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No. 72028-7-I

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION 1

TIMOTHY WHITE

V.

SKAGIT COUNTY; ISLAND COUNTY

APPELLANT'S ANSWER TO SECRETARY OF STATE'S AMICUS CURIAE BRIEF

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I. INTRODUCTION

The Secretary of State (SOS) echoes the counties' revisionist arguments about the intent of Appellant White's request (hereafter "Plaintiff"), and the existence of the requested records, in an ongoing effort to avoid a hard look at the law. The record shows Plaintiff requested locatable electronic records with deference to the functioning of the 2013 election. The counties have unlawfully withheld those records for over a year and have not met their burden to identify any explicit statute exempting them from public access. No exemption exists for the electronic records Plaintiff requested.

As chief elections officer, the SOS may wish there was an exemption for these records—to avoid extra work involved in complying, prevent the possibility of the public exposing an embarrassing election mistake, or for other political or personal reasons—but the SOS cannot create PRA exemptions. PRA exemptions are only found in statutes.

II. ARGUMENT

A. Agency Rules and Practice Cannot Create Exemptions.

"It is the court, and not the agency, which determines whether records are exempt." Servais v. Port of Bellingham, 127 Wn.2d 820, 834-35, 904 P.2d 1124 (1995) (citing Hearst Corp. v. Hoppe, 90 Wn.2d 123,

130, 580 P.2d 246 (1978)). Without a statutory leg to stand on, the SOS litters its amicus brief with Washington Administrative Code (WAC) citations—over 20 in total—and arguments from agency practice, all of which have no bearing on PRA exemptions. It is settled law in Washington that "[agencies] may not define the parameters of the exemptions." Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005) (citing Hearst, 90 Wn.2d at 131). Moreover, the Court "*cannot* defer to the [agency's] rule" when considering PRA exemptions and must only look to statutes. Brouillet v. Cowles Pub. Co., 114 Wn.2d 788, 794, 791 P.2d 526 (1990) (emphasis added); *see also* WAC 44-14-06002(1) ("An agency cannot define the scope of a statutory exemption through rule making or policy."). The court should not accept the SOS's invitation to re-write the PRA and permit agencies to enact their own PRA exemptions. Indeed, "[l]eaving interpretation of the act to those at whom it was aimed would be the most direct course to its devitalization." Servais, 127 Wn.2d at 834 (citing Hearst Corp., 90 Wn.2d at 131).

As Washington's chief elections officer, the SOS has conflicted political, bureaucratic and personal interests in limiting the PRA's application in the election context. The Court should consider those conflicts when weighing the SOS's position. There is pressure on county

auditors and the SOS to make the canvassing process as easy for themselves as possible, quickly certify results, and never look back for fear of exposing a mistake, error or incompetence. Public examination of records, potentially revealing mistakes in the canvassing process, could greatly embarrass the office and elected officials trusted to implement a fair election. To be sure, it would be far more convenient for the counties and SOS if all election materials were exempt from the PRA, but the PRA exempts only limited, enumerated records not at issue here. Appellant's Opening Brief at 21-22. "Courts shall take into account the policy...that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment." RCW 42.56.550(3); Appellant's Opening Brief at 40-41. Even if the SOS and counties crave an exemption for the records requested, none exist and the court cannot imply or create one. Appellant's Opening Brief at 20-24.

B. Plaintiff Requested Identifiable Records and Gave the Counties Time to Produce Them.

The SOS's amicus brief aims to confuse the court and muddy the record by injecting a false narrative about Plaintiff's request. It is important to clear up the record once and for all:

During the 2013 election, once the counties received voted paper ballots in the mail from voters, they digitally scanned each ballot before

"tabulating" them. Appellant's Opening Brief at 3; *see* CP 156. This scanning process created a computer file for use with Hart Intercivic, Inc. computer programs. Appellant's Opening Brief at 3, CP 160 ("Scanning and Resolving of Voted Ballots"). With those files and a Hart Intercivic program, the counties can access images of each scanned ballot with the stroke of a button. *Id.* Plaintiff requested copies of those files—in both the same format in which the files were created/used, and in a format viewable on an up-to-date home computer. CP 258. Plaintiff described those files as "pre-tabulated ballot" image files to clarify the point in the canvassing process when the files were created and to assist the counties in locating them. CP 257 (requesting files "created, received or used before tabulation"). The counties understood his request in this manner. CP 234-35.

While Mr. White preferred to receive the requested records as quickly as possible (as most requestors do), he recognized the busy and demanding time of year, stated he sought to avoid disruption of the election, and indicated it would be reasonable to receive the records after election certification. CP 258-59; *see also* CP 183 (Skagit indicating Plaintiff did not object when they informed him they needed more time to respond to his request).

The counties' and SOS's self-serving contention that Plaintiff demanded receipt of all the records before the election concluded is unsupported and wrong. In particular, the SOS vainly relies on Plaintiff's request for "disclosure" of responsive records within the statutorily defined period by mistaking the term "disclosure" for "production." SOS Amicus at 2. Plaintiff's "disclosure" request asked for a reasonable search for responsive records and disclosure (under the statutory deadline) of the records in the counties' possession—not for physical production of all records at that time. "Disclosure" and "production" have different meanings under the PRA. "[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); Sanders v. State, 169 Wn.2d 848, 836, 240 P.3d 120 (2010). The counties needed to produce the records as soon as they could, and continue on an installment basis if one batch was infeasible. RCW 42.56.080. The counties have entirely withheld all responsive documents in violation of the PRA.

Moreover, the counties understood Plaintiff's request for "pre-tabulated ballot image files" to reference a point in time when the files were created:

> Your request, we understand, is for *pre-tabulated ballots as imaged, or digital files of pre-tabulated ballots*, metadata and 'properties associated with the electronic or digital files...

CP 234-35 (emphasis added). The counties cannot now reverse course and claim Plaintiff's request was impossible to fulfill and/or demanded halting the election—nor can the SOS. Plaintiff requested copies of the files the county created during the ballot imaging/scanning process, which occurred before the ballots' tabulation. Those are public records not exempted by any provision of the PRA or other statute.

C. Plaintiff Requested Electronic Data Files From Which Images May Be Obtained or Translated.

The SOS next piggy-backs on the counties' last-ditch, revisionist argument that the records do not even exist. This is counter to repeated acknowledgment in the counties' correspondence and briefs, declarations from county-employees, and additional evidence detailing the ballot-scanning and file-creating process with the Hart Intercivic system. Appellant's Opening Brief at 36-38. There is no real dispute that the files requested exist and contain "data compilations from which [images] may be obtained or translated." *Id.*; RCW 42.56.010(4). The SOS's deceptive argument that "the data file contains no ballot images, only ones and zeros" (SOS Amicus at 3) is remarkable given the subsequent acknowledgment that "the Ballot Now program allows election workers to view ballot images on screen." SOS Amicus at 4; *see also* Appellant's Opening Brief at 36-38. It would be quite a magic trick to make those

ballot images appear out of thin air, but obviously they come from the counties' data files—public records which Plaintiff requested.

Furthermore, the counties have an obligation to guarantee public access to the requested records by converting those files to a readable format. Indeed, the Attorney General—at the instruction of the Legislature, and after holding thirteen public forums across Washington—concluded the PRA requires file conversion in cases like this. WAC 44-14-0001; 44-14-050(2) (for electronic record requests, the agency will provide records "in an electronic format that is used by the agency and is generally commercially available, or in a format that is reasonably translatable from the format in which the agency keeps the record"); 44-14-05001 ("In general, an agency should provide electronic records in an electronic format if requested in that format."); 44-14-05002 (agency must "translate the agency's original into a usable copy for the requestor"); 44-14-05004 (in a worst-case scenario, a "programmer" may be required to "write a computer code specifically to extract" responsive electronic records to comply with a request—which the agency must do if there is no other way to produce the record). Converting records to a publically readable format does not "create a new record," it effectuates the intent of the PRA.

D. The SOS Shows How Redaction Should Happen.

Finally, in the amicus brief, the SOS describes a routine practice that can facilitate redactions to prevent the production of any voter-identifying information: "Where canvassing boards display a ballot, they cover any marks that could destroy absolute ballot secrecy." SOS Amicus at 6. Canvassing boards appear to have some expertise recognizing and redacting identifying marks already. Such ability to "cover" identifying marks refutes the counties' position that redaction would be infeasible.

Moreover, before a 2009 amendment, any ballots containing voter-identifying information were considered "invalid" and not counted. Former RCW 29A.60.040 (2008); Act of April 24, 2009, ch. 414, 2009 Wash. Sess. Laws 2125 (act relating to identifying marks on ballots). That law required election officials to examine each and every ballot for such markings *before tabulation* and remove the invalid ones. *Id.* Looking for and recognizing identifying marks on ballots before counting the votes used to be routine practice and remains feasible. The counties must produce the requested records and redact voter-identifying information.

E. The Records are "Archival" Records Available to the Public.

The records at issue are "archival" public records, treated the same as every document filed with the County Auditor and countless other

public records. *Compare* CP 75 ("Election – Official Results Records") *with* CP 81 ("Filed Documents") (both describing "archival" records). Archival public records must be securely stored and not destroyed, in part to ensure their availability and authenticity for PRA requests. CP 69, 84. The same is true for non-archival public records, but with a different timeline. CP 85.

Strict records-retention schedules requiring secure storage for defined periods of time are essential to ensure all non-exempt public records are authentic and available for public inspection and copying. The SOS is wrong to imply a far-reaching PRA exemption from the retention schedules in place. SOS Amicus at 14-15.

> The statute's language reflects the belief that the sound governance of a free society demands that the public have full access to information concerning the workings of the government. Accordingly, courts must avoid interpreting the PRA in a way that would tend to frustrate that purpose.

Worthington v. Westnet, No. 90037-0, Slip. Op. at 7 (Wash. Sup. Ct., January 22, 2015) (internal quotation marks and citations omitted). The SOS's interpretation of widely used records retention schedules would frustrate the purpose of the PRA. The Court must interpret the statutes at issue in a way that facilitates public access to election records.

III. CONCLUSION

For the foregoing reasons, and those expressed in Plaintiff's other briefing materials, Plaintiff respectfully contends the Court should order immediate production of the records Plaintiff requested, a daily penalty against each county for their PRA violations, and recovery of reasonable attorney's fees and costs.

Respectfully submitted this 27th day of January, 2015

SMITH & LOWNEY PLLC

By _____
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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:

On January 27, 2015, I served the foregoing to the following by e-mail:

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Dated this 27th day of January, 2015, at Seattle Washington.

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