No. 46081-5

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION 2

TIMOTHY WHITE

V.

CLARK COUNTY

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

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I. INTRODUCTION

The Secretary of State (SOS) merely echoes Clark County's 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. Clark County (the "county") has unlawfully withheld those records for nearly a year and a half and has not met its 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 settled law in Washington that "[agencies] may not define the parameters of [PRA] exemptions." Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005) (citing Hearst

Corp. v. Hoppe, 90 Wn.2d 123, 131, 580 P.2d 246 (1978)). "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, 90 Wn.2d at 130). Without a statutory leg to stand on, the SOS litters its amicus brief with Washington Administrative Code (WAC) citations and arguments from agency practice, all of which have no bearing on PRA exemptions. The Court "*cannot* defer to the [agency's] rule[s]" 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, 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 the records, potentially revealing mistakes in the canvass, could greatly embarrass the office and officials trusted to implement a fair election. To be sure, it would be far more convenient for the county and SOS if all election materials were exempt from the PRA, but Title 29A exempts only limited, enumerated records not at issue here. *See* Appellant's Corrected Opening Brief ("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); Opening Brief at 38-40. Even if the SOS and the county crave an exemption for the records requested, none exist and the court cannot imply or create one. Opening Brief at 20-24.

B. Plaintiff Requested Identifiable Records and Gave the County 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 therefore important to clarify the record:

During the 2013 election, after the county received voted paper ballots in the mail from voters, it digitally scanned each ballot before "tabulating" them. Opening Brief at 3; *see* CP 73-74, ¶¶ 4-5. This

scanning process created a computer file for use with Hart Intercivic, Inc. computer programs. *Id.*; CP 251. With those files and a Hart Intercivic computer program, the county can access images of each scanned ballot with the stroke of a button. CP 251 ("On-screen ballot adjudication"); CP 264-66 ("[computer] window showing a ballot" on-screen); CP 272-73, 277. Plaintiff requested copies of those files, both in the format in which the files were created/used and in a format viewable on an up-to-date home computer. CP 27. 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 county in locating them. CP 26 (requesting files "created, received or used before tabulation"). The county understood his request in this manner. CP 30.

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. Mr. White stated he sought to avoid disruption of the election, and said it would be reasonable to receive the records after election certification. CP 27-28; *see also* CP 30-31 (The county initially indicated it was "unable to make the records available…on such short notice." Plaintiff responded: "Thank you for keeping me posted…I'm trying to assure I make [a] proper thorough request…with minimum staff effort or stress. I know you are super busy right now.").

The county's 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 and disclosure of responsive records in the county's possession (under the statutory deadline)—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 county needed to produce the records as soon as it could, and continue on an installment basis if one batch was infeasible. RCW 42.56.080. But the county has entirely withheld all responsive documents in violation of the PRA.

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

> [P]lease be assured that all ballot image files remain intact throughout the tabulation process and the delay will not affect the record production.

CP 31. The county 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 explicit 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 county's last-ditch, revisionist argument that the records do not even exist. This is counter to repeated acknowledgment in the county's correspondence and briefs, declarations from county employees, and additional evidence detailing the ballot-scanning and file-creating process with the Hart Intercivic system. Opening Brief at 35-38. 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 ability for election workers to view ballot images on computer screens using that data. *See* CP 243 at lines 17-19 (images can be "screen printed" as a Word or PDF file with the Ballot Now program); CP 251; CP 264-66; CP 272-73, 277;

see also Opening Brief at 35-38. It would be quite a magic trick to make those ballot images appear out of thin air, but obviously they come from the county's data files—the very public records that Plaintiff requested.

Furthermore, the county has an obligation to guarantee public access to the requested records by converting those files to a readable format. Indeed, the Attorney General enacted model rules for PRA compliance—at the Legislature's instruction, and after holding thirteen public forums across Washington—clarifying that 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 Shares Plaintiff's Reading of Article 6 Section 6

The SOS appears to share Plaintiff's reading of art. 6 sec. 6 of the Washington Constitution, which guarantees the absolute anonymity of each ballot, but does not impose a veil of secrecy over the election process or restrict the public from seeing anonymous cast ballots. Public access to anonymous or redacted ballot image-files would not violate art. 6 sec. 6 because no one would know who cast which ballot.

The SOS highlights the many situations where certain individuals, and the public in general, see and observe cast ballots. *See* SOS Amicus Brief at 1 (election statutes provide "robust public oversight"), at 6 (observers are allowed to observe ballot processing, counting centers must be open to the public, "anyone can watch," and observers may attend recounts, where they are expressly permitted to observe ballots (citing RCW 29A.64.041)), at 7 (canvassing board determines how certain votes are counted at open public meetings). Public access to those ballots and processes does not violate art. 6 sec. 6 because the canvassing board "cover[s] any marks that could destroy absolute ballot secrecy." *Id.* at 7. Similar redaction of the requested records, here, would preserve the constitutionally mandated ballot secrecy.

Here, there is nothing in the record indicating the public records Plaintiff seeks are not anonymous. In fact, it would be illegal for the

county to use an election/tabulating system that creates or maintains records linking individuals and their ballot. RCW 29A.08.161 ("No record may be created or maintained…that identifies a voter with the information marked on the voter's ballot."). The Court should not assume the county violates this prohibition or maintains illegal and unconstitutional records, without any evidence in the record. As the county has not met its burden, the Court must order production of the redacted records.

> 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, 182 Wn.2d 500, 507, 341 P.2d 995 (2015) (internal quotation marks and citations omitted).

E. The SOS Shows How Redaction Should Happen.

Finally, as mentioned, the SOS describes a routine practice that can facilitate redactions to prevent the production of any voter-identifying information: the canvassing boards "cover any marks that could destroy absolute ballot secrecy." SOS Amicus at 7. Canvassing boards appear to have some expertise recognizing and redacting identifying marks already. Such ability to "cover" identifying marks refutes the county's position that redaction would be infeasible. Indeed, the SOS also indicates effective

redaction *is possible*, but takes time. *Id.* at 19 (explaining only that redaction would have been difficult before tabulation). The county needed to take the time and produce the redacted records as soon as it could.

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.

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 the county for its PRA violations, and recovery of reasonable attorney's fees and costs.

Respectfully submitted this 30th day of April, 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:

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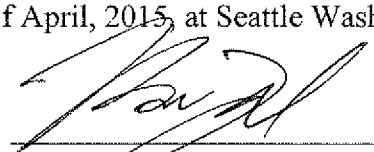

Marc Zemel

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