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SUPREME COURT OF WASHINGTON

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TIMOTHY WHITE

Petitioner,

vs.

CLARK COUNTY

Respondent.

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*APPELLANT'S* PETITIONER'S REPLY BRIEF

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*Cmm  
6-28-16*



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## I. INTRODUCTION

The central question in this appeal is whether the Public Records Act (“PRA” or “Act”) *ever* provides the public the right to copies of anonymous ballots.<sup>1</sup> The Court of Appeals already clarified that article VI, section 6 of the constitution does not forbid the public from seeing cast ballots, as long as the voter who cast that ballot cannot be identified. White v. Clark County, 188 Wn. App. 622, 632, 354 P.3d 38 (Div. 2 2015) (referred to herein as the “*Clark Case*”), *cert denied*, 2016 Wash. LEXIS 340 (2016). With the November 2013 election results certified over two years ago, and no evidence in the record showing the voters who cast each requested ballot could be identified, *id.*, Clark County must produce the anonymous ballots in its possession under the PRA.

The Court of Appeals previously held that the public does not have the right to see ballots *in the middle of an election*, when statutes restrict the movement and handling of ballots with a strict chain of custody to ensure ballots are not lost, stolen, or tampered with. *See id.*; White v. Skagit County, 188 Wn. App. 886, 355 P.3d 1178 (Div. 1 2015) (referred

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<sup>1</sup> The County spends some time fixating on records not at issue in this appeal, apparently in an attempt to confuse the Court. *See Respondent’s Brief* at 1, 6-7. This case has always strictly been about the withheld ballots, and associated withheld metadata. CP 3, ¶¶ 14-15 (Complaint – First Cause of Action) (“By failing to produce copies of ballot images from the November 5, 2013 General Election, as defined in the request, Defendant has violated the PRA”).

to herein as the “*Skagit Case*”), *cert denied*, 2016 Wash. LEXIS 341 (2016). The Court of Appeals did not consider whether the secure storage provisions of Title 29A RCW, which it found exempts ballots from production until 60 days after election tabulation, apply after that time, which is the impetus for this appeal. *Id.* The court’s reasoning does not extend to a PRA request for ballots made over a year after the election results were certified, when the purposes of the exemptions have already been fulfilled. *See Sargent v. Seattle Police Dept’*, 179 Wn.2d 276, 390 (2013) (recognizing that a categorical exemption can be “lost” when facts change or time passes). The plain language of Title 29A does not exempt ballots from public access under the facts of this case, where there is a safe distance from the finalized election. The County has not met its burden to cite any statute restricting access to ballots after the 60-day secure storage requirement of RCW 29A.60.110.

## II. ARGUMENT

### A. Clark County Did Not Carry Its Burden to Show That the Constitution Exempts Every Withheld Ballot.

Clark County (referred to as “Clark” or “County”) is correct that article VI, section 6 of the constitution exempts information from production that identifies how an individual voted. There is no dispute that there is a constitutional directive “that *the legislature must ensure*

*that every person's vote – i.e., how the person voted – remains secret...However, nothing in article VI, section 6 expressly provides that the ballot itself must remain 'secret' as long as the voter who cast that ballot cannot be identified. The provision expressly guarantees secrecy for every voter, not for the voter's ballots themselves.* White v. Clark County, 188 Wn. App. 622, 632, 354 P.3d 38 (Div. 2 2015) (emphasis added) (referred to hereafter as the “*Clark Case*”). It is Clark County's burden to put forth evidence for each withheld record showing each record contains constitutionally protected information; a burden Clark simply failed to carry. RCW 42.56.550(1) (“burden of proof shall be on the agency”).

Indeed, courts have entered voted ballots into evidence in Washington, a matter of public record that shows there is no *per se* exemption simply because the public records at issue are ballots. *See State ex rel. Morgan v. Aalgaard*, 194 Wash. 574, 577-78, 78 P.2d 596 (1938) (“The ballots cast at the election were introduced in evidence, and are before us,” also discussing the physical appearance of the ballots); *see e.g.* RCW 36.23.065. In Aalgaard, the identities of individual voters were even public, apparently because the voters waived their right to a secret

vote through testimony. *Id.* at 576 and 579 (“The trial court found that these three ballots had been voted by persons named in the findings...”).<sup>2</sup>

Clark County continues to offer the same hypothetical constitutional arguments—entirely disconnected from the specific facts of this case—which the Court of Appeals already rejected as insufficient. *Compare Respondent’s Brief* at 20-22 with Clark, 188 Wn. App. at 632. Considering **identical** evidence about general risks to a secret vote, Division Two concluded “*the County provided no evidence that production of the ballot images White requested would compromise voter secrecy.*” Clark, 188 Wn. App. at 632 (emphasis added); *see also Respondent’s Brief* at 20-22 (citing to Declaration of Cathie Garber, filed in support of the previous *Clark Case* [CP 88-89]). This Court should reach the same conclusion—Clark County has not met its burden.

Not only is there absolutely no evidence in the record that *any* of the withheld ballots contain constitutionally protected information, but the County erred in assuming that *none* of the requested ballots are free of the unusual hypothetical circumstances it describes. *See, Sargent*, 179 Wn.2d

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<sup>2</sup> It is unclear if voters placing identifying marks on their ballot would have a similar legal effect of waiving their secret vote. The County’s contention that “a voter would expect an election official to see their name or handwriting in this situation,” but not necessarily the broader public, *Respondent’s Brief* at 22, is inadmissible hearsay that the Court should strike. ER 802.

at 390 (“We simply hold that the [agency] had the burden to parse the individual documents...” If any of the withheld ballots lack constitutionally protected information, they are not exempt and must be produced

Clark argues that “[w]hen there is a low turnout in a small precinct, a copy of a ballot could be tied back to a voter,” without even asserting that any of the ballots Mr. White requested involve a low turnout in a small precinct. *Respondent’s Brief* at 20. Clark has never claimed that every single ballot cast in Clark County for the November 2013 election involved a low turnout in a small precinct, which would be demonstrably false. *See CP 27* (98,000 ballots withheld). Even assuming, *arguendo*, that some small subset of the ballots Mr. White requested involved a low enough turnout in a small enough precinct that would allow someone to tie those ballots back to the voter, there would still be thousands of ballots not subject to those conditions that must be produced under the PRA. The County must produce all anonymous records.

Moreover, accepting Clark’s constitutional argument would lead to absurd results. Suppose an election involved a so-called “small precinct” with a “low turnout,” where only a few people voted who all happened to vote the same way. Would article 6, section 6 of the constitution forbid releasing the results of that election to the public because comparing the

results to public records would reveal how those few people voted? Taking Clark's argument to its logical conclusion, the county *could not tell the public the election tally* because someone could find out who voted in that precinct and necessarily know how all voters voted. Imagine the backlash if the winner of an election is declared without releasing the vote-tally. The constitution does not hamstring our democracy in this way. Clark's arguments are unavailing.

Clark also argues that voter-placed markings, including "*Any* handwriting on the ballot at all" could be used to identify voters. *Respondent's Brief* at 21-22 (emphasis original). Again, Mr. White does not want copies of any voter-placed identifying marks, which can be avoided through redaction, as the Secretary of State explained. See Skagit, 188 Wn. App. at 896 ("Meetings of the county canvassing board are open public meetings...*Where canvassing boards display a ballot, they cover any marks that could destroy absolute ballot secrecy.*" (quoting Secretary of State) (emphasis added)). An order from this Court directing Clark County to redact any and all written markings, other than the shaded boxes showing the votes, would address this concern. And even assuming, *arguendo*, that a subset of ballots that Mr. White requested contain identifying marks that are impossible to redact for some reason, there are likely thousands of other ballots free of any extraneous markings, which

the County must produce. We simply do not know how many ballots actually contain hand-written markings because the County did not comply with the most basic requirement to “parse the individual documents.” Sargent, 179 Wn.3d at 390.

Finally, Clark argues that it need not strictly comply with the PRA’s mandate because Mr. White should be satisfied with receipt of different records. *Respondent’s Brief* at 2 and 22. The plain language of the PRA categorically rejects the ability of agencies “to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created...” RCW 42.56.030. Clark County cannot evade disclosure requirements by partially complying with a request, or directing a requester to different records. *See e.g. Sanders v. State*, 169 Wn.2d 827, 837, 240 P.3d 120 (2010) (finding wrongful withholding, despite production of 1,000 pages of material). Accepting this justification for withholding public records would set a dangerous precedent that conflicts with the PRA, allowing agencies to pick and choose the records they feel most comfortable releasing, while concealing the rest. *See* RCW 42.56.550(3). Mr. White requested copies of ballots, so Clark County must produce copies of ballots.

**B. Title 29A RCW Does Not Mandate Ballot Destruction and Contains No PRA Exemption for Ballots After the Election is Over.**

Clark County's contrived arguments about RCW 29A.60.110 are inconsistent, at times arguing that the statute mandates destruction of ballots, exempting them from production no matter how long after an election, and at other times acknowledging that there is no destruction mandate. The County cannot have it both ways. Either Title 29A RCW mandates destruction at a specific time, thereby exempting the ballots from the PRA, or destruction is left discretionary with the PRA's mandate requiring production at the earliest opportunity.

The Court of Appeals' detailed analysis of ballot handling regulations and the text of Title 29A in the *Clark Case* confirms that ballot destruction is not mandated by statute. See Clark, 188 Wn. App. at 632-634. The *Skagit Court*'s conclusion that "the legislature has gone into great detail to ensure...ultimately destroying ballots" is an un-cited conclusion without legal support. *Respondent's Brief* at 5 (quoting Skagit, 355 P.3d at 1183).<sup>3</sup> There is no statute mandating ballot destruction. See generally Title 29A RCW.

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<sup>3</sup> The *Skagit Court* also misconstrues RCW 29A.60.125 in subsequent analysis, as explained by the *Clark Court*. See Clark, 188 Wn. App. at 634, n. 5 ("RCW 29A.60.125 is entitled 'Damaged Ballots' and clearly applies only to situations where a ballot is damaged and must be duplicated" for processing).

The legislature has required secure storage for ballots from the time the ballots are received until 60-days after ballots are counted, a precaution in case a recount is needed. RCW 29A.60.110; *see Clark*, 188 Wn. App. at 633-634 (recognizing Title 29A is limited in scope and has gaps). Following the “statutory secure storage period,” *Respondent’s Brief* at 5, ballot-preservation no longer serves the intended purposes, opening the door for public access.

First, Clark repeats its unsupported refrain that RCW 29A.60.110 mandates ballot destruction, so ballots can *never* be produced. *See id.* (“[i]n Title 29A RCW, the legislature has gone into great detail to ensure that the process of collecting, counting, storing, **and ultimately destroying ballots...**” (quoting *Skagit Court*, emphasis added by Clark County)). Despite pointing to no statute requiring ballot destruction (there are none), Clark argues that since Title 29A requires ballot destruction after the 60-day secure storage period, there is no room for the PRA to apply to ballots. *Id.* This is a legal fiction. RCW 29A.60.110 says nothing about destroying ballots, only minimum retention.

The purported statutory mandate to destroy ballots once the 60-day secure-storage period expires is a fallacy that Clark now relies upon to justify keeping the public in the dark *two years later*. *Id.* Because there is no statutory requirement to destroy the ballots after the mandated secure

storage period ends, there is no applicable PRA exemption at this point in time. Again, this is the fundamental difference between White's prior appeal (involving a request made during the election), and this one (made over a year after results were certified).

Indeed, Clark's brief acknowledges that "[b]ecause [the ballots] have been the subject of ongoing litigation, the County has retained all records" past the 60-day period, as required by the PRA. *Respondent's Brief* at p. 6; see RCW 42.56.100 ("If a public record request is made at a time when such record exists but is scheduled for destruction in the near future, the agency...shall retain possession of the record, and may not destroy or erase the record until the request is resolved."). Clark chose to comply with the PRA's prohibition on destruction, while ignoring the mandate to produce public records. The Court should not allow Clark to pick and choose which provisions of the PRA to follow. Clark's own action to preserve the withheld ballots pursuant to the PRA reinforces the plain language of Title 29A RCW, which lacks any requirement to destroy ballots at any time.

Second, Clark simultaneously concludes that RCW 29A.60.110 *does not* require destruction following the 60-day period, since it "provides a 60-day retention period as a floor, not a ceiling." *Respondent's Brief* at p. 16. On this point, Clark is correct. The County

may not destroy the ballots before the mandated 60-day period because they must be preserved in the event of a recount—after the 60 days the County *may* destroy them, but need not. RCW 29A.60.110. This is consistent with the Washington Coalition on Open Government’s (WCOG) prior unaddressed argument that RCW 29A.60.110 “merely restricts access to ballots up to a particular point in time.” CP 492. Consequently, once that point in time passes, the secure storage exemption loses force and there is no statutory exemption from the PRA.

Assuming *arguendo*, that there is no earlier point in the canvassing process at which a County could scan or copy ballots in response to a PRA request, the County is still required to produce copies of ballots after an election is over because ballots are not categorically exempt from disclosure and no statute *requires* the County to destroy ballots after the election. The last step in the canvassing process described by the County is governed by RCW 29A.60.110... This section is *not* an “other statute which exempts or prohibits disclosure of specific information or records” for the purposes of RCW 52.56.070(1). Rather, this statute merely restricts access to ballots up to a particular point in time. The restrictions in the second paragraph [of 29A.60.110] only apply during the retention period required by the first paragraph. The County cannot argue that the restrictions in the second paragraph continue to apply *after* the retention period because those restrictions do *not* authorize the destruction of ballots after an election...

The County has not cited any statute that prohibits the disclosure of ballots after the retention period provided by RCW 29.60.110 has ended. Consequently, the County relies on the erroneous argument that it is authorized or required to destroy ballots after an election even if those ballots are the subject of a PRA request. But the PRA explicitly prohibits the destruction of public records until a request for such records is resolved. RCW 42.56.100. And the

County has not cited any other statute that would allow or require the destruction of ballots despite this prohibition.

CP 491-493 (citations omitted, emphasis original). The *Clark Court* did not consider this argument, and limited its holding accordingly. Clark, 188 Wn. App. at 637, n. 6; *see also id.* at 627 (“ballots must be kept completely secure from the time of receipt through processing and tabulation.”). The *Skagit Court* did not consider or analyze this argument either, despite Clark’s claims to the contrary. *See generally Skagit*, 188 Wn. App. 886 (never analyzing the 60-day language or WCOG’s amicus brief); *id.* at 904 (striking White’s Answer to WCOG brief); *Respondent’s Brief* at 5.

Although the *Clark Court* did not reach the set of facts at issue here, it follows from the court’s meticulous analysis of the law governing ballot-handling at each point throughout the canvassing process that there is no statutory requirement to keep the ballots in secure storage past the mandated 60-day period. Clark, 188 Wn. App. at 633-634 (noting that the statutory provisions “are limited in scope”). There simply is no statute that governs ballot handling beyond that time, when preservation is no longer important due to the election’s conclusion. Without a specific exemption for ballots at this point in time, there is no “other statute” exemption on point.

Finally, Title 29A RCW does not establish any additional fundamental rights vis-à-vis “voter secrecy” than what is already provided by article VI, section 6 of the constitution:

Title 29A RCW is entitled “Elections.” RCW 29A.04.206(2) states that “[t]he rights of Washington voters are protected by its constitution and laws” and include the fundamental right of “absolute secrecy of the vote.” *Like article VI, section 6, this provision focuses on protecting from disclosure how a person voted.*

Clark, 188 Wn. App. at 632 (emphasis added) (citing Moyer v. Van de Vanter, 12 Wash. 377, 382, 41 P. 60 (1895)). Thus, it is Clark County’s burden to identify a specific statute forbidding public access to anonymous ballots two years after the corresponding election. Again, the Court of Appeals held “nothing in article VI, section 6 expressly provides that the ballot itself must remain ‘secret’ as long as the voter who cast that ballot cannot be identified.” *Id.* This is all that White seeks: copies of ballots where the voter who cast them cannot be identified.

**C. Clark County Did Not Carry Its Burden to Show That Any Administrative Code Exempts the Withheld Records.**

Clark County’s arguments do not justify a reversal of the long-standing principle that “[a]n agency cannot define the scope of a statutory exemption through rule making or policy.” WAC 44-14-06002(1) (citing Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124

(1995)); *see also* RCW 42.56.070(1) (listing the PRA “or other *statute*” as the sources of exemptions, not administrative code (emphasis added)). However, even if the Court embraces an agency’s authority to exempt records from public access, Clark County did not meet its burden to show that any administrative rules would exempt the anonymous records at issue.

As previously explained, allowing agencies to exempt public records from the PRA through their own administrative rules would undermine a central tenet of the PRA—that “[t]he 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.” RCW 42.56.030; *see also* *Petitioner’s Opening Brief* at 21-22; *Servais*, 127 Wn.2d at 834.

The Supreme Court has held that federal regulations can exempt certain records due to federal supremacy, but Petitioner is not aware of any precedent departing from the codified rule that forbids state agencies from determining which public records are exempt.<sup>4</sup> *See* *Ameriquest Mortgage Company v. Office of Attorney General*, 170 Wn.2d 418, 241 P.3d 1245 (2010); RCW 42.56.030; *see also* *Respondent’s Brief* at 13

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<sup>4</sup> Apparently Clark is unaware of any cases either, having cited to none after given the opportunity. *See generally* *Respondent’s Brief*.

(conceding that “the *Ameriquest* decision is founded on the primacy of federal laws”).

*“Placing the power in the hands of [the agency] to control, to any extent, whether disclosure is required is incompatible with the PRA. The court has stated many times that leaving the interpretation of the PRA to the agencies at which it is aimed would be the most direct course to its devitalization.”* Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 238, 189 P.2d 139 (2008) (internal citations and quotation marks omitted, emphasis added). To the extent the *Skagit Court* or *Clark Court* found an exemption for ballots in Washington administrative code, they erred.

The attorney general’s model rules for the PRA support this conclusion. Under statutory directive to adopt advisory rules, the attorney general’s office promulgated the PRA model rules under Chapter 44-14 WAC. *See* WAC 44-14-00001; RCW 42.56.155. “The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state...[and] [m]any requestors and agencies also provided detailed written comments...” WAC 44-14-00001.

Pursuant to this authority and its extensive outreach, the attorney general promulgated that “[a]n agency cannot define the scope of a statutory exemption through rule making or policy.” WAC 44-14-

06002(1) (emphasis added). “[W]hile the model rules are not binding on the [agency]...they contain persuasive reasoning.” Beal v. City of Seattle, 150 Wn.App. 865, 874, 209 P.3d 872 (Div. 1 2009); *see* WAC 44-14-00003.

In promulgating this rule, the attorney general intentionally avoided the use of “permissive” language to provide a forceful prohibition based upon careful consideration. *Compare* WAC 44-14-06002(1) (agency “cannot define” (emphasis added)) *with* WAC 44-14-00003 (“The use of the words ‘should’ or ‘may’ are permissive, not mandatory, and are not intended to create any legal duty.”). The attorney general’s model rules are “entitled to considerable weight in determining legislative intent” because they were adopted at the express direction of the legislature. Weyerhaeuser Co. v. State, 86 Wn.2d 310, 317, 545 P.2d 5 (1976) (citation omitted); RCW 42.56.155. The attorney general’s analysis is persuasive and should be followed.

Even if the Court departs from the attorney general’s guidance, Clark County has not met its burden to show that any administrative code exempts all the withheld ballots. Clark County argues that WAC 434-261-045 and WAC 434-250-110 were promulgated under two of the 54 different subparagraphs of RCW 29A.04.611, without citing to any support indicating which subparagraph of the statute those administrative

codes actually implement. *See Respondent's Brief* at 14 (citing subparagraphs (11) and (34)). The natural reading of WAC 434-261-045 and WAC 434-250-110 shows the Secretary of State promulgated those procedures pursuant to RCW 29A.04.611(9), which directs the Secretary of State to make rules to provide “[s]tandards and procedures to ensure the accurate tabulation and canvassing of ballots”—not to keep ballots hidden two years after the election. RCW 29A.04.611(10) is another possible source of authority: rules must ensure “[c]onsistency among the counties of the state in the preparation of ballots, the operation of vote tallying systems, and the canvassing of primaries and elections.” In either case, the implementing regulations do not exempt anonymous ballots two years after the election is over.

WAC 434-250-110 (entitled “Processing Ballots”) provides consistent instructions to the counties for processing, including ballot tabulation, pursuant to RCW 29A.04.611(10). WAC 434-261-045 (entitled “Secure Storage” – *not* “Secret Storage”) provides instructions for ballot storage “that will detect any inappropriate access to the secured materials” during the canvassing process to ensure accurate tabulation and canvassing pursuant to RCW 29A.04.611(9). Since “nothing in article VI, section 6 [of the constitution] expressly provides that the ballot itself must remain ‘secret’” (Clark, 188 Wn. App. at 632), there is no basis for

Clark's conclusion that the regulations cited were promulgated to guarantee a constitutional "secrecy of all ballots." *Respondent's Brief* at 14.

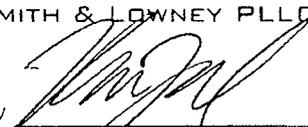
Division Two analyzed these regulations, concluding that the Secretary of State promulgated the regulations to protect ballots "*during processing.*" Clark, 188 Wn. App. at 636 (emphasis added). Here, the withheld ballots were processed *over two years ago*, when the election results were also certified. *See* CP 223, line 21 (certified November 26, 2013). The County's observance of the Secretary of State's instructions in WAC 434-250-110 and WAC 434-261-045 ensured consistent and accurate canvassing for that election and are no longer applicable.

### III. CONCLUSION

For the foregoing reasons and those provided in *White's Opening Brief*, the Court should reverse the trial court, order Clark to individually parse the withheld ballots for constitutionally protected information, and produce all anonymous records—redacted, if necessary.

Respectfully submitted this 27th day of June, 2016

SMITH & LOWNEY PLLC

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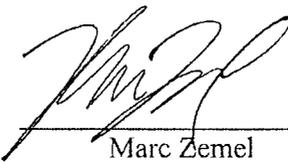
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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 27, 2016, I served the foregoing to the following by e-mail:

**Via**  
Jane Vetto  
Clark County Prosecuting Attorney  
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1300 Franklin Street, Suite 380  
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**Dated** this 27th day of June, 2016, at Seattle Washington.

  
\_\_\_\_\_  
Marc Zemel

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Greetings,

Petitioner's Reply Brief in the above referenced case is attached for filing.

White v. Clark County  
Supreme Court Case No. 92696-4

Thank you,

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