

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 16, 2015, 1:50 pm
BY RONALD R. CARPENTER
CLERK

E RF
RECEIVED BY E-MAIL

No. 92172-5

Appeal of Court of Appeals Case No. 46081-5-II

SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY WHITE

Petitioner,

v.

CLARK COUNTY

Respondent.

CLARK COUNTY'S
ANSWER TO PETITION FOR REVIEW

ANTHONY F. GOLIK
Prosecuting Attorney for Clark County, Washington

JANE VETTO, WSBA #21649
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney
Civil Division
PO Box 5000
Vancouver WA 98666-5000
Tele: (360) 397-2478
Fax: (360) 397-2184

 ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUE PRESENTED.....	2
III. STATEMENT OF THE CASE.....	3
IV. ANALYSIS.....	8
White’s Petition for Review does not Meet the Considerations Governing Acceptance of Review	8
A. There is no conflict between the two divisions of the Court of Appeals and neither decision conflicts with Supreme Court precedent.....	8
B. White’s issues do not raise any significant question of constitutional law.....	13
C. White’s Petition does not raise any issue of substantial public interest.....	15
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Pages
Cases:	
<i>AmeriQuest Mortgage Company v. Office of Attorney General</i> , 170 Wn.2d 418, 241 P.3d 1245 (2010).....	10
<i>Engstrom v. Goodman</i> , 166 Wn. App. 905, 271 P.3d 959, <i>review denied</i> , 175 Wn.2d 1004 (2012)	16
<i>Freedom Foundation v. Department of Transportation, Division of Washington State Ferries</i> , 168 Wn. App. 278, 276 P.3d 341 (2012).....	10
<i>Hangartner v. City of Seattle</i> , 151 Wn.2d 439, 90 P.3d 26 (2004).....	11
<i>Northlake Marine Works, Inc. v. City of Seattle</i> , 70 Wn. App. 491, 857 P.2d 283, 296 (1993).....	16
<i>Progressive Animal Welfare Soc’y v. Univ. of Wash.</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	6, 11-12
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 37, 666 P.2d 351 (1983).....	16
<i>Spokane Research v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	13
<i>State v. Hughes</i> , 106 Wn.2d 176, 720 P.2d 838 (1986).....	16
<i>State v. Stevenson</i> , 16 Wn. App. 341, 555 P.2d 1004 (1976), <i>review denied</i> , 175 Wn.2d 1004 (2012)	16
<i>White v. Skagit Cnty.</i> , ____ Wn. App. ____, 335 P.3d 1178 (2015).....	6-7, 9-10, 12, 18
Statutes:	
Chapter 42.56 RCW	5
RCW 29A.04.008.....	5

RCW 29A.04.611.....	10-11
RCW 29A.12.080.....	17
RCW 29A.12.130.....	14
RCW 29A.40.100.....	14
RCW 29A.60.050.....	14
RCW 29A.60.110.....	5,9
RCW 29A.60.140.....	14-15
RCW 29A.60.170.....	14
RCW 29A.60.235.....	4, 12, 15, 18
RCW 29A.64.041.....	14
RCW 42.56.070	7, 10
RCW 42.56.550	5
Title 29A RCW	1-2, 6-7, 9, 13-14, 17-19
WAC 434-261-010.....	14
WAC 434-261-045.....	10
WAC 434-261-102.....	18
WAC 434-262-025.....	15
WAC 434-250-110.....	10
WAC 343-335-040.....	17
WAC 343-335-330.....	18

Rules:

RAP 9.1.....	16
RAP 9.11.....	13
RAP 13.4.....	2, 19

Constitutional Provisions:

Washington Constitution Art. VI, Sec. 6	1-2, 6, 8-9, 11, 19
---	---------------------

Treatises:

26 Am. Jur. 2d Elections § 307 <i>Necessity for Secrecy</i> (2012).....	18
---	----

I. INTRODUCTION

The Court of Appeals protected the sanctity of the ballot as required by Washington Constitution Art. VI, Sec. 6, and Title 29A RCW. White sought electronic copies of general election ballots cast by voters in several Washington counties. As did the other counties, Clark County denied White's request for pre-tabulated, voted ballots¹ based on Washington law, which mandates that voters are entitled to the right of absolute secrecy and security of the vote and that voted ballots, including digital images, must be secured at all times. It is the policy of the State of Washington to protect the integrity of the electoral process by inviting party observers and the public to observe all ballot processing as it occurs, while guarding against discrimination and fraud by maintaining ballot secrecy and security.

White sued Clark County in Superior Court under the Public Records Act for failure to produce voted ballots. The trial court upheld Clark County's denial, finding deliberate legislative intent to not permit disclosure of voted ballots under the Public Records Act. Division Two of the Court of Appeals affirmed. White now seeks this Court's review.

¹ In this Petition, White alternatively refers to the records he sought as "electronic elections records" or "anonymous records." His actual request, however, unambiguously sought "pre-tabulated electronic ballot images." CP 36 lines 2-9.

This Court should deny review of Division Two's decision for several reasons. First, Division Two's decision does not conflict with a contemporaneous Division One decision, which reached the same conclusions and result, nor does it conflict with any decision of this Court. Second, there are ample safeguards and avenues for the public to oversee elections without compromising the ballot secrecy or security mandated by the Washington State Constitution. Finally, Division Two's decision protects ballot secrecy and security consistent with Art. VI, Sec. 6 and RCW 29A, and White has not raised an issue of substantial public importance.

II. ISSUE PRESENTED

White has not shown review is warranted under RAP 13.4(b), but if White's Petition for Review were granted, the issue would be:

Do Art. VI, Sec. 6 of the Washington Constitution and the strict ballot security provisions in Title 29A RCW constitute an "other statute" exemption under the PRA where these provisions permit robust public oversight of elections in many ways, but do not allow anyone other than county election officials to touch or possess voted ballots or copies of voted ballots?

/////

III. STATEMENT OF THE CASE

The County maintains its ballot counting center through the office of the Clark County Auditor.² Voting devices, scanners and computers, which use programs called “Boss,” “Ballot Now,” and “Tally” provided by Hart Intercivic, Inc., are used to create and process ballots.³ All voting and tabulation devices are secure and stand-alone, meaning they are not accessible to the public and are not connected to the internet or to the county’s computer system or to one another.⁴

After ballots are created and printed, they are mailed to registered voters, who may then mail their ballots back to the Clark County Auditor, deposit them in secure drop boxes located around the county or deliver them to the counting center.⁵ Ballots retrieved from the secure drop boxes or received through the mail or at the voting center are immediately secured and are accessible only by election staff (who must work in groups of at least two people) for the purposes of processing the ballots.⁶ After receipt and signature verification, the ballots are scanned and digitally communicated to a computer running the “Ballot Now”

² CP 73, page 2, lines 1-2.

³ CP 73, lines 2-4.

⁴ CP 73, lines 5-7.

⁵ CP 73, lines 8-13.

⁶ CP 73, lines 13-15.

program.⁷ The scanned images are converted to a proprietary format that only Ballot Now can read and process.⁸ Once this conversion occurs, the images do not exist as separate photographic image files that can be viewed and read by people.⁹ After this initial processing, data from the “Ballot Now” program is transferred to a second computer.¹⁰ This second computer runs the “Tally” program, which tabulates the votes.¹¹

While the public does not have access to these voting devices and cannot touch ballots, members of the public may observe the proceedings; political parties and other organizations may designate official observers; observers and the public may observe testing of vote tallying systems; counting centers are open to the public; political party observers may call for a random check of ballot counting equipment; observers may attend any recount; and the review of questioned votes by the county canvassing board are open public meetings, with published notice and rules.¹²

For each election, county officials must provide the Secretary of State’s Office with a precise reconciliation report that accounts for each ballot as it moved through ballot processing and tabulation. RCW 29A.60.235.

⁷ CP 73, lines 17-20.

⁸ CP 73, lines 21-22.

⁹ CP 73, lines 22-24.

¹⁰ CP 74, lines 6-7.

¹¹ CP 74, lines 7-9.

¹² CP 72-83.

To preserve the integrity of the election process, RCW 29A.60.110 requires all paper ballots to be sealed and secured immediately after scanning and tabulation.¹³ All ballots are maintained in a locked, inaccessible bin from the moment they are scanned into the voting device until the statutory retention date has passed.¹⁴ Pursuant to RCW 29A.60.110 secured ballots can be accessed only under court order in an election contest. After the mandated retention period has passed, the ballots are then destroyed by shredding.¹⁵

Under the Public Records Act (PRA), White requested “copies of electronic or digital image files of all pre-tabulated ballots received, cast, voted, or otherwise used in 2013 general election” from several counties in Washington.¹⁶ As did every other county, Skagit, Island and Clark counties denied White’s request for disclosure of the requested ballots.

White sought review in Clark County Superior Court, pursuant to RCW 42.56.550, which requires counties to show cause why they refuse to allow inspection or copying of requested records. In its ruling on White’s show cause motion, the superior court found that the requested images were ballots under the statutory definition in RCW 29A.04.008.¹⁷

¹³ CP 74, lines 12-13.

¹⁴ CP 74, lines 20-21.

¹⁵ CP 74, lines 22-23.

¹⁶ CP 36, lines 2-9.

¹⁷ CP 122.

The superior court held that Art. VI, Sec. 6 of the Washington Constitution and Title 29A. RCW's ballot security provisions constituted exemptions under the Public Records Act.¹⁸

In a parallel case that White filed against Skagit and Island Counties, the Snohomish County Superior Court also denied White's motion to show cause, finding that "the secrecy of a citizen's vote is the cornerstone of a free democratic government" and that taken as a whole, RCW 29A expressly exempts election ballots from disclosure as public record. *White v. Skagit Cnty.*, ___ Wn. App. ___, 355 P.3d 1178, 1181 (2015) (quoting the superior court decision in that case).

White appealed both the Snohomish and Clark Superior Courts' rulings. In upholding the Snohomish County Superior Court's decision, Division One considered "whether copies of ballots are exempt under an 'other statute,'" recognizing that "[a]n exemption may be found in an 'other statute' even if it is not stated explicitly." *White v. Skagit Cnty.* at 355 P.3d 1181, citing RCW 42.56.070(1); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, (*PAWS II*) 125 Wn.2d 243, 263-64, 884 P.2d 592 (1994). Division One held that "releasing voted ballots [including digital copies] for general public inspection would risk revealing the identity of individual voters," "many provisions" in Title 29A "already exist for

¹⁸ CP 116-126.

citizen oversight of elections” and “redaction will not eliminate the risk that disclosing copies of ballots will reveal the identity of individual voters,” and thus, “[b]allots are exempt in their entirety.” *White v. Skagit Cnty.*, 355 P.3d at 1183, 1185.

Division Two took a consistent approach and reached the same conclusion, emphasizing ballot security required under RCW 29A. Following its review of the applicable case law, statutes and regulations, Division Two concluded:

The Legislature has enacted statutes and the Secretary of State has adopted regulations pursuant to statutory authority, providing that all ballots and ballot images must be kept secured at all times from receipt until at least 60 days after tabulation. Because these provisions are inconsistent with producing copies of ballots and ballot images to a third person under the PRA, they constitute an express “other statute” exemption for ballots and ballot images under RCW 42.56.070 (1). Accordingly, we hold that the county did not violate the PRA by refusing to produce the images of pre-tabulated ballots that White requested under the PRA.

White v Clark Cty., 188 Wn. App. 622, 637, 354 P.3d 38, 44 (2015).

Thus, all of the superior court and Court of Appeals judges considering this question have agreed that voted ballots are exempt from disclosure under the Public Records Act.

//////

IV. ANALYSIS

White's Petition for Review does not Meet the Considerations Governing Acceptance of Review.

A petition for review will be accepted only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with a decision of another Division of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

A. There is no conflict between the two divisions of the Court of Appeals and neither decision conflicts with Supreme Court precedent.

White's assertion that the Division One and Division Two

decisions conflict with each other is completely without merit. The

decisions do not conflict with each other.¹⁹ They do not change the status

¹⁹ White's argument regarding Division Two's discussion that it had no evidence before it regarding voter secrecy is misplaced. Division Two's comments were directed at the evidence in its record; likewise, Division One's comments concerning voter secrecy was based on its evidentiary record. Neither Court's review of its respective evidentiary record conflicts with the other Court's legal analyses and conclusions. Clark County notes, however, that while Division Two ultimately reached the correct conclusion, if the Court accepts review, there is evidence in the record that production of the requested ballot images would compromise ballot secrecy. *See CP 76.*

quo: ballots have never been subject to disclosure, unless ordered by a court in an election contest under RCW 29A.60.110(4).

White's argument that Division One and Division Two interpret Art. IV, Sec. 6 of the Washington Constitution differently is incorrect. First, adhering to the primacy of the Washington Constitution, Division Two held that Art. VI, Sec. 6 "directed the legislature to guarantee absolute secrecy of electors' votes" and that "[t]he legislature in turn . . . enacted provisions to ensure ballot security," including a delegation "to the secretary of state to make reasonable rules to effectuate any provision of Title 29A RCW." *White v Clark Cnty.*, 188 Wn. App. at 634.

Also recognizing the constitutional requirement for ballot secrecy, Division One held: "The constitutional mandate for a secret ballot is implemented by statutes codified in Title 29A RCW." *White v Skagit Cnty.*, 355 P.3d at 1182. Thus, both Divisions held the respective counties complied with the Public Records Act because the body of election laws, including the constitutional requirement of absolute ballot secrecy and the ballot security provisions in Title 29A, required withholding of ballot images. There is no conflict in either outcome between the decisions and

while the analyses are not identical, their differences are not material and do not create a conflict.²⁰

White's next contention, that the decision of the Court of Appeals also conflicts with Supreme Court precedent is, likewise, unfounded. First, Division Two's holding that regulations adopted pursuant to specific legislative direction to create "standards and procedures to guarantee the secrecy of ballots," can support an exemption under the PRA does not create a conflict. RCW 29A.04.611(34). Addressing this issue directly, Division Two stated:

[S]*ervais* and *Hoppe* did not address whether regulations can qualify as other statutes that can create a PRA exemption. Instead, our Supreme Court simply rejected the idea that agencies can interpret or directly regulate the applicability of the PRA to protect records from disclosure. *Servais*, 127 Wn. 2d at 834 – 35; *Hoppe*, 90 Wn. 2d at 129 – 30. The situation here is different because the Secretary of State did not attempt to regulate disclosure directly or interpret the disclosure requirements of the PRA. Instead, the Secretary of State implemented regulations to ensure ballot security and secrecy during processing, pursuant to the express enabling provisions of RCW 29A.04.611.

We hold that under *AmeriQuest* and *Freedom Foundation*, WAC 434-261- 045 and WAC 434- 250-110 (5) create an 'other statute' exemption to the PRA under RCW 42.56.070 for pre-tabulated ballot images."

White v. Clark Cnty., 188 Wn. App. at 636.

²⁰ Explicitly recognizing both divisions' agreement on this issue, Division One noted in its holding, "We join our colleagues in Division Two, who recently reached the same conclusion in White's similar appeal of a decision dismissing his action in Clark County." *White v. Skagit Cnty.*, 355 P.3d at 1184.

Thus, Division Two specifically relied on Supreme Court precedent, both in its analysis and conclusion.

White also asserts that the Court of Appeals' holding will be read to permit agencies to adopt regulations that will exempt their own records from disclosure, but that is not the case. First, the Court of Appeals decision is explicitly far more narrow, relying on a regulation that was the result of specific direction from the legislature to adopt rules and procedures to ensure compliance with Art. VI, Sec. 6 of the Washington Constitution. RCW 29A.04.611. And it makes sense for the legislature to have directed the state agency with practical expertise in election administration to develop specific procedural requirements to ensure ballot secrecy and security. Second, the Secretary of State and her staff do not possess or process ballots—the counties do that—so the relevant Secretary of State regulations do not serve to protect an agency's own records and are not self-serving.

Likewise, Division Two's decision did not conflict with this Court's public records case law. This Court has recognized a public records exemption can exist even in cases where a statute does not expressly mention the public records act or use the word "exemption" or "confidential." *E.g., Hangartner v. City of Seattle*, 151 Wn.2d 439, 90 P.3d 26 (2004); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125

Wn.2d 243, 884 P.2d 592 (1994). Here, as in those cases, the statutory scheme does not permit disclosure.

Further, White asserts that Division Two improperly denied him access to ballots redacted to remove marks that might allow identification of the voter. Pet. at 18-19. But Division Two was correct to conclude that redaction is not sufficient to allow disclosure and voted ballots must remain entirely exempt. As Division One points out, redaction would not eliminate the risk of identification of the individual voter. *White v. Skagit Cnty.*, 355 P.3d at 1185. This is because possession of voted ballots would allow a requester to isolate all of the ballots from a small precinct that may have distinctive candidates and issues. This condensed pool of potential voters could be compared with the county auditor's publicly available report of who voted when each voter's ballot was received.²¹ Metadata, which White sought for the ballot images, would further indicate when each ballot was scanned. Ballots could then be further segregated by machine vote, e-mail ballots, and ballots including write-in votes, possibly in distinctive handwriting. A person with sufficient time to analyze a county's voted ballots could use this data to connect a voter to a ballot in a way that would not be readily apparent to election officials. *White v. Skagit Cnty.*, 355 P.3d at 1185.

²¹ RCW 29A.60.235.

In sum, Division Two's opinion does not conflict with any opinion of this Court, and while its reasoning is slightly different from Division One's opinion based on its review of the evidentiary record before it, the Courts reached the same result relying on the same legal principles. There is no material conflict between the Divisions.

B. White's issues do not raise any significant question of constitutional law.

In his Petition, White does not explicitly argue that his issues present a question of constitutional law for the simple reason that he cannot.²² To the extent that his concern that Division Two's decision "eliminates public oversight" in ensuring an election winner actually receives the majority of votes attempts to raise a constitutional issue, this argument likewise fails.²³

²² Indeed, the law is clear that a constitutional issue arises only if White were allowed access to voted ballots absent an election dispute. See discussion, *infra*. Furthermore, "[c]onstitutional issues not considered at trial will not be considered on appeal unless the jurisdiction of the court is at issue." *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 491, 512, 857 P.2d 283, 296 (1993).

²³ White cites to a San Juan Superior Court case in an attempt to create a suspicion of county error in the processing of ballots. PFR at 3, 5. However, this Court "cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings[.]" *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005), citing *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003); RAP 9.11. Furthermore, this issue is being raised for the first time on appeal. *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977) (Matters referred to in a brief but not included in the record cannot be considered on appeal.) The San Juan decision and any argument based on it should be disregarded. But even if this Court were inclined to consider it, the San Juan County case did not involve the security or disclosure of voted ballots. White's complaint was that a specific system, which allowed election officials and voters to track online whether their ballots

Washington's legislature has provided for citizen oversight of ballot processing and tabulation to facilitate transparency and the opportunity for timely election challenges where necessary, while also maintaining strict protocols to minimize the risk of fraud or mistake in vote counting. The political parties and other organizations can designate official observers whom the county auditors must allow to observe ballot processing.²⁴ Before an election, observers and the public must be permitted to watch testing of vote tallying systems.²⁵ Once ballot processing begins, counting centers must be open to the public.²⁶ Anyone can watch, but only employees and those specifically authorized by the county auditor can touch any ballot, ballot container or vote tallying system.²⁷ Political party observers can call for a random check of ballot counting equipment.²⁸ Observers may also attend any recount, though they cannot handle ballots or record information about voters or votes.²⁹

When election officials question the validity of a challenged or provisional ballot, or when the intent of the voter cannot be resolved, the

²³ (*cont.*) had been sent, and then received and counted, had to be certified. The system did not affect the tabulation of ballots, nor was the system's efficacy challenged.

²⁴ RCW 29A.40.100; RCW 29A.60.170.

²⁵ RCW 29A.12.130.

²⁶ RCW 29A.60.170; WAC 434-261-010.

²⁷ WAC 434-261-010.

²⁸ RCW 29A.60.170(3).

²⁹ RCW 29A.64.041.

county canvassing board determines how the votes will be counted.³⁰

Meetings of the county canvassing board are open public meetings.

Notice must be published and the board must make any rules available to the public.³¹ Canvassing boards must take care not to reveal the identity of a voter when making decisions about voter intent.

Finally, the county auditor must prepare and make publicly available detailed reports that precisely reconcile the number of ballots received, counted, and rejected, including specific accounting for various ballot types (for example, provisional ballots).³² Public oversight of ballot processing and tabulation from start to finish, along with public reconciliation reports, allow a public check on all elections.

Multiple safeguards exist to ensure election accuracy and White's contention that Division Two's decision raises a constitutional issue by "eliminating public oversight" is completely meritless. Because White has no evidence of a valid election dispute, he fails to identify a significant question of constitutional law that this Court needs to resolve.

C. White's Petition does not raise any issue of substantial public interest.

Before the lower courts, White argued that his inability to obtain voted ballots, absent a court order in an election dispute, violated the PRA.

³⁰ RCW 29A.60.050, .140.

³¹ RCW 29A.60.140(5); WAC 434-262-025.

³² RCW 29A.60.235.

Now, for the first time, White alleges that this somehow impedes public oversight of the election process and raises the specter of fraud, hacking and delayed access to ballots.

First, no evidence or argument in the record supports White's insinuations of fraud. The articles and argument on election fraud, hacking and mistrust, PFR at 3-5; vulnerabilities and inaccurate results in Kansas elections, PFR at 10; and the history of Initiative 276, which does not mention election records, PFR at 12; were not presented to the trial court or to the Court of Appeals. Nor was White's other argument, that the election laws merely delay access to ballots, raised before the superior court. Thus, the Court should not consider these documents or the arguments they support.³³ *State v. Hughes*, 106 Wn.2d 176, 206, 720 P.2d 838 (1986) (The composition of the record on appeal is limited by RAP 9.1(a) to a report of the trial court proceedings, the papers filed with the Superior Court Clerk and any exhibits admitted in the trial court proceedings); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before a trial court generally precludes a party from raising it on appeal"); *State v. Stevenson*, 16 Wn. App. 341, 345, 555 P.2d 1004 (1976), *review denied*, 88 Wn.2d 1008 (1977) (Matters referred

³³ When a party refers to matters in a brief that are not included in the record, the error should be brought to the appellate court's attention in a responsive pleading. *Engstrom v. Goodman*, 166 Wn. App. 905, 909, n. 2, 271 P.3d 959, *review denied*, 175 Wn.2d 1004 (2012).

to in a brief but not included in the record cannot be considered on appeal).

Even if this Court were inclined to consider these issues, however, they fail on their merits. First, as discussed above, the legislature has already provided a comprehensive statutory scheme for extensive public oversight of the election process under RCW 29A. Moreover, there is no evidence that any county used uncertified software³⁴ or that the computer systems and programs fail to meet the statutory and regulatory requirements for security of the vote. *See* RCW 29A.12.080 (requiring that the voting device secure voter secrecy), WAC 434-335-040(3).³⁵ Meeting these requirements, the Ballot Now and Tally computers are standalone set ups that cannot be “hacked.” They are not connected to any

³⁴ White does not allege or demonstrate that any county used unapproved software. To the extent this argument relies on White’s San Juan County superior court matter, as previously noted, this issue is also raised for the first time on appeal and should not be considered. But even if this Court were inclined to consider it, White’s complaint in that case was that a specific system, which allowed election officials and voters to track online whether their ballots had been sent, and then received and counted, had to be certified. The system did not affect the tabulation of ballots, nor was the system’s effectiveness challenged.

³⁵ WAC 434-335-040 provides, in part:

- (3) A vote tabulating system must:
 - (a) Be capable of being secured with lock and seal when not in use;
 - (b) Be secured physically and electronically against unauthorized access;
 - (c) Not be connected to, or operated on, any electronic network including, but not limited to, internal office networks, the internet, or the world wide web. A network may be used as an internal, integral part of the vote tabulating system but that network must not be connected to any other network, the internet, or the world wide web; and
 - (d) Not use wireless communications in any way.

network and a data card is used to transfer data between the two computers.³⁶ The computers are kept secure, access to them is severely restricted and tracked and election officials must work in teams of at least two people when tabulating or preparing for tabulation.³⁷ Systems must pass a logic and accuracy test prior to each election and the parties can randomly call for a test of the system mid-election.³⁸ Moreover, all counties must submit precise reconciliation reports to the Secretary of State that reconcile numbers of ballots as they move through the tabulation process ending in secure storage.³⁹

Finally, while Division Two declined to consider whether ballots could be released after the statutory secure storage period, Division One held that “[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** achieves the constitutional mandate for a secret ballot.” *White v. Skagit Cnty.*, 355 P.3d at 1183 (emphasis added). Division One correctly indicated that voted ballots must remain secret and secure until they are destroyed.⁴⁰

³⁶ CP 73, lines 5-7.

³⁷ WAC 434-261-102.

³⁸ WAC 434-335-330.

³⁹ RCW 29A.60.235.

⁴⁰ Indeed, public interest is served by the destruction of ballots. Destruction assures that there will be no retaliation against voters. See *26 Am. Jur. 2d Elections* § 307 (2012) (entitled "Necessity for Secrecy") (A secret written ballot is used "to prevent recrimination against people who vote for losing candidates.").

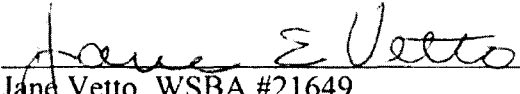
V. CONCLUSION

The decisions of the two divisions of the Court of Appeals come to the same conclusion. While their analyses are not identical, they properly rely on Art. VI, Sec. 6's absolute ballot secrecy requirements and RCW 29A.'s ballot security scheme to conclude that voted ballots are exempt from disclosure. Division Two specifically referenced and followed Supreme Court precedent in its decision. Finally, the laws and regulations adopted pursuant to Art. VI, Sec. 6 of the Washington Constitution satisfy the constitutional mandate for ballot secrecy, while providing a comprehensive method for members of the public to observe election staff as they process and tabulate ballots and oversee the elections process, eliminating any constitutional or public interest issues. Because Petitioner has not met his burden under RAP 13.4(b), Clark County respectfully requests that this Court deny White's Petition for Review.

DATED this 16th day of October, 2015.

RESPECTFULLY SUBMITTED:

ANTHONY F. GOLIK
Prosecuting Attorney for Clark County



Jane Vetto, WSBA #21649
Deputy Prosecuting Attorney
Of Attorneys for Respondent Clark County
Clark County Prosecutor's Office

Civil Div.
PO Box 5000
Vancouver WA 98666-5000
Telephone: (360) 397-2478
Facsimile: (360) 397-2184
Email: jane.vetto@clark.wa.gov

CERTIFICATE OF SERVICE

I, Thelma Kremer, hereby certify, under penalty of perjury under the laws of the State of Washington, that on the date noted below, I caused service of the foregoing *Clark County's Answer to Petition for Review* to be made on the parties as follows:

Marc Zemel
Eric D. Lowney
Smith & Lowney PLLC
2317 E John St
Seattle WA 98112

U.S. Mail
 Facsimile
 Hand Delivered
 Email to:
marcz@igc.org
knoll@igc.org

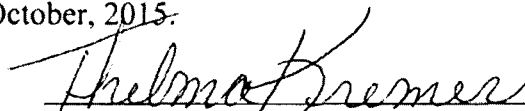
Rebecca R. Glasgow
Deputy Attorney General
Attorney General of Washington
PO Box 40100
Olympia WA 98504

U.S. Mail
 Facsimile
 Hand Delivered
 Email to:
rebeccag@atg.wa.gov
Stephaniell@atg.wa.gov

William John Crittenden
300 E Pine St
Seattle WA 98122

U.S. Mail
 Facsimile
 Hand Delivered
 Email to:
wjcrittenden@comcast.net

DATED this 16th day of October, 2015.


Thelma Kremer

OFFICE RECEPTIONIST, CLERK

To: Kremer, Thelma
Cc: Vetto, Jane; marcz@igc.org; knoll@igc.org; rebeccaG@ATG.WA.GOV; stephanie1@atg.wa.gov; wjcrittenden@comcast.net
Subject: RE: White v. Clark County; WA St Supreme Crt Case No. 92172-5; Clark County's Answer to Petition for Review

Received 10/16/15

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kremer, Thelma [mailto:Thelma.Kremer@clark.wa.gov]
Sent: Friday, October 16, 2015 1:48 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Vetto, Jane <Jane.Vetto@clark.wa.gov>; marcz@igc.org; knoll@igc.org; rebeccaG@ATG.WA.GOV; stephanie1@atg.wa.gov; wjcrittenden@comcast.net
Subject: White v. Clark County; WA St Supreme Crt Case No. 92172-5; Clark County's Answer to Petition for Review

Good afternoon:

Please find attached for filing with the Supreme Court a copy of *Clark County's Answer to Petition for Review* regarding the following matter:

Case No.: Supreme No. 92172-5
Case Name: Timothy White v. Clark County
Attorney Name and WSBA #: Jane Vetto, WSBA #21649
Contact Information: Jane Vetto at (360) 397-2478 and jane.vetto@clark.wa.gov; filed by Thelma Kremer at (360) 397-2478 and Thelma.kremer@clark.wa.gov

Hard copies have been sent out by U.S. mail to all counsel. If you have any questions in this matter, please contact this office.

Thelma Kremer

Clark County Prosecutor's Office - Civil Division
PO Box 5000
Vancouver WA 98666-5000
Tele: (360) 397-2478
Fax: (360) 397-2184
Email: thelma.kremer@clark.wa.gov

This e-mail and related attachments and any response may be subject to public disclosure under state law.