

NO. 72028-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

TIMOTHY WHITE,

Appellant,

v.

SKAGIT COUNTY; ISLAND COUNTY,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita L. Farris, Judge
Superior Court Cause No. 14-2-01716-1

AMENDED BRIEF OF RESPONDENT ISLAND COUNTY

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I. INTRODUCTION

Election ballots, including electronic images of ballots and associated metadata, are exempt under the Public Records Act (“PRA”), chapter 42.56 RCW. The Washington State Constitution mandates absolute secrecy of the ballot. In furtherance of this constitutional mandate, the state election laws, chapter 29A RCW, provide for the absolute security and secrecy of the voted ballot, prohibiting their release to the public. This body of state election laws in chapter 29A RCW qualifies as an “other statute” pursuant to RCW 42.56.070(1) and require counties to withhold voted ballots, including electronic images of ballots and associated metadata, from public inspection and copying. The election laws ensure transparency in the election process as the public is allowed to observe the ballot processing during an election and attend the canvassing board meetings which are open to the public.

This appeal stems from a public records request (“Request”) submitted by Mr. Timothy White (“Mr. White”) for copies of electronic or digital image files of *pre-tabulated* ballots. In separate responses to the Request, both Island County and Skagit County properly withheld the requested records from production. Mr. White challenged the Counties’ withholding of the ballots and the trial court agreed with the Counties that

the requested records were exempt. CP 3-17. The trial court also found that both Island County and Skagit County met the procedural requirements of the PRA in responding to Mr. White's request. CP 16.

Many of the issues raised by Mr. White in this appeal are directed jointly toward both Skagit County and Island County. Some issues, however, are unique to Island County. Rather than file duplicative briefs, Island County hereby adopts, pursuant to RAP 10.1(g), parts of Skagit County's Response Brief including Skagit County's counter-statement of the issues numbers 1 and 2 on page 8, parts of the Statement of the Case on pages 8-13, and Skagit County's argument presented in the Analysis Sections A, B, C (on pages 16-30) and E. *See Skagit County's Response Brief* at 16-30 and 34-47.

There are, however, issues raised that are unique to Island County. In Assignment of Error No. 5, Mr. White contends that Island County's response did not comply with the PRA's procedural rules. This brief will focus on Island County's response and Island County asks this Court to uphold the trial court and find that Island County's response complied with the procedural requirements of the PRA and properly withheld the requested records.

II. STATEMENT OF THE ISSUES

1. Did Island County's response to Mr. White's Request comply with the PRA's procedural rules, when such response: (1) was provided within five business days; (2) disclosed to Mr. White the identity of all of the responsive records requested; (3) included a statement of the specific exemption authorizing the withholding of the identified records; (4) and a brief explanation of how the exemption applies to the record withheld?

ANSWER: Yes, Island County's response fully complied with the PRA.

III. STATEMENT OF THE CASE

In this case, Mr. White submitted his Request on November 6, 2013 for copies of electronic or digital image files of pre-tabulated ballots. CP 220. The Request was received one day after the 2013 general election, during the processing and tabulating of the general election ballots. CP 158-161.

On November 12, 2013, within five business days, Island County responded to the Request. CP 234-236. Island County's response disclosed the identity of the total amount of digital images of scanned ballots that existed at the time of the response, and provided a clear and detailed explanation for why the ballot images and their accompanying metadata were categorically exempt under the PRA. The explanation

provided to Mr. White was clear that ballots – including ballot images – are held in secure storage as mandated by the Washington Constitution and state laws and regulations. These mandates establish a comprehensive means of preserving the sanctity of the ballot, which may only be breached by court order. Because Mr. White did not obtain an order from the court allowing the disclosure of the ballots to him, Island County was required by state law to deny Mr. White’s PRA request. CP 234-236.

Mr. White appealed and the Snohomish County Superior Court (“trial court”) agreed that Island County and Skagit County appropriately denied Mr. White’s request because, among other reasons, chapter 29A RCW is a statutory scheme that exempts ballots and facsimiles and copies of ballots from disclosure under the PRA. CP 3-17 at 7.

At the trial court, Mr. White raised two issues unique to Island County’s response. First, Mr. White alleged that Island County failed to respond at all within five business days. CP 252. However, as a factual matter, Island County presented sufficient evidence to prove clearly that it responded appropriately within five business days. CP 148; CP 175. Mr. White does not raise this issue in his appeal, so this issue has been abandoned. *See Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006)(A party abandons an issue by failing to pursue it on appeal by failing to brief the issue).

Second, Mr. White alleged that Island County's response did not comply with RCW 42.56.210(3) because it was not accompanied by an exemption log, despite Island County's full disclosure of the identity of the number of digital images of scanned ballots that were responsive to the Request and detailed explanation as to why the records were being withheld. CP 253.

The trial court held that Island County's response complied with the procedural requirements of the PRA as it was timely and because the explanation of the exemption to the PRA was explained with sufficient particularity to be understood and it is not necessary to repeat the same explanation thousands of times if it is the same for each ballot image. CP 33.

IV. ARGUMENT

A. Standard of Review

Judicial review of all agency actions taken or challenged under RCW 42.56.030 through 42.56.520 shall be de novo. RCW 42.56.550. The burden of proof is on the party seeking to prevent release of any records to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Attorney Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013); RCW 42.56.540, .550(1).

B. Island County's response to Mr. White's Request fully complied with the procedural requirements of the PRA.

The PRA establishes certain procedural requirements that an agency must follow when responding to a public records request. Here, Island County's response to Mr. White's Request fully complied with the requirements for responding under the PRA.

Island County complied with RCW 42.56.520 which generally requires prompt responses by agencies. RCW 42.56.520 provides in relevant part:

Within five business days of receiving a public records request, an agency. . . must respond by either (1) providing the record; (2) providing an internet address and link on the agency's web site to the specific records requested. . . ; (3) acknowledging that the agency. . . has received the request and providing a reasonable estimate of the time the agency. . . will require to respond to the request; or (4) denying the public record request.

In accordance with RCW 42.56.520, Island County timely responded to Mr. White's Request within five business days and properly denied the public record request.

When an agency's response refuses inspection of any public record, the procedural requirement set forth in RCW 42.56.210(3) applies.

RCW 42.56.210(3) provides in full:

Agency responses refusing, in whole or in part, inspection of any public record shall include a statement of the specific exemption authorizing the withholding of the

record (or part) and a brief explanation of how the exemption applies to the record withheld.

Island County's response properly disclosed the identity of all the responsive requested records being withheld, included a statement of the specific exemption authorizing the withholding and provided a brief explanation of how the exemption applies.

1. *Island County complied with RCW 42.56.210(3) without having to compile an arbitrary privilege log.*

To comply with the PRA, an agency must provide an explanation that specifically describes how the claimed exemption applies to the withheld information. *Gronquist v. Dep't of Licensing*, 175 Wn. App. 729, 744, 309 P.3d 538 (2013). “**One method** by which an agency can properly identify withheld information is with a privilege log.” *Gronquist*, 175 Wn. App. at 744, *citing Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wn.2d 525, 538-39, 199 P.3d 393 (2009)(noting WAC 44-14-04004(4)(b)(ii)). (emphasis added). The agency's chosen method, whether it be in the form of a privilege log or otherwise, “should include the type of information that would enable a records requester to make a threshold determination of whether the agency properly claimed the privilege. *Gronquist*, 175 Wn. App. at 744. Due to the nature of the requested records, Island County complied with RCW 42.56.210(3) by

providing sufficient information to Mr. White without having to compile a privilege log. See WAC 44-14-04004(b)(ii).

Mr. White erroneously contends that *Rental Housing Ass'n* requires an exemption log to be provided in every PRA response. See *Gronquist v. Dep't of Licensing*, 175 Wn. App. 729, 744, 309 P.3d 538 (2013) (**One method** by which an agency can properly identify withheld information is with a privilege log). (emphasis added).

In *Rental Housing Ass'n*, Rental Housing Association (“RHA”) requested records from City of Des Moines regarding the crime free rental housing program the City adopted. *Rental Housing Assn'n*, 165 Wn.2d at 528. The City sent an acknowledgment letter the following day and responded a month later by providing over 500 documents. *Id.* However, the City’s response letter refused to provide hundreds of other various records from the city attorney’s files. *Id.* The response letter did not identify which individual documents were withheld and did not provide a privilege exemption log; rather, it generally categorized the unidentified documents as falling into one of nine general categories. *Id.* at 529.

The Court did not rule that a privilege log is always required as suggested by Mr. White, but rather that without **the sort of information** that a privilege log provides, “a public citizen and reviewing court cannot know (1) what individual records are being withheld, (2) which

exemptions are being claimed for individual records, and (3) whether there is a valid basis for a claimed exemption for an individual record. (emphasis added). Failure to provide **the sort of identifying information** a detailed privilege log contains defeats the very purpose of the PRA to achieve broad public access to agency records.” *Id* at 540. (emphasis added). Accordingly, the Court’s holding placed the importance on providing to the requester sufficient identifying information of the withheld records, not on the specific method an agency chooses to provide such information.

The Court in *Rental Housing Ass’n* relied on the Supreme Court’s decision in *Progressive Animal Welfare Soc’y v. Univ. of Wash.* (“*PAWS II*”), 125 Wn.2d 243, 884 P.2d 592 (1994), in which the Supreme Court denounced the “silent withholding” in response to a PRA request and emphasized the need for particularity in the identification of records withheld and exemptions claimed. *PAWS II*, 125 Wn.2d at 270.

The *PAWS II* court held that, regarding identifying information:

The plain terms of the Public Records Act, as well as proper review and enforcement of the statute, make it imperative that all relevant records or portions be identified with particularity. Therefore, in order to ensure compliance with the statute and to create an adequate record for a reviewing court, an agency’s response to a requester must include specific means of identifying any individual records which are being withheld in their entirety.

Island County's November 12, 2013 response met the requirement of RCW 42.56.210(3). Island County sufficiently identified in particularity the responsive records it was withholding in a paragraph with the heading "Identification of Records." CP 235.

The response properly identified the records it was withholding from Mr. White as follows:

"The records you requested are digital files and associated metadata and properties for ballots in the November 5, 2013 general election. The county received one ballot by fax for this election. Only two voters voted by voting machine. The County received 28 e-mailed ballots for this election as of November 6, 2013. And the number of ballots scanned so far for this election is 28,668. For each of the scanned ballots a corresponding digital image file exists for each side of [sic] each ballot; each ballot for this election is a single page with two sides. There is metadata associated with each digital image file and with the e-mail ballots."

No further relevant information could have been provided to the requester about the identification of the withheld scanned ballot images that would typically be found in a privilege log. Island County could have arbitrarily logged the ballots providing 57,336 separate line items (28,668 scanned ballots x 2 pages per ballot), however, such an arbitrary log, due to the nature of the requested records, would not have provided any further useful information that was not already provided to Mr. White.

The nature of Mr. White's request is clearly distinguishable from the PRA request that was made in *Rental Housing Ass'n*. The records request in *Rental Housing Ass'n* was broad, open-ended, and cast a wide net in that responsive records could have included a variety of types of documents such as emails, letters, memos, notes, etc., related to the City's adopted crime free rental housing program. Accordingly, the City's response letter amounted to a "silent withholding" in that it withheld documents but did not sufficiently identify in particularity what documents were being withheld from the requester. Whereas here, Mr. White's Request that sought only "copies of electronic or digital image files of all pre-tabulated ballots received, cast, voted, or otherwise used in the County's current Nov. 5, 2013 General Election" (CP 255) is very narrow in scope resulting in only one very specific type of responsive record, scanned ballot images. Island County had no further relevant identifying information to provide to Mr. White that wouldn't have been completely arbitrary.

The rest of the County's response explained in detail why the requested records identified above were being withheld in their entirety. CP 235. Island County provided the following explanation to Mr. White:

RCW 29A.40.110, RCW 29A.60.125 and RCW 29A.60.110 require that ballots be sealed in secure storage at all times other than at those specific times and for those

specific purposes set forth by statute. See also WAC 434-261-045 and WAC 434-235-040(3). This requirement applies to government employees and officials as well as to others. Consequently, making or releasing copies of ballots without an order from a Superior Court Judge would constitute a violation of these statutes. Pursuant to RCW 29A.04.008, this applies to copies of ballots in any format, including copies of digital ballot images or e-mailed ballots.

Additionally, in *Doyle v. King County*, 138 Wash. 488 (1926), the Washington State Supreme Court said that the “sanctity of the ballot box is not to be invaded simply because a vote is close, and it is hoped that a recheck of the work performed may possibly show an error.” The Washington State Superior Court for Spokane County ruled in 2009 that copies of duplicated ballots from the 2008 General Election are not available under the Public Records Act. We provided you with a copy of the Superior Court ruling with previous final replies to your earlier requests for the same records.

Because a specific statute prohibits their release, these records are being withheld in their entirety under RCW 42.56.070(1), which references documents exempt from disclosure under other statutes. We will not release the ballot images without a court order as described by statute.

...

There is metadata associated with each digital image file and with the emailed ballots. . .The metadata is accessible only by accessing the digital image file or e-mail. As described above, in the absence of a court order, the County is prohibited from accessing these digital files or emails for any purpose other than those specific purposes described by elections statutes. Because the County is prohibited from accessing the digital files the County may not access the metadata associated with the files. Because a specific statute prohibits their release as described in the previous section, these records are being withheld in their entirety under RCW 42.56.070(1)

CP 235-36.

Essentially, Mr. White argues that this lengthy and detailed explanation should have been provided approximately 57,336 times for each digital image presented in a privilege log. The trial court recognized the flaw in Mr. White's argument and held:

“While the Counties could just arbitrarily number each ballot sequentially and list the numbers 1 through 28,000, this is form over substance. Demanding the Counties give each ballot an arbitrary number provides no real information about the exempted document to the requesting citizen. The Petitioner does not suggest how he thinks the ballots could have been identified individually or more specifically without providing identifying information. Given the nature of the requested documents, both Counties' responses were adequate. The explanation of the exemption to the Public Records Act was explained by both Counties with sufficient particularity to be understood and it is not necessary to repeat the same explanation thousands of times if it is the same for each ballot.”

CP 16.

Given the nature of the requested documents (scanned ballot images), Island County's response complied with the PRA requirements without the need to provide a privilege log repeating the same explanation thousands of times for the same type of document, because such a privilege log would not have provided the requester with any relevant information not already provided in the response. Island County's response clearly identified in particularity the records it withheld from Mr. White and included sufficient information for Mr. White to make a threshold

determination of whether Island County properly claimed the privilege for the identified records.

2. *Mr. White is not entitled to sorted or subcategorized withheld records, so long as an appropriate exemption for withholding is cited.*

Mr. White argues for the first time on appeal that “Island’s response lacked information about records related to ballots. . .” and argues that Island County’s response did not “describe . . . the metadata and properties it withheld.” *See Appellant’s Opening Brief*, page 45.

Mr. White’s Request identified the scope of his Request in Section No. 1:

“Pursuant to the state Public Records Act, **I request copies of electronic or digital image files of all *pre-tabulated ballots*** received, cast, voted, or otherwise used in the County’s current Nov. 5, 2013 General Election.” CP 220. (emphasis added).

Section No. 2 of his Request addresses the intent of his request, Mr. White provides that his Request “intends to include copies of image files of the following sets” and then lists out seven “sets” or categories of ballots that he intended to be included in his Request. CP 220. He clarified in Section No. 2 several subsets of ballots in an effort to get copies of all ballots, but he did not ask for separate records about these subsets or that such subsets of ballots be produced as separate requests. *See* CP 220.

Now, Mr. White argues that “Island’s response lacked information about records. . .” *See Appellant’s Opening Brief*, p. 45. However, there is a clear distinction between a request for information about public records and a request for the records themselves. Importantly, Mr. White’s Request did not ask for “information about records” nor did it ask Island County to “describe. . .the metadata and properties.” Nonetheless, even if he had requested “information about records” or a description of requested records, the PRA “does not require agencies to research or explain public records, but only to make those records accessible to the public” unless such records are exempt from public inspection and copying. *See Smith v. Okanogan County*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000). Island County was only required to adequately comply with RCW 42.56.210(3) when it withheld the requested records which it clearly did as discussed above.

V. CONCLUSION

Island County respectfully requests that this Court uphold the trial court and so hold that ballots, including scanned ballot images, as requested by Mr. White, are exempt from production under the PRA and that Island County’s response, for all the reasons listed above, fully complied with the requirements of the Public Records Act.

Respectfully submitted this 15th day of September, 2014.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

A handwritten signature in cursive script that reads "Daniel B. Mitchell". The signature is written in black ink and is positioned above a horizontal line.

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