

No. 46081-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TIMOTHY WHITE,

Appellant,

v.

CLARK COUNTY,

Respondent.

2015 FEB -2 PM 1:09
STATE OF WASHINGTON
BY _____
DEPUTY

FILED
COURT OF APPEALS
DIVISION II

BRIEF OF AMICUS CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. IDENTITY AND INTEREST OF AMICUS

WCOG is an independent, nonpartisan organization dedicated to promoting the public's right to know in matters of public interest and in the conduct of the public's business. WCOG's mission is to foster open government processes, supervised by an informed citizenry, which is the cornerstone of democracy. WCOG's interest in this case stems from the public's strong interest in timely access to accurate information concerning the conduct of government and in maintaining government accountability to the people of the state of Washington. WCOG and its members believe that state and local agencies exercise their authority by consent of the governed, and therefore have a duty to conduct their activities in a transparent manner. Access to public records under the Public Records Act, Chapter 42.56 RCW ("PRA") is an essential tool of transparency that should be protected and encouraged. WCOG is the state's freedom of information association, Washington citizens' representative organization on the National Freedom of Information Coalition, and a champion of the public's right of access in its educational programs and in court. WCOG has a legitimate interest in assuring that the Court is properly briefed on important issues involving the PRA.

II. STATEMENT OF THE CASE

WCOG generally relies on the facts set forth in the parties' briefs. There are two factual disputes that bear on WCOG's analysis of the legal issues.

First, the parties disagree about whether the computer running the Ballot Now program creates digital images of scanned ballots that can be downloaded later in response to a PRA request. *See App. Br.* at 3-4; *Resp. Br.* at 3-4. If such images are created then such images should be disclosed after the election (see Argument section A), subject to redaction (see Argument section B).

Second, the parties disagree about whether White's request for "pretabulated" ballots could be satisfied by producing copies of the ballots after the election. *See App. Br.* at 40; *Resp. Br.* at 13; *2d. Rev. Reply Br.* at 19. However, the County unambiguously informed White that there was no way to provide him with copies of the ballots before or after the election. CP 39. At a minimum, the County wrongfully withheld the records from White after the retention period was over because the ballots were not exempt at that time and should have been provided to White.

III. ARGUMENT

- A. **Ballots are not categorically exempt from disclosure, and no statute requires the County to destroy ballots after the retention period provided by RCW 29A.60.110 has ended.**

The County's declarations describe a canvassing process in which it is not possible to scan or copy ballots in response to a PRA request either during or immediately after an election. The County cites a number of statutes for the proposition that this tightly-controlled canvassing process is required by law. Assuming, *arguendo*, that there is no earlier point in the canvassing process at which a County could scan or copy ballots in response to a PRA request, the County is still required to produce copies of ballots after an election is over because ballots are not categorically exempt from disclosure and no statute *requires* the County to destroy ballots after the election.

The last step in the canvassing process described by the County is governed by RCW 29A.60.110, which provides:

Immediately after their tabulation, all ballots counted at a ballot counting center must be sealed in containers that identify the primary or election and be retained for at least sixty days or according to federal law, whichever is longer.

In the presence of major party observers who are available, ballots may be removed from the sealed containers at the elections department and consolidated into one sealed container for storage purposes. The containers may only be opened by the canvassing board as part of the canvass, to conduct recounts, to conduct a random check under RCW 29A.60.170, or by order of the superior

court in a contest or election dispute. If the canvassing board opens a ballot container, it shall make a full record of the additional tabulation or examination made of the ballots. This record must be added to any other record of the canvassing process in that county.

RCW 29A.60.110. This section is *not* an “other statute which exempts or prohibits disclosure of specific information or records” for purposes of RCW 42.56.070(1). Rather, this statute merely restricts access to ballots up to a particular point in time. The restrictions in the second paragraph only apply during the retention period required by the first paragraph. The County cannot argue that the restrictions in the second paragraph continue to apply *after* the retention period because those restrictions do *not* authorize the destruction of ballots after an election and the County admits that its normal practice is to destroy ballots after the retention period. *Resp. Br.* at 4.¹

The County has not cited any statute that prohibits the disclosure of ballots after the retention period provided by RCW 29A.60.110 has ended.

¹ Similarly, WAC 434-261-045 provides that ballots may only be accessed in accordance with RCW 29A.60.110 and RCW 29A.60.125 (relating to damaged ballots). Like RCW 29A.60.110, the WAC rule does not address the disposition of ballots after the retention period and does not prohibit the disclosure of ballots after the election is over. Consequently it is not necessary to address the question of whether a WAC regulation, standing alone, could prohibit the disclosure of records under the PRA. *See App. Br.* at 25; *Resp. Br.* at 20; *see also Freedom Foundation v. WSDOT*, 168 Wn. App. 278, 276 P.3d 341 (2012) (federal regulation amounts to an “other statute” exemption under the PRA). If there were any WAC rule that purported to restrict disclosure of ballots beyond the statutory requirements of Chap. 29.60 RCW, such regulation would be ultra vires. *See Duncan Crane Service v. Dep’t of Revenue*, 44 Wn. App. 684, 688-690, 723 P.2d 480 (1986).

Consequently, the County relies on the erroneous argument that it is authorized or required to destroy ballots after an election even if those ballots are the subject of a PRA request. *Resp. Br.* at 15. But the PRA explicitly prohibits the destruction of public records until a request for such records is resolved. RCW 42.56.100. And the County has not cited any other statute that would allow or require the destruction of ballots despite this prohibition.

RCW 40.14.060 does not require or even authorize the destruction of public records that are the subject of a pending PRA request. That section merely permits the destruction of public records under certain circumstances and requires such destruction to occur pursuant to an approved schedule. *Building Indus. Ass'n of Washington v. McCarthy (BIAW)*, 152 Wn. App. 720, 737-740, 218 P.3d 196 (2009), cited by the County, holds only that an agency has no duty to produce public records that were destroyed before a PRA request was made. *BIAW* correctly notes that RCW 42.56.100 prohibits the destruction of public records that are the subject of a PRA request even if the records are lawfully scheduled for destruction. 152 Wn. App. at 740. Under RCW 42.56.100 and *BIAW*, the County has no legal right to destroy the requested ballots pursuant to RCW 40.14.060 after White made his PRA request.

In sum, ballots are not categorically exempt from disclosure and no statute *requires* the County to destroy ballots after the retention period provided by RCW

29A.60.110 has ended. Consequently, the County violated the PRA by wrongfully withholding the ballots from White.

B. The ballot secrecy required by Wash. Const. art. VI, § 6 can be achieved by redaction.

WCOG does not dispute the basic proposition that Const. art. VI, § 6 gives each voter the right to “absolute secrecy in preparing and depositing his ballot.” But the required voter secrecy can be achieved by redaction of identifying marks or other information that could be tied to a particular voter. The County makes three arguments against such redaction, none of which have merit.

First, the County argues that ballots are exempt from public disclosure “in their entirety.” *Resp. Br.* at 29. This argument is based on the County’s erroneous assumption that it is required to destroy ballots after an election. As explained in section (A), ballots are not categorically exempt from disclosure, and there is no requirement that ballots be destroyed after an election is over.

Next, the County argues that compliance with White’s request would require the County to create a new record. *Resp. Br.* at 29. As explained in section (C), this is a straw man argument because White has not asked the County to recreate images of ballots from raw voting data, and the scanning (or copying)

of ballots, or the conversion of existing ballot images, if any,² to a different format, does not require the County to “create” a new record. *Fisher Broadcasting v. Seattle*, 180 Wn.2d 515, 523-524, 326 P.3d 688 (2014) (agency was not required to correlate information from different systems to create a new document, but agency should have produced partially responsive existing documents).

Finally, the County argues that statutes requiring ballot security require the County to destroy the ballots after the election. *Resp. Br.* at 29. As explained in section (A), there is no statute that requires or even authorizes the destruction of ballots that are the subject of a pending PRA request. On the contrary, such destruction is explicitly prohibited by RCW 42.56.100.

The County has not explained why copies of ballots could not be redacted after an election is over. The County thus concedes, *sub silentio*, that redaction of identifying marks or other information that could be tied to a particular voter would achieve the voter secrecy required by Wash. Const. art. VI, § 6.

² As noted in section II, the parties disagree about whether the computer running the Ballot Now program creates digital images of scanned ballots that can be downloaded later in response to a PRA request. *See App. Br.* at 3-4; *Resp. Br.* at 3-4.

The Secretary of State (SOS) makes a similar concession in its amicus brief filed in a similar case in Division I.³ In that brief, the SOS asserts that effective redaction of ballots would be difficult and time consuming, and that a county could not review and redact thousands of pages of ballots to preserve voter secrecy and still certify an election on time. *Amicus Br. of SOS*, No. 72028-7-1 at 17-19 (December 2, 2014); **Appendix**. This argument applies only to the pre-certification release of records, not the post-certification release of records. Like the County, the SOS thus concedes, *sub silentio*, that the voter secrecy required by Wash. Const. art. VI, § 6 could be achieved by redaction after an election is over.

C. Scanning or copying ballots, or converting existing electronic images to a different format, does *not* require the County to “create” a new record.

The County argues that responding to White’s request would require the County to create new records, contrary to *Smith v. Okanogan County*, 100 Wn. App. 7, 994 P2d 857 (2000) (agency has no duty to create records that do not already exist). *Resp. Br.* at 27-28. WCOG would agree that the PRA does not require the County to recreate images of individual ballots from raw voting data.

³ The Secretary of State has indicated that it will file an amicus brief in this case. *See SOS Motion for Extension of Time* (October 3, 2014). As of the date of this brief, the amicus brief of SOS has not been filed in this (Division II) case. However, SOS has filed its amicus brief in Division I in a similar case brought by White against Skagit and Island Counties. A portion of that brief is attached hereto as an appendix.

But, as explained in section (B), White did not ask the County to recreate images of ballots from such data.

Rather, White asserts that scanned images are already created by the scanning process and that the County simply needs to produce such images in a readable format. *App. Br.* at 40. As noted in section II, the County asserts that such images are not actually created by the Ballot Now computer program. *Resp. Br.* at 26. WCOG takes no position on the parties' factual dispute.

Assuming, *arguendo*, that such images are created by the Ballot Now program, then the copying of such records, including any necessary conversion of the image data to a usable electronic format, is required by the PRA and does not amount to the creation of new records under *Smith, supra. Fisher Broadcasting*, 180 Wn.2d at 523-524; *see* WAC 44-14-050. Conversely, if such images are not created during the Ballot Now scanning process then the County can respond to White's PRA request by scanning the paper ballots after the retention period provided by RCW 29A.60.110 has ended.

D. The County violated the PRA by failing to explain why ballots would be exempt and by withholding non-exempt records.

As noted in Section II (above), the parties disagree about whether White's request for "pretabulated" ballots could be satisfied by producing copies of the ballots after the election. *See App. Br.* at 40; *Resp. Br.* at 13; *2d. Rev. Reply Br.* at

19. However, the County unambiguously informed White that there was no way to provide him with copies of the ballots before or after the election. CP 39; *Resp. Br.* at 5, 13. At a minimum, the County wrongfully withheld the records from White after the retention period was over because the ballots were not exempt at that time and should have been provided to White.

An agency has the duty to provide the fullest assistance to requesters and the most timely possible responses. RCW 42.56.100. In this context, the County had a duty to provide redacted copies of ballots as soon after the election as possible. It did not do so. Furthermore, in *City of Lakewood v. Koenig*, ___ Wn.2d ___, ___ P.3d ___ (December 11, 2014), the Supreme Court confirmed that agencies have a duty under RCW 42.56.210(3) to explain why records are exempt from public disclosure, and that an agency's failure to provide an adequate explanation of exemption claims is a separate violation of the PRA for which an award of attorney fees is required. Finally, the County has the burden to prove that its ongoing refusal to provide the requested records even after the election is over "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records." RCW 42.56.550(1). The County has not carried its burden of proof, and the requested ballots have been wrongfully withheld from White.

IV. APPENDIX

Appendix *Portion of Amicus Brief of Secretary of State (December 2, 2014)*
filed in *White v. Skagit County*, No. 72028-7-I.

CERTIFICATE OF SERVICE

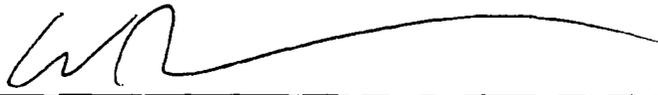
The undersigned certifies that on 30th day of January, 2015, true and correct copies of this pleading and the *Motion for Leave to File Brief of Amicus Curiae* were served on the parties as follows:

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AMICUS BRIEF OF THE SECRETARY OF STATE

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Appendix

In sum, Washington's election statutes are other statutes that prevent elections officials from creating new electronic copies of voted ballots during tabulation. Secure ballot storage and ballot destruction requirements, along with principles of election finality, prevent later copying and release. The counties properly denied Mr. White's request.

D. Article VI, section 6 Requires Absolute Secrecy of the Ballot, and Redaction Alone Would Not Eliminate the Risk of Improper Disclosure of a Voter's Identity

Article VI, section 6 of the Washington Constitution guarantees every voter "*absolute* secrecy in preparing and depositing his ballot," the strictest language found among state constitutions at the time of its adoption. Const.art. VI, §6. (emphasis added).⁸ Dictionaries existing in 1889 defined "absolute" as "not subject to exception."⁹ The purpose of this provision was to procure ballot secrecy, regardless of the form of the ballot. *See State v. Carroll*, 78 Wash. 83, 85-86, 138 P. 306 (1914).

Washington's election statutes also require absolute ballot secrecy. RCW 29A.04.611(11), (34), (39) (requiring regulations to preserve ballot secrecy in all circumstances, but especially where a small number of ballots are counted or where small precinct returns might sacrifice secrecy); RCW 29A.08.625 (secrecy of provisional ballots); RCW 29A.60.230 (small

⁸ See also Erik Van Hagen, *The Not-So-Secret Ballot: How Washington Fails to Provide a Secret Vote for Impaired Voters as Required by the Washington State Constitution*, 80 Wash. L. Rev. 787, 801-03, n.115-n.120 (2005) (listing examples).

⁹ "[P]lain meaning of 'absolute' secrecy, according to dictionaries in use at the time of ratification, is secrecy . . . not subject to exceptions." *Id.* at 799.

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precincts or precincts with limited returns); RCW 29A.60.160 (county auditors must exercise discretion in counting to preserve secrecy); RCW 29A.12.080 (requiring voting systems to preserve voter secrecy); RCW 29A.40.110 (requiring absolute secrecy for military and overseas voters' faxed or emailed ballots).

Mr. White requested that he be provided copies of ballots made prior to their tabulation. *E.g.*, CP at 220 ("I am not requesting ballot image files of ballots already tabulated."). County elections officials could not simultaneously respond to Mr. White's request and be sure they were complying with the absolute ballot secrecy requirements discussed above. Uncontroverted evidence in the record reflects that "releasing copies of ballots prior to election day or the certification of the election would compromise . . . ballot secrecy [of] voters." CP at 92. When a particular voter from a particular precinct has returned his or her ballot, that information is public, and lists of voters who have voted are requested frequently during an election. RCW 29A.40.130. For example, in Washington's least populated county, in a low 20 percent turnout election, only 313 votes would be cast in the entire county. CP at 93. Thus, release of subtotaled votes cast by precinct, city, and district boundaries, in conjunction with release of lists of voters who have returned their ballots, could risk connection of a voter to a particular ballot. CP at 93.

Appendix

Significantly, this problem would not be apparent to an election official who is simply reviewing ballot pages for redaction.

Moreover, it is not uncommon for voters to make marks on ballots, making it possible to trace the ballot back to the voter, including comments, explanations of voter intent, initialing corrections, or writing themselves in as a candidate. CP at 93. It would be impossible for elections officials to review the tens of thousands of pages necessary to redact records that Mr. White requested, pre-tabulation, and certify the election on time. *E.g.*, CP at 217 (“request for today’s ballot image files before tabulation this afternoon”). In sum, the counties could not have complied with Mr. White’s request as it was written, without sacrificing absolute ballot secrecy. Thus, Washington’s laws requiring absolute protection of voter secrecy are also “other statutes” justifying the counties’ denial of Mr. White’s request. RCW 42.56.070.

E. Mr. White Has the Burden to Show Lack of Vital Government Interest Supporting the Ballot Security and Secrecy Provisions

Mr. White also asserts that under RCW 42.56.210(2), the counties must show that these exemptions are necessary to protect an individual’s right of privacy or a vital government function. But under RCW 42.56.210, it is the requester’s burden to convince the superior court that the asserted exemption is unnecessary to serve one of these interests. *See Oliver v. Harborview Med. Ctr.*, 94 Wn.2d 559, 567–68, 618 P.2d 76 (1980) (burden

Appendix

CERTIFICATE OF SERVICE

The undersigned certifies that on 30th day of January, 2015, true and correct copies of this pleading and the *Motion for Leave to File Brief of Amicus Curiae* were served on the parties as follows:

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