No. 72028-7-I

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

TIMOTHY WHITE,

Appellant,

v.

SKAGIT COUNTY and ISLAND COUNTY,

Respondents.

COUNTIES' ANSWER TO AMICUS BRIEF FILED BY WASHINGTON COALITION OF OPEN GOVERNMENT

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

A. O. DENNY, WSBA #14021
MELINDA MILLER, WSBA #30143
Deputy Prosecuting Attorney
Office Identification #91059

Skagit County Prosecuting Attorney
605 South Third Street
Mount Vernon, WA 98273
(360) 336-9460

TABLE OF CONTENTS

Table of Authorities. ii

I. Introduction 1

II. Statement of the Case 1

III. Analysis 2

A. The court should not consider WCOG's argument that ballots can be released after the retention period because it raises an issue not presented to the trial court. 2

B. WCOG misinterprets RCW 29A.60.110, which is just one of the election laws providing for cradle to grave security and secrecy of ballots. 5

C. The counties' denials are based on the body of election laws that stand as an other statute establishing an exemption for ballots, not on the mere need to create a new record. 8

IV. Conclusion 9

TABLE OF AUTHORITIES

Cases

Adams v. King County, 164 Wn.2d 640, 192 P.3d 891 (2008) 7

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) 4

Grant County v. Bohne, 89 Wn.2d 953, 577 P.2d 138 (1978) 5

In re Det. of Williams, 147 Wn.2d 476, 55 P.3d 597 (2002) 7

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

Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 884 P.2d 592 (1994) 7

Protect the Peninsula v. City of Port Angeles 175 Wn. App. 201, 304 P.3d 914, 923 (2013) 2

Ruff v. King County, 125 Wn.2d 697, 887 P.2d 886 (1995) 2

Sargent v. Seattle Police Dep't, 167 Wn. App. 1, 260 P.3d 1006 (2011), *reversed on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013) 4

Saunders v. Lloyd's of London, 113 Wn.2d 330, 779 P.2d 249 (1989) 5

Smith v. Shannon, 100 Wn.2d 26, 666 P.2d 351 (1983) 2

State ex rel. Shepard v. Superior Court of King County, 60 Wash. 370, 111 P. 233 (1910) 6

Statutes

RCW 29A.60.110 ..... 5, 6, 8

RCW 29A.60.125 6

RCW 29A.60.170 6

RCW 29A.84.420 6

RCW 29A.84.540 6

RCW 42.56.070 7

RCW 42.56.550 4

Other Authorities

Washington State Bar Association's *Public Records Act Deskbook* 4

Rules

RAP 10.3.....5
RAP 2.5.....2
RAP 9.1.....4

Regulations

WAC 44-14-040004 4

I. INTRODUCTION

Amicus Washington Coalition for Open Government (WCOG) argues that the requested ballots can now be released because the statutory retention period has run. This issue was not presented to the trial court. Further barring review, WCOG's analysis relies on a hypothetical set of facts and fails to consider controlling facts and applicable authority.

The legislature adopted a body of election laws that meets the constitutional mandate for ballot secrecy. This body of election laws serves as an other statute that exempts ballots from disclosure under the Public Records Act (PRA). WCOG does not show otherwise.

II. STATEMENT OF THE CASE

On November 6, 2013, the day after the general election, White unambiguously requested "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 183, 220 (italics in original). White excluded "ballot image files of ballots already tabulated," CP 252; and emphasized that his request was time sensitive. CP 253.

Skagit and Island counties denied White's request, CP 235, 230; and White sought review. CP 246-59. Before the trial court, White sought release of the pre-tabulated ballots held at the time he submitted his request for records, the day after the election. White never argued that the

court should reverse the counties' decisions because the requested records could be disclosed upon a post-request event: the expiration of the statutory 60 day retention period. As a result, the trial court did not address any such theory in her Order on Show Cause. CP 20-34.

III. ANALYSIS

A. The court should not consider WCOG's argument that ballots can be released after the retention period because it raises an issue not presented to the trial court.

WCOG argues that the counties should now disclose the requested ballots because they are no longer categorically exempt. *See* WCOG Amicus at 3. This argument, which implicitly relies upon the hypothetical that White submitted his request after the statutory retention period and the mistaken belief that PRA requests are continuing, is raised for the first time on appeal. It should not be considered by the court. *See* RAP 2.5; *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.") *See also Protect the Peninsula v. City of Port Angeles* 175 Wn. App. 201, 217, 304 P.3d 914, 923 (2013) ("[T]his court does not consider new issues raised for the first time in an amicus brief.") *citing Ruff v. King County*, 125 Wn.2d 697, 704 n. 2, 887 P.2d 886 (1995).

Probably because of his reliance[1] on *Price v. Town of Fairlee*, 190 Vt. 66, 26 A.3d 26 (2011) for the generic proposition that ballots are not exempt from disclosure, White did not raise an issue about post-retention release before the trial court. *See* CP 121-22. If he had, the argument would have been contradicted by *Price's* holding that "had plaintiff or any other interested citizen filed a public-records request seeking access to ballots during the 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." *Price v. Town of Fairlee*, 190 Vt. 66 at 16. White wanted to use *Price* generically to gain disclosure based upon the timing of his request. White did not argue that PRA requests are continuing or that ballots became subject to release upon the expiration of the retention period because he did not want to concede that the pre-tabulation ballots he sought were not disclosable at the time of his request.

---

[1] In relying on *Price*, White failed to acknowledge that Vermont's election law that ballots "may" be destroyed at the end of the statutory retention period has no counterpart in Washington law. The *Price* court interpreted "may" as allowing disclosure if ballots were requested after the retention period had expired. WCOG seems to ignore *Price* because this key factual difference – the timing of the requests – contradicts its argument that the ballots can be released now even though White's request was submitted before the statutory retention period had run.

WCOG fails to recognize the significance of the timing of White's request for ballots. By arguing that the counties are engaged in an "ongoing refusal" to produce records, *see* WCOG Amicus at 10, WCOG is asking the court to ignore the facts in the record and consider a hypothetical.

Judicial review of an agency's "show[ing of] cause why it has refused to allow inspection or copying of a specific public record or class of records" under RCW 42.56.550 is necessarily limited to the facts and laws existing at the time of the denial. *See* RAP 9.1. A controlling fact before the trial court was that White submitted his request the day after the election. The controlling law on this point is that Washington's "Public Records Act does not provide for 'continuing' or 'standing' requests." *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 11, 260 P.3d 1006 (2011), *reversed on other grounds,* 179 Wn.2d 376, 381, 314 P.3d 1093 (2013) *citing* the Washington State Bar Association's *Public Records Act Deskbook. Also see* WAC 44-14-040004(4)(a) ("An agency must only provide access to public records in existence at the time of the request.")

WCOG fails to identify any fact in the record or legal authority to support its hypothetical that White's request survives the county's denial. Therefore, the court should not consider WCOG's argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

(grounds that "are not supported by any reference to the record" will not be considered) *citing* RAP 10.3(a)(5); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (issues unsupported by adequate argument and authority will not be considered); RAP 10.3(a). *Also see Grant County v. Bohne*, 89 Wn.2d 953, 958, 577 P.2d 138 (1978) ("Where no authorities are cited, the court may assume that counsel, after diligent search, has found none.")

B. WCOG misinterprets RCW 29A.60.110, which is just one of the election laws providing for cradle to grave security and secrecy of ballots.

WCOG erroneously argues that RCW 29A.60.110 "merely restrict[s] access to ballots up to a particular point in time" because it does not explicitly require ballots to be destroyed at the end of the statutory retention period. *See* WCOG Amicus at 4.[2]

[2] WCOG also relies on RCW 42.56.100, but fails to show how the statute's requirement to preserve requested records until an appeal has been resolved trumps the body of elections laws qualifying ballots as an exemption under the PRA or requires disclosure upon a set of facts not present at the time of the denial. WCOG also ignores RCW 42.56.100 caution that requestors "keep in mind that all agencies have essential functions in addition to providing public records" and "recognize[] that agency public records procedures should prevent 'excessive interference' with the other 'essential functions' of the agency." The statute therefore supports the trial court's opinion that White's request for pre-tabulated copies of ballots interfered with the essential government function of certifying the election within 21 days. CP 23.

By focusing on RCW 29A.60.110, WCOG ignores the body of Washington election laws that prohibits any "person except those employed and authorized by the county auditor [to] touch any ballot or ballot container," RCW 29A.60.170; makes it a crime to remove a ballot from a voting center, RCW 29A.84.540; prevents unauthorized examination of ballots to identify voters, RCW 29A.84.420; and requires sealing "in secure storage . . . **at all times**, except during duplication, inspection by canvassing board, or tabulation," RCW 29A.60.125 (emphasis added). This body of election law, including RCW 29A.60.110, falls within the legislature's authority to enforce the constitutional mandate for ballot secrecy and security. *See State ex rel. Shepard v. Superior Court of King County*, 60 Wash. 370, 372, 111 P. 233 (1910) ("It is not within the power of the legislature to destroy the franchise, but it may control and regulate the ballot, so long as the right is not destroyed or made so inconvenient that it is impossible to exercise it. It follows, then, that that which does not destroy or unnecessarily impair the right must be held to be within the constitutional power of the legislature.")

WCOG's interpretation of RCW 29A.60.110 is further flawed by its failure to acknowledge that the legislature omitted the running of the statutory retention period from the non-generic list of circumstances that would allow for the disclosure of ballots. The omission of the retention

period is an exclusion from disclosure under the canon of statutory construction "expressio unius est exclusio alterius, ... to express one thing in a statute implies the exclusion of the other." *See Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) ("[o]missions are deemed to be exclusions)," *citing In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)

WCOG also ignores a significant part of Skagit County's Response when it argues that the counties do not explain why ballots cannot now be redacted to preserve secrecy.[3] WCOG's argument about post-denial redaction is also premised on the erroneous theory that requests are continuing and denials are not final, which theory may conflict with the PRA by preempting direct appeals on a ripeness issue. WCOG cites no precedent for the proposition that an agency should treat a denied request as continuing and subject to changes in the law or the records status. Like WCOG's other arguments, this post-denial redaction argument was not raised before the trial court.

---

[3] *Progressive Animal Welfare Society v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994) holds that "[r]edaction and then release is not required when an "other statute" exempts a record from disclosure under the PRA." *See* Skagit County's Response at 19. Because the election laws governing the security and secrecy of ballots constitute an "other statute" under RCW 42.56.070(1) none of the ballots were subject to disclosure or redaction at the time of White's request.

Further, WCOG does not dispute that available voter data and the existence of different ballots for small districts could be used to readily identify specific voters if their ballots were to be released. *See* CP 92-95. Nor does WCOG make any effort to demonstrate that redaction would negate the likelihood of voter identification.

WCOG's consideration of RCW 29A.60.110 in isolation and failure to dispute to the counties' analysis that Washington's election laws "provide for cradle to grave security for ballots," *see* Skagit County's Response at 13-16, fails to demonstrate how its redaction argument warrants reversal of the trial court's decision. Again, WCOG offers facts and argument that were not raised before the trial court. At best, WCOG's arguments only serve to confuse the issues raised by White's appeal and should be given little weight.

C. The counties' denials are based on the body of election laws that stand as an other statute establishing an exemption for ballots, not on the mere need to create a new record.

Contrary to WCOG's analysis, the counties have not argued that the need to create a new record by screen printing ballot images barred release of the requested ballots under the PRA. The need to screen print images simply demonstrated how responding to White's "time sensitive" request for images of pre-tabulated ballots would have delayed certification of the election and frustrated an important government

function. *See* Skagit County Response at 8; CP 23 ("Government's use of documents is not required to cease just because the documents are the subject of a Public Records Act request.")

IV. CONCLUSION

WCOG's arguments are founded on the hypothetical that White submitted his request after the retention period. Because WCOG's issues were not raised before the trial court and are unsupported by any facts in the record they should not be considered by the court on appeal.

Given that the counties' denials of White's requests for ballots were timely, final, and are fully supported by the body of several election

laws, which constitute an other statute that exempts ballots from disclosure under the PRA, the court should affirm the trial court's decision. WCOG does not establish otherwise.

RESPECTFULLY SUBMITTED this 16th day of March, 2015.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By: _____
A. O. DENNY, WSBA #14021
Deputy Prosecuting Attorney

_____
MELINDA MILLER, WSBA #30143
Deputy Prosecuting Attorney

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: D. Mitchell
by A.O. Denny
DANIEL B. MITCHELL, WSBA #38341
Deputy Prosecuting Attorney

DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

I sent for delivery by; **[X]United States Postal Service**; [ ]ABC Legal Messenger Service, [ ] electronic mail a true and correct copy of the document to which this declaration is attached, to: Marc Zemel (marcz@igc.org) and Knoll Lowney (knoll@igc.org), and to Daniel Mitchell (D.Mitchell@co.island.wa.us.), Rebecca Glasgow (RebeccaG@ATG.WA.GOV), and to William Crittenden (wjcrittenden@comcast.net).

Daniel Mitchell
Island County Prosecuting Atty Office
PO Box 5000
Coupeville, WA 98239-5000

Marc Zemel
Smith & Lowney, PLLC
2317 E. John Street
Seattle, WA 98112

Knoll Lowney
Smith & Lowney, PLLC
2317 E John Street
Seattle WA 98112

Rebecca Glasgow
Solicitor General Division
PO Box 40100
Olympia, WA 98504-0100

William John Crittenden
Attorney at Law
300 Pine Street
Seattle, WA 98122-2029

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 16th day of March 2015.

Judy L. Kiesser

Judy L. Kiesser, Declarant