system.” RCW 29A.60.125

<sup>38</sup> “[R]ecords are never exempt from disclosure, only production...” Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 721, 261 P.3d 119 (2011)

refutes regardless—the county needed to show that they withheld “damaged ballots.” The county has not met its burden; RCW 29A.60.125 is inapplicable to the records requested.<sup>39</sup>

**C. Even if There Were an Exemption, It Would Not Justify Denial**

**1. Withholding the Records is Not Necessary to Protect Privacy or a Vital Government Interest**

Even assuming *arguendo* that an explicit exemption applies to the records, the court must evaluate whether the exemptions are “unnecessary to protect any individual’s right of privacy or any vital governmental function”— and if the exemptions are unnecessary, the public may access the records notwithstanding the exemption. RCW 42.56.210(2); RCW 42.56.540; Resident Action Council, 300 P.3d at 382 (“even records that are otherwise exempt may be inspected or copied if a court finds that the exemption of such records is clearly unnecessary to protect any individual’s right of privacy or any vital governmental function.”

(quotation marks and citation omitted)); *see also* Soter v. Spokane School Dist. No. 81, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (to enjoin public

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<sup>39</sup> The county also relies on RCW 29A.60.110, which provides security directives for the storage of ballots after tabulation. Plaintiff refutes that this statute is an “explicit exemption,” but even assuming that it is, such exemption would not apply to the images of *rejected* ballots—which are never tabulated and were included in Plaintiff’s request. *See* RCW 29A.60.040; RCW 29A.60.050. The county violated the PRA by withholding the digital files of rejected ballots, to which RCW 29A.60.110 does not apply.

access to a public record, “the trial court must find that a specific exemption applies *and* that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital governmental interest.” (italics original) (citing RCW 42.56.540). The Superior Court erred in failing to conduct this analysis. *See generally* CP 116-126.

This is a text-book case where production of the records is in the public interest to restore public oversight of and confidence in elections, and where any exemptions are clearly unnecessary to protect privacy and vital governmental interests. As discussed in section VI.A above, in Washington, elections are meant to be open to public observation and involvement, but the advent of “vote by mail” has limited the opportunities for citizens to participate. *See* RCW 29A.60.170(2). Making county-created digital images of cast ballots public effectuates the legislature’s intent to provide public oversight.

Furthermore, the exemptions claimed are unnecessary because production should pose no risk to ballot anonymity or to expose elections to fraud or tampering, as discussed above.<sup>40</sup> Public production would

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<sup>40</sup> As discussed above, the remote hypothetical scenarios cited by the county—all absent here—can either be resolved with redaction (as required under the PRA), or handled at the local level. *See*, RCW 29A.60.230 (election official may aggregate results from more than one precinct if reporting a single precinct’s ballot results would jeopardize the secrecy of a ballot); RCW 29A.60.160 (“In order to protect the secrecy of a ballot, the

increase civic knowledge and democratic participation, increase voter confidence in the system, and guard against errors, fraud and abuse. Record production would accomplish all these public goods without conflicting with any statutes regulating elections.<sup>41</sup>

And even if there were an exemption to protect a privacy right or a vital governmental function, the county must redact any exempted information and produce the rest of the records. Resident Action Council, 300 P.3d at 382 (“exemptions are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific record sought.” (quotation marks omitted)); *id.* at 379 (“the PRA requires redaction and disclosure of public records insofar as all exempt material can be removed.”); RCW 42.56.070(1) (“To the extent required to prevent an unreasonable invasion of personal privacy interests...an agency shall delete identifying details in a manner consistent with this chapter...”).

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county auditor may use discretion to decide when to process absentee ballots and canvass the votes.”); *See* CP 114-115 (“County election departments must also employ administrative methods to protect the ‘secrecy of a ballot’ in precincts with a low number of voters receiving ballots.”)

<sup>41</sup> *See* RCW 29A.60.170(2). The public would need not touch any ballots or ballot containers and would not touch any tabulation machine.

#### **D. The County's Other Arguments Have No Merit**

##### **1. RCW 29A.60.110 and RCW 29A.68, et seq. Do Not Provide An Exemption**

The county wrongly argued, and the Superior Court erroneously agreed, that “Plaintiff requested records so that he could challenge the election. Thus, he needed to first obtain a court order [in an election dispute]...” CP 64 at lines 6-7 (citing RCW 29A.60.110); *see also* CP 120 at line 25. The county misses the mark for several reasons.

First, the PRA is clear: “Agencies shall not distinguish among persons requesting records, and such **persons shall not be required to provide information as to the purpose for the request**, [except for very limited situations not relevant here],” **making such purposes “irrelevant.”** Koenig v. City of Des Moines, 158 Wn.2d 173, 190, 142 P.3d 162 (2006) (citing RCW 42.17.270, recodified as 42.56.080); *see also* King Co. v. Sheehan, 114 Wn. App. 325, 341 (Div. 1, 2002) (“[a citizen’s] intended use of the information cannot be a basis for denying disclosure.”). By relying on a purported “purpose” for Plaintiff’s request, the Superior Court erred.<sup>42</sup>

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<sup>42</sup> The county’s assertion is also factually wrong. Mr. White requested the records at issue to increase public involvement with the election process, increase oversight, and avoid errors, fraud or abuse by election officials who would know the public is watching— not to challenge or contest the election. *See* CP 31 (“There’s nothing sneaky or tricky in my request, Ms. Volkman. I want to accomplish what is serving elections administrators and voters in more and more states by doing in WA what they are already

Second, “the fact that [information or documents] are readily available from another source is not a reason to deny a request for disclosure.” Limstrom, 136 Wn.2d at 615 (citing Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132, 580 P.2d 246 (1978)).

Any procedures for viewing cast ballots as part of an election contest or dispute would therefore not apply to the current facts and would not be exclusive. Those procedures are contained in RCW 29A.68, *et seq.*, and require a court to prevent and/or correct election fraud and errors when shown. *See* RCW 29A.68.011; RCW 29A.68.020.<sup>43</sup> The procedures provide one safeguard against fraud and errors by permitting the contest of an election where there is evidence of error, but it does not contain a PRA exemption.

In fact, that Washington’s election laws provide for public access to ballots in certain contexts shows the legislature did not enact RCW 29A.60.110 or RCW 29A.68, *et seq.* to protect anyone’s privacy, weighing against an exemption. *See Fisher Broadcasting Seattle TV LLC d.b.a.*

KOMO 4 v. City of Seattle, et al., No. 87271-6, Concurrence Slip. Op. at 3

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doing with Hart [Intercivic, Inc.] and other voting system ballots: have officials (or citizens) post online the anonymous voted ballots as public records for everybody to see and anybody to count or audit—in one transparent stroke wiping out a whole arena of controversy and mistrust.”); *see also* CP 110 at ¶ 8.

<sup>43</sup> *See also PAWS II*, 125 Wn.2d at 262 (“[I]n the event of a conflict between the [Public Records] Act and other statutes, the provisions of the Act govern.” (citing Public Disclosure Act, RCW 42.17.920)); RCW 42.56.030.

(J. McCloud, concurring) (Wash. Sup. Ct. June 12, 2014).<sup>44</sup> Moreover, neither RCW 29A.60.110 or RCW 29A.68, *et seq.* even mention the PRA, showing the legislature did not intend either to provide an exemption. *See id.*, Slip. Op. at 13 (finding a lack of reference to the Act significant when analyzing whether a statute provides an exemption).

The county's reliance on Deer v. DSHS, 122 Wn. App. 84 (Div. 2, 2004) to the contrary is misplaced, conflating the court's two holdings. In Deer, the requestor sought copies of juvenile dependency records, which contained sensitive personal information, in contrast with the records here, which should not be linked to any individual. 122 Wn. App. at 91. The Appellate Court held that a statute in that case exempted production under the PRA "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.'" *Id.* The court's finding of an exemption had nothing to do with an alternative means of requesting the records, as the county contends. *Id.* The court discussed the alternative means of access solely to evaluate whether the PRA exemption already

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<sup>44</sup> *See also Fisher*, No. 87271-6, Concurrence Slip. Op. at 5-7 (J. McCloud, concurring) (by definition, "'exempt material' can never be [produced]," so statutes that provide for public viewing in any context are not PRA exemptions). It follows that because viewing ballots is available to counting center officials, and observers—and broader members of the public contesting an election—ballots are not "exempt" under the Act. *See e.g.* RCW 29A.64.041(3) ("Witnesses shall be permitted to observe the ballots..."); RCW 29A.64.030 ("all interested persons may attend and witness a recount.").

identified “conflict[ed] with the [PRA’s] purpose of holding public officials and institutions accountable and providing access to public records.” *Id.* at 92. An alternative means of requesting records does not create an exemption under the PRA.

Deer is also distinguishable because the information contained in the records requested is completely different. The Deer court found Chapter 13.50 RCW to be a PRA exemption in part because it would exempt “only those public records most capable of causing substantial damage to the privacy rights of citizens.” Deer at 122 Wn. App. at 91 (which consisted of deeply personal information related to juvenile dependency battles). In contrast, as discussed above, the records Plaintiff requests should be anonymous and would not damage the privacy rights of citizens at all. *See* RCW 29A.08.161.

## **2. Plaintiff’s Request Is Not Impossible to Fulfill and Defendant Need Not Create New Records**

It is clear that the requested records exist and must be produced. The county’s contention that there are no “ballot images” stored on data cards or hard drives is demonstrably false and self-contradictory. *See* CP 58 at lines 11-14. The Superior Court erred in disregarding relevant evidence on this point.

The county's own words show the county can simply "print" ballot images from a computer containing the data. *See* CP 76 at lines 2-3 (to comply with Mr. White's request, county staff would search for images by serial number "and print it out."); CP 31 (E-mail from Clark County: "all *ballot image files remain intact*"); *See also* CP 72 at line 25 ("*ballot images*" can be "resolved" in a computer program—a process where a human examines a *ballot image* on a computer screen to make sure the program will read it correctly); *Id.* at line 28 (Resolving the image "does not change the *image*"); CP 243 at lines 17-18 (Mr. Cunningham "screen printed" ballot images from the digital files in a test using the Hart Intercivic Inc. "Ballot Now" program).

The county can use the Ballot Now program to retrieve any ballot-image file and view the ballot image on a computer monitor. CP 272, 277 (Ballot Now Audit Tool 1.0 Operations Manual: "**Images of individual ballots...can then be retrieved, reviewed and audited in the Ballot Now application,**" and one can choose ballots in the "Resolve" window of Ballot Now "to show the ballot"); CP 251 (Ballot Now info sheet: the program "Digitally stores ballot images (no need to handle paper ballots)" and provides for "On-screen ballot adjudication"); CP 264, figure 6-6 (Ballot Now Operations Manual: showing a sample Ballot Now screen image of a scanned ballot during the ballot "Resolve" process); CP 265

(image of ballot “is displayed in the middle of the Resolve Ballot window.”).

The ability to view digital images of the scanned ballots on a computer screen shows that the image files exist, even if they may exist in a format that is not typically readable on a home computer. Further, the county maintains the ability to print out ballot images and save them as PDFs or Word documents. CP 243 at lines 17-20 (indicating ability to print the requested images or save them as Word documents or PDFs). Digital images of ballots, created with off-the-shelf scanners, exist, are retrievable, printable and convertible.

The County’s statement that “the data consists of 1s and 0s, not images,” or that the images may be encrypted does not show otherwise.<sup>45</sup> CP 75 at line 26; CP 36 at lines 13-14. Digital images are always stored

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<sup>45</sup> See WAC 434-662-040 (“Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period...); WAC 434-662-070 (“If encryption is employed on public records, the agency must maintain the means to decrypt the record for the life of the records...” (emphasis added)). Again, Clark County is afforded a presumption of regularity in maintaining its electronic records according to these rules, and the Court should presume, as a matter of law, that the County maintains the means to retrieve and decrypt the images at issue. Gallego, 276 F.2d at 917.

The county’s reference to a “proprietary format” in which the records are stored also cannot absolve it of its duty under the PRA. See CP 73 at lines 21-22. RCW 29A.36.111(2) expressly forbids election officials from entering into a contract in which ballot information is proprietary: “An elections [election] official may not enter into or extend any contract with a vendor if such contract may allow the vendor to acquire an ownership interest in any data pertaining to...any ballot.”

using binary code (1s and 0s), yet still “exist” as public records for copying under the PRA.<sup>46</sup> See RCW 42.56.010(4) (public records include “data compilations from which information may be obtained or translated.”); Fisher Broadcasting, No. 87271-6, slip op. at 9 (“This broad definition [of “public record”] includes electronic information in a database. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a [new] record.” (citations omitted)). The county confuses the concept of different “records” with different “formats.”<sup>47</sup>

### **3. Administrative Inconvenience Does Not Exempt the Records**

Additionally, any hardship associated with extracting or printing records for the public does not excuse the county from producing the records. “Courts shall take into account the policy...that free and open examination of public records is in the public interest, **even though such**

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<sup>46</sup> “Digital” necessarily means “of or relating to information that is stored in the form of the numbers 0 and 1.” Merriam-Webster Online Dictionary (<http://www.merriam-webster.com/>).

<sup>47</sup> The rule that agencies need not create new records in response to a PRA request was incorporated from federal FOIA case-law, which relieved agencies of having to aggregate information/data from numerous records into centralized lists, graphs or charts which did not already exist. See Smith v. Okanogan County, 100 Wn.App. 7, 14, 994 P.2d 857 (Div. 3 2000). It does not relieve agencies of their duty to convert, digitally copy, photocopy or print copies of already existing records for public production.

examination may cause inconvenience or embarrassment...” RCW 42.56.550(3); *see also* Rental Housing Ass’n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) (“**Administrative inconvenience or difficulty does not excuse strict compliance with the PRA.**” (citation omitted)).

The Superior Court erroneously relied on the county’s “burden” in converting the digital images to a readable format.<sup>48</sup> *See* CP 122 at lines 9-11. The county needed to take the time and produce the records under the PRA.<sup>49</sup> *See* Fisher, No. 87271-6, Slip Op. at 1-2, 4, 11. In Fisher, the Seattle Police Department consulted with the company that provided it with dashboard video equipment and the computer system that managed video storage and retrieval. *Id.* The company said that to comply with a PRA request for videos using mass copying, it would require additional computer “programming.” *Id.* The Supreme Court held the department violated the PRA by claiming it could not comply with the request on that basis. *Id.* As in Fisher, additional programming may make it easier for

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<sup>48</sup> In fact, rules promulgated to ensure the “preservation of electronic public records” (Chapter 434-662 WAC) and the availability of those records to the public, includes the mandate that “If encryption is employed on public records, the agency must maintain the means to decrypt the record for the life of the record...” WAC 434-662-070.

<sup>49</sup> It is also important to note that Hart Intercivic offers another product, “Verity,” which “make[s] it *easy* to access scanned ballot images and cast vote records, all while maintaining strict voter privacy.” Hart Intercivic official website, Verity System Overview page, <http://www.hartintercivic.com/content/verity-system-overview#Audit> (emphasis added).

the county to comply with Plaintiff's request, but such ease is not necessary to require strict compliance with the PRA.

The Superior Court also erred in relying on the timing of the request, "during the crucible of an election tabulation and certification deadline requirements," to highlight the burden. CP 122 at lines 10-11. In Clark County's initial response to Mr. White's request, Lori Volkman expressed the difficulty in producing the records on short notice, but added, "please be assured that all ballot image files remain intact throughout the tabulation process and *the delay will not affect the record production.*" CP 31 (emphasis added). Mr. White responded, "Thank you for keeping me posted, Ms. Volkman! I'm trying to assure I make proper thorough request[s] of the target records with minimum staff effort or stress. I know you are super busy right now." *Id.* The timing of Clark County's record production did not need to be immediate to comply with Mr. White's request.<sup>50</sup> See RCW 42.56.080 (allowing agencies to make records available on an installment basis as records are assembled or prepared).

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<sup>50</sup> The reference to "pre-tabulated" ballots in Plaintiff's request did not identify a deadline for producing the documents requested; rather it aimed to identify the time when the County scans the ballots, and creates the images requested. See CP 29-33.

**E. Plaintiff is Entitled to Full Recovery of His Reasonable Attorney's Fees and Costs, and the Court Should Impose a Daily Penalty on Defendant.**

The Superior Court erred in not awarding recovery of Plaintiff's costs incurred in bringing this action, and in not conducting a lodestar analysis to determine Plaintiff's reasonable attorney fees.

The PRA provides for Plaintiff's recovery of fees, costs and penalties from the county as a prevailing party. RCW 42.56.550(4); Sanders v. State, 169 Wn.2d 827, 848, 240 P.3d 120 (2010). Plaintiff is entitled to fees and costs when prevailing on any claim of a PRA violation, including the Act's procedural rules. Sanders, 169 Wn.2d at 848 ("the agency's failure to provide a brief explanation should be considered when awarding costs, fees, and penalties...Such an interpretation serves the PRA's policy of disclosure by providing incentives for the agency to explain its claimed exemptions."). An award of fees is mandatory, even where an agency has acted in good faith. Amren v. City of Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The lodestar method is the appropriate way to calculate attorney fees under the PRA. Sanders, 169 Wn.2d at 869 (citations omitted).

Plaintiff prevailed on his claim that Clark County violated the PRA's response requirements. *See* CP 92 at line 11. Plaintiff respectfully contends that the Superior Court erred in not awarding Plaintiff recovery

of his costs incurred for this action, and for failing to consider any evidence for a lodestar analysis when awarding reasonable fees. *See* CP 92 at lines 14-18 (awarding a nominal flat \$1,500 in attorney fees with no lodestar analysis and without providing for costs).

“The first sentence [of RCW 42.56.550(4)] entitles a prevailing party to costs *and* reasonable attorney fees for vindicating... ‘the right to receive a response.’” Sanders, 169 Wn.2d at 860 (quoting RCW 42.56.550(4) (emphasis added) (“shall be awarded *all* costs, including reasonable attorney fees...” (emphasis added))). Plaintiff vindicated his right to receive a response from the county, prevailing on this issue. CP 92 at lines 10-11. Plaintiff also contends the Superior Court erred in denying his right to inspect or copy the records at issue, and that the Court should award full recovery of Plaintiff’s reasonable attorney fees for all work related to this case.

Plaintiff further requests an award of his reasonable fees and costs from this appeal, *See PAWS II*, 125 Wn.2d at 271 (interpreting RCW 42.56.550(4) to include appellate costs and fees), and the imposition of a daily penalty for each day the county withheld the ballot images and the associated metadata.

For the reasons identified above, Clark County has violated the PRA by improperly withholding responsive records and failing to comply

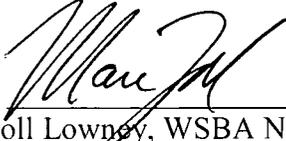
with the strict procedural rules for an agency's response/denial. The court should therefore award Plaintiff White his reasonable attorney fees and costs and impose a daily penalty against the county.

#### VII. CONCLUSION

For the foregoing reasons, Plaintiff Timothy White respectfully requests the Court reverse the ruling of the Superior Court, order immediate production of all requested records, award recovery of Plaintiff's reasonable costs and attorney fees, and impose a daily penalty against the County for its PRA violations.

Respectfully submitted this 18th day of July, 2014

SMITH & LOWNEY PLLC

By   
Knoll Lowney, WSBA No. 23457  
Marc Zemel, WSBA No. 44325

## DECLARATION OF SERVICE

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

That on July 18, 2014, I served the foregoing Corrected Opening Brief of Appellant to the following by U.S. Mail and e-mail:

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

**Dated** this 18th day of July, 2014, at Seattle Washington.

  
\_\_\_\_\_  
Jessie C. Sherwood

COURT FILED  
APPELLANTS  
2014 JUL 18 PM 3:27  
STATE OF WASHINGTON  
PERJURY

Appendix A:

Copy of decision:

Marks v. Koch, 284 P.3d 118 (Colo.  
Ct. App. 2011), *cert denied*, Colo.  
No. 11SC816 (July 16, 2012).

Neutral

As of: July 3, 2014 1:07 PM EDT

## Marks v. Koch

Court of Appeals of Colorado, Division Three  
September 29, 2011, Decided  
Court of Appeals No. 10CA1111

**Reporter:** 284 P.3d 118; 2011 Colo. App. LEXIS 1556; 2011 WL 4487753

Marilyn Marks, a resident of the City of Aspen, Colorado, Plaintiff-Appellant, v. Kathryn Koch, Clerk of the City of Aspen, Colorado, Defendant-Appellee.

**Subsequent History:** Writ of certiorari denied *Koch v. Marks*, 2012 Colo. LEXIS 280 (Colo., Apr. 16, 2012)  
Writ of certiorari denied *Koch v. Marks*, 2012 Colo. LEXIS 464 (Colo., June 21, 2012)

**Prior History:** [\*\*1] Pitkin County District Court No. 09CV294. Honorable James B. Boyd, Judge.

**Disposition:** JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS.

### Core Terms

ballots, voter, files, election, Marks, voting, candidates, secrecy, municipal election, inspection, cast, provisions, printed, constitutional provision, appellate attorney, tabulation, records, procedures, common meaning, destruction, contest, digital, strings, public disclosure, public record, ballot box, Constitution's, indicates, releasing, requires

### Case Summary

#### Overview

Digital copies of municipal ballots were eligible for public inspection under *Colo. Rev. Stat. § 24-72-203(1)(a)* (2011) because such inspection was not contrary to law under *Colo. Rev. Stat. § 24-72-204(1)(a)* (2011), with the narrow exception of any content that could identify an individual voter and thus contravene the intent of *Colo. Const. art. VII, § 8*. The files were not ballots as contemplated by *Colo. Rev. Stat. § 31-10-902* (2011) and therefore were not subject to the ballot storage and destruction requirements of *Colo. Rev. Stat. § 31-10-616(1)* (2011).

#### Outcome

Reversed and remanded.

### LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

**HN1** In evaluating a motion to dismiss under *Colo. R. Civ. P. 12(b)(5)*, a court must accept all averments of material fact as true and view the complaint's allegations in the light most favorable to the plaintiff. Such motions are viewed with disfavor, and a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief.

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

**HN2** In evaluating a claim based on a request under the Colorado Open Records Act (CORA), *Colo. Rev. Stat. §§ 24-72-200.1 to 24-72-206* (2011), a court does so with the understanding that precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions. Moreover, exceptions to CORA should be narrowly construed.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

**HN3** See *Colo. Rev. Stat. § 24-72-203(1)(a)* (2011).

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

**HN4** See *Colo. Rev. Stat. § 24-72-204(1)(a)* (2011).

Governments > Local Governments > Elections

**HN5** See *Colo. Const. art. VII, § 8*.

Constitutional Law > State Constitutional Operation

**HN6** In giving effect to a constitutional provision, a court employs the same set of construction rules applicable to statutes; in giving effect to the intent of the constitution, the court starts with the words, gives them their plain and commonsense meaning, and reads applicable provisions as a whole, harmonizing them if possible.

Governments > Local Governments > Elections

**HN7** Colo. Const. art. VII, § 8 in its first sentence states that no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The plain and commonsense meaning of this clause, by virtue of the term "person," clearly indicates that the identity of an individual voter, and any markings on the ballot that could identify that voter, are to be kept secret. The constitutional provision in its second sentence states that election officials shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. The plain and commonsense meaning of this clause, by virtue of the term "elector," again indicates that an individual voter's identity is to be protected from public disclosure, because this clause coincides with the election officials' viewing of the marked ballots. Hence, the phrase "secrecy in voting," when read in conjunction with the clauses described above, protects from public disclosure the identity of an individual voter and any content of the voter's ballot that could identify the voter. The content of a ballot is not protected, however, when the identity of the voter cannot be discerned from the face of that ballot.

Governments > Local Governments > Elections

**HN8** See Colo. Rev. Stat. § 31-10-616 (2011).

Governments > Legislation > Interpretation

**HN9** In interpreting a statute, a court's objective is to effectuate the legislative intent, and all related provisions of an act must be construed as a whole. To ascertain the legislative intent, the court looks first to the provision's plain language, giving that language its commonly accepted and understood meaning. When a statute does not define its terms but the words used are terms of common usage, the court may refer to dictionary definitions to determine the plain and ordinary meanings of those words. Because the court may presume that the General Assembly meant what it clearly said, however, where the statutory language is unambiguous, the court does not resort to further rules of statutory construction to determine the statute's meaning.

Governments > Local Governments > Elections

**HN10** See Colo. Rev. Stat. § 31-10-902(1) (2011).

Governments > Local Governments > Elections

**HN11** Paper ballots, as the term is used in Colo. Rev. Stat. § 31-10-616 (2011), are those paper documents that are to be printed and then possessed by the clerk at least ten days prior to the election.

Governments > Legislation > Interpretation

**HN12** All related statutory provisions must be construed as a whole.

Governments > Local Governments > Elections

**HN13** See Colo. Rev. Stat. § 31-10-902(3)(a)-(c) (2011).

Governments > Local Governments > Elections

**HN14** Colo. Rev. Stat. § 31-10-616(1) (2011), which concerns ballots, requires (among other things) that the ballots be both retained for six months after the election in which they were cast and destroyed by fire, shredding, or burial, or by any other method approved by the appropriate public officials, when the six months are complete. In contrast, the second subsection, which concerns other official election records, does not contain such details but rather requires only that such records be preserved for at least six months. § 31-10-616(2). It would not be appropriate to read into this subsection of the statute any of the intricate procedures required by the first subsection.

Civil Procedure > Appeals > Costs & Attorney Fees

**HN15** A statutory award of attorney fees may include reasonable appellate attorney fees.

**Counsel:** Robert A. McGuire, Attorney at Law, LLC, Robert A. McGuire, III, Denver, Colorado, for Plaintiff-Appellant.

John P. Worcester, City Attorney, James R. True, Special Counsel, Aspen, Colorado, for Defendant-Appellee.

**Judges:** Opinion by JUDGE FURMAN. Roy and Lichtenstein, JJ., concur.

**Opinion by:** FURMAN

#### Opinion

**[\*119]** In this proceeding under the Colorado Open Records Act (CORA), sections 24-72-200.1 to -206, C.R.S. 2011, plaintiff, Marilyn Marks, appeals the district court's judgment dismissing her case for failure to state a claim upon which relief can be granted, pursuant to the motion filed by defendant, Kathryn Koch, the City Clerk of Aspen (Clerk). We reverse and remand for further proceedings.

#### I. The Public Records at Issue

Because of this case's procedural posture, all facts set forth below are derived from Marks's complaint and viewed in the light most favorable to her.

**[\*120]** The public records Marks seeks to have released under CORA are 2544 digital copies of ballots cast in the May 2009 Aspen mayoral municipal election, in which Marks was a losing candidate. The copies were created as

part of a computerized [\*\*2] ballot tabulation system designed for the new instant runoff voting (IRV) procedures of the City of Aspen (City). The IRV procedures were intended to avoid the need for subsequent runoff elections by having voters rank all the candidates and not simply vote for one particular candidate, and then using computer software to determine the winner in a manner simulating an extended runoff voting process.

City engaged TrueBallot, Inc. (TBI), a Maryland corporation, to tabulate the paper ballots under the IRV procedures mandated by City. The new system required Clerk to bring all paper ballots cast by voters to a central location and give them to TBI for tabulation using software designed by TBI to meet the IRV procedures.

TBI's tabulation process had four steps: (1) each paper ballot had to be scanned and the resulting digital photographic image saved as a single computer file in tagged image file format (TIFF) using TBI's software; (2) the software was then used to detect each individual TIFF file's ballot markings to create a raw data string of the voter's rankings of the candidates; (3) the raw data strings were developed into clean data strings; and (4) the clean data strings were interpreted [\*\*3] by TBI's software to determine the winner of each race using City's new IRV procedures. Essentially, then, the TIFF files were digital copies of the corresponding paper ballots that voters used to rank the candidates. It is these digital TIFF files that Marks seeks to have released under CORA.

City and TBI took several precautionary steps to assure the integrity of the new computerized tabulation process. They briefly displayed, in whole or in part, each of the 2544 TIFF files on large, public video monitors at the tabulation center at City's city hall; broadcasted selected TIFF files over local television for greater public scrutiny; compared some of the original voter ballots to the data strings those ballots generated, a process open to members of the public; and publicly released both the raw and the clean data strings created by TBI's IRV computer tabulation program.

The record reflects that Clerk, who was then the incumbent clerk for City, was aware of the precautionary measures in place — including the public displaying and broadcasting of the individual TIFF files created from the paper ballots — yet took no action to prevent or alter those measures. Clerk, rather, assisted in [\*\*4] the tabulation process by delivering the paper ballots to TBI in a previously agreed-upon manner so that portions of the TIFF files, once created, could be publicly displayed.

Clerk subsequently disclosed that there was a discrepancy between the manual tallies of the paper ballots and TBI's

computer-generated data, such that the winner of the mayoral race received more votes than initially stated. Clerk, however, did not publicly disclose this information until nine days after she learned of it — which also happened to be almost a week after the expiration of the statutory deadline to contest the election.

Once Clerk disclosed this information, Marks sought release of all the TIFF files by filing a CORA request with Clerk. Clerk denied Marks' request, asserting that (1) the TIFF files, being duplicates of ballots, were in fact ballots themselves; to be treated in the same manner as the original paper ballots from which they were created; (2) releasing the TIFF files would violate the Colorado Constitution's secrecy in voting requirement, which Clerk interpreted to bar the public disclosure of the contents of ballots; and (3) releasing the TIFF files would also violate section 31-10-616, C.R.S. 2011 [\*\*5] — the ballot storage and destruction provision of the Colorado Municipal Election Code, sections 31-10-101 to -1540, C.R.S. 2011 — which required Clerk to hold ballots in the ballot box for six months after an election, after which they were to be destroyed.

Marks amended her CORA request to exclude those TIFF files that contained either a write-in candidate or ballot markings Clerk thought might identify a particular voter. Marks' subsequent CORA request was again [\*\*121] denied by Clerk for the same reasons as her initial request.

Marks sought a court order to enforce her CORA request. Marks succeeded in obtaining a preliminary injunction preventing the destruction of the TIFF files pending the resolution of her complaint. The preliminary injunction was extended at Clerk's request to include the paper ballots as well as the TIFF files.

The district court granted a motion by Clerk dismissing Marks' complaint for failing to state a claim upon which relief could be granted. The district court accepted Clerk's argument that (1) the TIFF files were ballots; (2) releasing the TIFF files was prohibited by the Colorado Constitution's secrecy in voting provision; and (3) because the TIFF files were [\*\*6] ballots, releasing them was prohibited by the Colorado Municipal Election Code's ballot storage and destruction provision.

Marks appeals the district court's judgment dismissing her claim. Both parties also request appellate attorney fees.

## II. Standard of Review

*HNI* In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), we must accept all averments of material fact as true and view the complaint's allegations in the light most favorable to the plaintiff. Dorman v. Petrol Aspen, Inc.,

284 P.3d 118, \*121; 2011 Colo. App. LEXIS 1556, \*\*6

914 P.2d 909, 911 (Colo. 1996). Such motions are viewed with disfavor, and "a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Id.*

Marks' appeal challenging the dismissal is based on her CORA request seeking release of the TIFF files. **HN2** In evaluating a claim based on a CORA request, we do so with the understanding that "[o]ur precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions." Ritter v. Jones, 207 P.3d 954, 959 (Colo. App. 2009). Moreover, exceptions to CORA should be narrowly construed. Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150, 1154 (Colo. App. 1998).

CORA's **[\*\*7]** section 24-72-203(1)(a), C.R.S. 2011, states in relevant part that **HN3** "[a]ll public records shall be open for inspection by any person at reasonable times, except as provided . . . by law." Section 24-72-204, C.R.S. 2011, states in relevant part:

**HN4** (1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds . . . :

(a) Such inspection would be contrary to any state statute.

Marks contends the right to inspect the TIFF files was not contrary to either (1) the secrecy in voting requirement of article VII, section 8 of the Colorado Constitution; or (2) the Colorado Municipal Election Code. We address each contention in turn.

### III. The Colorado Constitution's "Secrecy in Voting" Requirement

Marks contends that because the Colorado Constitution's secrecy in voting requirement extends only to protect the identity of a voter and not the content of his or her ballot — assuming the voter's identity could not be discerned from the content of the ballot — it does not bar the latter from release under CORA. We agree.

Article VII, section 8 of the Colorado Constitution provides in relevant part:

**HN5** All **[\*\*8]** 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.

**[\*122]** **HN6** In giving effect to a constitutional provision, "we employ the same set of construction rules applicable to statutes; in giving effect to the intent of the constitution, we start with the words, give them their plain and commonsense meaning, and read applicable provisions as a whole, harmonizing them if possible." Danielson v. Dennis, 139 P.3d 688, 691 (Colo. 2006).

The constitutional provision in its fourth sentence **[\*\*9]** uses, but does not define, the phrase "secrecy in voting" by stating that "secrecy in voting" must be preserved, regardless of how the votes cast at any election are received and registered. Because we must read the constitutional provision as a whole, *see Danielson, 139 P.3d at 691*, we look to the prior clauses of the provision, upon which the phrase is dependent, to ascertain the phrase's definition.

**HN7** The constitutional provision in its first sentence states that "no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the *person* casting it." Colo. Const. art. VII, § 8 (emphasis added). The plain and commonsense meaning of this clause, by virtue of the term "person," clearly indicates that the identity of an individual voter, and any markings on the ballot that could identify that voter, are to be kept secret. *See Danielson, 139 P.3d at 691*.

The constitutional provision in its second sentence states that election officials "shall be sworn or affirmed not to inquire or disclose how any *elector* shall have voted." Colo. Const. art. VII, § 8 (emphasis added). The plain and commonsense meaning of this clause, by virtue of the term "elector," again indicates **[\*\*10]** that an individual voter's identity is to be protected from public disclosure, because this clause coincides with the election officials' viewing of the marked ballots.

Hence, we conclude that the phrase "secrecy in voting," when read in conjunction with the clauses described above, protects from public disclosure the identity of an individual voter and any content of the voter's ballot that

could identify the voter. See *Danielson*, 139 P.3d at 691. The content of a ballot is *not* protected, however, when the identity of the voter cannot be discerned from the face of that ballot. To the extent the TIFF files do not reveal a particular voter's identity, then, permitting the right to inspect the TIFF files would not be contrary to the "secrecy in voting" provision of article VII, section 8.

#### IV. The TIFF Files Are Not "Ballots"

Marks also contends that, because the TIFF files are not ballots, releasing them would not be contrary to the Colorado Municipal Election Code's ballot storage and destruction provision. We agree.

The Colorado Municipal Election Code's provision for the storage and destruction of "ballots" is outlined in section 31-10-616, which provides:

**HN8** (1) The ballots, when not required [\*\*11] to be taken from the ballot box for the purpose of election contests, shall remain in the ballot box in the custody of the clerk until six months after the election at which such ballots were cast or until the time has expired for which the ballots would be needed in any contest proceedings, at which time the ballot box shall be opened by the clerk and the ballots destroyed by fire, shredding, or burial, or by any other method approved by the executive director of the department of personnel. If the ballot boxes are needed for a special election before the legal time for commencing any proceedings in the way of contests has elapsed or in case such clerk, at the time of holding such special election, has knowledge of the pendency of any contest in which the ballots would be needed, the clerk shall preserve the ballots in some secure manner and provide for their being kept so that no one can ascertain how any voter may have voted.

(2) The clerk shall preserve all other official election records and forms for at least six months following a regular or special election.

**HN9** In interpreting a statute, our objective is to effectuate the legislative intent, and all related provisions of an act [\*\*12] must be construed as a whole. *Foiles v. Whitman*, 233 P.3d 697, 699 (Colo. 2010). To ascertain the legislative intent, we look first to the provision's plain language, giving that language its [\*\*123] commonly accepted and understood meaning. *Id.*

When a statute does not define its terms but the words used are terms of common usage, we may refer to

dictionary definitions to determine the plain and ordinary meanings of those words. *People v. Daniels*, 240 P.3d 409, 411 (Colo. App. 2009). Because we may presume that the General Assembly meant what it clearly said, however, where the statutory language is unambiguous, we do not resort to further rules of statutory construction to determine the statute's meaning. *Foiles*, 233 P.3d at 699.

Because the May 2009 Aspen mayoral municipal election used paper ballots, we turn to section 31-10-902(1), C.R.S. 2011. It states in relevant part: **HN10** "The clerk of each municipality using paper ballots shall provide printed ballots for every municipal election. The official ballots shall be printed and in the possession of the clerk at least ten days before the election." Therefore, **HN11** paper "ballots," as the term is used in section 31-10-616, are those paper documents [\*\*13] that are to be printed and then possessed by the clerk at least ten days prior to the election. See *Foiles*, 233 P.3d at 699 (concluding that **HN12** all related statutory provisions must be construed as a whole).

We conclude the TIFF files do not meet these criteria. The TIFF files were created after voters had used paper ballots to indicate their voting preferences and after the polling places were closed. In addition, the TIFF files were wholly or partially displayed to the public through multiple media. Only after this process was completed did Clerk take possession of them.

Other provisions of the Colorado Municipal Election Code bolster our analysis. Section 31-10-902(3)(a)-(c), C.R.S. 2011, states:

**HN13** (a) The ballots shall be printed to give each voter a clear opportunity to designate his choice of candidates by a cross mark (X) in the square at the right of the name. On the ballot may be printed such words as will aid the voter, such as "vote for not more than one".

(b) At the end of the list of candidates for each different office shall be as many blank spaces as there are persons to be elected to such office in which the voter may write the name of any eligible person not printed on the [\*\*14] ballot for whom he desires to vote as a candidate for such office; but no cross mark (X) shall be required at the right of the name so written in.

(c) When the approval of any question is submitted at a municipal election, such question shall be printed upon the ballot after the lists of candidates for all offices. The ballots shall be printed to give each voter a

clear opportunity to designate his answer by a cross mark (X) in the appropriate square at the right of the question.

The plain language of these provisions indicates that voters are to use the paper ballots to indicate their voting preferences for both candidates and ballot initiatives. The TIFF files, however, were used solely by election officials who, after having created them, retained exclusive possession of them. In contrast with how voters must use paper ballots to indicate their preferences, pursuant to the Colorado Municipal Election Code, the voters in Aspen's May 2009 election did not use the TIFF files for any purpose whatsoever.

Clerk nevertheless contends that section 31-10-616 constitutes a "contrary state statute" pursuant to which the TIFF files must not be released. *See* § 24-72-204(1)(a). We disagree. *HN14* The **[\*\*15]** first subsection of section 31-10-616, which concerns "ballots," requires (among other things) that the ballots be both retained for six months after the election in which they were cast and destroyed by fire, shredding, or burial, or by any other method approved by the appropriate public officials, when the six months are complete. In contrast, the second subsection, which concerns "other official election records," does not contain such details but rather requires only that such records be "preserve[d] . . . for at least six months." § 31-10-616(2). We decline to read into this subsection of the statute any of the intricate procedures required by the first subsection. *See Foiles, 233 P.3d at 699.*

Given our reasoning that (1) section 24-72-204 authorizes the release of public records under CORA absent a constitutional or statutory exception; (2) "secrecy in voting," as **[\*124]** used in article VII, section 8 of the Colorado Constitution, does not exempt the TIFF files from release under CORA, because that constitutional provision protects only the identity of an individual voter and any content of the voter's ballot that could identify the voter; and (3) section 31-10-616 does not exempt the **[\*\*16]** TIFF files from release under CORA because the

TIFF files are not "ballots," we conclude the TIFF files are eligible for public inspection under CORA, with the narrow exception of any TIFF file containing content that could identify an individual voter and thereby contravene the intent of article VII, section 8. *See Freedom Newspapers, Inc., 961 P.2d at 1154*; cf. § 31-10-1517, *C.R.S. 2011* (stating in relevant part, "No voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him, and no other mark shall be placed upon the ballot to identify it after it has been prepared for voting," the violation of which is a misdemeanor).

On remand, the district court shall release the TIFF files to Marks for inspection pursuant to CORA, with the exception of those TIFF files that contain either a write-in candidate or ballot markings that could identify an individual voter. Whether a TIFF file contains ballot markings that could identify an individual voter is a matter within Clerk's discretion to determine.

#### V. Parties' Requests for Appellate Attorney Fees

Marks requests appellate attorney fees pursuant to *C.A.R. 39.5* and section 24-72-204(5), C.R.S. 2011. **[\*\*17]** Marks has prevailed on appeal and has stated a proper basis on which fees may be awarded to her. *C.A.R. 39.5*; *see* § 24-72-204(5) ("prevailing applicant" may receive award of attorney fees); *Town of Erie v. Town of Frederick, 251 P.3d 500, 506 (Colo. App. 2010)* *HN15* ("A statutory award of attorney fees may include reasonable appellate attorney fees."); *see also Wheeler v. T.L. Roofing, Inc., 74 P.3d 499, 506 (Colo. App. 2003)*. Accordingly, Marks is entitled to her reasonable appellate attorney fees. On remand, and upon Marks' application, the district court shall determine the reasonableness of Marks' appellate attorney fees.

Clerk requests appellate attorney fees in the event she successfully defends the *C.R.C.P. 12(b)(5)* dismissal. Because her defense was unsuccessful, she is not entitled to such fees. *See Wheeler, 74 P.3d at 506.*

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

JUDGE ROY and JUDGE LICHTENSTEIN concur.

Appendix B:

Copy of decision:

Price v. Town of Fairlee, 26 A.3d  
26, 190 Vt. 66 (Vt. 2011).

Positive  
As of: July 3, 2014 2:48 PM EDT

## Price v. Town of Fairlee

Supreme Court of Vermont  
April 29, 2011, Filed  
No. 10-125

**Reporter:** 2011 VT 48; 190 Vt. 66; 26 A.3d 26; 2011 Vt. LEXIS 47

Timothy K. Price v. Town of Fairlee

**Subsequent History:** Motion for Reargument Denied May 25, 2011

**Prior History:** On Appeal from Orange Superior Court. Thomas J. Devine, J.

*Price v. Town of Fairlee*, 2009 Vt. Super. LEXIS 60 (Vt. Super. Ct., July 20, 2009)

**Disposition:** The judgment is reversed.

### Core Terms

ballots, election, disclosure, records, destroyed, tally, sheets, public record, destruction, preservation, expiration, days, materials, Inspect, seal, construe, provisions, custodian, town clerk, confidential, authorization, exempt, moot, election statute, trial court, narrowly, recount, orderly process, election ballot, public-records

### Case Summary

#### Procedural Posture

In 2008, plaintiff town resident filed a complaint under the Vermont Access to Public Records Act (PRA), *Vt. Stat. Ann. tit. 1, §§ 315-320*, against defendant town in which plaintiff sought ballots and tally sheets from the November 2006 election. The State intervened. The Orange Superior Court (Vermont) granted the State's motion for summary judgment and dismissed the complaint. Plaintiff appealed.

#### Overview

The court held that the ballots and tally sheets were open to public inspection. It stated that in *Vt. Stat. Ann. tit. 1, § 315*, the PRA expressed a strong legislative policy favoring access to public documents and records, and that its provisions were to be construed liberally in favor of disclosure. Furthermore, *Vt. Stat. Ann. tit. 17, § 2590(d)* permitted—but did not require—the destruction of ballots and tally sheets after the expiration of the preservation period. In the absence of a clear statutory requirement that these election materials remain under seal if not destroyed, the court was constrained to construe the provision

narrowly to permit the disclosure promoted by the PRA. The court held that the discretionary authority to destroy ballots and tally sheets after the preservation period had expired under *§ 2590(d)* had to be stayed when a public-records request for the material was filed under *Vt. Stat. Ann. tit. 1, § 318*, and the stay had to remain in effect until the request was resolved. The court held that the trial court did not err in not dismissing the complaint as moot. Although the ballots had been destroyed, the case was capable of repetition yet evading review.

#### Outcome

The court reversed the decision granting summary judgment in favor of the town and the State.

### LexisNexis® Headnotes

Governments > Legislation > Interpretation

**HN1** A court's task is to resolve competing statutory constructions, not competing public policies. The latter is the domain of the legislature, which remains free to amend any statutory scheme to more closely conform to the legislative will.

Administrative Law > Governmental Information > Freedom of Information > General Overview

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

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Governments > Legislation > Interpretation

**HN2** In adopting the Vermont Access to Public Records Act (PRA), *Vt. Stat. Ann. tit. 1, §§ 315-320*, the legislature reaffirmed the fundamental principle of open government that public officials are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. The PRA thus expresses a strong legislative policy favoring access to public documents and records, and its provisions are to be construed liberally in favor of disclosure. Conversely, a court construes the statutory exceptions to the general policy of disclosure strictly

against the custodians of the records and any doubts should be resolved in favor of disclosure. The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure.

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

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

Governments > Legislation > Interpretation

**HN3** The exemption under the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320, for records designated confidential or the equivalent "by law" is no exception to the general rule of strict construction favoring disclosure. Vt. Stat. Ann. tit. 1, § 317(c)(1) must be construed narrowly to implement the strong policy in favor of disclosure.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

**HN4** The relatively short statutory timeframes for election challenges are undoubtedly designed to promote finality. The sealing of election ballots and tally sheets serves a critical function by preserving their integrity and reliability as physical evidence in the event of such a challenge.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

**HN5** The express, overarching goal of the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320, of ensuring public access to review and criticize the performance of public officials, even though such examination may cause inconvenience or embarrassment, plainly must take precedence over preserving electoral "purity" or stability. Vt. Stat. Ann. tit. 1, § 315.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

**HN6** The elections statute permits—but does not require—the destruction of ballots and tally sheets after the expiration of the preservation period. Vt. Stat. Ann. tit. 17, § 2590(d) (ballots and tally sheets shall be retained for a period of 90 days from the date of the election, after which time they may be destroyed). In the absence of a clear statutory provision or purpose requiring that these election materials remain under seal if not destroyed, the Vermont Supreme Court is constrained to construe the

provision narrowly to permit the disclosure promoted by the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320. There is no contrary intent in the few specific statutes authorizing the unsealing of ballots in certain limited circumstances, such as where a container is damaged, Vt. Stat. Ann. tit. 17, § 2590(c), or in the provisions for disclosure of other election materials, such as "spoiled" ballots, Vt. Stat. Ann. tit. 17, § 2568.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

**HN7** The Vermont Access to Public Records Act (PRA), Vt. Stat. Ann. tit. 1, §§ 315-320, and the cases construing it are clear that disclosure is the rule, and that any other statute providing for confidentiality or limited disclosure of records "by law" must be strictly construed in deference to that overriding goal.

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

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

**HN8** Under circumstances where a request under the Vermont Access to Public Records Act (PRA), Vt. Stat. Ann. tit. 1, §§ 315-320, is pending, the destruction of ballots must be treated as unauthorized. The PRA establishes a clear and orderly process for the handling of PRA requests, and there is no basis to exempt this or any similar request from its provisions. Under this procedure, if the custodian considers the record to be exempt from inspection, the custodian must so certify in writing and notify the person making the request of the right to appeal to the head of the agency from the adverse determination. Vt. Stat. Ann. tit. 1, § 318(a)(2). If the denial is upheld, the agency must then notify the person making the request of the provisions for judicial review under the PRA. § 318(a)(3). This orderly process would be circumvented, and the citizen's right to access defeated, if Vt. Stat. Ann. tit. 17, § 2590(d) of the election statutes were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

**HN9** While the custodian may have a good faith belief that the records may be destroyed in reliance upon the elections statute, nevertheless this is precisely the sort of legal conclusion that the review process under the Vermont

Access to Public Records Act. Vt. Stat. Ann. tit. 1, §§ 315-320, was established to determine. Accordingly, the discretionary authority to destroy ballots and tally sheets after the preservation period has expired under Vt. Stat. Ann. tit. 17, § 2590(d) must be stayed when a public-records request for the material is filed pursuant to Vt. Stat. Ann. tit. 1, § 318, and the stay must remain in effect until the request is resolved.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

**HN10** The Vermont Supreme Court is bound to examine any subject potentially affecting the court's jurisdiction. A decision that would not resolve a live controversy would exceed its jurisdiction.

Civil Procedure > ... > Justiciability > Mootness > Evading Review Exception

**HN11** To meet the mootness exception for cases capable of repetition yet evading review, two criteria must be satisfied: the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again.

## Headnotes/Syllabus

### Summary

**Appeal** by plaintiff from dismissal of action under Access to Public Records Act. Orange Superior Court, *Devine, J.*, presiding. *Reversed.*

### Headnotes

VERMONT OFFICIAL REPORTS HEADNOTES  
OFFICIAL REPORTS HEADNOTES

#### VT1. 1.

Statutes > Generally > Construction

A court's task is to resolve competing statutory constructions, not competing public policies. The latter is the domain of the Legislature, which remains free to amend any statutory scheme to more closely conform to the legislative will.

#### VT2. 2.

Records > Right to Inspect > Generally

In adopting the Vermont Access to Public Records Act (PRA), the Legislature reaffirmed the fundamental principle of open government that public officials are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause

inconvenience or embarrassment. The PRA thus expresses a strong legislative policy favoring access to public documents and records, and its provisions are to be construed liberally in favor of disclosure. Conversely, a court construes the statutory exceptions to the general policy of disclosure strictly against the custodians of the records and any doubts should be resolved in favor of disclosure. The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure. 1 V.S.A. §§ 315-320.

#### VT3. 3.

Records > Right to Inspect > Exceptions

The exemption under the Vermont Access to Public Records Act for records designated confidential or the equivalent "by law" is no exception to the general rule of strict construction favoring disclosure. The exemption must be construed narrowly to implement the strong policy in favor of disclosure. 1 V.S.A. § 317(c)(1).

#### VT4. 4.

Elections > Contests > Generally

The relatively short statutory timeframes for election challenges are undoubtedly designed to promote finality. The sealing of election ballots and tally sheets serves a critical function by preserving their integrity and reliability as physical evidence in the event of such a challenge.

#### VT5. 5.

Records > Right to Inspect > Particular Records

The express, overarching goal of the Vermont Access to Public Records Act of ensuring public access to review and criticize the performance of public officials, even though such examination may cause inconvenience or embarrassment, plainly must take precedence over preserving electoral "purity" or stability. 1 V.S.A. § 315.

#### VT6. 6.

Records > Right to Inspect > Particular Records

The elections statute permits — but does not require — the destruction of ballots and tally sheets after the expiration of the preservation period. In the absence of a clear statutory provision or purpose requiring that these election materials remain under seal if not destroyed, the Court is constrained to construe the provision narrowly to permit the disclosure promoted by the Vermont Access to Public Records Act. There is no contrary intent in the few specific statutes authorizing the unsealing of ballots in certain limited circumstances, such as where a container is damaged, or in the provisions for disclosure of other election materials, such as "spoiled" ballots. 1 V.S.A. §§ 315-320; 17 V.S.A. §§ 2568, 2590(c), (d).

**VT7. 7.**

Records &gt; Right to Inspect &gt; Generally

The Vermont Access to Public Records Act (PRA) and the cases construing it are clear that disclosure is the rule, and that any other statute providing for confidentiality or limited disclosure of records "by law" must be strictly construed in deference to that overriding goal. 1 V.S.A. §§ 315-320.

**VT8. 8.**

Records &gt; Right to Inspect &gt; Particular Records

No legislative policy evident from the election statutes, whether considered singly or as a whole, was furthered by maintaining the confidentiality of ballots and tally sheets from a 2006 election. The preservation period for the election in question had expired, the election results were final, and the purpose of maintaining the ballots under seal had been served. 1 V.S.A. § 318; 17 V.S.A. § 2590(d).

**VT9. 9.**

Records &gt; Right to Inspect &gt; Particular Records

Under circumstances where a request under the Vermont Access to Public Records Act (PRA) is pending, the destruction of ballots must be treated as unauthorized. The PRA establishes a clear and orderly process for the handling of PRA requests, which would be circumvented, and the citizen's right to access defeated, if the statute giving discretionary authority to destroy ballots and tally sheets after the preservation period has expired were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending. 1 V.S.A. § 318; 17 V.S.A. § 2590(d).

**VT10. 10.**

Records &gt; Right to Inspect &gt; Particular Records

While the custodian may have a good faith belief that the records may be destroyed in reliance upon the elections statute, nevertheless this is precisely the sort of legal conclusion that the review process under the Vermont Access to Public Records Act was established to determine. Accordingly, the discretionary authority to destroy ballots and tally sheets after the preservation period has expired must be stayed when a public-records request for the material is filed, and the stay must remain in effect until the request is resolved. 1 V.S.A. § 318; 17 V.S.A. § 2590(d).

**VT11. 11.**

Courts &gt; Jurisdiction &gt; Appellate Jurisdiction

The Court is bound to examine any subject potentially affecting its jurisdiction. A decision that would not resolve a live controversy would exceed its jurisdiction.

**VT12. 12.**

Constitutional Law &gt; Judicial Powers and Duties &gt; Mootness

To meet the mootness exception for cases capable of repetition yet evading review, two criteria must be satisfied: the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again.

**VT13. 13.**

Constitutional Law &gt; Judicial Powers and Duties &gt; Mootness

The trial court did not err in not dismissing a complaint under the Vermont Access to Public Records Act seeking election ballots and tally sheets as moot. The destruction of the ballots meant that the action to be challenged was a fait accompli, and its duration was over before the issue could be joined in court. The State had not challenged the trial court's findings that plaintiff would likely continue to request access to the Town's past election ballots based on his "continuing interest" in evaluating the performance of the Town's election officials and that the Town's response would likely be the same. 1 V.S.A. § 318.

**Counsel:** *Timothy K. Price*, Pro Se, Fairlee, Plaintiff-Appellant.

Frank H. Olmstead of *DesMeules, Olmstead & Ostler*, Norwich, for Defendant-Appellee.

William H. Sorrell, Attorney General, and Jacob A. Humbert, Assistant Attorney General, Montpelier, for Appellee-Intervenor State of Vermont.

**Judges:** Present: **Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.**

**Opinion by:** BURGESS

**Opinion**

[\*P1] [\*\*68] [\*\*\*28] **Burgess, J.** The question presented is whether, under the Vermont Access to Public Records Act, ballots and tally sheets from the November 2006 election in the Town of Fairlee are open to public inspection. For the reasons set forth below, we conclude that they are. The trial court judgment to the contrary, therefore, is reversed.

[\*P2] The factual and procedural background is as follows. In August 2008, plaintiff, a resident of the Town of Fairlee, filed a pro se complaint in the superior court seeking access to the ballots and tally sheets from the November 2006 election in the possession of the town clerk "before they are in any way tampered with or

destroyed.” Plaintiff’s stated purpose was to determine whether “the vote totals as tabulated are in agreement with the actual ballot count in all the races, and to learn, if possible, how errors may have happened, [and] to verify the integrity of the voting process in Fairlee.” In a contemporaneous letter filed with the court, plaintiff explained that the complaint [\*\*69] was prompted by the recount in the 2006 race for State Auditor which revealed that town officials had undercounted eleven votes for one of the candidates. Plaintiff was concerned about the error, and wished to determine whether it was isolated or part of larger pattern for purposes of evaluating the overall performance of the local board of civil authority.

[\*P3] The Town moved to dismiss the complaint, alleging that plaintiff failed to state a claim for which relief could be granted because the time for an election contest or recount had long since passed. See 17 V.S.A. §§ 2602(b), 2683(a) (state and local candidates must file petitions for [\*\*\*29] recount within 10 days of election); *id.* § 2603(a), (c) (“any legal voter” may contest result of election by filing complaint “within 15 days after the election in question, or if there is a recount, within 10 days after the court issues its judgment on the recount”). In conjunction with the Town’s motion to dismiss, the State of Vermont, by and through the Office of the Attorney General, moved to intervene in support of the Town’s position, stating its view that disclosure of ballots and tally sheets two years after completion of an election was inconsistent with the State’s interest in the finality of elections.

[\*P4] The pending motions and plaintiff’s request for injunctive relief were heard on November 10, 2008. In the course of the proceeding, the trial court observed that plaintiff’s complaint was really in the nature of a request for access to the election materials under the Vermont Access to Public Records Act, 1 V.S.A. §§ 315-320 (PRA). Accordingly, the court ruled that plaintiff should be allowed to file an amended complaint for declaratory relief under the PRA and denied the motion to dismiss. As to plaintiff’s request for injunctive relief, however, the court noted that under 17 V.S.A. § 2590(d), the town clerk was required to retain “all ballots and tally sheets ... for a period of 90 days from the date of the election, after which time they may be destroyed.” Because the statute authorized the clerk to destroy the materials after ninety days, the court concluded that there was “no right on the part of a citizen to have access to them” after that time, and as there was “no right” under the statute plaintiff could demonstrate no harm. As the court later explained, it viewed the issue as “whether ballots and tally sheets that remain in the Town Clerk’s possession after expiration of

the secure [90-day] period are subject to inspection under the Public Records Act ... *if they have not yet been destroyed.*” (Emphasis [\*\*70] added.) Accordingly, plaintiff’s request for injunctive relief was denied.

[\*P5] Two days later, on November 12, 2008, plaintiff submitted a request to the Town for disclosure of the election materials under the PRA. The Town’s attorney responded by letter indicating that, following the court’s denial of the preliminary injunction, the town clerk had indeed destroyed the 2006 ballots and tally sheets “as authorized by law” and that plaintiff’s request could not be met “because the documents do not exist.” The Town then filed a second motion to dismiss, asserting that the action was moot because the requested materials had been destroyed and were no longer available for disclosure.

[\*P6] In early December 2008, the trial court issued a written decision, denying the motion to dismiss. The court acknowledged that the destruction of the election materials had rendered the case moot, since it could no longer grant the relief requested. It concluded, however, that the case fit within an exception to the mootness doctrine for actions “capable of repetition, yet evading review.” In this regard, the court found that the time period between a request for records of this nature and their authorized destruction was “too short for the legal issue to be fully litigated” and that the action was likely to recur, plaintiff having indicated an interest in requesting “access to ballots and tally sheets following future elections” and the Town having expressed no intention of responding any differently. See *In re Vt. State Emps. Ass’n*, 2005 VT 135, ¶ 12, 179 Vt. 578, 893 A.2d 338 (mem.) (restating principle that exception for matters “capable of repetition yet evading review” may apply where challenged action “was in its duration too short to be fully litigated prior to its cessation or expiration” and there is “reasonable expectation that the same complaining party would be [\*\*\*30] subjected to the same action again” (quotation omitted)).<sup>1</sup>

[\*P7] Shortly thereafter, the State moved for summary judgment, asserting that disclosure of the requested materials was prohibited under the “comprehensive statutory framework” governing the conduct of elections in Vermont. Under that scheme, ballots, tally sheets, and other election materials must be “securely sealed” in [\*\*71] containers provided by the Secretary of State and returned “to the town clerk, who 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). Furthermore, as noted, “[e]xcept as otherwise provided by federal law, all ballots and tally sheets shall be retained for a period of 90 days from the date of the

<sup>1</sup> The Town later moved to amend the court’s decision, asserting that there was no basis for its findings relating to the mootness exception, but the court denied the motion.

election, after which time they may be destroyed; provided, however, that if a court order is entered prior to the expiration of the 90-day period, ordering some different disposition of the ballots, the town clerk shall abide by such order.” *Id.* § 2590(d).

[\*P8] The election statutes identify several specific scenarios in which election ballots may be unsealed. If a container “breaks, splits, or opens through handling,” the Secretary of State may order the contents moved to new bags. *Id.* § 2590(c). In addition, a court may order a recount of the ballots in two circumstances: first, where the election results are sufficiently close and the “losing candidate” petitions for a recount within ten days of the election, *id.* §§ 2601, 2602(b); and second, where “any legal voter” files a complaint within fifteen days after the election, or within ten days after a court-ordered recount, alleging error or fraud sufficient to change the ultimate result, *id.* § 2603(a)-(c). And, of course, the containers may be unsealed and the ballots and tally sheets “may be destroyed” 90 days after the election. *Id.* § 2590(d).

[\*P9] The election statutes also authorize the public dissemination of certain specific election materials. These include “spoiled” ballots, which after ninety days may be destroyed or “distributed by the town clerk for educational purposes.” *id.* § 2568; the “return” or summary sheet showing vote totals, a copy of which shall be made “available to the public upon request,” *id.* § 2588(c); and a copy of the entrance or exit “checklist,” which must be retained for a period of at least five years from the date of the election and “made available at cost to the public upon request.” *Id.* § 2590(e).

[\*P10] Viewing the elections scheme as a whole, the trial court concluded that it effectively excluded the requested ballots from disclosure under two settled PRA exemptions: as “records which by law are designated confidential or by a similar term,” *1 V.S.A. § 317(c)(1)*, [\*72] and as “records which by law may only be disclosed to specifically designated persons.” *id.* § 317(c)(2). “Given the care with which the Legislature specifically crafted procedures for the sealing, storage, and transportation of ballots after an election,” the court concluded, they qualified as records designated confidential “by law” and accessible only to designated persons.

[\*P11] The court also ventured that “sound public policy reasons” supported a construction “limiting access to sealed ballots only to the enumerated instances permitted in the election statute,” to wit, the [\*\*\*31] “overriding need for finality in elections.” While acknowledging that plaintiff’s intent was not to challenge any specific election result but rather to hold the Town’s election officials “to

high standards of accountability,” the court reasoned that “the incidental effects of studies such as the one plaintiff hopes to undertake could serve to undermine the public’s confidence in the validity of the various elections nonetheless.” The strict statutory timeframes for election challenges, the court concluded, were imposed “precisely to prevent re-examination of election results months or years after the fact.” Accordingly, the court granted the State’s motion for summary judgment and dismissed the complaint. This appeal followed.

[\*P12] VT[1] [1] We emphasize at the outset that *HNI* our task is to resolve competing statutory constructions, not competing public policies. The latter is the domain of the Legislature, which remains free to amend this or any other statutory scheme to more closely conform to the legislative will. See *Smith v. Parrott*, 2003 VT 64, ¶ 14, 175 Vt. 375, 833 A.2d 843 (holding that resolution of competing “policy concerns” is “more properly left to the Legislature” (quotation omitted)). That said, we approach this particular dispute with the distinct benefit of clear and settled legislative priorities.

[\*P13] VT[2] [2] *HN2* In adopting the PRA, the Legislature reaffirmed the fundamental principle of open government that public officials “are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.” *1 V.S.A. § 315*; see *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 12, 188 Vt. 470, 13 A.3d 1075. The PRA thus expresses a strong legislative policy “favoring access to public documents and records,” *Wesco, Inc. v. Sorrell*, 2004 VT 102, ¶ 10, 177 Vt. 287, 865 A.2d 350, and its provisions are to be “construed liberally” in [\*73] favor of disclosure. *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 106, 624 A.2d 857, 861 (1993). Conversely, we construe the statutory exceptions to the general policy of disclosure “strictly against the custodians of the records and any doubts should be resolved in favor of disclosure.” *Id.* at 107, 624 A.2d at 861 (quotation omitted); see also *Finberg v. Murnane*, 159 Vt. 431, 436, 623 A.2d 979, 982 (1992) (“[W]e must construe the exceptions to the Act narrowly to implement the strong policy in favor of disclosure.”). “The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure.” *Wesco*, 177 Vt. 287, 2004 VT 102, ¶ 10, 865 A.2d 350.

[\*P14] VT[3] [3] *HN3* The PRA exemption for records designated confidential or the equivalent “by law” is no exception to the general rule of strict construction favoring disclosure. See *Norman v. Vt. Office of Court Adm’r*, 2004 VT 13, ¶ 4, 176 Vt. 593, 844 A.2d 769 (mem.) (“We have

<sup>2</sup> Under federal law, records related to elections for federal office must be retained for 22 months. *42 U.S.C. § 1974*.

made it clear ... that § 317(c)(1) ... must be construed narrowly to implement the strong policy in favor of disclosure.” (quotation omitted). Thus, we are bound to construe the electoral scheme on which the State and Town purport to rely as narrowly in favor of public disclosure as its text and evident purposes will allow. With that in mind, there is no support for the broad exception they claim. We find, instead, an exception that can be confined to its narrow statutory purpose of ensuring the integrity of Vermont elections while simultaneously permitting public access once that goal is satisfied.

[\*P15] VT[4] [4] To be sure, *HN4* the relatively short statutory timeframes for election challenges are undoubtedly designed to promote “finality.” The sealing of election [\*\*\*32] ballots and tally sheets serves a critical function by preserving their integrity and reliability as physical evidence in the event of such a challenge. See, e.g., *Qualkinbush v. Skubisz*, 357 Ill. App. 3d 594, 826 N.E.2d 1181, 1204, 292 Ill. Dec. 745 (Ill. App. Ct. 2004) (holding that, for ballots to be admissible in election contest, they must have been kept intact with no opportunity for interference); *Ryan v. Montgomery*, 396 Mich. 213, 240 N.W.2d 236, 238 (Mich. 1976) (“The evident purpose of the [sealing] precautions prescribed in the statute is to preserve the integrity of the ballots, so that, if necessary to resort to a recount thereof, it may be done with the assurance of having the ballots present the identical verity they bore when cast.” (quotation omitted)).

[\*P16] Therefore, had plaintiff or any other interested citizen filed a public-records request seeking access to ballots during the [\*\*74] 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. When that time has run and the election results have been certified, however, the purpose of maintaining the ballots under seal has been fully served, and the confidentiality requirement rendered superfluous. Subsequent disclosure of the ballots and tally sheets can have no effect on the election’s outcome or finality.

[\*P17] VT[5] [5] What the State really appears to be arguing here is that, as the trial court found, subsequent disclosure may undermine “the public’s confidence” in an election later revealed to contain errors or discrepancies, and that withholding the ballots therefore serves to preserve electoral “purity” or stability. Yet even if that were the unstated purpose of the election statutes — a conclusion we do not reach today — *HN5* the PRA’s express, overarching goal of ensuring public access “to review and criticize” the performance of our public

officials “*even though such examination may cause inconvenience or embarrassment*” plainly must take precedence. 1 V.S.A. § 315 (emphasis added).<sup>3</sup>

[\*P18] VT[6,7] [6, 7] We are also mindful that *HN6* the elections statute permits — but does not require — the destruction of ballots and tally sheets after the expiration of the preservation period. 17 V.S.A. § 2590(d) (“[B]allots and tally sheets shall be retained for a period of 90 days from the date of the election, after which time they may be destroyed.”). 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. *Finberg*, 159 Vt. at 436, 623 A.2d at 982. We find no contrary intent in the few specific statutes authorizing the unsealing of ballots in certain limited circumstances, such as where a container is damaged. 17 V.S.A. § 2590(c), or in the provisions for disclosure of other election materials, such as “spoiled” ballots, *id.* § 2568. Contrary to the State’s claim, this is not a case where two statutory schemes deal with the identical subject matter and we must choose the more “specific” over the “general.” *Town of [\*\*75] Brattleboro v. Garfield*, 2006 VT 56, ¶ 10, 180 Vt. 90, 904 A.2d 1157. *HN7* The PRA and the cases construing it are clear that disclosure is the rule, and that any other statute providing for confidentiality or limited disclosure of records “by law” must be strictly construed in deference to that overriding goal. *Norman*, 176 Vt. 593, 2004 VT 13, ¶ 4, 844 A.2d 769.

[\*P19] VT[8] [8] [\*\*\*33] Nor do the several out-of-state decisions cited in the State’s brief compel a different conclusion. Each is predicated upon the intersection of elections and public-records laws containing language quite distinct from our own. See, e.g., *In re Decision of State Bd. of Elections v. N.C. State Bd. of Elections*, 153 N.C. App. 804, 570 S.E.2d 897, 898 (N.C. Ct. App. 2002) (denying public records request for ballots in deference to elections statute “unequivocally provid[ing]” that they could be opened only upon written order of elections board or court). Several, moreover, involved public-records requests within the limited timeframe for election challenges, resulting in a holding that the ballots could not be disclosed without directly contravening their integrity and the purpose of the election statutes. See *Smith v. DeKalb Cnty.*, 288 Ga. App. 574, 654 S.E.2d 469, 471-72 (Ga. Ct. App. 2007) (denying public records request for ballot information filed shortly after election under statute requiring that it be kept under seal for at least twenty-four months); *Kibort v. Westrom*, 371 Ill. App. 3d 247, 862 N.E.2d 609, 616, 308 Ill. Dec. 676 (Ill. App. Ct.

<sup>3</sup> As world events regularly demonstrate, moreover, secrecy is no guarantee of political stability or public confidence in the integrity of elections or elected officials.

2011 VT 48. \*P19; 190 Vt. 66. \*\*75; 26 A.3d 26, \*\*\*33

2007) (denying public records request filed shortly after election and observing that “accommodation of plaintiff’s inspection request would have required the Commission to unseal the ballots ... following the tallying and reporting of the votes” and “compromise[d] their integrity so as to render them suspect for purposes of a proceeding to challenge the election”); *State ex rel. Roussel v. St. John the Baptist Parish Sch. Bd.*, 135 So. 2d 665, 668 (La. Ct. App. 1961) (denying public records request for ballots on ground that it would “destroy, or make completely ineffectual, the right given by the election statutes to contest the election”). The case before us is clearly distinguishable; the preservation period for the election in question has expired, the election results are final, and the purpose of maintaining the ballots under seal has been served. No legislative policy evident from the election statutes, whether considered singly or as a whole, is furthered by maintaining their confidentiality.

[\*P20] The practical question of enforcement remains to be considered. As noted, the trial court here denied plaintiff’s request [\*\*76] for a preliminary injunction to preserve the ballots from destruction, reasoning that any right to public access was subject to the Town’s discretionary authority to destroy them after ninety days. Not surprisingly, that is precisely what occurred.

[\*P21] VT[9,10] [9, 10] HN8 Under circumstances where a PRA request is pending, however, this destruction must be treated as unauthorized. The PRA establishes a clear and orderly process for the handling of PRA requests, and we discern no basis to exempt this or any similar request from its provisions. Under this procedure, if the custodian “considers the record to be exempt from inspection” the custodian must “so certify in writing” and notify the person making the request of the right to appeal to the “head of the agency” from the adverse determination. 1 V.S.A. § 318(a)(2). If the denial is upheld, the agency must then notify the person making the request of the provisions for judicial review under the PRA. Id. § 318(a)(3). This orderly process would be circumvented, and the citizen’s right to access defeated, if § 2590(d) of the election statutes were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending. HN9 While the custodian

may have a good faith belief that the records may be destroyed in reliance upon the elections statute, nevertheless this is precisely the sort of legal conclusion that the PRA review process was established to determine. See *Munson v. City of S. Burlington*, [\*\*34] 162 Vt. 506, 509-10, 648 A.2d 867, 869-70 (1994) (reaffirming principle that statutes which overlap should be construed, where possible, to harmonize their provisions in order to effectuate legislative intent and avoid absurd results). Accordingly, we hold that the discretionary authority to destroy ballots and tally sheets after the preservation period has expired under 17 V.S.A. § 2590(d) must be stayed when a public-records request for the material is filed pursuant to 1 V.S.A. § 318, and the stay must remain in effect until the request is resolved.

[\*P22] Contrary to the opinion of our dissenting colleague, this result is not “made up,” *post*, ¶ 27, but is necessarily compelled upon reconciling the two competing legislative schemes: one establishing the goal of open government with an express requirement that its provisions be “liberally” construed to that end, 1 V.S.A. § 315, and the other seeming to authorize a purposeless destruction of public records in frustration of that goal. Nor, contrary to the dissent, does our holding brand the town clerk a [\*\*77] criminal or subject her to penalties for unauthorized destruction of public records under 1 V.S.A. § 320(b). Obviously, the clerk’s actions preceded our instant holding and followed the trial court’s denial of an injunction to prevent the records’ destruction. See *State v. LaBounty*, 2005 VT 124, ¶ 4, 179 Vt. 199, 892 A.2d 203 (noting that defendant’s right to adequate notice of what conduct may give rise to criminal punishment requires “rule of lenity” in which any statutory ambiguity must be resolved in favor of accused). Further, while the dissent is correct that the records no longer exist in this case and so are practically unavailable as contemplated by 1 V.S.A. § 318(a)(4), we do not subscribe to the suggested corollary that destruction of ballots in the face of the next PRA request must trump access, as it would perpetually beg the question of whether access to ballots requested under the PRA can ever be realized before their destruction.<sup>4</sup> Absent either an evident reason or a direct expression of such intent, we do not understand that the Legislature meant to defeat the PRA in regard to ballots, so the clerk’s statutory

<sup>4</sup> Under the dissent’s analysis the demand for access would never, except as described below, be ripe for enforcement since the ballots would generally be “in storage” during the preservation period and therefore not immediately accessible under 1 V.S.A. § 318(a)(1) (excepting from immediate inspection a public record “in storage and therefore not available”) but still subject to purposeless destruction afterwards. In the event a town denies access, fails to respond “promptly” as directed by 1 V.S.A. § 318(a), or even purports to agree to post-preservation access, the dissent would apparently leave the applicant to obtain, before the preservation period expires, a court order based on a right to access under the PRA and the lack of any town obligation to preserve ballots after ninety days, to prevent destruction of the ballots. See 17 V.S.A. § 2590(d) (“[I]f a court order is entered prior to the expiration of the 90-day period, ordering some different disposition of the ballots, the town clerk shall abide by such order.”). Such a procedure is not only cumbersome and costly, but is incompatible with the competing legislative mandate for “free and open examination” of public records not explicitly excluded from disclosure. 1 V.S.A. §§ 315, 317.

discretion to destroy them must yield to a PRA request until otherwise ordered by the superior court.

[\*P23] VT[11] [11] Finally we consider whether the trial court erred in denying the Town's motion to dismiss the complaint as moot. Normally this is an issue we would address at the outset, but the State itself briefed the claim last and expressly declined to assert it at oral argument. The State's diffidence notwithstanding, however, *HN10* we are bound to examine any subject potentially affecting the [\*78] Court's jurisdiction. [\*\*\*35] See *In re Keystone Dev. Corp.*, 2009 VT 13, ¶ 7, 186 Vt. 523, 973 A.2d 1179 (mem.) (observing that a decision that "would not resolve a live controversy" would "exceed our jurisdiction").

[\*P24] VT[12,13] [12, 13] There is no basis to disturb the trial court's ruling. As noted, the trial court found — despite the destruction of the ballots — that the case qualified for consideration under the settled exception for cases "capable of repetition yet evading review." *HN11* To meet this exception, two criteria must be satisfied: the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *State v. Tallman*, 148 Vt. 465, 469, 537 A.2d 422, 424 (1987). In the instant case, the destruction of the ballots meant that the action to be challenged was a fait accompli, and its duration was over before the issue could be joined in court.

[\*P25] As to the second criterion, the State has not challenged the trial court's findings that plaintiff will likely continue to request access to the Town's past election ballots based on his "continuing interest" in evaluating the performance of the Town's election officials and that the Town's response will likely be the same. These findings are not undermined by the State's claim that, since the Town's conversion to electronic scanning machines to read and tally ballots, "human error" is less likely to occur in the future. Indeed, it is precisely to test such assertions that this action was filed.

[\*P26] The trial court was correct to entertain plaintiff's petition, but erred in ruling that the records requested were exempt from disclosure under the PRA and erred in granting summary judgment in favor of the Town and State.

*The judgment is reversed.*

**Dissent by: DOOLEY**

#### Dissent

[\*P27] Dooley, J., dissenting. This is an example of creating a right where the governing statute does not provide for it. The right the majority has created is logical for the reasons it states. I agree that it would be good public policy. I cannot agree that we can make it up. Moreover, because the necessary result of the majority's decision is to make the conduct of the town clerk a crime, I think we must proceed very cautiously.

[\*P28] [\*\*\*79] As the majority acknowledges, *17 V.S.A. § 2590(d)* authorizes the town clerk to destroy the ballots. It specifically contains an exception that could have applied here — that is, at any time during the period of 90 days after the election, the court could order a different disposition of the ballots. The different disposition is not restricted in the statute; it could have included an examination of the ballots by plaintiff. Of course, plaintiff had to ask for that disposition sufficiently quickly after the election to allow the court to act in the 90-day period, and he failed to do so. The majority calls the procedure under *§ 2590(d)* "cumbersome and costly," *ante*, ¶ 22 n.4, but it is the procedure that the Legislature explicitly created, unlike the procedure created by the majority.

[\*P29] The situation here is virtually unique because there is a statutory authorization to destroy a public record.<sup>5</sup> Through *1 V.S.A. § 317a*, Vermont provides [\*\*\*36] that the custodian of a public record shall not destroy it "unless specifically authorized by law." This is the only section of the Vermont *Access to Public Records Act* (PRA) that deals directly with the destruction of a public record.

[\*P30] Willful destruction of a public record without authority is a crime. *Id. § 320(c)*. In this case, there is an authorization by law, so a town clerk cannot be charged criminally for destroying the ballots pursuant to *17 V.S.A. § 2590(d)*.

[\*P31] The majority holds, however, that there is an exception to the authorization when a public records request has been made for the record. *Section 317a* of the PRA does not provide such an exception, and it is the only section that deals directly with record destruction. Such an exception is not stated anywhere else in the PRA. Instead, the majority infers the exception because the "orderly process" of citizen access "would be circumvented." *Ante*, ¶ 21. I emphasize that the majority infers such an exception because it is not stated anywhere in the statute, even though the authorization to destroy the record is

<sup>5</sup> The majority labels the authorization as "purposeless." *Ante*, ¶ 22 n.4. The statute serves the obvious purpose of bringing finality to elections. As I said in the beginning of this dissent, if the choice for us were between competing policies, I would vote with the majority. But the choice among competing policies belongs to the Legislature, not to this Court.

stated explicitly. This is an implementation choice the Legislature could have made but did **[\*\*80]** not. Even though I agree that the result is good policy, the choice is not for us but for the Legislature.

**[\*P32]** I also emphasize that in reaching its conclusion that the Town has circumvented the orderly process of citizen access, the majority is selective in describing the "orderly process." The statutes it cites all deal with existing public records and access to them. We are dealing here with records that do not exist. In that circumstance, subsection 318(a)(4) of the PRA says that "if a record does not exist, the custodian shall certify in writing that the record does not exist," and that certification becomes the extent of the custodian's obligation under the statute. Subsection 318(a)(4) obviously trumps procedures cited in the majority opinion that are all based on access to records that actually exist.

**[\*P33]** In this case, the Town followed the letter of the law even as explained by the majority. By the time that plaintiff filed an access to public records request with the Town, the Town responded that there were no records that met the request. Subsection 318(a)(4) authorizes exactly that response.

**[\*P34]** The only possible remedy in this case is criminal prosecution of the town clerk under 1 V.S.A. § 320(c). I reiterate that we should be cautious in construing a statute to expand the risk of criminal liability with no description of the scope beyond that in an opinion of this Court. There are obvious questions about the scope of a Court-created exception to the authorization to destroy the ballots that can be answered only over time, leaving town officials in a state of uncertainty. This is exactly why the exception the Court has created should instead be created, if at all, by the Legislature, which can define its scope.

**[\*P35]** This opinion comes out during a legislative session in which the Legislature is considering amendments to the PRA. Whatever the outcome of this case, I hope the Legislature will consider the issues confronting us and specifically amend the language of the statutes to more clearly define the interrelationship between the right of public access and the authorization to destroy public records, where it exists.

**[\*P36]** Reluctantly, I must dissent from this Court's decision that the Town of Fairlee violated the PRA as it currently exists.

Appendix C:

Examples of “Explicit” and  
“Specific” PRA Exemptions in  
“Other Statutes”

There are no comparably worded  
statutes which would exempt ballots  
or scanned ballot images.

**Appendix C:**  
**Examples of “Specific” and “Explicit” PRA Exemptions in “Other Statutes”**

**RCW 2.64.111:**

“exempt from the public disclosure requirements of chapter 42.56 RCW during such investigation or initial proceeding”

**RCW 7.07.050:**

“exempt from the requirements of chapter 42.56 RCW”

**RCW 9.41.129:**

“shall not be disclosed except as provided in RCW ...”

**RCW 10.97.080:**

“The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying”

**RCW 16.67.180:**

“exempt from public disclosure”

**RCW 18.32.040:**

“exempted from disclosure under chapter 42.56 RCW”

**RCW 18.106.320(2):**

“confidential and is not open to public inspection under chapter 42.56 RCW”

**RCW 18.130.095(1)(a):**

“exempt from public disclosure under chapter 42.56 RCW”

**RCW 19.28.171:**

“confidential and is not open to public inspection under chapter 42.56 RCW”

**RCW 19.108.010:**

“exempt from the public records disclosure requirements of chapter 42.56 RCW”

**RCW 21.20.855:**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 26.23.120(1):**

“shall be private and confidential and shall only be subject to public disclosure as provided in subsection (2) of this section”

**RCW 28C.10.050(1)(a):**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 29A.08.710(1):**

“considered confidential and unavailable for public inspection and copying”

**RCW 29A.08.710(2):**

“No other information ... is available for public inspection or copying”

**RCW 29A.08.720(1):**

“is not available for public inspection and ... shall not be disclosed to the public”

**RCW 29A.32.100(1):**

“is not available for public inspection or copying until...”

**RCW 29A.56.670:**

“shall not be available for public inspection or copying”

**RCW 30.04.410(e)(3):**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 32.04.220(5):**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 33.04.110(5):**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 40.24.060:**

“Neither ... shall be included in any list ... available to the public”

**RCW 41.06.157(4):**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 41.06.160:**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 41.06.167:**

“shall not be subject to public disclosure under chapter 42.56 RCW”

**RCW 43.22.434(3):**

“confidential and not open to public inspection under chapter 42.56 RCW”

**RCW 43.43.856(2):**

“shall be confidential and not subject to examination or publication pursuant to chapter 42.56 RCW”

**RCW 46.20.041:**

“exempt from public inspection and copying notwithstanding chapter 42.56 RCW”

**RCW 46.20.118(1):**

“shall not be available for public inspection and copying under chapter 42.56 RCW”

**RCW 48.02.065(1):**

“not subject to public disclosure under chapter 42.56 RCW”

**RCW 48.32.110(2):**

“shall not be open to public inspection”

**RCW 48.32.110(4):**

“shall not be considered public documents”

**RCW 49.17.210:**

“shall be deemed confidential and shall not be open to public inspection”

**RCW 49.17.250(3):**

“shall be deemed confidential and shall not be open to public inspection”

**RCW 50.13.015(5):**

“This section supersedes any provisions of chapter 42.56 RCW to the contrary”

**RCW 50.13.060(8):**

“exempt from public inspection and copying under chapter 42.56 RCW”

**RCW 50.13.060(11)(b)(iii):**

“not subject to disclosure under chapter 42.56 RCW”

**RCW 51.16.070(2):**

“shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties)”

**RCW 66.16.090:**

“shall be deemed confidential, and, except subject to audit by the state auditor, shall not be permitted to be inspected by any person whatsoever”

**RCW 70.56.050(2)(a):**

“shall be subject to the confidentiality protections of those laws and RCW 42.56.360(1)(c)”

**RCW 70.148.060(4):**

“are not subject to public disclosure under chapter 42.56 RCW”

**RCW 72.05.130(1):**

“shall not be open to public inspection”

**RCW 84.40.020:**

“hereby exempted from public inspection”