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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 OPENING BRIEF

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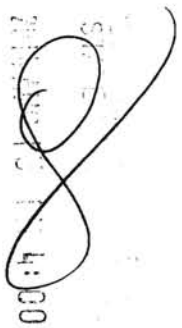

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Washington Authorities

Other Authorities

Appellant Timothy White (hereafter "Plaintiff") respectfully submits this Opening Brief in support of his appeal of the Snohomish County Superior Court's ruling denying relief under the Public Records Act.

I. ASSIGNMENTS OF ERROR

1. The Superior Court erred in denying Plaintiff's requested relief, where no Public Records Act exemption exists for the documents requested—including digital ballot images and associated metadata and properties from the November 2013 election.

2. The Superior Court erred in assuming Plaintiff's request dictated the records could not be used before they are copied.

3. The Superior Court erred in assuming release of the records would undermine ballot secrecy without any such evidence in the record.

4. In the alternative, the Superior Court erred in denying Plaintiff's requested relief where redaction of the records would remove any exempted information.

5. In the alternative, the Superior Court erred in denying Plaintiff's requested relief where any applicable Public Records Act exemptions are unnecessary to protect any individual's privacy or any vital government interest.

6. The Superior Court erred in finding Skagit and Island counties' responses to Plaintiff's request complied with the Public Records Act's strict procedural rules.

7. The Superior Court erred in denying Plaintiff recovery of his litigation costs and fees and in not imposing a daily penalty for Skagit and Island counties' Public Records Act violations.

II. STATEMENT OF THE ISSUES

1. Did Skagit and Island counties meet their heavy burden to identify an explicit exemption to the Public Records Act for the requested records?

2. Did the Superior Court err in implying an exemption to the Public Records Act in Washington's election law, Title 29A RCW?

3. Did the Superior Court err in assuming Plaintiff's request dictated that the records could not be used before being copied?

4. Are the requested records "ballots" under RCW 29A.04.008(1)?

5. If certain information in the requested records is exempt from production under the Public Records Act, must Skagit and Island counties still produce the requested records with the exempted information redacted?

6. Regardless of whether there is an applicable exemption, must the documents still be produced because public access to election records furthers the public interest and would not irreparably damage any person's privacy or vital government interest?

7. Is Plaintiff a prevailing party, entitling him to full recovery of his reasonable attorney fees and costs? And should Skagit and Island counties pay a daily penalty for their Public Records Act violations?

III. STATEMENT OF THE CASE

This is an appeal from the Snohomish County Superior Court which denied Plaintiff's Public Records Act ("PRA" or the "Act") action. Plaintiff's suit sought to compel production of records requested under the Act, recovery of reasonable attorney's fees and costs, and the imposition of a daily penalty for Skagit and Island counties' PRA violations.

Plaintiff contends that the public records he requested from Skagit and Island counties (the "counties")—digital images of ballots cast in the November 2013 election and associated file metadata and properties, among others—are not exempt under the PRA, and that the counties are compelled by law to provide copies of those records.

Mr. White is a longtime open-elections advocate. Clerk's Papers ("CP") 143. Mr. White understands that openness in the election process is a public good, gets citizens involved, increases public confidence and provides oversight against error, fraud and abuse. *Id.* To further those goals, Mr. White requested copies of ballot images and associated file metadata and properties, among other records, which the counties created in connection with the November 2013 election. CP 220-222.

As in all of Washington, both counties conduct their elections predominantly by mail. CP 182 at lines 6-12; CP 150 at lines 4-11. The counties' voters typically receive paper ballots in the mail, record their preferences on their ballot from home, and mail the marked ballot back to the counties. *Id.* Once received, the counties scan the ballots with an off-the-shelf commercial scanner, which digitally images the paper ballots for storage as digital files on a computer, and for use with Hart Intercivic, Inc. verification and tabulation software. CP 150-51; CP 182.

After being scanned, the ballots themselves are immediately stored in a sealed ballot box and election officials need not handle them to resolve ballot images, tabulate them, or canvass the election. CP 150-51 at ¶¶ 6, 8; CP 182 at lines 15-24. The Hart Intercivic "Ballot Now" and "Tally" programs read the scanned digital images of the ballots to verify and count the images. CP 151 at ¶ 8; CP 182 at lines 21-24. The counties can use the "Ballot Now" program to retrieve any of the ballot-image files it created, and view the ballot image on a computer monitor—without needing to handle the ballots again. CP 150 at ¶ 6; CP 182 at lines 15-17 (images "resolved"[1] in the "Ballot Now" program).[2] The counties further maintain the ability to print copies of the ballot images and save them as PDFs or Microsoft Word documents. CP 184 at lines 16-19.

On November 6, 2013, under the PRA, Plaintiff White requested copies of the digital ballot image files created and used in the November 2013 election and all metadata and properties associated with those

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[1] The "ballot resolve" process allows election officials to view images of ballots that contain markings that the tabulation program cannot interpret, but from which a human viewing the ballot image could clearly understand the intent of the voter (i.e. a circle around a candidate's name instead of a filled-in box next to it, among other examples). *See* CP 150 at ¶ 6; CP 182 at lines 15-21.

[2] *See also* HartIntercivic.com, Ballot Now brochure, http://www.hartintercivic.com/sites/default/files/BallotNow_brief.pdf (last visited Aug. 14, 2014) (The Ballot Now program "[d]igitally stores ballot images (no need to handle paper ballots).").

county-created files, among other records including those related to votes received by e-mail or fax and images of ballots not counted. CP 220-222. On December 6, 2013, Skagit County denied Plaintiff's request and provided an incomplete exemption log identifying some of the responsive records withheld, but did not include any information about requested file metadata and properties; ballots, ballot declarations, attachments and the emails themselves for votes received by e-mail; ballots and ballot declarations and sheets received by fax or other electronic transmission; or scanned images of ballots not counted. CP 230. On November 12, 2013, Island County denied Plaintiff's request without providing an exemption log or index of responsive records at all. CP 234-236. Plaintiff never received any of the public records he requested under the Act from either county. CP 214-15 at ¶¶ 6, 8.

On January 2, 2014, Plaintiff commenced this case to compel the counties to comply with the PRA and provide copies of the records. *See* CP 248-55. Through litigation, Plaintiff learned Skagit withheld over 70,000 responsive digital images,[3] as well as file metadata associated with each image (CP 185) and Island withheld over 57,000 digital images and file metadata. CP 165. In doing so, the counties cited no authority

[3] The scanning produces two images for each ballot, one image for each side of the ballot. CP 185.

explicitly exempting the records from production and instead asked the court to imply a new exemption from the Constitution, the broad election regulations of Title 29A RCW, and administrative code.

Following briefing from both parties, the Superior Court held a show cause hearing on February 13, 2014[4] and denied all relief by written ruling on May 9, 2014. *See* CP 20-34. This appeal followed.

IV. STANDARD OF REVIEW

Under the PRA, there is a strong presumption for full access to public records. American Civil Liberties Union of Wash. v. Blaine School Dist. No. 503, 86 Wn.App. 688, 693, 937 P.2d 1176 (Div. 1 1997) ("The statement of public policy in the law creates the presumption that there will be full access to public records."); Zink v. City of Mesa, 140 Wn.App. 328, 337, 166 P.3d 738 (Div. 3 2007) (The Act "establishes a strong presumption in favor of full disclosure of public records."). The counties bear the heavy burden to overcome this presumption. RCW 42.56.550(1).

The PRA demands the Act be liberally construed to promote the enumerated policy of public control and transparency, and requires its exemptions be narrowly construed:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do

[4] The Superior Court heard no testimony during the hearing, and the record was limited to documentary evidence and affidavits. The court made no stenographic or electronic record of the proceedings and no transcript is available.

> not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.030;[5] *See also* Resident Action Council v. Seattle Housing Auth., 300 P.3d 376, 382 (2013) ("**The PRA's purpose of open government remains paramount**, and thus, the PRA directs that its **exemptions must be narrowly construed**." (emphasis added)). For emphasis, "the Legislature takes the trouble to repeat three times that exemptions under the Public Records Act should be construed narrowly." Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d, 243, 260, 884 P.2d 592 (1994) ("PAWS II") (citing the Public Disclosure Act).

The language of the Act "**does not allow a court 'to imply exemptions** but only allows *specific* exemptions to stand.'" PAWS II, 125 Wn.2d at 262 (quoting Brouillet v. Cowles Pub'g Co., 114 Wn.2d 788, 800, 791 P.2d 526 (1990)) (emphasis added). Administrative code or

[5] The PRA (formerly the Public Disclosure Act) was passed by popular initiative in 1972 to preserve "the most central tenets of representative government, namely the sovereignty of the people and the accountability to the people of public officials and institutions," by ensuring public access to government documents and records. Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d, 243, 251, 884 P.2d 592 (1994).

policies may not exempt records either. Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995); WAC 44-14-06002(1).[6] "[I]n the event of a conflict between the [Public Records] Act and other statutes, the provisions of the Act govern." PAWS II, 125 Wn.2d at 262 (citing Public Disclosure Act, RCW 42.17.920); *see also* RCW 42.56.030.

Appellate review of the Superior Court's ruling is de novo. Limstrom v. Ladenburg, 136 Wn.2d 595, 612, 963 P.2d 869 (1998) ("Where, as here, a trial court's order is based solely on documentary evidence, affidavits and memoranda of law, our review is de novo."); RCW 42.56.550(3).

V. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff asserts that both counties are required to provide copies of the digital ballot images, associated file metadata and properties and the other requested records under the PRA. Agencies, including counties, must produce copies of records on request, unless one of the limited exemptions to the Act applies. Agencies bear the heavy burden to show a specific exemption applies to each record; none of the exemptions contained in the Act or in other statutes apply to the records at issue here.

[6] The reasoning behind this rule is that in order for the PRA to be effective, agencies must not be able to determine for itself which of its documents it will provide to the public and which documents will remain hidden. Servais, 127 Wn.2d at 834

The mandate to produce ballot image files under the PRA is a matter of first impression in Washington, but other jurisdictions looking at this duty rule in favor of production. *See* Marks v. Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No. 11SC816 (July 16, 2012);[7] Price v. Town of Fairlee, 26 A.3d 26, 190 Vt. 66 (Vt., 2011).[8] Given the especially strong law favoring production in Washington, the same result should happen here. The counties have not met their heavy burden and the Superior Court erred in misreading Plaintiff's request, assuming facts not in the record, and implying exemptions from Washington's election law.

VI. ARGUMENT

A The Image Files and Other Records are Public Records Subject to the PRA and There Is Great Public Interest in Production.

The PRA defines "public record" broadly, "regardless of physical form or characteristics," and includes the records here. RCW 42.56.010(3). "Public records" under the Act include:

> handwriting, typewriting, printing, photostating, photographing, and **every other means of recording any form of** communication or **representation** including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic punched cards, discs, drums, diskettes, sound recordings and any

[7] A copy of the Marks decision (as provided by Lexis Nexis) is at Appendix A.

[8] A copy of the Price decision (as provided by Lexis Nexis) is at Appendix B.

other document including existing **data compilations from which information may be obtained or translated.**"

RCW 42.56.010(4) (emphasis added). The Act provides this broad definition to ensure the public maintains control over the instruments it created and to protect the public interest. RCW 42.56.030. The PRA highlights the importance of government transparency and provides a safeguard against agency abuse. Such transparency is especially important in the context of elections. *See* Doe v. Reed, 561 U.S. 186, 198, 130 S. Ct. 2811 (2010) (agreeing with Washington that transparency in the electoral process is essential to the proper functioning of a democracy).

Here, the public interest clearly warrants production of the requested ballot images and associated file metadata and properties. Production of these records would increase public oversight of (and involvement with) this fundamental instrument of democracy and facilitate civic engagement. Such transparency will promote public confidence in the election process by permitting efficient public verification of election results. Indeed, production of anonymous ballot images will restore the longstanding tradition of truly public processing and counting of elections.

Before the days of voting by mail, email and fax, thousands of volunteers and public observers mobilized to canvass every election at thousands of neighborhood precinct polling places. *See generally* 2005

Washington Code, Title 29A. Each precinct was overseen by one inspector and two citizen judges, former RCW 29A.44.410 (2005), plus such additional persons as were necessary, former RCW 29A.44.420 (2005), and were watched over by additional political observers. Former RCW 29A.60.110 (2005). Citizen election officers formed each precinct board which debated and ruled on unclear or disputed ballots or votes, former RCW 29A.60.050 (2005); former RCW 29A.60.060 (2005), and citizens did the counting. Former RCW 29A.44.450 (2005). All this was out in the open, former RCW 29A.44.250 (2005), and those volunteers stayed to the wee hours if needed. Former RCW 29A.60.030 (2005).

Now, with the final 2011 consolidation and mandatory remote voting, for budgetary reasons the legislature permanently dismantled precinct in-person election-day poll sites, but retained the goal of public oversight. *See* SB 5124, 62nd Leg., Reg. Sess., 2011 Laws 10 (effective July 22, 2011) (repealing 96 statutes and amending 83 others).[9] All precinct volunteer positions have been discontinued and their functions assigned to a small group of officials and temporary workers operating a highly mechanized and centralized electronic canvass at each county's counting center. *Id.* Elections now run for weeks or months to count tens

[9] Available at http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5124-S.SL.pdf

of thousands of ballots on one vendor's voting system as the ballots trickle in by mail, with few or no public observers actually watching.

Yet, the Legislature retains the desire to make elections accountable to the public with observers. *See e.g.* RCW 29A.60.170(2) (counting centers open to public observation); RCW 29A.64.041 (recounts open to public and "witnesses shall be permitted to observe the ballots"); RCW 29A.40.130; RCW 29A.04.230 (secretary of state shall make elections records "available to the public upon request."). The only statutory restraints on open observation relate to touching ballots or their containers, and operating the tabulation machine. RCW 29A.60.170(2). Producing digital copies of the records is simply the electronic-age equivalent of fulfilling the traditional public observation. Public access to images does so while respecting the enumerated proscriptions: hands-off the ballots, ballot containers and tallying equipment. Ballots have always been processed, canvassed and counted in public. The digital images created by the Hart Intercivic, Inc. voting system provides the opportunity to efficiently reaffirm the power of oversight for the public.

1. The Court Should Follow the Lead of Colorado and Vermont.

While there is no Washington precedent directly on point for this matter, appellate decisions with similar laws and facts in other

jurisdictions favor production of requested ballot images. *See* Marks v. Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No. 11SC816 (July 16, 2012); Price v. Town of Fairlee, 26 A.3d 26 (Vt. 2011). The Court should follow Colorado and Vermont and order production of the image files and other records requested.[10] Marks provides a strikingly similar case where a citizen requested copies of digital ballot images under the Colorado Open Records Act (CORA), a similar statute to the PRA. 284 P.3d at 119. Price is also similar, where the court ordered citizen access to cast ballots themselves. Price, 26 A.3d at 35.

In Marks, the City of Aspen used a corporation, like the counties did here, which provided a similar service as Hart Intercivic, Inc. to tabulate ballot images using tabulation software. Marks, 284 P.3d at 120. Paper ballots were similarly scanned with the resulting digital files stored

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[10] *See also*, **Michigan**—Access to Ballots Voted at an Election, Op. Mich. Att'y Gen. No. 7247 (May 13, 2010) ("Voted ballots, which are not traceable to the individual voter, are public records subject to disclosure under the Freedom of Information Act...") (Available at http://www.ag.state.mi.us/opinion/datafiles/2010s/op10324.htm); **California**— Humboldt County scans all ballots for each election and posts the images online. *See* Humboldt County Election Transparency Project, http://www.humtp.com/ballots.htm; **Minnesota**—Copies of ballots in Franken-Coleman 2008 U.S. Senate election are posted online. MPR News, Challenged Ballots: You Be the Judge, http://minnesota.publicradio.org/features/2008/11/19_challenged_ballots/round1/. *See also* Minnesota Secretary of State, Statement of Need and Reasonableness, Proposed Permanent Rules Relating to Election (November 16, 2009), available at www.sos.state.mn.us/Modules/ShowDocument.aspx?documentid=8571 (election official is permitted "to make photocopies of the challenged ballots, because making copies...gives the public access...while still keeping the original challenged ballot secure and safe from tampering, damage or loss.").

electronically, and the agency initially denied the records request on similar grounds. *Id.*[11] The Appellate Court rejected the agency's arguments and ordered production of the images requested. *Id.* at 121-24.

First, the Colorado court found "the Colorado Constitution's secrecy in voting requirement extends only to protect the identity of a voter and not the contents of his or her ballot—assuming the voter's identity could not be discerned from the content of the ballot." *Id.* at 121. While the texts of the Washington and Colorado Constitution's "secrecy in voting" requirements are not identical, the purpose of each provision is the same. *Compare*, Washington Constitution Art. 6, sec. 6 *with* Colorado Constitution Art. 7, sec. 8. Washington law further guarantees that a voter's identity cannot be discerned from the content of the ballot (or any other record). RCW 29A.08.161.[12]

Second, the Colorado court held the digital images are "not ballots" and that "releasing them would not be contrary to [Colorado's] ballot storage and destruction provision." Marks, 284 P.3d at 122. The

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[11] The agency asserted (1) the images were "in fact ballots themselves," (2) releasing the images would violate the Constitution's secrecy in voting requirement, and (3) releasing the images would violate Colorado's "ballot storage and destruction provision." Marks, 284 P.3d at 120.

[12] "No records may be created or maintained by a state or local governmental agency or a political organization that identifies a voter with the information marked on the voter's ballot..."

Colorado court did not apply the "ballot storage and destruction provision" at all because the requested images were not "ballots." *Id.* The court left open whether those provisions would exempt production if the images were in-fact "ballots." *Id.*

In Marks, the images were not "ballots" because the "files were created after voters had used paper ballots to indicate their voting preferences..." 284 P.3d at 122. The image files "were used solely by election officials who, after having created them, retained exclusive possession of them. In contrast with how voters must use paper ballots to indicate their preferences . . . the voters in [the] election did not use the [image] files for any purpose whatsoever." *Id.*

The same is true here. The images and data Plaintiff requested were created after voters used paper ballots to indicate their preference and after election officials scanned those ballots. CP 150; 182. County voters did not use the image files or data for any purpose whatsoever. *Id.* Like in Colorado, the digital copies are not "ballots" because they are not the item on which an individual voter records his or her choices in an election. *See* RCW 29A.04.008(1)(d) ("'Ballot' means...The physical document on which the voter's choices are to be recorded.").

The ruling in Price is also instructive. There, the Vermont Supreme Court ordered production of cast ballots under the Vermont

PRA, even though Vermont law mandated ballots "must be 'securely sealed' in containers...[and kept with] the town clerk, who shall safely store them and shall not permit them to be removed from his or her custody..."[13] Price, 26 A.3d at 30. Citing familiar language as that used in Washington PRA precedent, the Vermont court held "any doubts should be resolved in favor of disclosure." *Id.* at 31. "With that in mind, there [was] no support for the broad exception [the agencies] claim[ed]," and the court permitted public access to the ballots. *Id.*

The Court should follow Colorado and Vermont's reasoning and require production of the records requested. The PRA's demand that all exemptions be narrowly construed requires a ruling upholding openness.

B. The Superior Court Erred in Implying an Exemption under the PRA

In ruling on this matter, the Superior Court misread *security* directives as *secrecy* mandates in citing to Title 29A RCW as an implied PRA exemption. The counties have failed to meet their heavy burden to show any explicit exemptions apply to the records requested, especially in light of the strong presumption of public access to public records. Without any specific exemption on point, the Superior Court erroneously

[13] This Vermont statute is nearly identical to Washington's RCW 29A.60.110, on which the counties and the Superior Court mistakenly relied for a PRA exemption.

implied an exemption where one "cannot be found" in a particular statute. CP 27 at lines 2-3.

1. The Constitutional Provision for Ballot Secrecy Does Not Create an Exemption

In this case, the Washington Constitution does not provide a PRA exemption. For Article 6, sec. 6 to operate as an exemption the counties needed to carry their burden to identify specific responsive records which would eliminate ballot anonymity, which they did not. The counties have made no assertion, or provided any evidence, that any of the records Plaintiff seeks contain any information destroying the anonymity of any ballot. Indeed, under state law, the counties are prohibited from creating or maintaining any record that permits voter-identification. RCW 29A.08.161.[14]

In arguing that release of the images could destroy ballot anonymity, the counties rely on remote hypothetical scenarios—all absent here—which fall short of their burden under the Act. *See* CP 92-93 at ¶¶ 4-8 (voicing concerns where voter-placed markings could identify voters—without asserting any of the requested images contain such markings; and where there is a low turnout in a small precinct—without

[14] *See also* RCW 29A.36.111(1) (requiring ballot uniformity and that "No paper ballot or ballot card may be marked by or at the direction of an election official in any way that would permit the identification of the person who voted that ballot.")

asserting Skagit or Island counties have small precincts or that there was a low turnout in November 2013).[15]

To the extent the Court gives weight to those hypothetical assertions (which it should not since they are inapplicable), there are measures in place to prevent ballot identification in those unusual situations. The counties can—indeed must—redact identifying voter-placed markings before producing copies, and election-administration procedures (mandated by law) render the other concerns baseless. *See* RCW 29A.04.611(11), (34), and (39) (Secretary of State must make rules to ensure ballot secrecy when a small number of ballots are counted, to aggregate precinct results to avoid jeopardizing ballot secrecy, and to guarantee the secrecy of ballots in general); RCW 29A.60.230 (the election administrator should aggregate results from multiple precincts if a single precinct's results could jeopardize anonymity); RCW 29A.60.160(3) (county auditor must use discretion to decide when to process ballots and canvass votes to protect secrecy); CP 55-57.

Absent evidence to the contrary, the Court must presume officials followed these statutes and administered the November 2013 election to

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[15] The counties also reference a problem if ballot images are produced before 8:00pm on Election Day. CP 93 at ¶ 9. This is of no concern here, where Mr. White made his request after polls closed. CP 213 at ¶ 2 (request issued November 6, 2014, the day after Election Day).

maintain ballot anonymity. *See* Washington v. J.A.B., 98 Wn.App. 662, 991 P.2d 98, n.4 (Div. 1 2000) (quoting Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960) (A "presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.")). The Court must also presume, as a matter of law, that the counties do not maintain any information that links any ballot to an individual voter, consistent with RCW 29A.08.161. *Id.* Thus production of the images requested should not compromise ballot anonymity. The counties have not met their burden to rebut this presumption and the Superior Court erred in relying on additional hypothetical secrecy problems not contained in the record. *See* CP 29.[16]

In addition and fundamentally, the Constitution does not place a general veil of secrecy over the election process, as the counties claim. The election process is meant to be open with public oversight as it always has been. *See* RCW 29A.60.170(2); RCW 29A.64.041 (**public is "permitted to observe the ballots"**); RCW 29A.40.130; RCW

[16] For example, the Superior Court described a "write-in" vote as appearing benign, unless one knows who cast the ballot and the voter wrote in his own name. CP 29. Not only does evidence of this situation (among the others cited by the court) not appear in the record, but the court does not acknowledge that if one knows who cast the write-in ballot in the first place, there is an underlying problem—separate from producing ballot images—with a system that does not protect ballot secrecy. The counties provided no evidence that such ballot/voter identification is possible and the court erred in reaching that conclusion without evidentiary support.

29A.04.230 (**elections records "available to the public upon request."**). The counties' claim that production would violate a broad constitutionally mandated secrecy over elections is unsupported and wrong.

Finally, even if the counties had identified information in the requested records which would permit voter identification (which they did not), the counties must still produce the images with such identifying information redacted. Resident Action Council, 300 P.3d at 379 ("the PRA requires redaction and disclosure of public records insofar as all exempt material can be removed."); RCW 42.56.070(1). By failing to do so, the counties violated the PRA.

2. Statutes Providing for Ballot Security Do Not Create an Exemption

The counties improperly rely on the ballot-security chapters of Title 29A RCW, which are designed to ensure that people do not tamper with ballots, not to exempt scanned images and associated metadata and properties from production under the PRA.[17] *Compare* RCW 29A.60.110

[17] *See* RCW 29A.40.160(13) (ballots transported in secure containers); RCW 29A.40.110(2) (ballots stored in "secure locations"); RCW 29A.60.125 (duplicated damaged ballots kept in "secure storage"); RCW 29A.60.110 (after tabulation, ballots are sealed in containers until destruction); *see also* RCW 29A.04.611 (Secretary of State shall make rules governing "Standards and procedures *to prevent fraud and to facilitate accurate processing and canvassing of ballots*..."); RCW 29A.04.205 ("[i]t is the policy of the state of Washington...to protect the integrity of the electoral process by providing equal access to the process while *guarding against discrimination and fraud*." (emphasis added)).

with 17 V.S.A § 2590 (a) and (c)—which the Price court concluded did not exempt ballots (Price, 26 A.3d at 30). The counties have failed to meet their burden to show that those statutes contain any "explicit exemption" under the Act and the Superior Court erred in implying one.

First, in examining Title 29A RCW, the Superior Court ignored the presumption of public access afforded to public records under the Act and ignored relevant portions of that title. *See* CP 29 (stating it would be "superfluous" to single out certain election information as subject to the PRA "unless the rest of the statutory scheme made everything else non-disclosable"). Other statutes need not specify records to be treated as public under the PRA; treating public records as such is the default under the PRA itself. RCW 42.56.070(1). In converse, exemptions to the PRA, which may overcome the presumption of access, must be "explicitly identified." PAWS II, 125 Wn.2d at 262. By concluding that Title 29A's silence about handling ballots as public records shows a PRA exemption, the Superior Court improperly imputed a presumption *against* public access, in direct violation of the Act.

In fact, Title 29A RCW explicitly exempts at least six types of election documents from production under the PRA but does not do so for ballots (or digital images). *See* RCW 29A.08.710(1)) (Exempting voter registration forms), RCW 29A.08.710(2) (Exempting voter registration

records other than those identified), RCW 29A.08.720 (Exempting the identity of the office or agency where an individual registered to vote or choice not to register),[18] RCW 29A.32.100 (Exempting the statement submitted to the secretary of state for the voter's pamphlet at certain times), and RCW 29A.56.670 (Exempting nominating petitions). Title 29A RCW lacks any similarly worded exemption for ballots or ballot images.[19] The Legislature knows how to exempt specific records from the PRA, and even did so repeatedly under Title 29A, but chose not to exempt ballots or ballot images. There is no exemption for the records requested.

Second, the counties made no assertion, nor provided any evidence, that production of copies of images now would expose ballots to tampering or fraud—nor can they. The requested records are mere scanned images of ballots. CP 150; 182. The paper ballots themselves are in secure storage and will remain there until destruction. *Id.* To comply with Plaintiff's request, the counties need not handle the original ballots at all and may simply "screen print" ballot images from their stored data. CP

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[18] *See also* RCW 40.24.060 (exempting name and address of victim confidentiality program participant from list of registered voters available to public).

[19] *See* Appendix C for examples of explicit PRA exemptions found in "other statutes." No similarly worded statute exists which would exempt ballots or digital ballot image files and associated metadata and properties. No PRA exemption exists for the records requested.

184 at lines 17-20 (Mr. Cunningham went through the "screen print" process without opening the ballot box and converted a sample image to a Word document). And significantly, the November 2013 election has already been certified, eliminating any such risk. CP 182 at line 24.

On the other hand, producing the records could help expose election errors, tampering or fraud, and inform safeguards for future elections. *See* Doe. v. Reed, 561 U.S. at 197-99 ("Public disclosure can help cure the inadequacies of the verification and canvassing process."). Metadata and properties for ballot images may also show the date the file was created or subsequently altered—information which may expose tampering. *See* O'Neill v. City of Shoreline, 170 Wn.2d 138, 143, 240 P.3d 1149 (2010).[20] Making that information public furthers the goal of fair elections through additional oversight.

Finally, the general mandate to provide secure storage for certain records does not alter the PRA's strongly worded obligation for agencies to provide public access and copies. Nearly all public records are stored in secure locations by law to ensure authenticity, yet agencies must still

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[20] Defining metadata as "'data about data' or hidden information about electronic documents created by software programs." **This includes "information about whether a document was altered**..." O'Neill, 170 Wn.2d at 147 (emphasis added). Metadata are public records subject to the PRA. Fisher Broad. Seattle TV LLC d.b.a. KOMO 4 v. City of Seattle, et al., No. 87271-6, Slip. Op. at 10 (Wash. Sup. Ct. June 12, 2014). A copy of the Fisher decision is at Appendix D.

produce them when requested under the PRA. *See, e.g.*, RCW 40.14.020(4) (The state archivist shall "**insure the maintenance and security of *all* state public records** and to establish safeguards against unauthorized removal or destruction." (emphasis added)); RCW 42.56.070. If the Court accepts the counties' and Superior Court's application of "secure storage" provisions as PRA exemptions, it would emasculate the PRA's ability to ensure public access to public records by exempting *all* secure records. RCW 40.14.020(4) provides for security of *all* public records, which under the Superior Court's reading would exempt *all* public records. In reality, there is nothing remarkable about providing for the security of public records, which is not a PRA exemption; agencies must produce records even if they store them securely.[21] The counties have not met their burden. RCW 42.56.550(1).

3. The Purported Exemptions Do Not Apply Because the Records are Not "Ballots"—They Are Election Records

Each voter has only one ballot per election, not many. The paper ballot on which each voter records his/her choice is the legal "ballot," not the digital image files (and other records) requested here. Because the

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[21] The counties' reference to criminal penalties for unauthorized removal of ballots also shows nothing. *See* CP 199 at note 4. Those statutes provide for penalties when ballots are removed "without lawful authority," or "without authorization," authorization that the PRA provides. RCW 29A.84.540; 29A.85.545. In addition, similar penalties are provided for unlawful removal of *any* public record (RCW 40.16.010) but the PRA authorizes public access to and copies of public records, with no risk of criminal penalties.

image files are not "ballots," none of the statutes regulating ballot handling are applicable to the records in the first place. *See* Marks, 284 P.3d at 123-24. The records are election records, created by the counties and "available to the public upon request." RCW 29A.04.230.

The use of "either/or" language in the statutory definition of "ballot" confirms that ballots are singular. In other words, each voter has only one ballot. "Ballot means, **as the context implies, either**... (c) a physical **or** electronic record of the choices of an individual voter in a particular [election]; **or** (d) **The physical document on which the voter's choices are to be recorded**." RCW 29A.04.008(1) (emphasis added).

"Statutes must be interpreted and construed so that all language used is given effect, with no portion rendered meaningless or superfluous." Prison Legal News, Inc. v. Dep't of Corrections, 154 Wn.2d 628, 643-44, 115 P.3d 316 (2005). The Court must therefore give effect to the unambiguous "either/or" language of the "ballot" definition and find that there is only one legal ballot.[22] *See* Cerrillo v. Esparza, 158 Wn.2d

[22] The different forms a "ballot" can take under the laws of Washington relate to the different forms used for the various "methods of voting" provided by the Legislature—not to each and every copy of a ballot or record of cast votes. By providing several options at RCW 29A.04.008(1) for what a "ballot" could be, the Legislature provided local authorities the flexibility to determine which method of voting they prefer in the modern age. *See* State ex rel. Empire Voting Machine Co. v. Carrol, 78 Wash. 83, 85, 138 P. 306 (1914). Such methods could be an analog voting machine, a digital voting machine, or paper ballots, among others (and the corresponding "ballot" depends on the *context*).

194, 204, 142 P.3d 155 (2006) ("This court has consistently read clauses separated by the word 'or' and a semicolon disjunctively.") (citing State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996) ("in interpreting statutory language, **'or' serves a disjunctive purpose and does not mean 'and.'**")) (additional citation omitted).

The Court must also give effect to the clause "as the context implies" and consider the context here, where voters record their choices on a physical paper ballot, which is subsequently mailed to the counties where the counties scan and image it before tabulation. In this context, the ballot is the "physical document on which the voter's choices are to be recorded," not the digital image, created by the counties after scanning the real ballot.[23] RCW 29A.04.008(1)(d).[24] Because the requested images are not "ballots" under this definition,[25] none of the counties' purported

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[23] When facing this issue, the Marks court concluded that scanned ballot images were not "ballots" under the similar laws of Colorado. 284 P.3d at 122-24. As a practical matter, treating every single duplicate or short-term record of election choices as an official ballot— subject to the verification, tabulation and secure storage requirements of the election process (among others)— would be unworkable.

[24] The Court should also not apply the definition at RCW 29A.04.008(1)(b) (for faxed ballots) to the requested records because Skagit County never identified any ballots received by facsimile in the November 2013 election and Island County identified only one. *See* CP 224-32; CP 234-36; RCW 29A.04.008(1)(b). To the extent the Court identifies evidence in the record showing other ballots were received by facsimile, the definition at RCW 29A.04.008(1)(b) should not apply to any of the other ballots received by mail (or in person). In any case, Washington's election laws do not provide a PRA exemption for "ballots" in the first place, as discussed.

[25] It is also worth noting that although administrative code cannot create a PRA exemption, the language of WAC 434-261-045 helps illustrate that digital ballot images

exemptions pertaining to "ballots" apply to these records in the first place.[26] Those statutes do not exempt the records requested.

4. The Counties Have Not Identified If any Images Show "Damaged" Ballots

The counties further relied on RCW 29A.60.125, which provides unique instructions for "damaged" ballots; but the counties did not disclose whether any of the withheld records are in fact copies of "damaged ballots."[27] CP 169; 200. First, failure to identify "damaged ballots" (if any) in the counties' response emails violated the PRA's strict "identification" and "explanation" requirements. *See* CP 224-236; PAWS II, 125 Wn.2d at 270; RCW 42.56.210(3); Section VI.E below. Second, the counties do not meet their burden by failing to identify any "damaged

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are not "ballots" under Washington's election law, as discussed. The Code treats "ballots" and "ballot images" as two distinct items. WAC 434-261-045 (listing "ballots and ballot images"). If ballot images were the same as "ballots," listing them separately would be entirely redundant and have no meaning.

[26] Nor did the Legislature intend the requested records to be treated as ballots. *Compare with* RCW 29A.12.085, which specifies "paper records produced by direct recording electronic voting devices are subject to all the requirements of chapter 29A.60 RCW for ballot handling, preservation, reconciliation, transit and storage." Washington statute contains no comparable provision for the handling of scanned ballot images of voted paper ballots, showing no legislative intent to handle those image files in the same manner as ballots. But as discussed, even if the records were handled like ballots, those handling statutes are not exemptions.

[27] "Damaged" ballots are either "physically damaged" or "otherwise unreadable or uncountable by the tabulating system." RCW 29A.60.125

ballot"-images among the images withheld.[28] In order to show that RCW 29A.60.125 is an explicit exemption applying to any of the records withheld—which Plaintiff refutes regardless—the counties needed to show that they withheld "damaged ballots." The counties have not met their burden; RCW 29A.60.125 is inapplicable to the records requested.[29]

Moreover, the Superior Court misread RCW 29A.60.125 when it classified all the digital images requested as "duplicates" of ballots under that statute. CP 24-25. "Duplicate ballots" is a term of art under RCW 29A.60.125 and are created "only if" the voter's intent on the original ballot is clear, but the electronic tabulation system (here, the "Tally" program) cannot properly read the ballot. RCW 29A.60.125; WAC 434-261-005(1)-(4). The "ballot resolve" process—where officials pull up digital images of the official paper ballot on a screen with the "Ballot Now" program—is designed to uncover these "damaged ballots." CP 194 at lines 11-17. This happens, for example, if a voter circles the name of a

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[28] "[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)

[29] The counties also rely on RCW 29A.60.110, which provides security directives for the storage of ballots after tabulation. Plaintiff refutes that this statute is an "explicit exemption," but even assuming that it is, such exemption would not apply to the images of *rejected* ballots—which are never tabulated and were included in Plaintiff's request. *See* RCW 29A.60.040; RCW 29A.60.050. The counties violated the PRA by withholding the digital files of rejected ballots, to which RCW 29A.60.110 does not apply.

candidate instead of filling in a box next to the name. *Id.* In that situation, election officials create a "duplicate" ballot to reflect the voter's intent in a way that is readable by the computer tallying program and allows his/her vote to be counted by the computer. RCW 29A.60.125. The counties' routine scanning of every ballot received is not the act of "duplicating" ballots under RCW 29A.60.125.[30] The Superior Court erred in finding RCW 29A.60.125 exempts any of the records requested.

C. Even if There Were an Exemption, It Would Not Justify Denial

1. Withholding the Records is Not Necessary to Protect Privacy or a Vital Government Interest

Even assuming arguendo that an explicit exemption applies to the records, the Court must evaluate whether the exemptions are "unnecessary to protect any individual's right of privacy or any vital governmental function"— and if the exemptions are unnecessary, the public may access the records notwithstanding the exemption. RCW 42.56.210(2); RCW 42.56.540; Resident Action Council, 300 P.3d at 382 ("even records that are otherwise exempt may be inspected or copied if a court finds that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function."

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[30] Indeed, every time the election laws reference "duplicate" ballots, it is related to "damaged" ballots, not the digital images routinely created by the counties. *See e.g.* RCW 29A.60.120.

(quotation marks and citation omitted)); *see also* Soter v. Spokane School Dist. No. 81, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (to enjoin public access to a public record, "the trial court must find that a specific exemption applies ***and*** that disclosure would not be in the public interest and would substantially and irreparably damage a person or a vital governmental interest." (italics original) (citing RCW 42.56.540). Because there is no evidence in the record showing production would undermine ballot secrecy, the Superior Court erred in holding the proffered exemptions are necessary. *See generally* CP 30-31.

This is a text-book case where production of the records is in the public interest to restore public oversight of and confidence in elections, and where any exemptions are clearly unnecessary to protect privacy and vital governmental interests. As discussed in section VI.A above, in Washington, elections are meant to be open to public observation and involvement, but the advent of "vote by mail" has limited the opportunities for citizens to participate. *See* RCW 29A.60.170(2). Making county-created digital images of cast ballots public effectuates the legislature's intent to provide public oversight.

Furthermore, the exemptions claimed are unnecessary because production should pose no risk to ballot anonymity or to expose elections

to fraud or tampering, as discussed above.[31] Public production would increase civic knowledge and democratic participation, increase voter confidence in the system, and guard against errors, fraud and abuse. Record production would accomplish all these public goods without conflicting with any statutes regulating elections.[32]

2. The Counties Must Redact Exempt Information and Produce the Rest

And even if there were an applicable exemption designed to protect a privacy right or a vital governmental function, the counties must redact any exempted information and produce the rest of the records. Resident Action Council, 300 P.3d at 382 ("exemptions are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific record sought." (quotation marks omitted)); *id.* at 379 ("the PRA requires redaction and disclosure of public records insofar as all exempt material can be removed."); RCW 42.56.070(1) ("To the extent required to prevent an unreasonable invasion of personal privacy interests...an agency shall delete identifying details in a manner consistent with this chapter...").

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[31] As discussed above, the remote hypothetical scenarios cited by the counties—all absent here—can either be resolved with redaction (as required under the PRA), or handled at the local level. *See*, RCW 29A.60.; RCW 29A.60.160; CP 55-57.

[32] *See* RCW 29A.60.170(2). The public would need not touch any ballots or ballot containers and would not touch any tabulation machine.

D. The Counties' Other Arguments Have No Merit

1. The Legislature Provides Access to Elections Records and Allows the Public to View Ballots, Showing There is No Exemption Under the PRA

Washington's election laws expressly provide for public access to ballots in certain contexts, showing the legislature did not enact RCW 29A.60.110 or RCW 29A.68, *et seq*. (or any other statute) to protect anyone's privacy—weighing against an exemption. *See* Fisher Broad. Seattle TV LLC d.b.a. KOMO 4 v. City of Seattle, et al., No. 87271-6, Concurrence Slip. Op. at 3 (Wash. Sup. Ct. June 12, 2014) (J. McCloud, concurring) ("the fact that [a] statute allows [agency] officers to eventually distribute the recording to the public also undermines the claim that [the statute] was enacted to protect anyone's privacy."). The Legislature enacted those election statutes to ensure ballot *security*, which is of no concern here. *See* Section VI.B.2, above. To ensure Article 6 section 6's guarantee of absolute secrecy, the Legislature forbids the creation or maintenance of any record which could undermine ballot secrecy in the first place. RCW 29A.08.161.

Because viewing ballots is expressly available to the public—*see e.g.* RCW 29A.64.030; RCW 29A.64.041(3) ("Witnesses shall be permitted to observe the ballots…"); RCW 29A.68 *et seq.*—ballots are not "exempt" under the Act. Fisher, No. 87271-6, Concurrence Slip Op. at 5-

7 (J. McCloud, concurring) (by definition, "'exempt' material is material that can *never* be disclosed." (emphasis added)). Moreover, neither RCW 29A.60.110 or the other statutes cited even mention the PRA, showing the legislature did not intend them to provide an exemption. *See id.*, Slip. Op. at 13 (finding a lack of reference to the Act significant when analyzing whether a statute provides an exemption).

Finally, the records requested are "elections records," expressly "**available to the public upon request**." RCW 29A.04.230. The Legislature intended the public to have access to elections records and to provide oversight to the election process.

2. RCW 29A. 60.110 and RCW 29A.68, *et seq*. Do Not Provide Exemptions

The counties wrongly argued that Plaintiff "requested records so that he could challenge the election, [so], he needed to obtain a court order [in an election dispute]..." CP 204 at lines 1-3; CP 173 (citing RCW 29A.60.110). The counties miss the mark for several reasons.

First, the PRA is clear: "Agencies shall not distinguish among persons requesting records, and such **persons shall not be required to provide information as to the purpose for the request**, [except for very limited situations not relevant here]," **making such purposes "irrelevant."** Koenig v. City of Des Moines, 158 Wn.2d 173, 190, 142

P.3d 162 (2006) (citing RCW 42.17.270, recodified as 42.56.080); *see also* King Co. v. Sheehan, 114 Wn. App. 325, 341 (Div. 1, 2002) ("[a citizen's] intended use of the information cannot be a basis for denying disclosure."). By relying on a purported "purpose" for Plaintiff's request, the counties unlawfully withheld the records.[33]

Second, "the fact that [information or documents] are readily available from another source is not a reason to deny a request for disclosure." Limstrom, 136 Wn.2d at 615 (citing Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132, 580 P.2d 246 (1978)). Any procedures for viewing cast ballots as part of an election contest or dispute would therefore not apply to the current facts and would not be exclusive. Those procedures are contained in RCW 29A.68, *et seq.*, and require a court to prevent and/or correct election fraud and errors when shown. *See* RCW 29A.68.011; RCW 29A.68.020. The procedures provide one safeguard against fraud and errors by permitting the contest of an election where there is evidence of error, but it does not contain a PRA exemption.[34]

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[33] The counties' assertion is also factually wrong. Mr. White requested the records at issue to increase public involvement with the election process, increase oversight, and avoid errors, fraud or abuse by election officials who would know the public is watching— not to challenge or contest the election. CP 143 at ¶ 8.

[34] *See* PAWS II, 125 Wn.2d at 262 ("[I]n the event of a conflict between the [Public Records] Act and other statutes, the provisions of the Act govern." (citing Public Disclosure Act, RCW 42.17.920)); RCW 42.56.030.

The counties' reliance on Deer v. DSHS, 122 Wn. App. 84 (Div. 2, 2004) to the contrary is misplaced, conflating the court's two holdings. In Deer, the requestor sought copies of juvenile dependency records, which contained sensitive personal information, in contrast with the records here, which should be anonymous. 122 Wn. App. at 91. The Court of Appeals held that a statute exempted production under the PRA "by strictly limiting the types of juvenile records that an agency may release and the parties to whom it may release them, thereby preserving 'anonymity and confidentiality.'" *Id*; *see also* RCW 13.50.100(2) ("Records covered by this section shall be confidential and shall be released only pursuant to this section…"—an explicit exemption, unlike here). The court finding an exemption had nothing to do with an alternative means of requesting the records, as the counties contend. Deer, 122 Wn. App. at 91. The court discussed the alternative means of access solely to evaluate whether the PRA exemption already identified "conflict[ed] with the [PRA's] purpose of holding public officials and institutions accountable and providing access to public records." *Id.* at 92. An alternative means of requesting records does not create an exemption.

Indeed, Deer is also distinguishable because the information contained in the records requested is completely different. The Deer court found Chapter 13.50 RCW to be a PRA exemption in part because it

would exempt "only those public records most capable of causing substantial damage to the privacy rights of citizens." Deer at 122 Wn. App. at 91 (which consisted of deeply personal information related to juvenile dependency battles). In contrast, as discussed above, the records Plaintiff requests should be anonymous and would not damage the privacy rights of citizens at all. *See* RCW 29A.08.161.

3. Plaintiff's Request Is Not Impossible to Fulfill and Defendants Need Not Create New Records

It is clear that the requested records exist and must be produced. The counties' contention that there are no "ballot images" stored digitally is demonstrably false and self-contradictory. *See* CP 165; 196. The Superior Court erred in disregarding relevant evidence on this point.

The counties' own words show they can simply "screen print" ballot images from a computer displaying the image. CP 184 at lines 17-21; *See also* CP 182 at lines 15-17 (ballots are "scanned and digitally communicated to a computer" and "*ballot images* can be 'resolved'" in a computer program—a process where a human examines a *ballot image* on a computer screen to make sure the program will read it correctly); *Id.* at line 17-18 (Resolving the image "does not change the *image*").

The ability to view digital images of the scanned ballots on a computer screen shows that the image files exist, even if they may exist in

a format not typically readable on a home computer. The counties maintain the ability to use the existing image files to print copies of the images and/or save them as PDF or Word documents. CP 184 (indicating ability to print the images or save them as those formats). The Superior Court ignored this evidence and lacked any basis—other than the counties' contradicted and self-serving statements to the contrary—for its "assumption" that the digital files cannot be copied as readable images. CP 22. Digital images of ballots, created by the counties with off-the-shelf scanners, exist, are retrievable, printable and convertible.

The Counties' statement that "the data consists of 1s and 0s, not images," or that the images may be encrypted, does not show otherwise. CP 184.[35] Digital images are always composed and stored as binary code

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[35] *See* WAC 434-662-040 ("**Electronic records must be retained in electronic format and remain usable, searchable, retrievable and authentic for the length of the designated retention period**…); WAC 434-662-070 ("**If encryption is employed on public records, the agency must maintain the means to decrypt the record for the life of the records**…" (emphasis added)). Again, the counties are afforded a presumption of regularity in maintaining its electronic records according to these rules, and the Court should presume, as a matter of law, that the counties maintain the means to retrieve and decrypt the images at issue. Gallego, 276 F.2d at 917.

The counties' reference to a "proprietary format" in which the records are stored also cannot absolve it of its duty under the PRA. *See* CP 64 at line 13. RCW 29A.36.111(2) expressly forbids election officials from entering into a contract in which ballot information is proprietary. The counties needed to convert the digital images and provide copies under the PRA.

(1s and 0s), yet still "exist" as public records for copying under the PRA.[36] *See* RCW 42.56.010(4) (public records include "data compilations from which information may be obtained or translated."); Fisher Broadcasting, No. 87271-6, slip op. at 9 ("This broad definition [of "public record"] includes electronic information in a database. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a [new] record." (citations omitted)). The counties confuse the concept of different "records" with different "formats."[37]

4. Plaintiff's Request Was Not Conditioned on the Government Halting the Election

The Superior Court erred in concluding Plaintiff's request placed conditions on the use of the requested records and would have necessarily disrupted the election. *See* CP 21-23. Plaintiff placed no such condition on his request and showed great deference to the smooth operation of the November 2013 election. CP 222 ("I realize an election is your busiest

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[36] "Digital" necessarily means "of or relating to information that is stored in the form of the numbers 0 and 1." Merriam-Webster Online Dictionary (http://www.merriam-webster.com/dictionary/digital).

[37] The rule that agencies need not create new records in response to a PRA request was incorporated from federal FOIA case-law, which relieved agencies of having to aggregate information/data from numerous records into centralized lists, graphs or charts which did not already exist. *See* Smith v. Okanogan County, 100 Wn.App. 7, 14, 994 P.2d 857 (Div. 3 2000). It does not relieve agencies of their duty to convert, digitally copy, photo-copy or print copies of already existing records for public production.

most demanding time of year. I am trying to tailor my request to minimize and automate county efforts **without disruption of the election**."). Indeed, Plaintiff proposed what he characterized as a "reasonable" schedule for production, where the counties' final responses would come "after certification" of the election. CP 221 (modelled after a previous arrangement with Clark County).

The Superior Court's confusion may have arisen from Plaintiff's request for images of "[d]igital image files of all pre-tabulated ballots received, cast, voted, or otherwise used" *See* CP 220. "Pre-tabulated ballots" refers to the time the digital images were *created*, not a demand for production before ballots are tabulated. *Id.* By framing his request this way, Plaintiff sought to ensure his request would encompass digital images of "rejected" ballots, which are never tabulated but are scanned by the counties upon receipt (pre-tabulation). *See* RCW 29A.60.040; RCW 29A.60.050; *see also* CP 220-222 (Plaintiff requested copies of ballot images "whether to be tabulated or not.").

In addition, the PRA contemplates situations like this, where agency compliance may take time—agencies may provide copies of records on an installment basis. RCW 42.56.080. The counties failed to produce the records at all, in violation of the Act.

5. Administrative Inconvenience Does Not Exempt the Records

Additionally, any hardship associated with extracting, printing or copying records for the public does not excuse the counties from producing the records. "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); *see also* Rental Housing Ass'n of Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) ("**Administrative inconvenience or difficulty does not excuse strict compliance with the PRA**." (citation omitted)).

The Superior Court erroneously relied on the counties' burden in converting the digital images to a readable format.[38] *See* CP 21-23. The counties needed to take the time and produce the records.[39] The Supreme Court's recent ruling in Fisher is instructive. *See* Fisher, No. 87271-6,

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[38] In fact, administrative rules promulgated to ensure the "preservation of electronic public records" (Chapter 434-662 WAC) and the availability of those records to the public, mandates that "If encryption is employed on public records, the agency must maintain the means to decrypt the record for the life of the record..." WAC 434-662-070. Maintaining the means to decrypt the records eases the counties' burden.

[39] It is also important to note that Hart Intercivic offers another product, "Verity," which "**make[s] it *easy* to access scanned ballot images** and cast vote records, all while maintaining strict voter privacy." HartIntercivic.com, Verity System Overview page, http://www.hartintercivic.com/content/verity-system-overview#Audit (last visited August 14, 2014) (emphasis added).

Slip Op. at 1-2, 4, 11. In Fisher, to respond to a PRA request, the Seattle Police Department consulted with the company that provided it with dashboard video equipment and the computer system that managed its video storage and retrieval. *Id.* The company said that if the department wanted to use mass copying to comply with a citizen's request for videos, it would require additional computer "programming." *Id.* The Court held the department violated the PRA by claiming it could not comply with the request on that basis. *Id.* As in Fisher, additional programming may make it easier for the counties to comply with Plaintiff's request, but such ease is not necessary for strict compliance with the PRA. It is up to the counties how they want to comply with their PRA duties.

E. The Counties Violated the PRA's Strict Procedural Requirements

Independent of whether the counties' properly withheld records, their initial response to Plaintiff's request violated the procedural rules of the Act. The PRA specifies detailed requirements for agency responses to PRA requests, which the counties ignored. Court enforcement of these procedural rules, even when not ordering production of records, is critical to keep the Act effective—the PRA "is only as reliable as the weakest link in the chain." Sanders v. State, 169 Wn.2d 827, 846, 240 P.3d 120 (2010) quoting PAWS II, 125 Wn.2d at 269-71). The Superior Court erred by not

strictly applying the procedural requirements of the Act and excusing the counties' insufficient responses.

According to the Act, before responding to requests, Agencies must conduct an "adequate search" for responsive records to facilitate full disclosure. Neighborhood Alliance of Spokane County v. County of Spokane, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). Agencies claiming exemptions to any request (in whole or in part) must compile "a withholding index provided to the requestor." WAC 44.14.08004(6). "[T]he plain terms of the [PRA]...make it imperative that all relevant records or portion be identified with particularity." PAWS II, 125 Wn.2d at 270. "[R]ecords are never exempt from disclosure, only production..." Neighborhood Alliance of Spokane County, 172 Wn.2d at 721.

An agency's response must also include a "statement of the specific exemption authorizing the withholding of the record...and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.201(3). "The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper." WAC 44-14-04004(4)(b)(ii). The Court should hold the counties accountable for their procedural wrongs and deter future violations.

1. Neither County Disclosed All Records Withheld

Plaintiff requested copies of digital images of 1) ballots to be tabulated, 2) ballots not to be tabulated, 3) ballots and ballot declarations, attachments and the emails themselves for votes received by email, 4) ballots and ballot declarations and sheets received by fax or other electronic submission, 5) ballots voted on voting machines, 6) duplicated ballots, 7) other sets of image files of ballots used by the counties in the election, and 8) the original metadata and Properties of each of the requested image files. CP 220. Neither county fully disclosed whether it withheld each of the categories of records requested. The Superior Court erred in finding the counties' vague responses adequate. *See* CP 33.

Skagit provided an exemption log, identifying "images" withheld, but did not specify if any of the withheld images show ballots that were tabulated, ballots that were rejected (i.e. not tabulated), documents related to ballots received by email (and which documents), documents received by fax or other electronic means (and which documents), ballots voted by voting machine, or duplicated ballots. CP 214, 230, 232. Skagit's response left unknown which of the requested records exist and which do not, in violation of the Act. *See* PAWS II, 125 Wn.2d at 270; Neighborhood Alliance of Spokane County, 172 Wn.2d at 721.

In addition, Skagit did not disclose whether metadata and properties related to the requested digital files exist, another PRA violation. The Superior Court erred by excusing Skagit's violation because it asked for "clarification" regarding metadata. *See* CP 31-32. In 2010, the Supreme Court expressly defined "metadata," informing Skagit that it "is most clearly defined as 'data about data' or hidden information about electronic documents created by software programs," including "information about whether a document was altered, [or] what time a document was created." O'Neill, 170 Wn.2d at 143, 147. RCW 42.56.520, which permits agencies to ask for clarifications about unclear requests, was not enacted to permit agencies to avoid their PRA duties when an explanatory definition is readily available. Skagit knew what "metadata" is and feigned ignorance to delay or avoid their duties. Indeed, in its opening brief in the Superior Court, Skagit acknowledged "the [Hart Intercivic, Inc.] software allows for logs of information about images," showing its comprehension. CP 196. The Court should not allow agencies to hide behind RCW 42.56.520 when the meaning of a request is understood—and defined by the Supreme Court. By failing to disclose the metadata and properties withheld, Skagit violated the Act.

Island violated the Act by not providing an exemption log at all. Rental Housing Ass'n, 165 Wn.2d at 540 ("requiring a[n exemption] log

does not *add* to the [PRA's] statutory requirements, but rather effectuates them." (emphasis original)). Instead, Island summarily stated "two voters voted by voting machine," it received "one ballot by fax," "28 e-mailed ballots," had scanned 28,668 ballots as of that date and that "there is metadata associated with each digital image file." CP 234-35. Island's response lacked information about records related to ballots that were tabulated, ballots that were rejected (i.e. not tabulated), ballot declarations and attachments to e-mailed ballots, documents received by fax or other electronic means (and which documents), or duplicated ballots. Nor did Island describe "individually" (Rental Housing Ass'n, 164 Wn.2d at 539) the metadata and properties it withheld. These ambiguous responses do not meet the PRA's strict procedural requirements.

2. Skagit County's Response Did not Contain an Adequate Explanation of Their Claimed Exemptions.

Agency responses to PRA requests must sufficiently explain how their claimed exemptions apply to each withheld record to allow "a requestor to make a threshold determination of whether the claimed exemption is proper." WAC 44-14-04004(4)(b)(ii); RCW 42.56.210(3). Skagit violated this requirement by merely listing statutes and mentioning vague concerns about secure storage of ballots, falling short of the specificity required. *See* CP 230. Skagit's explanation needed to do more

than merely cite a claimed exemption because "[a]llowing the mere identification of a document and the claimed exemption to count as a 'brief explanation' would render [the PRA's] brief-explanation clause superfluous." Sanders, 169 Wn.2d at 846.

The so-called "explanation" provided in Skagit County's response letter was limited to the following:

> We regret that we are unable to provide the digital images that you have requested. It is our understanding that Washington State Laws, specifically RCW 29A.60.110, RCW 29A.60.125 and WAC 434-261-045, which are other laws preventing disclosure pursuant to RCW 42.56.070(1), bar us from providing you the requested records. These Washington Statutes and Administrative Code detail that ballots must remain in secure storage at all times, and may only be opened or accessed for specific authorized purposes.

CP 230. Skagit's response did not explain why "secure" storage provisions exempt records from production at all, and did not explain why such provisions about "ballot" storage apply to the digital images and metadata requested in the first place. *Id.* Plaintiff requested digital "image files," and clarified his request "does not seek to inspect or copy the paper ballots themselves," which explains Plaintiff's confusion over Skagit's imprecise denial. CP 221.

Skagit made no attempt to explain how the laws it cited, which it claimed required "ballots" to remain in secure storage applied to the "digital images" requested. *See* CP 230. For example and in contrast,

Island County cited to the statutory ballot definition (RCW 29A.04.008) and argued (albeit in error) that it applies to copies of digital ballot images. CP 235. "Claimed exemptions cannot be vetted for validity if they are unexplained." Sanders, 169 Wn.2d at 846. Indeed, "[t]he Public Records Act clearly and emphatically prohibits silent withholding by agencies of records relevant to a public records request." PAWS II, 125 Wn.2d at 270. Skagit's response did not contain enough information. The Superior Court erred in failing to rule on this claim. The Court should find Skagit's explanation violated the PRA.

F. Plaintiff is Entitled to Full Recovery of His Reasonable Attorney's Fees and Costs, and the Court Should Impose a Daily Penalty on Defendants.

The PRA provides for Plaintiff's recovery of fees, costs and daily penalties from the counties as a prevailing party. RCW 42.56.550(4); Sanders, 169 Wn.2d 827. Plaintiff is entitled to fees and costs when prevailing on any claim of a PRA violation, including the Act's procedural rules. Sanders, 169 Wn.2d at 848 ("the agency's failure to provide a brief explanation should be considered when awarding costs, fees, and penalties...Such an interpretation serves the PRA's policy of disclosure by providing incentives for the agency to explain its claimed exemptions."); *Id.* At 860 ("The first sentence [of RCW 42.56.550(4)] entitles a prevailing party to costs and reasonable attorney fees for vindicating...'the

right to receive a response.'") (quoting RCW 42.56.550(4)). An award of fees is mandatory, even where an agency has acted in good faith. Amren v. City of Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997). The lodestar method is the appropriate way to calculate attorney fees under the PRA. Sanders, 169 Wn.2d at 869 (citations omitted).

Plaintiff contends the Superior Court erred in denying any of the relief he requested and that the Court should award full recovery of Plaintiff's reasonable attorney fees for all work related to this case.

Plaintiff further requests an award of his reasonable fees and costs from this appeal, *See* PAWS II, 125 Wn.2d at 271 (interpreting RCW 42.56.550(4) to include appellate costs and fees), and the imposition of a daily penalty for each day the counties withheld the records.

For the reasons identified above, Skagit and Island counties have violated the PRA by improperly withholding responsive records and failing to comply with the strict procedural rules for an agency's response. The Court should therefore award Plaintiff White his reasonable attorney fees and costs and impose a daily penalty against the counties.

VII. CONCLUSION

For the foregoing reasons, Plaintiff Timothy White respectfully requests the Court reverse the ruling of the Superior Court, order immediate production of all requested records, award recovery of

Plaintiff's reasonable costs and attorney fees, and impose a daily penalty against the counties for their PRA violations.

Respectfully submitted this 15th day of August, 2014

SMITH & LOWNEY PLLC

By _____
Knoll Lowney, WSBA No. 23457
Marc Zemel, WSBA No. 44325

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:

That on August 15, 2014, I served the foregoing Opening Brief of Appellant to the following by U.S. Mail and e-mail:

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Dated this 15th day of August, 2014, at Seattle Washington.

Jessie C. Sherwood

Jessie C. Sherwood

Appendix A:

Copy of decision:

Marks v. Koch, 284 P.3d 118 (Colo. Ct. App. 2011), *cert denied*, Colo. No. 11SC816 (July 16, 2012).

Neutral
As of: July 3, 2014 1:07 PM EDT

Marks v. Koch

Court of Appeals of Colorado, Division Three
September 29, 2011, Decided
Court of Appeals No. 10CA1111

Reporter: 284 P.3d 118; 2011 Colo. App. LEXIS 1556; 2011 WL 4487753

Marilyn Marks, a resident of the City of Aspen, Colorado, Plaintiff-Appellant, v. Kathryn Koch, Clerk of the City of Aspen, Colorado, Defendant-Appellee.

Subsequent History: Writ of certiorari denied *Koch v. Marks, 2012 Colo. LEXIS 280 (Colo., Apr. 16, 2012)*
Writ of certiorari denied Koch v. Marks, 2012 Colo. LEXIS 464 (Colo., June 21, 2012)

Prior History: [**1] Pitkin County District Court No. 09CV294. Honorable James B. Boyd, Judge.

Disposition: JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS.

Core Terms

ballots, voter, files, election, Marks, voting, candidates, secrecy, municipal election, inspection, cast, provisions, printed, constitutional provision, appellate attorney, tabulation, records, procedures, common meaning, destruction, contest, digital, strings, public disclosure, public record, ballot box, Constitution's, indicates, releasing, requires

Case Summary

Overview

Digital copies of municipal ballots were eligible for public inspection under *Colo. Rev. Stat. § 24-72-203(1)(a)* (2011) because such inspection was not contrary to law under *Colo. Rev. Stat. § 24-72-204(1)(a)* (2011), with the narrow exception of any content that could identify an individual voter and thus contravene the intent of *Colo. Const. art. VII, § 8*. The files were not ballots as contemplated by *Colo. Rev. Stat. § 31-10-902* (2011) and therefore were not subject to the ballot storage and destruction requirements of *Colo. Rev. Stat. § 31-10-616(1)* (2011).

Outcome

Reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1 In evaluating a motion to dismiss under *Colo. R. Civ. P. 12(b)(5)*, a court must accept all averments of material fact as true and view the complaint's allegations in the light most favorable to the plaintiff. Such motions are viewed with disfavor, and a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

HN2 In evaluating a claim based on a request under the Colorado Open Records Act (CORA), *Colo. Rev. Stat. §§ 24-72-200.1 to 24-72-206* (2011), a court does so with the understanding that precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions. Moreover, exceptions to CORA should be narrowly construed.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

HN3 See *Colo. Rev. Stat. § 24-72-203(1)(a)* (2011).

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN4 See *Colo. Rev. Stat. § 24-72-204(1)(a)* (2011).

Governments > Local Governments > Elections

HN5 See *Colo. Const. art. VII, § 8*.

Constitutional Law > State Constitutional Operation

HN6 In giving effect to a constitutional provision, a court employs the same set of construction rules applicable to statutes; in giving effect to the intent of the constitution, the court starts with the words, gives them their plain and commonsense meaning, and reads applicable provisions as a whole, harmonizing them if possible.

Governments > Local Governments > Elections

HN7 Colo. Const. art. VII, § 8 in its first sentence states that no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The plain and commonsense meaning of this clause, by virtue of the term "person," clearly indicates that the identity of an individual voter, and any markings on the ballot that could identify that voter, are to be kept secret. The constitutional provision in its second sentence states that election officials shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. The plain and commonsense meaning of this clause, by virtue of the term "elector," again indicates that an individual voter's identity is to be protected from public disclosure, because this clause coincides with the election officials' viewing of the marked ballots. Hence, the phrase "secrecy in voting," when read in conjunction with the clauses described above, protects from public disclosure the identity of an individual voter and any content of the voter's ballot that could identify the voter. The content of a ballot is not protected, however, when the identity of the voter cannot be discerned from the face of that ballot.

Governments > Local Governments > Elections

HN8 See Colo. Rev. Stat. § 31-10-616 (2011).

Governments > Legislation > Interpretation

HN9 In interpreting a statute, a court's objective is to effectuate the legislative intent, and all related provisions of an act must be construed as a whole. To ascertain the legislative intent, the court looks first to the provision's plain language, giving that language its commonly accepted and understood meaning. When a statute does not define its terms but the words used are terms of common usage, the court may refer to dictionary definitions to determine the plain and ordinary meanings of those words. Because the court may presume that the General Assembly meant what it clearly said, however, where the statutory language is unambiguous, the court does not resort to further rules of statutory construction to determine the statute's meaning.

Governments > Local Governments > Elections

HN10 See Colo. Rev. Stat. § 31-10-902(1) (2011).

Governments > Local Governments > Elections

HN11 Paper ballots, as the term is used in Colo. Rev. Stat. § 31-10-616 (2011), are those paper documents that are to be printed and then possessed by the clerk at least ten days prior to the election.

Governments > Legislation > Interpretation

HN12 All related statutory provisions must be construed as a whole.

Governments > Local Governments > Elections

HN13 See Colo. Rev. Stat. § 31-10-902(3)(a)-(c) (2011).

Governments > Local Governments > Elections

HN14 Colo. Rev. Stat. § 31-10-616(1) (2011), which concerns ballots, requires (among other things) that the ballots be both retained for six months after the election in which they were cast and destroyed by fire, shredding, or burial, or by any other method approved by the appropriate public officials, when the six months are complete. In contrast, the second subsection, which concerns other official election records, does not contain such details but rather requires only that such records be preserved for at least six months. § 31-10-616(2). It would not be appropriate to read into this subsection of the statute any of the intricate procedures required by the first subsection.

Civil Procedure > Appeals > Costs & Attorney Fees

HN15 A statutory award of attorney fees may include reasonable appellate attorney fees.

Counsel: Robert A. McGuire, Attorney at Law, LLC, Robert A. McGuire, III, Denver, Colorado, for Plaintiff-Appellant.

John P. Worcester, City Attorney, James R. True, Special Counsel, Aspen, Colorado, for Defendant-Appellee.

Judges: Opinion by JUDGE FURMAN. Roy and Lichtenstein, JJ., concur.

Opinion by: FURMAN

Opinion

[*119] In this proceeding under the Colorado Open Records Act (CORA), sections 24-72-200.1 to -206, C.R.S. 2011, plaintiff, Marilyn Marks, appeals the district court's judgment dismissing her case for failure to state a claim upon which relief can be granted, pursuant to the motion filed by defendant, Kathryn Koch, the City Clerk of Aspen (Clerk). We reverse and remand for further proceedings.

I. The Public Records at Issue

Because of this case's procedural posture, all facts set forth below are derived from Marks's complaint and viewed in the light most favorable to her.

[*120] The public records Marks seeks to have released under CORA are 2544 digital copies of ballots cast in the May 2009 Aspen mayoral municipal election, in which Marks was a losing candidate. The copies were created as

part of a computerized **[**2]** ballot tabulation system designed for the new instant runoff voting (IRV) procedures of the City of Aspen (City). The IRV procedures were intended to avoid the need for subsequent runoff elections by having voters rank all the candidates and not simply vote for one particular candidate, and then using computer software to determine the winner in a manner simulating an extended runoff voting process.

City engaged TrueBallot, Inc. (TBI), a Maryland corporation, to tabulate the paper ballots under the IRV procedures mandated by City. The new system required Clerk to bring all paper ballots cast by voters to a central location and give them to TBI for tabulation using software designed by TBI to meet the IRV procedures.

TBI's tabulation process had four steps: (1) each paper ballot had to be scanned and the resulting digital photographic image saved as a single computer file in tagged image file format (TIFF) using TBI's software; (2) the software was then used to detect each individual TIFF file's ballot markings to create a raw data string of the voter's rankings of the candidates; (3) the raw data strings were developed into clean data strings; and (4) the clean data strings were interpreted **[**3]** by TBI's software to determine the winner of each race using City's new IRV procedures. Essentially, then, the TIFF files were digital copies of the corresponding paper ballots that voters used to rank the candidates. It is these digital TIFF files that Marks seeks to have released under CORA.

City and TBI took several precautionary steps to assure the integrity of the new computerized tabulation process. They briefly displayed, in whole or in part, each of the 2544 TIFF files on large, public video monitors at the tabulation center at City's city hall; broadcasted selected TIFF files over local television for greater public scrutiny; compared some of the original voter ballots to the data strings those ballots generated, a process open to members of the public; and publicly released both the raw and the clean data strings created by TBI's IRV computer tabulation program.

The record reflects that Clerk, who was then the incumbent clerk for City, was aware of the precautionary measures in place — including the public displaying and broadcasting of the individual TIFF files created from the paper ballots — yet took no action to prevent or alter those measures. Clerk, rather, assisted in **[**4]** the tabulation process by delivering the paper ballots to TBI in a previously agreed-upon manner so that portions of the TIFF files, once created, could be publicly displayed.

Clerk subsequently disclosed that there was a discrepancy between the manual tallies of the paper ballots and TBI's computer-generated data, such that the winner of the mayoral race received more votes than initially stated. Clerk, however, did not publicly disclose this information until nine days after she learned of it — which also happened to be almost a week after the expiration of the statutory deadline to contest the election.

Once Clerk disclosed this information, Marks sought release of all the TIFF files by filing a CORA request with Clerk. Clerk denied Marks' request, asserting that (1) the TIFF files, being duplicates of ballots, were in fact ballots themselves, to be treated in the same manner as the original paper ballots from which they were created; (2) releasing the TIFF files would violate the Colorado Constitution's secrecy in voting requirement, which Clerk interpreted to bar the public disclosure of the contents of ballots; and (3) releasing the TIFF files would also violate *section 31-10-616, C.R.S. 2011* **[**5]** — the ballot storage and destruction provision of the Colorado Municipal Election Code, *sections 31-10-101 to -1540, C.R.S. 2011* — which required Clerk to hold ballots in the ballot box for six months after an election, after which they were to be destroyed.

Marks amended her CORA request to exclude those TIFF files that contained either a write-in candidate or ballot markings Clerk thought might identify a particular voter. Marks' subsequent CORA request was again **[*121]** denied by Clerk for the same reasons as her initial request.

Marks sought a court order to enforce her CORA request. Marks succeeded in obtaining a preliminary injunction preventing the destruction of the TIFF files pending the resolution of her complaint. The preliminary injunction was extended at Clerk's request to include the paper ballots as well as the TIFF files.

The district court granted a motion by Clerk dismissing Marks' complaint for failing to state a claim upon which relief could be granted. The district court accepted Clerk's argument that (1) the TIFF files were ballots; (2) releasing the TIFF files was prohibited by the Colorado Constitution's secrecy in voting provision; and (3) because the TIFF files were **[**6]** ballots, releasing them was prohibited by the Colorado Municipal Election Code's ballot storage and destruction provision.

Marks appeals the district court's judgment dismissing her claim. Both parties also request appellate attorney fees.

II. Standard of Review

HN1 In evaluating a motion to dismiss under *C.R.C.P. 12(b)(5)*, we must accept all averments of material fact as true and view the complaint's allegations in the light most favorable to the plaintiff. *Dorman v. Petrol Aspen, Inc.*,

914 P.2d 909, 911 (Colo. 1996). Such motions are viewed with disfavor, and "a complaint is not to be dismissed unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Id.*

Marks' appeal challenging the dismissal is based on her CORA request seeking release of the TIFF files. ***HN2*** In evaluating a claim based on a CORA request, we do so with the understanding that "[o]ur precedent eschews strict attention to form and mandates a content-based inquiry into CORA disclosure exceptions." Ritter v. Jones, 207 P.3d 954, 959 (Colo. App. 2009). Moreover, exceptions to CORA should be narrowly construed. Freedom Newspapers, Inc. v. Tollefson, 961 P.2d 1150, 1154 (Colo. App. 1998).

CORA's **[**7]** section 24-72-203(1)(a), C.R.S. 2011, states in relevant part that ***HN3*** "[a]ll public records shall be open for inspection by any person at reasonable times, except as provided . . . by law." Section 24-72-204, C.R.S. 2011, states in relevant part:

> ***HN4*** (1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds . . .:
>
> (a) Such inspection would be contrary to any state statute.

Marks contends the right to inspect the TIFF files was not contrary to either (1) the secrecy in voting requirement of article VII, section 8 of the Colorado Constitution; or (2) the Colorado Municipal Election Code. We address each contention in turn.

III. The Colorado Constitution's "Secrecy in Voting" Requirement

Marks contends that because the Colorado Constitution's secrecy in voting requirement extends only to protect the identity of a voter and not the content of his or her ballot — assuming the voter's identity could not be discerned from the content of the ballot — it does not bar the latter from release under CORA. We agree.

Article VII, section 8 of the Colorado Constitution provides in relevant part:

> ***HN5*** All **[**8]** elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

[*122] ***HN6*** In giving effect to a constitutional provision, "we employ the same set of construction rules applicable to statutes; in giving effect to the intent of the constitution, we start with the words, give them their plain and commonsense meaning, and read applicable provisions as a whole, harmonizing them if possible." Danielson v. Dennis, 139 P.3d 688, 691 (Colo. 2006).

The constitutional provision in its fourth sentence **[**9]** uses, but does not define, the phrase "secrecy in voting" by stating that "secrecy in voting" must be preserved, regardless of how the votes cast at any election are received and registered. Because we must read the constitutional provision as a whole, *see* Danielson, 139 P.3d at 691, we look to the prior clauses of the provision, upon which the phrase is dependent, to ascertain the phrase's definition.

HN7 The constitutional provision in its first sentence states that "no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the *person* casting it." Colo. Const. art. VII, § 8 (emphasis added). The plain and commonsense meaning of this clause, by virtue of the term "person," clearly indicates that the identity of an individual voter, and any markings on the ballot that could identify that voter, are to be kept secret. *See* Danielson, 139 P.3d at 691.

The constitutional provision in its second sentence states that election officials "shall be sworn or affirmed not to inquire or disclose how any *elector* shall have voted." Colo. Const. art. VII, § 8 (emphasis added). The plain and commonsense meaning of this clause, by virtue of the term "elector," again indicates **[**10]** that an individual voter's identity is to be protected from public disclosure, because this clause coincides with the election officials' viewing of the marked ballots.

Hence, we conclude that the phrase "secrecy in voting," when read in conjunction with the clauses described above, protects from public disclosure the identity of an individual voter and any content of the voter's ballot that

could identify the voter. *See Danielson, 139 P.3d at 691*. The content of a ballot is *not* protected, however, when the identity of the voter cannot be discerned from the face of that ballot. To the extent the TIFF files do not reveal a particular voter's identity, then, permitting the right to inspect the TIFF files would not be contrary to the "secrecy in voting" provision of *article VII, section 8*.

IV. The TIFF Files Are Not "Ballots"

Marks also contends that, because the TIFF files are not ballots, releasing them would not be contrary to the Colorado Municipal Election Code's ballot storage and destruction provision. We agree.

The Colorado Municipal Election Code's provision for the storage and destruction of "ballots" is outlined in *section 31-10-616*, which provides:

> ***HN8*** (1) The ballots, when not required **[**11]** to be taken from the ballot box for the purpose of election contests, shall remain in the ballot box in the custody of the clerk until six months after the election at which such ballots were cast or until the time has expired for which the ballots would be needed in any contest proceedings, at which time the ballot box shall be opened by the clerk and the ballots destroyed by fire, shredding, or burial, or by any other method approved by the executive director of the department of personnel. If the ballot boxes are needed for a special election before the legal time for commencing any proceedings in the way of contests has elapsed or in case such clerk, at the time of holding such special election, has knowledge of the pendency of any contest in which the ballots would be needed, the clerk shall preserve the ballots in some secure manner and provide for their being kept so that no one can ascertain how any voter may have voted.
>
> (2) The clerk shall preserve all other official election records and forms for at least six months following a regular or special election.

HN9 In interpreting a statute, our objective is to effectuate the legislative intent, and all related provisions of an act **[**12]** must be construed as a whole. *Foiles v. Whittman, 233 P.3d 697, 699 (Colo. 2010)*. To ascertain the legislative intent, we look first to the provision's plain language, giving that language its **[*123]** commonly accepted and understood meaning. *Id.*

When a statute does not define its terms but the words used are terms of common usage, we may refer to dictionary definitions to determine the plain and ordinary meanings of those words. *People v. Daniels, 240 P.3d 409, 411 (Colo. App. 2009)*. Because we may presume that the General Assembly meant what it clearly said, however, where the statutory language is unambiguous, we do not resort to further rules of statutory construction to determine the statute's meaning. *Foiles, 233 P.3d at 699*.

Because the May 2009 Aspen mayoral municipal election used paper ballots, we turn to *section 31-10-902(1), C.R.S. 2011*. It states in relevant part: ***HN10*** "The clerk of each municipality using paper ballots shall provide printed ballots for every municipal election. The official ballots shall be printed and in the possession of the clerk at least ten days before the election." Therefore, ***HN11*** paper "ballots," as the term is used in *section 31-10-616*, are those paper documents **[**13]** that are to be printed and then possessed by the clerk at least ten days prior to the election. *See Foiles, 233 P.3d at 699* (concluding that ***HN12*** all related statutory provisions must be construed as a whole).

We conclude the TIFF files do not meet these criteria. The TIFF files were created after voters had used paper ballots to indicate their voting preferences and after the polling places were closed. In addition, the TIFF files were wholly or partially displayed to the public through multiple media. Only after this process was completed did Clerk take possession of them.

Other provisions of the Colorado Municipal Election Code bolster our analysis. *Section 31-10-902(3)(a)-(c), C.R.S. 2011*, states:

> ***HN13*** (a) The ballots shall be printed to give each voter a clear opportunity to designate his choice of candidates by a cross mark (X) in the square at the right of the name. On the ballot may be printed such words as will aid the voter, such as "vote for not more than one".
>
> (b) At the end of the list of candidates for each different office shall be as many blank spaces as there are persons to be elected to such office in which the voter may write the name of any eligible person not printed on the **[**14]** ballot for whom he desires to vote as a candidate for such office; but no cross mark (X) shall be required at the right of the name so written in.
>
> (c) When the approval of any question is submitted at a municipal election, such question shall be printed upon the ballot after the lists of candidates for all offices. The ballots shall be printed to give each voter a

> clear opportunity to designate his answer by a cross mark (X) in the appropriate square at the right of the question.

The plain language of these provisions indicates that voters are to use the paper ballots to indicate their voting preferences for both candidates and ballot initiatives. The TIFF files, however, were used solely by election officials who, after having created them, retained exclusive possession of them. In contrast with how voters must use paper ballots to indicate their preferences, pursuant to the Colorado Municipal Election Code, the voters in Aspen's May 2009 election did not use the TIFF files for any purpose whatsoever.

Clerk nevertheless contends that *section 31-10-616* constitutes a "contrary state statute" pursuant to which the TIFF files must not be released. *See§ 24-72-204(1)(a)*. We disagree. ***HN14*** The **[**15]** first subsection of *section 31-10-616*, which concerns "ballots," requires (among other things) that the ballots be both retained for six months after the election in which they were cast and destroyed by fire, shredding, or burial, or by any other method approved by the appropriate public officials, when the six months are complete. In contrast, the second subsection, which concerns "other official election records," does not contain such details but rather requires only that such records be "preserve[d] . . . for at least six months." *§ 31-10-616(2)*. We decline to read into this subsection of the statute any of the intricate procedures required by the first subsection. *See Foiles, 233 P.3d at 699*.

Given our reasoning that (1) *section 24-72-204* authorizes the release of public records under CORA absent a constitutional or statutory exception; (2) "secrecy in voting," as **[*124]** used in *article VII, section 8 of the Colorado Constitution*, does not exempt the TIFF files from release under CORA, because that constitutional provision protects only the identity of an individual voter and any content of the voter's ballot that could identify the voter; and (3) *section 31-10-616* does not exempt the **[**16]** TIFF files from release under CORA because the TIFF files are not "ballots," we conclude the TIFF files are eligible for public inspection under CORA, with the narrow exception of any TIFF file containing content that could identify an individual voter and thereby contravene the intent of *article VII, section 8*. *See Freedom Newspapers, Inc., 961 P.2d at 1154*; *cf. § 31-10-1517, C.R.S. 2011* (stating in relevant part, "No voter shall place any mark upon his ballot by means of which it can be identified as the one voted by him, and no other mark shall be placed upon the ballot to identify it after it has been prepared for voting," the violation of which is a misdemeanor).

On remand, the district court shall release the TIFF files to Marks for inspection pursuant to CORA, with the exception of those TIFF files that contain either a write-in candidate or ballot markings that could identify an individual voter. Whether a TIFF file contains ballot markings that could identify an individual voter is a matter within Clerk's discretion to determine.

V. Parties' Requests for Appellate Attorney Fees

Marks requests appellate attorney fees pursuant to *C.A.R. 39.5* and *section 24-72-204(5), C.R.S. 2011*. **[**17]** Marks has prevailed on appeal and has stated a proper basis on which fees may be awarded to her. *C.A.R. 39.5*; *see§ 24-72-204(5)* ("prevailing applicant" may receive award of attorney fees); *Town of Erie v. Town of Frederick, 251 P.3d 500, 506 (Colo. App. 2010)**HN15*** ("A statutory award of attorney fees may include reasonable appellate attorney fees."); *see also Wheeler v. T.L. Roofing, Inc., 74 P.3d 499, 506 (Colo. App. 2003)*. Accordingly, Marks is entitled to her reasonable appellate attorney fees. On remand, and upon Marks' application, the district court shall determine the reasonableness of Marks' appellate attorney fees.

Clerk requests appellate attorney fees in the event she successfully defends the *C.R.C.P. 12(b)(5)* dismissal. Because her defense was unsuccessful, she is not entitled to such fees. *See Wheeler, 74 P.3d at 506*.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

JUDGE ROY and JUDGE LICHTENSTEIN concur.

Appendix B:

Copy of decision:

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

Price v. Town of Fairlee

Supreme Court of Vermont
April 29, 2011, Filed
No. 10-125

Reporter: 2011 VT 48; 190 Vt. 66; 26 A.3d 26; 2011 Vt. LEXIS 47

Timothy K. Price v. Town of Fairlee

Subsequent History: Motion for Reargument Denied May 25, 2011

Prior History: On Appeal from Orange Superior Court. Thomas J. Devine, J.
Price v. Town of Fairlee, 2009 Vt. Super. LEXIS 60 (Vt. Super. Ct., July 20, 2009)

Disposition: The judgment is reversed.

Core Terms

ballots, election, disclosure, records, destroyed, tally, sheets, public record, destruction, preservation, expiration, days, materials, Inspect, seal, construe, provisions, custodian, town clerk, confidential, authorization, exempt, moot, election statute, trial court, narrowly, recount, orderly process, election ballot, public-records

Case Summary

Procedural Posture

In 2008, plaintiff town resident filed a complaint under the Vermont Access to Public Records Act (PRA), *Vt. Stat. Ann. tit. 1, §§ 315-320*, against defendant town in which plaintiff sought ballots and tally sheets from the November 2006 election. The State intervened. The Orange Superior Court (Vermont) granted the State's motion for summary judgment and dismissed the complaint. Plaintiff appealed.

Overview

The court held that the ballots and tally sheets were open to public inspection. It stated that in *Vt. Stat. Ann. tit. 1, § 315*, the PRA expressed a strong legislative policy favoring access to public documents and records, and that its provisions were to be construed liberally in favor of disclosure. Furthermore, *Vt. Stat. Ann. tit. 17, § 2590(d)* permitted—but did not require—the destruction of ballots and tally sheets after the expiration of the preservation period. In the absence of a clear statutory requirement that these election materials remain under seal if not destroyed, the court was constrained to construe the provision narrowly to permit the disclosure promoted by the PRA. The court held that the discretionary authority to destroy ballots and tally sheets after the preservation period had expired under *§ 2590(d)* had to be stayed when a public-records request for the material was filed under *Vt. Stat. Ann. tit. 1, § 318*, and the stay had to remain in effect until the request was resolved. The court held that the trial court did not err in not dismissing the complaint as moot. Although the ballots had been destroyed, the case was capable of repetition yet evading review.

Outcome

The court reversed the decision granting summary judgment in favor of the town and the State.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

HN1 A court's task is to resolve competing statutory constructions, not competing public policies. The latter is the domain of the legislature, which remains free to amend any statutory scheme to more closely conform to the legislative will.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Enforcement > Burdens of Proof

Governments > Legislation > Interpretation

HN2 In adopting the Vermont Access to Public Records Act (PRA), *Vt. Stat. Ann. tit. 1, §§ 315-320*, the legislature reaffirmed the fundamental principle of open government that public officials are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. The PRA thus expresses a strong legislative policy favoring access to public documents and records, and its provisions are to be construed liberally in favor of disclosure. Conversely, a court construes the statutory exceptions to the general policy of disclosure strictly

against the custodians of the records and any doubts should be resolved in favor of disclosure. The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Governments > Legislation > Interpretation

HN3 The exemption under the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320, for records designated confidential or the equivalent "by law" is no exception to the general rule of strict construction favoring disclosure. Vt. Stat. Ann. tit. 1, § 317(c)(1) must be construed narrowly to implement the strong policy in favor of disclosure.

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN4 The relatively short statutory timeframes for election challenges are undoubtedly designed to promote finality. The sealing of election ballots and tally sheets serves a critical function by preserving their integrity and reliability as physical evidence in the event of such a challenge.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN5 The express, overarching goal of the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320, of ensuring public access to review and criticize the performance of public officials, even though such examination may cause inconvenience or embarrassment, plainly must take precedence over preserving electoral "purity" or stability. Vt. Stat. Ann. tit. 1, § 315.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN6 The elections statute permits—but does not require—the destruction of ballots and tally sheets after the expiration of the preservation period. Vt. Stat. Ann. tit. 17, § 2590(d) (ballots and tally sheets shall be retained for a period of 90 days from the date of the election, after which time they may be destroyed). In the absence of a clear statutory provision or purpose requiring that these election materials remain under seal if not destroyed, the Vermont Supreme Court is constrained to construe the provision narrowly to permit the disclosure promoted by the Vermont Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320. There is no contrary intent in the few specific statutes authorizing the unsealing of ballots in certain limited circumstances, such as where a container is damaged, Vt. Stat. Ann. tit. 17, § 2590(c), or in the provisions for disclosure of other election materials, such as "spoiled" ballots, Vt. Stat. Ann. tit. 17, § 2568.

Administrative Law > Governmental Information > Freedom of Information > General Overview

Governments > Legislation > Interpretation

HN7 The Vermont Access to Public Records Act (PRA), Vt. Stat. Ann. tit. 1, §§ 315-320, and the cases construing it are clear that disclosure is the rule, and that any other statute providing for confidentiality or limited disclosure of records "by law" must be strictly construed in deference to that overriding goal.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > General Overview

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN8 Under circumstances where a request under the Vermont Access to Public Records Act (PRA), Vt. Stat. Ann. tit. 1, §§ 315-320, is pending, the destruction of ballots must be treated as unauthorized. The PRA establishes a clear and orderly process for the handling of PRA requests, and there is no basis to exempt this or any similar request from its provisions. Under this procedure, if the custodian considers the record to be exempt from inspection, the custodian must so certify in writing and notify the person making the request of the right to appeal to the head of the agency from the adverse determination. Vt. Stat. Ann. tit. 1, § 318(a)(2). If the denial is upheld, the agency must then notify the person making the request of the provisions for judicial review under the PRA. § 318(a)(3). This orderly process would be circumvented, and the citizen's right to access defeated, if Vt. Stat. Ann. tit. 17, § 2590(d) of the election statutes were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Governments > Local Governments > Elections

Governments > State & Territorial Governments > Elections

HN9 While the custodian may have a good faith belief that the records may be destroyed in reliance upon the elections statute, nevertheless this is precisely the sort of legal conclusion that the review process under the Vermont

Access to Public Records Act, Vt. Stat. Ann. tit. 1, §§ 315-320, was established to determine. Accordingly, the discretionary authority to destroy ballots and tally sheets after the preservation period has expired under Vt. Stat. Ann. tit. 17, § 2590(d) must be stayed when a public-records request for the material is filed pursuant to Vt. Stat. Ann. tit. 1, § 318, and the stay must remain in effect until the request is resolved.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN10 The Vermont Supreme Court is bound to examine any subject potentially affecting the court's jurisdiction. A decision that would not resolve a live controversy would exceed its jurisdiction.

Civil Procedure > ... > Justiciability > Mootness > Evading Review Exception

HN11 To meet the mootness exception for cases capable of repetition yet evading review, two criteria must be satisfied: the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again.

Headnotes/Syllabus

Summary

Appeal by plaintiff from dismissal of action under Access to Public Records Act. Orange Superior Court, *Devine*, J., presiding. *Reversed.*

Headnotes

VERMONT OFFICIAL REPORTS HEADNOTES OFFICIAL REPORTS HEADNOTES

VT1. 1.

Statutes > Generally > Construction

A court's task is to resolve competing statutory constructions, not competing public policies. The latter is the domain of the Legislature, which remains free to amend any statutory scheme to more closely conform to the legislative will.

VT2. 2.

Records > Right to Inspect > Generally

In adopting the Vermont Access to Public Records Act (PRA), the Legislature reaffirmed the fundamental principle of open government that public officials are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment. The PRA thus expresses a strong legislative policy favoring access to public documents and records, and its provisions are to be construed liberally in favor of disclosure. Conversely, a court construes the statutory exceptions to the general policy of disclosure strictly against the custodians of the records and any doubts should be resolved in favor of disclosure. The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure. 1 V.S.A. §§ 315-320.

VT3. 3.

Records > Right to Inspect > Exceptions

The exemption under the Vermont Access to Public Records Act for records designated confidential or the equivalent "by law" is no exception to the general rule of strict construction favoring disclosure. The exemption must be construed narrowly to implement the strong policy in favor of disclosure. 1 V.S.A. § 317(c)(1).

VT4. 4.

Elections > Contests > Generally

The relatively short statutory timeframes for election challenges are undoubtedly designed to promote finality. The sealing of election ballots and tally sheets serves a critical function by preserving their integrity and reliability as physical evidence in the event of such a challenge.

VT5. 5.

Records > Right to Inspect > Particular Records

The express, overarching goal of the Vermont Access to Public Records Act of ensuring public access to review and criticize the performance of public officials, even though such examination may cause inconvenience or embarrassment, plainly must take precedence over preserving electoral "purity" or stability. 1 V.S.A. § 315.

VT6. 6.

Records > Right to Inspect > Particular Records

The elections statute permits — but does not require — the destruction of ballots and tally sheets after the expiration of the preservation period. In the absence of a clear statutory provision or purpose requiring that these election materials remain under seal if not destroyed, the Court is constrained to construe the provision narrowly to permit the disclosure promoted by the Vermont Access to Public Records Act. There is no contrary intent in the few specific statutes authorizing the unsealing of ballots in certain limited circumstances, such as where a container is damaged, or in the provisions for disclosure of other election materials, such as "spoiled" ballots. 1 V.S.A. §§ 315-320; 17 V.S.A. §§ 2568, 2590(c), (d).

VT7. 7.

Records > Right to Inspect > Generally

The Vermont Access to Public Records Act (PRA) and the cases construing it are clear that disclosure is the rule, and that any other statute providing for confidentiality or limited disclosure of records "by law" must be strictly construed in deference to that overriding goal. *1 V.S.A. §§ 315-320*.

VT8. 8.

Records > Right to Inspect > Particular Records

No legislative policy evident from the election statutes, whether considered singly or as a whole, was furthered by maintaining the confidentiality of ballots and tally sheets from a 2006 election. The preservation period for the election in question had expired, the election results were final, and the purpose of maintaining the ballots under seal had been served. *1 V.S.A. § 318*; *17 V.S.A. § 2590(d)*.

VT9. 9.

Records > Right to Inspect > Particular Records

Under circumstances where a request under the Vermont Access to Public Records Act (PRA) is pending, the destruction of ballots must be treated as unauthorized. The PRA establishes a clear and orderly process for the handling of PRA requests, which would be circumvented, and the citizen's right to access defeated, if the statute giving discretionary authority to destroy ballots and tally sheets after the preservation period has expired were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending. *1 V.S.A. § 318*; *17 V.S.A. § 2590(d)*.

VT10. 10.

Records > Right to Inspect > Particular Records

While the custodian may have a good faith belief that the records may be destroyed in reliance upon the elections statute, nevertheless this is precisely the sort of legal conclusion that the review process under the Vermont Access to Public Records Act was established to determine. Accordingly, the discretionary authority to destroy ballots and tally sheets after the preservation period has expired must be stayed when a public-records request for the material is filed, and the stay must remain in effect until the request is resolved. *1 V.S.A. § 318*; *17 V.S.A. § 2590(d)*.

VT11. 11.

Courts > Jurisdiction > Appellate Jurisdiction

The Court is bound to examine any subject potentially affecting its jurisdiction. A decision that would not resolve a live controversy would exceed its jurisdiction.

VT12. 12.

Constitutional Law > Judicial Powers and Duties > Mootness

To meet the mootness exception for cases capable of repetition yet evading review, two criteria must be satisfied: the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again.

VT13. 13.

Constitutional Law > Judicial Powers and Duties > Mootness

The trial court did not err in not dismissing a complaint under the Vermont Access to Public Records Act seeking election ballots and tally sheets as moot. The destruction of the ballots meant that the action to be challenged was a fait accompli, and its duration was over before the issue could be joined in court. The State had not challenged the trial court's findings that plaintiff would likely continue to request access to the Town's past election ballots based on his "continuing interest" in evaluating the performance of the Town's election officials and that the Town's response would likely be the same. *1 V.S.A. § 318*.

Counsel: *Timothy K. Price*, Pro Se, Fairlee, Plaintiff-Appellant.

Frank H. Olmstead of *DesMeules, Olmstead & Ostler*, Norwich, for Defendant-Appellee.

William H. Sorrell, Attorney General, and Jacob A. Humbert, Assistant Attorney General, Montpelier, for Appellee-Intervenor State of Vermont.

Judges: Present: **Reiber, C.J., Dooley, Johnson, Skoglund and Burgess, JJ.**

Opinion by: BURGESS

Opinion

[*P1] [68] [***28] Burgess, J.** The question presented is whether, under the Vermont Access to Public Records Act, ballots and tally sheets from the November 2006 election in the Town of Fairlee are open to public inspection. For the reasons set forth below, we conclude that they are. The trial court judgment to the contrary, therefore, is reversed.

[*P2] The factual and procedural background is as follows. In August 2008, plaintiff, a resident of the Town of Fairlee, filed a pro se complaint in the superior court seeking access to the ballots and tally sheets from the November 2006 election in the possession of the town clerk "before they are in any way tampered with or

destroyed." Plaintiff's stated purpose was to determine whether "the vote totals as tabulated are in agreement with the actual ballot count in all the races, and to learn, if possible, how errors may have happened, [and] to verify the integrity of the voting process in Fairlee." In a contemporaneous letter filed with the court, plaintiff explained that the complaint **[**69]** was prompted by the recount in the 2006 race for State Auditor which revealed that town officials had undercounted eleven votes for one of the candidates. Plaintiff was concerned about the error, and wished to determine whether it was isolated or part of larger pattern for purposes of evaluating the overall performance of the local board of civil authority.

[*P3] The Town moved to dismiss the complaint, alleging that plaintiff failed to state a claim for which relief could be granted because the time for an election contest or recount had long since passed. See *17 V.S.A. §§ 2602(b), 2683(a)* (state and local candidates must file petitions for **[***29]** recount within 10 days of election); *id. § 2603(a), (c)* ("any legal voter" may contest result of election by filing complaint "within 15 days after the election in question, or if there is a recount, within 10 days after the court issues its judgment on the recount"). In conjunction with the Town's motion to dismiss, the State of Vermont, by and through the Office of the Attorney General, moved to intervene in support of the Town's position, stating its view that disclosure of ballots and tally sheets two years after completion of an election was inconsistent with the State's interest in the finality of elections.

[*P4] The pending motions and plaintiff's request for injunctive relief were heard on November 10, 2008. In the course of the proceeding, the trial court observed that plaintiff's complaint was really in the nature of a request for access to the election materials under the Vermont *Access to Public Records Act, 1 V.S.A. §§ 315-320 (PRA)*. Accordingly, the court ruled that plaintiff should be allowed to file an amended complaint for declaratory relief under the PRA and denied the motion to dismiss. As to plaintiff's request for injunctive relief, however, the court noted that under *17 V.S.A. § 2590(d)*, the town clerk was required to retain "all ballots and tally sheets ... for a period of 90 days from the date of the election, after which time they may be destroyed." Because the statute authorized the clerk to destroy the materials after ninety days, the court concluded that there was "no right on the part of a citizen to have access to them" after that time, and as there was "no right" under the statute plaintiff could demonstrate no harm. As the court later explained, it viewed the issue as "whether ballots and tally sheets that remain in the Town Clerk's possession after expiration of the secure [90-day] period are subject to inspection under the Public Records Act ... *if they have not yet been destroyed*." (Emphasis **[**70]** added.) Accordingly, plaintiff's request for injunctive relief was denied.

[*P5] Two days later, on November 12, 2008, plaintiff submitted a request to the Town for disclosure of the election materials under the PRA. The Town's attorney responded by letter indicating that, following the court's denial of the preliminary injunction, the town clerk had indeed destroyed the 2006 ballots and tally sheets "as authorized by law" and that plaintiff's request could not be met "because the documents do not exist." The Town then filed a second motion to dismiss, asserting that the action was moot because the requested materials had been destroyed and were no longer available for disclosure.

[*P6] In early December 2008, the trial court issued a written decision, denying the motion to dismiss. The court acknowledged that the destruction of the election materials had rendered the case moot, since it could no longer grant the relief requested. It concluded, however, that the case fit within an exception to the mootness doctrine for actions "capable of repetition, yet evading review." In this regard, the court found that the time period between a request for records of this nature and their authorized destruction was "too short for the legal issue to be fully litigated" and that the action was likely to recur, plaintiff having indicated an interest in requesting "access to ballots and tally sheets following future elections" and the Town having expressed no intention of responding any differently. See *In re Vt. State Emps. Ass'n, 2005 VT 135, ¶ 12, 179 Vt. 578, 893 A.2d 338* (mem.) (restating principle that exception for matters "capable of repetition yet evading review" may apply where challenged action "was in its duration too short to be fully litigated prior to its cessation or expiration" and there is "reasonable expectation that the same complaining party would be **[***30]** subjected to the same action again" (quotation omitted)). [1]

[*P7] Shortly thereafter, the State moved for summary judgment, asserting that disclosure of the requested materials was prohibited under the "comprehensive statutory framework" governing the conduct of elections in Vermont. Under that scheme, ballots, tally sheets, and other election materials must be "securely sealed" in **[**71]** containers provided by the Secretary of State and returned "to the town clerk, who shall safely store them, and shall not permit them to be removed from his or her custody or tampered with in any way." *17 V.S.A. § 2590(a), (c)*. Furthermore, as noted, "[e]xcept as otherwise provided by federal law, all ballots and tally sheets shall be retained for a period of 90 days from the date of the

[1] The Town later moved to amend the court's decision, asserting that there was no basis for its findings relating to the mootness exception, but the court denied the motion.

election, after which time they may be destroyed; provided, however, that if a court order is entered prior to the expiration of the 90-day period, ordering some different disposition of the ballots, the town clerk shall abide by such order." [2] *Id. § 2590(d)*.

[*P8] The election statutes identify several specific scenarios in which election ballots may be unsealed. If a container "breaks, splits, or opens through handling," the Secretary of State may order the contents moved to new bags. *Id. § 2590(c)*. In addition, a court may order a recount of the ballots in two circumstances: first, where the election results are sufficiently close and the "losing candidate" petitions for a recount within ten days of the election, *id. §§ 2601, 2602(b)*; and second, where "any legal voter" files a complaint within fifteen days after the election, or within ten days after a court-ordered recount, alleging error or fraud sufficient to change the ultimate result, *id. § 2603(a)-(c)*. And, of course, the containers may be unsealed and the ballots and tally sheets "may be destroyed" 90 days after the election. *Id. § 2590(d)*.

[*P9] The election statutes also authorize the public dissemination of certain specific election materials. These include "spoiled" ballots, which after ninety days may be destroyed or "distributed by the town clerk for educational purposes," *id. § 2568*; the "return" or summary sheet showing vote totals, a copy of which shall be made "available to the public upon request," *id. § 2588(c)*; and a copy of the entrance or exit "checklist," which must be retained for a period of at least five years from the date of the election and "made available at cost to the public upon request." *Id. § 2590(e)*.

[*P10] Viewing the elections scheme as a whole, the trial court concluded that it effectively excluded the requested ballots from disclosure under two settled PRA exemptions: as "records which by law are designated confidential or by a similar term," *1 V.S.A. § 317(c)(1)*, **[**72]** and as "records which by law may only be disclosed to specifically designated persons," *id. § 317(c)(2)*. "Given the care with which the Legislature specifically crafted procedures for the sealing, storage, and transportation of ballots after an election," the court concluded, they qualified as records designated confidential "by law" and accessible only to designated persons.

[*P11] The court also ventured that "sound public policy reasons" supported a construction "limiting access to sealed ballots only to the enumerated instances permitted in the election statute," to wit, the **[***31]** "overriding need for finality in elections." While acknowledging that plaintiff's intent was not to challenge any specific election result but rather to hold the Town's election officials "to high standards of accountability," the court reasoned that "the incidental effects of studies such as the one plaintiff hopes to undertake could serve to undermine the public's confidence in the validity of the various elections nonetheless." The strict statutory timeframes for election challenges, the court concluded, were imposed "precisely to prevent re-examination of election results months or years after the fact." Accordingly, the court granted the State's motion for summary judgment and dismissed the complaint. This appeal followed.

[*P12] ***VT[1]*** [1] We emphasize at the outset that ***HN1*** our task is to resolve competing statutory constructions, not competing public policies. The latter is the domain of the Legislature, which remains free to amend this or any other statutory scheme to more closely conform to the legislative will. See *Smith v. Parrott, 2003 VT 64, ¶ 14, 175 Vt. 375, 833 A.2d 843* (holding that resolution of competing "policy concerns" is "more properly left to the Legislature" (quotation omitted)). That said, we approach this particular dispute with the distinct benefit of clear and settled legislative priorities.

[*P13] ***VT[2]*** [2] ***HN2*** In adopting the PRA, the Legislature reaffirmed the fundamental principle of open government that public officials "are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment." *1 V.S.A. § 315*; see *Shlansky v. City of Burlington, 2010 VT 90, ¶ 12, 188 Vt. 470, 13 A.3d 1075*. The PRA thus expresses a strong legislative policy "favoring access to public documents and records," *Wesco, Inc. v. Sorrell, 2004 VT 102, ¶ 10, 177 Vt. 287, 865 A.2d 350*, and its provisions are to be "construed liberally" in **[**73]** favor of disclosure. *Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 106, 624 A.2d 857, 861 (1993)*. Conversely, we construe the statutory exceptions to the general policy of disclosure "strictly against the custodians of the records and any doubts should be resolved in favor of disclosure." *Id. at 107, 624 A.2d at 861* (quotation omitted); see also *Finberg v. Murnane, 159 Vt. 431, 436, 623 A.2d 979, 982 (1992)* ("[W]e must construe the exceptions to the Act narrowly to implement the strong policy in favor of disclosure."). "The burden of showing that a record falls within an exception is on the agency seeking to avoid disclosure." *Wesco, 177 Vt. 287, 2004 VT 102, ¶ 10, 865 A.2d 350*.

[*P14] ***VT[3]*** [3] ***HN3*** The PRA exemption for records designated confidential or the equivalent "by law" is no exception to the general rule of strict construction favoring disclosure. See *Norman v. Vt. Office of Court Adm'r, 2004 VT 13, ¶ 4, 176 Vt. 593, 844 A.2d 769* (mem.) ("We have

[2] Under federal law, records related to elections for federal office must be retained for 22 months. 42 U.S.C. § 1974.

made it clear ... that § 317(c)(1) ... must be construed narrowly to implement the strong policy in favor of disclosure." (quotation omitted)). Thus, we are bound to construe the electoral scheme on which the State and Town purport to rely as narrowly in favor of public disclosure as its text and evident purposes will allow. With that in mind, there is no support for the broad exception they claim. We find, instead, an exception that can be confined to its narrow statutory purpose of ensuring the integrity of Vermont elections while simultaneously permitting public access once that goal is satisfied.

[*P15] ***VT[4]*** [4] To be sure, ***HN4*** the relatively short statutory timeframes for election challenges are undoubtedly designed to promote "finality." The sealing of election **[***32]** ballots and tally sheets serves a critical function by preserving their integrity and reliability as physical evidence in the event of such a challenge. See, e.g., *Qualkinbush v. Skubisz, 357 Ill. App. 3d 594, 826 N.E.2d 1181, 1204, 292 Ill. Dec. 745 (Ill. App. Ct. 2004)* (holding that, for ballots to be admissible in election contest, they must have been kept intact with no opportunity for interference); *Ryan v. Montgomery, 396 Mich. 213, 240 N.W.2d 236, 238 (Mich. 1976)* ("The evident purpose of the [sealing] precautions prescribed in the statute is to preserve the integrity of the ballots, so that, if necessary to resort to a recount thereof, it may be done with the assurance of having the ballots present the identical verity they bore when cast." (quotation omitted)).

[*P16] Therefore, had plaintiff or any other interested citizen filed a public-records request seeking access to ballots during the **[**74]** 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. When that time has run and the election results have been certified, however, the purpose of maintaining the ballots under seal has been fully served, and the confidentiality requirement rendered superfluous. Subsequent disclosure of the ballots and tally sheets can have no effect on the election's outcome or finality.

[*P17] ***VT[5]*** [5] What the State really appears to be arguing here is that, as the trial court found, subsequent disclosure may undermine "the public's confidence" in an election later revealed to contain errors or discrepancies, and that withholding the ballots therefore serves to preserve electoral "purity" or stability. Yet even if that were the unstated purpose of the election statutes — a conclusion we do not reach today — ***HN5*** the PRA's express, overarching goal of ensuring public access "to review and criticize" the performance of our public officials "*even though such examination may cause inconvenience or embarrassment*" plainly must take precedence. *1 V.S.A. § 315* (emphasis added). [3]

[*P18] ***VT[6,7]*** [6, 7] We are also mindful that ***HN6*** the elections statute permits — but does not require — the destruction of ballots and tally sheets after the expiration of the preservation period. *17 V.S.A. § 2590(d)* ("[B]allots and tally sheets shall be retained for a period of 90 days from the date of the election, after which time they may be destroyed."). In the absence of a clear statutory provision or purpose requiring that these election materials remain under seal if not destroyed, we are constrained to construe the provision narrowly to permit the disclosure promoted by the PRA. *Finberg, 159 Vt. at 436, 623 A.2d at 982*. We find no contrary intent in the few specific statutes authorizing the unsealing of ballots in certain limited circumstances, such as where a container is damaged, *17 V.S.A. § 2590(c)*, or in the provisions for disclosure of other election materials, such as "spoiled" ballots, *id. § 2568*. Contrary to the State's claim, this is not a case where two statutory schemes deal with the identical subject matter and we must choose the more "specific" over the "general." *Town of* **[**75]** *Brattleboro v. Garfield, 2006 VT 56, ¶ 10, 180 Vt. 90, 904 A.2d 1157*. ***HN7*** The PRA and the cases construing it are clear that disclosure is the rule, and that any other statute providing for confidentiality or limited disclosure of records "by law" must be strictly construed in deference to that overriding goal. *Norman, 176 Vt. 593, 2004 VT 13, ¶ 4, 844 A.2d 769*.

[*P19] ***VT[8]*** [8] **[***33]** Nor do the several out-of-state decisions cited in the State's brief compel a different conclusion. Each is predicated upon the intersection of elections and public-records laws containing language quite distinct from our own. See, e.g., *In re Decision of State Bd. of Electionsv. N.C. State Bd. of Elections, 153 N.C. App. 804, 570 S.E.2d 897, 898 (N.C. Ct. App. 2002)* (denying public records request for ballots in deference to elections statute "unequivocally provid[ing]" that they could be opened only upon written order of elections board or court). Several, moreover, involved public-records requests within the limited timeframe for election challenges, resulting in a holding that the ballots could not be disclosed without directly contravening their integrity and the purpose of the election statutes. See *Smith v. DeKalb Cnty., 288 Ga. App. 574, 654 S.E.2d 469, 471-72 (Ga. Ct. App. 2007)* (denying public records request for ballot information filed shortly after election under statute requiring that it be kept under seal for at least twenty-four months); *Kibort v. Westrom, 371 Ill. App. 3d 247, 862 N.E.2d 609, 616, 308 Ill. Dec. 676 (Ill. App. Ct.*

[3] As world events regularly demonstrate, moreover, secrecy is no guarantee of political stability or public confidence in the integrity of elections or elected officials.

2007) (denying public records request filed shortly after election and observing that "accommodation of plaintiff's inspection request would have required the Commission to unseal the ballots ... following the tallying and reporting of the votes" and "compromise[d] their integrity so as to render them suspect for purposes of a proceeding to challenge the election"); State ex rel. Roussel v. St. John the Baptist Parish Sch. Bd., 135 So. 2d 665, 668 (La. Ct. App. 1961) (denying public records request for ballots on ground that it would "destroy, or make completely ineffectual, the right given by the election statutes to contest the election"). The case before us is clearly distinguishable; the preservation period for the election in question has expired, the election results are final, and the purpose of maintaining the ballots under seal has been served. No legislative policy evident from the election statutes, whether considered singly or as a whole, is furthered by maintaining their confidentiality.

[*P20] The practical question of enforcement remains to be considered. As noted, the trial court here denied plaintiff's request **[**76]** for a preliminary injunction to preserve the ballots from destruction, reasoning that any right to public access was subject to the Town's discretionary authority to destroy them after ninety days. Not surprisingly, that is precisely what occurred.

[*P21] ***VT[9,10]*** [9, 10] ***HN8*** Under circumstances where a PRA request is pending, however, this destruction must be treated as unauthorized. The PRA establishes a clear and orderly process for the handling of PRA requests, and we discern no basis to exempt this or any similar request from its provisions. Under this procedure, if the custodian "considers the record to be exempt from inspection" the custodian must "so certify in writing" and notify the person making the request of the right to appeal to the "head of the agency" from the adverse determination. 1 V.S.A. § 318(a)(2). If the denial is upheld, the agency must then notify the person making the request of the provisions for judicial review under the PRA. Id. § 318(a)(3). This orderly process would be circumvented, and the citizen's right to access defeated, if § 2590(d) of the election statutes were applied to allow the custodian to unilaterally destroy the requested ballots and tally sheets even when an access request remains pending. ***HN9*** While the custodian may have a good faith belief that the records may be destroyed in reliance upon the elections statute, nevertheless this is precisely the sort of legal conclusion that the PRA review process was established to determine. See Munson v. City of S. Burlington, **[***34]** 162 Vt. 506, 509-10, 648 A.2d 867, 869-70 (1994) (reaffirming principle that statutes which overlap should be construed, where possible, to harmonize their provisions in order to effectuate legislative intent and avoid absurd results). Accordingly, we hold that the discretionary authority to destroy ballots and tally sheets after the preservation period has expired under 17 V.S.A. § 2590(d) must be stayed when a public-records request for the material is filed pursuant to 1 V.S.A. § 318, and the stay must remain in effect until the request is resolved.

[*P22] Contrary to the opinion of our dissenting colleague, this result is not "made up," *post*, ¶ 27, but is necessarily compelled upon reconciling the two competing legislative schemes: one establishing the goal of open government with an express requirement that its provisions be "liberally" construed to that end, 1 V.S.A. § 315, and the other seeming to authorize a purposeless destruction of public records in frustration of that goal. Nor, contrary to the dissent, does our holding brand the town clerk a **[**77]** criminal or subject her to penalties for unauthorized destruction of public records under 1 V.S.A. § 320(b). Obviously, the clerk's actions preceded our instant holding and followed the trial court's denial of an injunction to prevent the records' destruction. See State v. LaBounty, 2005 VT 124, ¶ 4, 179 Vt. 199, 892 A.2d 203 (noting that defendant's right to adequate notice of what conduct may give rise to criminal punishment requires "rule of lenity" in which any statutory ambiguity must be resolved in favor of accused). Further, while the dissent is correct that the records no longer exist in this case and so are practically unavailable as contemplated by 1 V.S.A. § 318(a)(4), we do not subscribe to the suggested corollary that destruction of ballots in the face of the next PRA request must trump access, as it would perpetually beg the question of whether access to ballots requested under the PRA can ever be realized before their destruction. [4] Absent either an evident reason or a direct expression of such intent, we do not understand that the Legislature meant to defeat the PRA in regard to ballots, so the clerk's statutory

[4] Under the dissent's analysis the demand for access would never, except as described below, be ripe for enforcement since the ballots would generally be "in storage" during the preservation period and therefore not immediately accessible under 1 V.S.A. § 318(a)(1) (excepting from immediate inspection a public record "in storage and therefore not available") but still subject to purposeless destruction afterwards. In the event a town denies access, fails to respond "promptly" as directed by 1 V.S.A. § 318(a), or even purports to agree to post-preservation access, the dissent would apparently leave the applicant to obtain, before the preservation period expires, a court order based on a right to access under the PRA and the lack of any town obligation to preserve ballots after ninety days, to prevent destruction of the ballots. See 17 V.S.A. § 2590(d) ("[I]f a court order is entered prior to the expiration of the 90-day period, ordering some different disposition of the ballots, the town clerk shall abide by such order."). Such a procedure is not only cumbersome and costly, but is incompatible with the competing legislative mandate for "free and open examination" of public records not explicitly excluded from disclosure. 1 V.S.A. §§ 315, 317.

discretion to destroy them must yield to a PRA request until otherwise ordered by the superior court.

[*P23] ***VT[11]*** [11] Finally we consider whether the trial court erred in denying the Town's motion to dismiss the complaint as moot. Normally this is an issue we would address at the outset, but the State itself briefed the claim last and expressly declined to assert it at oral argument. The State's diffidence notwithstanding, however, ***HN10*** we are bound to examine any subject potentially affecting the **[**78]** Court's jurisdiction. **[***35]** See *In re Keystone Dev. Corp., 2009 VT 13, ¶ 7, 186 Vt. 523, 973 A.2d 1179* (mem.) (observing that a decision that "would not resolve a live controversy" would "exceed our jurisdiction").

[*P24] ***VT[12,13]*** [12, 13] There is no basis to disturb the trial court's ruling. As noted, the trial court found — despite the destruction of the ballots — that the case qualified for consideration under the settled exception for cases "capable of repetition yet evading review." ***HN11*** To meet this exception, two criteria must be satisfied: the challenged action must be in its duration too short to be fully litigated prior to its cessation or expiration, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *State v. Tallman, 148 Vt. 465, 469, 537 A.2d 422, 424 (1987)*. In the instant case, the destruction of the ballots meant that the action to be challenged was a fait accompli, and its duration was over before the issue could be joined in court.

[*P25] As to the second criterion, the State has not challenged the trial court's findings that plaintiff will likely continue to request access to the Town's past election ballots based on his "continuing interest" in evaluating the performance of the Town's election officials and that the Town's response will likely be the same. These findings are not undermined by the State's claim that, since the Town's conversion to electronic scanning machines to read and tally ballots, "human error" is less likely to occur in the future. Indeed, it is precisely to test such assertions that this action was filed.

[*P26] The trial court was correct to entertain plaintiff's petition, but erred in ruling that the records requested were exempt from disclosure under the PRA and erred in granting summary judgment in favor of the Town and State.

The judgment is reversed.

Dissent by: DOOLEY

Dissent

[*P27] **Dooley, J.**, dissenting. This is an example of creating a right where the governing statute does not provide for it. The right the majority has created is logical for the reasons it states. I agree that it would be good public policy. I cannot agree that we can make it up. Moreover, because the necessary result of the majority's decision is to make the conduct of the town clerk a crime, I think we must proceed very cautiously.

[*P28] **[**79]** As the majority acknowledges, *17 V.S.A. § 2590(d)* authorizes the town clerk to destroy the ballots. It specifically contains an exception that could have applied here — that is, at any time during the period of 90 days after the election, the court could order a different disposition of the ballots. The different disposition is not restricted in the statute; it could have included an examination of the ballots by plaintiff. Of course, plaintiff had to ask for that disposition sufficiently quickly after the election to allow the court to act in the 90-day period, and he failed to do so. The majority calls the procedure under *§ 2590(d)* "cumbersome and costly," *ante*, ¶ 22 n.4, but it is the procedure that the Legislature explicitly created, unlike the procedure created by the majority.

[*P29] The situation here is virtually unique because there is a statutory authorization to destroy a public record. [5] Through *1 V.S.A. § 317a*, Vermont provides **[***36]** that the custodian of a public record shall not destroy it "unless specifically authorized by law." This is the only section of the Vermont *Access to Public Records Act* (PRA) that deals directly with the destruction of a public record.

[*P30] Willful destruction of a public record without authority is a crime. *Id. § 320(c)*. In this case, there is an authorization by law, so a town clerk cannot be charged criminally for destroying the ballots pursuant to *17 V.S.A. § 2590(d)*.

[*P31] The majority holds, however, that there is an exception to the authorization when a public records request has been made for the record. *Section 317a* of the PRA does not provide such an exception, and it is the only section that deals directly with record destruction. Such an exception is not stated anywhere else in the PRA. Instead, the majority infers the exception because the "orderly process" of citizen access "would be circumvented." *Ante*, ¶ 21. I emphasize that the majority infers such an exception because it is not stated anywhere in the statute, even though the authorization to destroy the record is

[5] The majority labels the authorization as "purposeless." *Ante*, ¶ 22 n.4. The statute serves the obvious purpose of bringing finality to elections. As I said in the beginning of this dissent, if the choice for us were between competing policies, I would vote with the majority. But the choice among competing policies belongs to the Legislature, not to this Court.

stated explicitly. This is an implementation choice the Legislature could have made but did **[**80]** not. Even though I agree that the result is good policy, the choice is not for us but for the Legislature.

[*P32] I also emphasize that in reaching its conclusion that the Town has circumvented the orderly process of citizen access, the majority is selective in describing the "orderly process." The statutes it cites all deal with existing public records and access to them. We are dealing here with records that do not exist. In that circumstance, *subsection 318(a)(4)* of the PRA says that "if a record does not exist, the custodian shall certify in writing that the record does not exist," and that certification becomes the extent of the custodian's obligation under the statute. *Subsection 318(a)(4)* obviously trumps procedures cited in the majority opinion that are all based on access to records that actually exist.

[*P33] In this case, the Town followed the letter of the law even as explained by the majority. By the time that plaintiff filed an access to public records request with the Town, the Town responded that there were no records that met the request. *Subsection 318(a)(4)* authorizes exactly that response.

[*P34] The only possible remedy in this case is criminal prosecution of the town clerk under *1 V.S.A. § 320(c)*. I reiterate that we should be cautious in construing a statute to expand the risk of criminal liability with no description of the scope beyond that in an opinion of this Court. There are obvious questions about the scope of a Court-created exception to the authorization to destroy the ballots that can be answered only over time, leaving town officials in a state of uncertainty. This is exactly why the exception the Court has created should instead be created, if at all, by the Legislature, which can define its scope.

[*P35] This opinion comes out during a legislative session in which the Legislature is considering amendments to the PRA. Whatever the outcome of this case, I hope the Legislature will consider the issues confronting us and specifically amend the language of the statutes to more clearly define the interrelationship between the right of public access and the authorization to destroy public records, where it exists.

[*P36] Reluctantly, I must dissent from this Court's decision that the Town of Fairlee violated the PRA as it currently exists.

Appendix C:

Examples of "Explicit" and "Specific" PRA Exemptions in "Other Statutes"

There are no comparably worded statutes which would exempt ballots or scanned ballot images.

Appendix C:
Examples of "Specific" and "Explicit" PRA Exemptions in "Other Statutes"

RCW 2.64.111:

"exempt from the public disclosure requirements of chapter 42.56 RCW during such investigation or initial proceeding"

RCW 7.07.050:

"exempt from the requirements of chapter 42.56 RCW"

RCW 9.41.129:

"shall not be disclosed except as provided in RCW ..."

RCW 10.97.080:

"The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying"

RCW 16.67.180:

"exempt from public disclosure"

RCW 18.32.040:

"exempted from disclosure under chapter 42.56 RCW"

RCW 18.106.320(2):

"confidential and is not open to public inspection under chapter 42.56 RCW"

RCW 18.130.095(1)(a):

"exempt from public disclosure under chapter 42.56 RCW"

RCW 19.28.171:

"confidential and is not open to public inspection under chapter 42.56 RCW"

RCW 19.108.010:

"exempt from the public records disclosure requirements of chapter 42.56 RCW"

RCW 21.20.855:

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 26.23.120(1):

"shall be private and confidential and shall only be subject to public disclosure as provided in subsection (2) of this section"

RCW 28C.10.050(1)(a):

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 29A.08.710(1):

"considered confidential and unavailable for public inspection and copying"

RCW 29A.08.710(2):

"No other information … is available for public inspection or copying"

RCW 29A.08.720(1):

"is not available for public inspection and … shall not be disclosed to the public"

RCW 29A.32.100(1):

"is not available for public inspection or copying until…"

RCW 29A.56.670:

"shall not be available for public inspection or copying"

RCW 30.04.410(e)(3):

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 32.04.220(5):

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 33.04.110(5):

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 40.24.060:

"Neither … shall be included in any list … available to the public"

RCW 41.06.157(4):

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 41.06.160:

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 41.06.167:

"shall not be subject to public disclosure under chapter 42.56 RCW"

RCW 43.22.434(3):

"confidential and not open to public inspection under chapter 42.56 RCW"

RCW 43.43.856(2):

"shall be confidential and not subject to examination or publication pursuant to chapter 42.56 RCW"

RCW 46.20.041:

"exempt from public inspection and copying notwithstanding chapter 42.56 RCW"

RCW 46.20.118(1):

"shall not be available for public inspection and copying under chapter 42.56 RCW"

RCW 48.02.065(1):

"not subject to public disclosure under chapter 42.56 RCW"

RCW 48.32.110(2):

"shall not be open to public inspection"

RCW 48.32.110(4):

"shall not be considered public documents"

RCW 49.17.210:

"shall be deemed confidential and shall not be open to public inspection"

RCW 49.17.250(3):

"shall be deemed confidential and shall not be open to public inspection"

RCW 50.13.015(5):

"This section supersedes any provisions of chapter 42.56 RCW to the contrary"

RCW 50.13.060(8):

"exempt from public inspection and copying under chapter 42.56 RCW"

RCW 50.13.060(11)(b)(iii):

"not subject to disclosure under chapter 42.56 RCW"

RCW 51.16.070(2):

"shall be deemed confidential and shall not be open to public inspection (other than to public employees in the performance of their official duties)"

RCW 66.16.090:

"shall be deemed confidential, and, except subject to audit by the state auditor, shall not be permitted to be inspected by any person whatsoever"

RCW 70.56.050(2)(a):

"shall be subject to the confidentiality protections of those laws and RCW 42.56.360(1)(c)"

RCW 70.148.060(4):

"are not subject to public disclosure under chapter 42.56 RCW"

RCW 72.05.130(1):

"shall not be open to public inspection"

RCW 84.40.020:

"hereby exempted from public inspection"

Appendix D:

Copy of Slip Opinion:

Fisher Broadcasting Seattle TV LLC d.b.a. KOMO 4 v. City of Seattle, et al., No. 87271-6 (Wash. Sup. Ct. June 12, 2014).

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FISHER BROADCASTING–SEATTLE TV LLC dba KOMO 4, Appellant, v. CITY OF SEATTLE, a local agency, and the SEATTLE POLICE DEPARTMENT, a local agency, Respondents.	)	No. 87271-6 En Banc Filed JUN 12 2014

GONZÁLEZ, J.—KOMO news reporter Tracy Vedder made three unsuccessful public records requests to the Seattle Police Department (SPD) relating to "dash-cam" videos taken by SPD officers. We conclude that two of the requests should have been granted.

FACTS

Since 2007, SPD's entire patrol fleet has been equipped with in-car video and sound recording equipment. SPD's recording system was manufactured by COBAN Technologies, a private company that provides both the recording equipment and the computer system that manages at least the

initial video storage and retrieval. The COBAN system was not integrated into SPD's records management system or its computer aided dispatch system, and at least at the time this case arose, recordings could be searched only by "officer's name, serial number, date and time." Clerk's Papers (CP) at 403, 440, 454.

SPD's written policy directs officers to use their in-car video recorders to "document all traffic stops, pursuits, vehicle searches and citizen contacts when occurring within camera range." CP at 88 (SPD Policies and Procedures chapter 17.260). Under this written policy, videos are kept for 90 days unless an officer tags an individual video as "required for case investigation/prosecution," in which case they are kept for at least three years. *Id.* Under SPD policy, videos needed longer than three years should be burned onto a DVD and stored in a relevant case file. Otherwise, videos are scheduled to be destroyed after three years.

In 2010, Vedder made both informal requests for information and a series of formal Public Records Act (PRA), chapter 42.56 RCW, requests. On August 3, 2010, she asked for user and training manuals on the dash-cam video system. SPD denied this request on the grounds the materials were protected under federal copyright law and RCW 42.56.240(1)'s exception for materials essential to effective law enforcement.

On August 4, 2010, Vedder requested "a copy of any and all Seattle police officer's log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present." CP at 96.[1] On August 10, 2010, SPD's public record's officer, Sheila Friend Gray, responded that no relevant records existed.

The next day, Vedder requested "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005 to the present. This list should include, but not be limited to, the officer's name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag." CP at 98. On August 18, SPD denied the request on the grounds that "SPD is unable to query the system in the way you have requested. We can search by individual officer name, date, and time only. We cannot generate mass retention reports due to system limitations. Thus we do not have any responsive records." CP at 99.

On September 1, 2010, Vedder requested "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to the present. The

[1] Vedder's declaration in support of KOMO's motion for summary judgment states that the request was submitted on August 4, 2010, as does Judge Rogers' order on cross motions for summary judgment. CP at 75, 535. The request was sent to SPD by e-mail late afternoon on August 3, 2010. CP at 95-96.

recordings should also include, but not be limited to, corresponding identifying information such as the date, time, location, and officer(s) connected to each unique recording." CP at 110. SPD contacted COBAN for help with this request. COBAN told SPD that such a list could be generated by running a computer script that COBAN was willing to provide for free, but coding the program to enable mass copying of the videos "will take some real programming" and would cost at least $1,500. CP at 239. SPD denied Vedder's third request on October 1, 2010, telling her, "'SPD is unable to query the system to generate a retention report that would provide a list of the retained videos.' Without this capability we are unable to respond to your request. Therefore we have no documents responsive to your request." CP at 254. After Vedder pressed the matter, SPD's attorney told her that the privacy act prevented release of the videos that were less than three years old.

Meanwhile, in February 2011, Eric Rachner requested "a copy of the full and complete database of all Coban D[igital] V[ideo] M[anagment] S[ystem (DVMS)] activity logs in electronic form." CP at 40. He suggested since "Coban DVMS system's database runs on Microsoft SQL [(structured query language)] server, . . . it should be convenient to provide the logs, in electronic form, in their original Microsoft SQL Server format. The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS." *Id.* After working closely with

Rachner, SPD began to provide the records in June. That summer, Rachner showed Vedder what he had received from SPD. According to Vedder, "I was amazed because the COBAN DVMS database provided to Mr. Rachner was exactly the sort of list of videos in electronic format that I had requested on August 11, 2010." CP at 81.

On September 19, 2011, KOMO sued SPD under the PRA for failing to timely produce records in response to Vedder's August 4, August 11, and September 1, 2010 requests, among other things. The next day the SPD gave Vedder a copy of materials it had produced for Rachner. Early in 2012, both parties moved for summary judgment. Judge Rogers found that SPD properly denied Vedder's request for police officer's log sheets and for the videos themselves. However, he found SPD had improperly rejected Vedder's request for the list of videos. The court initially levied a "$25.00 a day fine from the day Mr. Rachner received his first batch of COBAN files to the day Ms. Vedder received her COBAN files," plus fees and costs. CP at 540.[2]

We granted direct review. SPD is supported on review by the Washington State Association of Municipal Attorneys and the Washington Association of Sheriffs and Police Chiefs. KOMO is supported on review by the Washington Association of Criminal Defense Lawyers, the Washington

[2] Later, Judge Rogers clarified the penalty would accrue from the date the request was denied, not the date the materials were provided to Rachner. CP at 840-41.

Defender Association and the Defender Association, and the News Media Entities and Washington Coalition for Open Government.

ANALYSIS

"The PRA mandates broad public disclosure." *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 385, 314 P.3d 1093 (2013) (citing RCW 42.56.030); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). It declares that "[t]he people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." RCW 42.56.030. The PRA is "liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." *Id.* To that end, State and local agencies are required to disclose their records upon request, unless the record falls within an exception. *Gendler v. Batiste*, 174 Wn.2d 244, 251, 274 P.3d 346 (2012) (citing RCW 42.56.070(1)). The agency refusing to release records bears the burden of showing secrecy is lawful. *Sargent*, 179 Wn.2d at 385-86 (citing *Newman v. King County*, 133 Wn.2d 565, 571, 947 P.2d 712 (1997)). The PRA does not, however, require agencies to "'create or produce a record that is nonexistent.'"

Gendler, 174 Wn.2d at 252 (quoting *Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004)).

Agencies must make a sincere and adequate search for records. RCW 42.56.100; *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 720, 723, 261 P.3d 119 (2011). When an agency denies a public records request on the grounds that no responsive records exist, its response should show at least some evidence that it sincerely attempted to be helpful. *See, e.g.*, *Neighborhood Alliance*, 172 Wn.2d at 722.

Our review of both the agency action and the court opinions below is de novo. *Gendler*, 174 Wn.2d at 251 (citing RCW 42.56.550(3)).

1. "OFFICER'S LOG SHEETS"

Vedder requested "a copy of any and all Seattle police officer's log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present." CP at 96. The department responded that it had no relevant records. Judge Rogers found this did not violate the PRA. We agree.

Records requestors are not required to use the exact name of the record, but requests must be for identifiable records or class of records. WASH. STATE BAR ASS'N, PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 4.1(1)-(2) (2006 ed. &

2010 Supp.). The record establishes that "log sheets" specifically referred to paper forms that had not been used since 2002 and that these forms had been destroyed in 2004. Among other things, David Strom, senior warehouser of archival records for the SPD, testified that "log sheets" were "paper forms that officers filled out during their patrols. The 'log sheets' contained areas in which officers entered information regarding calls dispatched via radio, location, clearance code, notes, mileage and vehicle condition." CP at 399. Friend Gray looked for responsive records, was told definitively that "officer's log sheets" referred to a specific class of documents that no longer existed, and communicated her finding to Vedder. We find SPD's response complied with the PRA and affirm Judge Rogers' denial of this claim.

2. "LIST OF ALL RETAINED VIDEOS"

We turn now to Vedder's request for "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005[, including] officer's name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag." CP at 98. Judge Rogers found SPD violated the PRA when it told Vedder it had no responsive records. We agree.

SPD contends that Vedder was asking it to create a new record. This is clearly true to some extent; producing a document that would correlate *all* of

the information Vedder requested would have required mining data from two distinct systems and creating a new document. This is more than the PRA requires. *Citizens for Fair Share v. Dep't of Corrections*, 117 Wn. App. 411, 435, 72 P.3d 206 (2003) (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000)). However, as SPD's later response to Rachner demonstrated, it did have the capacity to produce a partially responsive record at the time it denied her request. It should have done so.

We recognize that neither the PRA itself nor our case law have clearly defined the difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data. Given the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one. But "public record" is broadly defined and includes "existing data compilations from which information may be obtained" "regardless of physical form or characteristics." RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. *Id.*; *see also* WAC 44-14-04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.

Whether a particular public records request asks an agency to produce or create a record will likely often turn on the specific facts of the case and thus may not always be resolved at summary judgment. But for SPD's response to Rachner's request, this might well have been such a case. However, the uncontroverted evidence presented showed that a partially responsive response could have been produced at the time of the original denial. The failure to do so violated the PRA.

In the alternative, SPD argues that Vedder was requesting metadata and that while metadata is subject to the PRA, it must be specifically requested. Br. of Resp't at 33 (citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 151-52, 240 P.3d 1149 (2010)). In *O'Neill*, we defined "metadata" as ""data about data' or hidden information about electronic documents created by software programs." 170 Wn.2d at 143 (quoting Jembaa Cole, *When Invisible Electronic Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata*, 1 SHIDLER J.L. COM. & TECH. ¶ 7 (Feb. 2, 2005)). But Vedder was not seeking to peer beneath some text in an electronic database. She was not requesting metadata in any meaningful sense.

We find the rest of SPD's arguments unavailing. We hold that SPD violated the PRA when it incorrectly told Vedder it had no responsive records and affirm.

3. THE VIDEOS AND THE PRIVACY ACT

We turn now to Vedder's request for "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to the present." CP at 110. After consulting with COBAN, SPD denied this request based on the grounds that it was "'unable to query the system to generate a report that would provide a list of retained videos.' Without this capability we are unable to respond to your request." CP at 254. But SPD had the capability to produce the list, so to the extent that its ability to produce the videos was contingent on its ability to produce the list, its initial response violated the PRA.

SPD also argues it is barred from releasing the videos by RCW 9.73.090(1)(c) of the privacy act. Under the PRA, "other statutes" may exempt or prohibit disclosure of certain records or information. *See Ameriquest Mortg. Co. v. Office of Attorney Gen.*, 170 Wn.2d 418, 440, 241 P.3d 1245 (2010) (quoting RCW 42.56.070(1)). All exceptions, including "other statute" exceptions, are construed narrowly. *Hearst*, 90 Wn.2d at 138-39. Generally, Washington's privacy act requires all parties to a private communication to consent to any recording. RCW 9.73.030. However, some recordings made by police are exempted from disclosure whether or not they record private conservations. Relevantly:

> The provisions of RCW 9.73.030 through 9.73.080[3] shall not apply to police . . . in the following instances:
>
> . . . .
>
> (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. . . .
>
> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.

RCW 9.73.090(1)(c). SPD argues that this statute functions as an "other statute" exception to the PRA. We agree in part, but given the general rule that exemptions are to be interpreted narrowly, RCW 42.56.030, we find this exemption is limited to cases where the videos relate to actual, pending litigation.[4]

The legislature added RCW 9.73.090(1)(c) in 2000. LAWS OF 2000, ch. 195, § 2. It stated that its intent was "to provide a very limited exception to the restrictions on disclosure of intercepted communications." LAWS OF 2000, ch. 195, § 1. Prior to that time, RCW 9.73.090 had authorized certain law enforcement and emergency recordings and restricted their use to "valid police or court activities." LAWS OF 2000, ch. 195, § 2. This amendment and the

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[3] These provisions make intercepting, recording, or divulging private communications unlawful, RCW 9.73.030; establish grounds for a an ex parte court order authorizing interception, RCW 9.73.040; make unlawfully intercepted communications generally inadmissible in court, RCW 9.73.050; create a civil action for damages, RCW 9.73.060; exempt certain common carriers and 911 calls, RCW 9.73.070; and make violation of the act a gross misdemeanor, RCW 9.73.080.

[4] We note that RCW 9.73.090(1)(c) is not a complete bar to release of videos pertaining to ongoing litigation. It does not bar release of videos to all parties involved in that litigation and may not be a bar to release pursuant to a court order.

statement of legislative intent strongly suggest that the legislature intended to provide greater guidance on the use of these authorized recordings. It does not suggest the legislature intended to create a broad categorical exception to the PRA. We note that neither the statute nor even the bill reports mention the PRA or its predecessor. *See, e.g.*, H.B. REP. on H.B. 2876, 59th Leg., Reg. Sess. (Wash. 2006); H.B. REP. on H.B. 2903, 56th Leg., Reg. Sess. (Wash. 2000); RCW 42.56.050, .240. Indeed, exempting recordings from disclosure "until final disposition of any criminal or civil litigation which arises from the event," RCW 9.73.090(1)(c), would be a strange way to protect privacy. Privacy does not evaporate when litigation ends.

Of course, we turn to extrinsic evidence of legislative intent only when the plain language of the statute does not answer the question. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). In determining the plain meaning of a statute, we consider "all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* at 11. In this case, the statute as a whole suggests the legislative goal was neither to instill categorical delay nor protect personal privacy. Instead, the statute as a whole provides a limited exception to the rules against recording and the rules requiring disclosure to protect the integrity of law enforcement investigations and court proceedings. In authorizing "[s]ound recordings that correspond to video images recorded

[without all parties' consent] by video cameras mounted in law enforcement vehicles," RCW 9.73.090(1)(c), our legislature built on an exception to the privacy act that had for decades permitted recording of emergency calls and interviews of persons in custody. LAWS OF 1970, 1st Ex. Sess., ch. 48; LAWS OF 2000, ch. 195. For decades the privacy act has admonished that these "recordings shall only be used for valid police or court activities." LAWS OF 1970, 1st Ex. Sess., ch. 48, §1(2)(d) (codified at RCW 9.73.090(1)(b)(iv)). Context suggests that the legislature's intent in providing that "[n]o sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded" is to give more guidance to agencies attempting to limit their use of these recordings to "valid police or court activities," RCW 9.73.090(1)(b)(iv). So long as "police or court activities" are ongoing, RCW 9.73.090(1)(c) restricts disclosure—most likely to protect those very "police or court activities" recited by the statute. *Accord Sargent*, 179 Wn.2d at 395. Neither the statutory text nor the legislative history suggests that categorical delay was legislative purpose. Delay was simply the means to an end—likely, to avoid tainting pending litigation.

KOMO contends that RCW 9.73.090(1)(c) is not an "other statute" exception to the PRA because it does not provide an alternative method of

obtaining public records. Br. of Appellant at 34 (citing *Deer v. Dep't of Soc. & Health Serv.*, 122 Wn. App. 84, 93 P.3d 195 (2004); *In re Dependency of K.B.*, 150 Wn. App. 912, 210 P.3d 330 (2009)). But while it was true that in both *Deer* and *K.B.* there was an alternative statutory procedure to obtain records, neither case held that was a necessary factor.[5]

We hold that RCW 9.73.090(1)(c) is a limited exception to immediate disclosure under the PRA, but it is one that applies only where there is actual, pending litigation. We reverse and remand for further proceedings on this claim as well.[6]

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[5] KOMO also contends that RCW 9.73.090(1)(c) does not qualify as an "other statute exception" because such other statutes "must exempt or prohibit disclosure of specific public records in their entirety." Br. of Appellant at 30 (citing *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994)) (*PAWS*). This is based on a widespread, but mistaken, reading of that passage in *PAWS*. In that passage, we considered the University of Washington's contention that several other statutes exempted unfunded grant proposals from disclosure *in their entirety*, rather than merely allowed their redaction to protect specific information. *PAWS*, 125 Wn.2d at 261-62. We articulated a test to determine when that was so. *Id.* That test is not helpful for determining whether a specific statute creates *any* exception under the PRA but only for determining whether it exempts a record in its entirety. Notably, *PAWS* itself did not apply that test to determine whether the Uniform Trade Secrets Act, chapter 19.108 RCW, or an antiharassment statute, RCW 4.24.580, applied, but simply looked to their plain language. 125 Wn.2d at 262-63.

[6] KOMO also argues that SPD violated the PRA by not providing a privilege log on the videos it did not disclose. Reply Br. of Appellant at 9 (citing RCW 42.56.210(3)). KOMO raised this in its complaint and summary judgment motion but did not assign error to the trial court's failure to reach it or otherwise address the issue in its opening brief. Given that, we decline to reach it. For similar reasons, we decline to reach whether SPD showed undue favoritism towards Rachner.

CONCLUSION

We hold that SPD complied with the PRA when it declined Vedder's request for officer log sheets. We hold that SPD did not comply with the PRA when it failed to produce a list of retained videos. We hold that RCW 9.73.090(1)(c) may exempt specific videos from public disclosure during the pendency of litigation but does not create a blanket exemption for any video that might be the subject of litigation. KOMO is entitled to attorney fees on the claims it prevailed upon. We remand to the trial court for further proceedings consistent with this opinion.

González, J.

WE CONCUR:

J.M. Johnson, P.T.

Stephens, J.

Gordon McCloud, J.

No. 87271-6

GORDON McCLOUD, J. (concurring)—I agree with the majority's resolution of this case. In particular, I agree that RCW 9.73.090(1)(c) cannot be read to bar the release of the police dashboard camera ("dash-cam") videos at issue here. I write separately to emphasize that the majority's analysis of how the Public Records Act (PRA), chapter 42.56 RCW, might apply if the conversations at issue here were private is unnecessary, because those conversations were not private at all.

This court has clearly held that conversations between police officers and the drivers they stop are not private for purposes of the privacy act, chapter 9.73 RCW. *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 460, 139 P.3d 1078 (2006). So has the Court of Appeals. *State v. Flora*, 68 Wn. App. 802, 806, 845 P.2d 1355 (1992) ("The State urges us to adopt the view that public officers performing an official function on a public thoroughfare in the presence of a third party and within the sight and hearing of passersby

enjoy a privacy interest which they may assert under the statute. We reject that view as wholly without merit.").

For this reason, RCW 9.73.090(1)(c) cannot be characterized as a privacy protection at all. Hence, it is not an "other statute" designed to protect privacy that trumps the PRA's disclosure mandate. Instead, RCW 9.73.090(1)(c) must be read to bar the "law enforcement agency" from making a *unilateral* "agency" determination to release such recordings before litigation based on the subject of these recordings is final. RCW 9.73.090(1)(c). The law enforcement agency, however, has a duty to make a lawful, nonunilateral decision about disclosure. To comply with both its disclosure requirement and its RCW 9.73.090(1)(c) limitation, the law enforcement agency need only get advice from outside that agency—e.g., from the city attorney, the prosecuting attorney, or the attorney general—before making a decision to disclose.

ANALYSIS

I. RCW 9.73.090(1)(c) Does Not Make Conversations Between Law Enforcement Officers and the Drivers They Stop Private

As discussed above, "this court and the Court of Appeals have repeatedly held that conversations with police officers are not private." *Lewis*, 157 Wn.2d at 460 (collecting cases).

If the subject of the dash-cam video is not private for purposes of the privacy act, then it is hard to believe that the legislature limited the reproduction and distribution of such videos (via RCW 9.73.090(1)(c)) to protect privacy. Moreover, as the majority points out, the fact that that statute allows law enforcement officers to eventually distribute the recording to the public also undermines the claim that RCW 9.73.090(1)(c) was enacted to protect anyone's privacy. *See* majority at 13 ("Privacy does not evaporate when litigation ends."). Finally, as this court has made clear, public records from a public agency that are available under court rules regarding discovery (including dash-cam videos, *see* Rules of Criminal Procedure (CrR) 4.7) are not exempt from disclosure under the PRA. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001); *id.* at 913 (Chambers, J., concurring). This also undermines the notion that RCW 9.73.090(1)(c) was designed as a privacy exemption.

The only natural reading of RCW 9.73.090(1)(c)—which is a separate paragraph tucked into a statute otherwise devoted to the different topic of *permitting* recordings—is that it is there to protect the right to a fair trial. (The City agrees. Br. of Resp't at 43-44 ("[Police dashboard camera] recordings play a significant evidentiary role in civil and criminal litigation,

and the Legislature recognized the impact that disclosure of recordings to the public could have if they were released before the subject of the recordings had an opportunity to fully adjudicate any criminal charges or civil claims related to the events that were recorded" (citing Clerk's Papers at 487-88)).

Broad distribution of discovery of any sort prior to litigation can pose problems for the litigant, particularly for the criminal defendant, and the legislature is certainly entitled to adopt measures to try to protect the jury pool from taint. RCW 9.73.090(1)(c) seems like such a measure. It is directed to the "law enforcement agency subject to this section," and it bars that "law enforcement agency"—but no one else—from certain dissemination. RCW 9.73.090(1)(c). It bars that agency's unilateral, unsupervised distribution of police recordings before the trial in which the recordings might become evidence (subject to "final disposition"), and it bars that "law enforcement agency" from "commercial" distribution at any time. It makes sense that the legislature would do this to protect fair trials. *Id.*

II. RCW 9.73.090(1)(c) Does Not Create an "Exemption" from Disclosure

The City, however, argues—and the majority partially agrees—that RCW 9.73.090(1)(c) creates a statutory "exemption" from disclosure, per

the language of RCW 42.56.070(1), trumping the PRA's disclosure mandate. Majority at 12.

But the City doesn't really treat RCW 9.73.090(1)(c) as a true *exemption* from disclosure; "exempt" material is material that can never be disclosed. Instead, dash-cam videos are routinely released to individuals outside the "law enforcement agency." RCW 9.73.090(1)(c). They are available to aid prosecutorial decisionmaking (which occurs outside the "law enforcement agency"). *Id.* They are available to criminal defense counsel and their agents (who work outside the "law enforcement agency"). *Id.* They are even available for admission into evidence in court. And despite the fact that RCW 9.73.090(1)(c) says that these recordings can't be made "available to the public" by the "law enforcement agency," our courtrooms are, of course, open to the public and the press. All that reproduction and disclosure, including disclosure to the public at trial, occurs well before "final disposition of any criminal or civil litigation which arises from the event . . . recorded." *Id.* And it probably also occurs long before the three year time limit adopted by the agency[1] (but not by the legislature) expires.[2]

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[1] I mention the three-year time limit because it shows that even the agency adopting that limit acknowledges that RCW 9.73.100(1)(c) permits distribution to the public at some point. I do not mention the three-year time limit to endorse it as lawful; the media amici have the better argument that "[d]etermining the scope of

Is all that distribution of dash-cam videos to prosecutors, defense counsel, juries, and public courtrooms unlawful or does it violate RCW 9.73.090(1)(c)? No one contends that this disclosure is unlawful, but why not? Why are dash-cam videos subject to disclosure in open court if RCW 9.73.090(1)(c) bars their public dissemination?

The answer is that RCW 9.73.090(1)(c) does *not* bar all public dissemination of dash-cam videos. Instead, the statute, by its plain language, applies *only* to the "law enforcement agency subject to this section." RCW 9.73.090(1)(c). It does not bar prosecutors from using them in open court—

PRA exemptions is the purview of the courts, not the agency holding the records." Br. of Amici Curiae News Media Entities et al. at 5 (citing *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 130, 580 P.2d 246 (1978)).

[2] The City asserts (in its brief responding to the Washington Association of Criminal Defense Lawyers (WACDL)) that RCW 9.73.090(1)(c) is just like many other statutes that completely bar distribution of photos to the public even though the events captured were as public as the events captured by dash-cam videos. A review of the language of the statutes the City cites, though, shows that they use completely different language. They say that the videos and photos taken at tolls and similar places are completely private, not at all open to "the public," and that they cannot ever be distributed to the public except for the listed purposes. *See* Answer to Amicus Curiae WACDL at 12 ("RCW 9.73.090(1)(c) is just one of several statutes restricting or *prohibiting* dissemination of law-enforcement videos and images. The Legislature authorizes photo toll systems but prohibits *any* public dissemination of the images. RCW 46.63.160(6)(c); RCW 47.56.795(2)(b); RCW 47.46.105(2)(b). Likewise, the statute authorizing traffic safety cameras at stoplights, railroad crossings, and school speed zones does not permit *any* public dissemination of the images. RCW 46.63.170(1)(g). These statutes are based on the nature of the recording rather than the place where it is recorded.").

prosecutors are not the "law enforcement agency subject to this statute." *Id.* It does not bar criminal defense lawyers from using them in open court—these lawyers are not the "law enforcement agency" either. *Id.* It does not bar judges from admitting them into evidence in open court or from entering an order to disclose them—judges are obviously not "law enforcement agenc[ies]." *Id.* And it certainly does not bar courts from adopting and enforcing rules compelling disclosure of recordings by "video cameras mounted in law enforcement vehicles." *Id.*; *see, e.g.*, CrR 4.7(a)-(e) (listing discoverable materials); Rules of Evidence (ER) 402 (relevant evidence admissible); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (due process clause requires disclosure of any evidence favorable to the accused).

That means that RCW 9.73.090(1)(c) is not an "other statute which *exempts* or *prohibits* disclosure of specific information or records," creating a categorical "exempt[ion]" from disclosure, at all. RCW 42.56.070(1). It is, instead, a statute about who gets to decide whether to release dash-cam videos before "final disposition." RCW 9.73.090(1)(c). It bars law enforcement agencies from making that decision unilaterally.

This interpretation of RCW 9.73.090(1)(c) is consistent with our prior case law, which holds that RCW 9.73.090 creates special rules applicable solely to police.[3] We have held that police must strictly observe those rules, which require officers to notify drivers and arrested persons that they are being recorded "*even though the conversations involved clearly were not private*." *Lewis*, 157 Wn.2d at 465-66 (emphasis added).

III. Since RCW 42.56.070 Mandates Disclosure of Dash-Cam Videos of Law Enforcement Encounters with the Public and RCW 9.73.090(1)(c) Regulates Who Can Make the Disclosure Decision, the Law Enforcement Agency Must Turn to Counsel from Outside That Agency

If the duty to release dash-cam recordings (RCW 42.56.070) conflicted with the bar against law enforcement agencies making a decision to release these recordings, then the duty to release would prevail. RCW 42.56.030 ("In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.").

But we have a duty to harmonize statutes, if possible. *State v. Fagalde*, 85 Wn.2d 730, 736-37, 539 P.2d 86 (1975) (citing *Publishers Forest Prods. Co. v. State*, 81 Wn.2d 814, 505 P.2d 453 (1973)). The two

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[3] *See Lewis*, 157 Wn.2d at 464-67 ("the legislature enacted the provisions in . . . RCW 9.73.090(1)[(c)] . . . so that police officers would comply with those provisions"); *State v. Cunningham*, 93 Wn.2d 823, 829, 613 P.2d 1139 (1980) (interpreting former RCW 9.73.090(2) (1977), *recodified as* RCW 9.73.090(1)(b), which is "specifically aimed at the specialized activity of police").

statutes at issue here can be harmonized if the "law enforcement agency" makes its decision based on advice of its counsel from outside that agency, rather than unilaterally. RCW 9.73.090(1)(c). Such a requirement is in keeping with current practices; police departments and individual officers routinely consult counsel such as the local city attorney.[4] The outside-agency legal advisor would not be bound by RCW 9.73.090(1)(c)'s procedural limits (though it would be bound to consider other exemptions). And, if the disclosure request ends up in court, the court is not bound by RCW 9.73.090(1)(c)'s limit on "law enforcement agenc[ies]," either. *Id.*

There will certainly be cases—and this could be one—in which a personal privacy interest could justify withholding dash-cam videos from the public. The PRA exempts from production "specific investigative records" where nondisclosure "is essential . . . for the protection of any person's right

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[4] *See In re Estate of Hansen*, 81 Wn. App. 270, 279-80, 914 P.2d 127 (1996) (noting that police department frequently obtained prior approval from Kent City Attorney, even though such approval was not required, before pursuing seizures warrants); *Fann v. Smith*, 62 Wn. App. 239, 241, 814 P.2d 214 (1991) (describing advisory memo from Seattle City Attorney to Police Relief and Pension Fund Trustees); Seattle City Attorney, http://www.seattle.gov/law/precinct_liaisons/ (last visited Apr. 8, 2014) (describing Seattle City Attorney's "Precinct Liaison Program," whose responsibilities include "[p]roviding real-time proactive legal advice for officers in each precinct"). This type of outside consultation is statutorily required for other agencies, as well. *See* RCW 36.27.020(2) (duty of prosecuting attorney to advise "all county and precinct officers"); RCW 43.10.030(4) (duty of Attorney General to "[c]onsult with and advise the several prosecuting attorneys in matters relating to their duties").

to privacy." RCW 42.56.240(1). But this is not a categorical exemption. As with the exemption recently discussed in *Sargent v. Seattle Police Department*, this exemption requires the agency to justify nondisclosure on a case-by-case basis. 179 Wn.2d 376, 394, 314 P.3d 1093 (2013) ("when an agency withholds internal investigation information citing the effective law enforcement exemption, the burden will rest with the agency to prove that specific portions of the internal file are essential to effective law enforcement").

There could be other situations in which nondisclosure would be considered necessary to protect a defendant's fair trial right. *See Seattle Times Co. v. Serko*, 170 Wn.2d 581, 595-96, 243 P.3d 919 (2010) (listing factors for courts to consider when determining whether to compel nondisclosure to protect defendant's fair trial right). But that is not a categorical exemption, either. *Id.* at 596 ("Application of the standard should be done as to each record requested, with the trial court conducting an in camera review.").

CONCLUSION

I therefore concur in the majority's conclusion that RCW 9.73.090(1)(c) does not create a blanket exemption from disclosure. I would

add only that the trial court erred in interpreting RCW 9.73.090(1)(c) as an "other statute" that categorically exempts recordings from chapter 42.56 RCW's disclosure requirement.

No. 87271-6

FAIRHURST, J. (concurring in part/dissenting in part)—I agree with the majority that the trial court correctly concluded that the Seattle Police Department (SPD) did not violate the Public Records Act (PRA), chapter 42.56 RCW, by stating that it had no responsive records to Tracy Vedder's request for "'police officer's log sheets.'" Majority at 7 (quoting Clerk's Papers (CP) at 96). I also agree with the majority that the trial court correctly concluded SPD violated the PRA by stating that it had no responsive records to Vedder's request for "'a list of any and all digital in-car video/audio recordings.'" *Id.* at 8 (quoting CP at 98).

I disagree, however, with the majority's conclusion that SPD violated the PRA by withholding the dashboard camera recordings requested by Vedder. The PRA requires state and local agencies to disclose public records upon request. An exemption to this requirement is a record that falls within an "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). Under Washington's privacy act, chapter 9.73 RCW, police dashboard video recordings are not available to the public "until final disposition of any

criminal or civil litigation which arises from the event or events which were recorded." RCW 9.73.090(1)(c). The majority finds that RCW 9.73.090(1)(c) is an other statute but interprets the prohibition found in RCW 9.73.090(1)(c) as "limited to cases where the videos relate to actual, pending litigation." Majority at 12. While I agree that this provision creates an exemption to the PRA, I disagree with this limitation and rewriting of the statute. I would affirm the trial court on all grounds.

The PRA is a "strongly worded mandate for broad disclosure of public records." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The PRA requires all state and local agencies to "make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [the PRA] or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). That is to say, RCW 42.56.070(1) "incorporates into the [PRA] other statutes which exempt or prohibit disclosure of specific information or records" and that supplement, or do not conflict with, the PRA. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994) (citing former RCW 42.17.260(1) (1992), *recodified as* RCW 42.56.070, LAWS OF 2005, ch. 274, § 103).

RCW 9.73.090(1)(c) specifically prohibits disclosure of video recordings to "the public" and prohibits disclosure to the public "until final disposition of any

criminal or civil litigation."[1] *See* WAC 44-14-06002(1) (distinguishing "exemption" from "prohibit[ion]" on the grounds that an agency has the discretion to disclose exempt public records, but an agency has no discretion to disclose records that are confidential or prohibited from disclosure). RCW 9.73.090(1)(c) does not conflict with the PRA and prohibits disclosure of specific public records in their entirety. Thus, we agree with the majority that RCW 9.73.090(1)(c) is an other statute that operates as an exception to the PRA, prohibiting disclosure of in car law enforcement video recordings.

However, we disagree with the majority at the scope of the exemption. The majority limits the prohibition to "cases where the videos relate to actual, pending litigation." Majority at 12. The majority imposes this limitation citing the proposition that an exemption or disclosure prohibition found in a supplemental statute should be narrowly interpreted to maintain the PRA's goal of free and open examination of public records. *Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 386-87, 314 P.3d 1093 (2013). While we agree that a court should interpret other statute exemptions narrowly, the court must still interpret the other statute in good faith and

[1]While RCW 9.73.090(1)(c) prohibits disclosure to the public, it does not prohibit disclosure of police dashboard video camera recordings to "all parties involved in . . . litigation [relating to the substance of the recording]" or disclosure "pursuant to a court order." Majority at 12 n.4. I would add that if criminal charges are brought against the subjects of such videos, police are required to make such videos available to the subject's counsel under RCW 9.73.100.

may not impose an improperly narrow interpretation simply to reach a desired result. The majority improperly interprets the exemption too narrowly, essentially rewriting the statute in a way that is contrary to legislative intent and the statutory language itself.

"The goal of statutory interpretation is to discern and implement the legislature's intent." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). "In interpreting a statute, this court looks first to its plain language." *Id.* "If the plain language of the statute is unambiguous, then this court's inquiry is at an end." *Id.* We need not go beyond the plain language in this case to see the majority's limitation of the prohibition to "actual, pending litigation" is unduly narrow. Majority at 12.

The language of RCW 9.73.090(1)(c) prohibits disclosing the video recordings to the public until "final disposition of any criminal or civil litigation." "Final disposition" could mean entry of final judgment by a trial court or the exhaustion of appellate remedies. *Id.* Litigation might also be final when the possibility of litigation is foreclosed by a statute of limitations or other procedural mechanism. Although "final disposition" can be "reasonably interpreted in more than one way," it is not ambiguous "simply because different interpretations are conceivable." *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)).

The meaning of "any" is more clear. The word "any" has been given broad and inclusive connotations. *State v. Sutherby*, 165 Wn.2d 870, 880-81, 204 P.3d 916 (2009) (citing *Rosenoff v. Cross*, 95 Wash. 525, 527, 164 P. 236 (1917)); *State ex rel. Evans v. Bhd. of Friends,* 41 Wn.2d 133, 145, 247 P.2d 787 (1952) (the state constitution's prohibition on legislative authority to authorize any lottery or grant any divorce was unambiguously phrased in the broadest sense). The word is not limited by specific reference to a point in time. *Rosenoff*, 95 Wash. at 528 ("The words 'theretofore' and 'any' are broad and inclusive as to time and subject-matter. They negat[e] any intention to make only the violation of existing law a disqualification."). The meaning of the phrase "any order" has been held to be "'so plain as to admit of no argument as to the[] meaning.'" *State ex rel. Tacoma E. R.R. v. Pub. Serv. Comm'n*, 102 Wash. 589, 591, 173 P. 626 (1918) (internal quotation marks omitted) (quoting *State ex rel. Great N. Ry. v. Pub. Serv. Comm'n*, 76 Wash. 625, 627, 137 P.132 (1913) (citing *State ex rel. R.R. Comm'n v. Or. R.R. & Nav. Co.*, 68 Wash. 160, 123 P. 3 (1912))). In *State ex rel. Tacoma Eastern Railroad*, we emphasized that "any" must mean "all" because if it meant anything less, the legislature would have said as much. 102 Wash. at 591-92 ("[W]e are constrained to hold that the legislature, in using the words 'any order,' meant all orders, unless they had specifically excepted therefrom certain orders or class of orders in the foregoing statutes."). This case law demonstrates that there is a uniform, consistent, and thus

plain meaning for the widely used term "any." So we reaffirm Washington precedent and interpret "'any' to mean 'every' or 'all.'" *Sutherby*, 165 Wn.2d at 881 (internal quotation marks omitted) (quoting *State v. Smith*, 117 Wn.2d 263, 271 & n.8, 814 P.2d 652 (1991)); *State v. Westling*, 145 Wn.2d 607, 611, 40 P.3d 669 (2002); *Smith*, 117 Wn.2d at 271 ("Washington courts have repeatedly construed the word 'any' to mean 'every' and 'all.'").

Although the "final disposition" language can be reasonably interpreted in more than one way, none of those ways equate "any" to "actual" and "pending" litigation. Furthermore, the stated purpose of RCW 9.73.090(1)(c) is to prohibit the disclosure of police dashboard video recordings. Requiring law enforcement to publicly disclose dashboard video recordings upon request—except when there is actual, pending litigation—is directly in contradiction to the purpose and language of the statute, i.e., to prohibit public disclosure until final disposition of any criminal or civil litigation. Under the majority's theory, one need only ask for the recordings the day before filing the suit when there was no actual or pending litigation, which would obliterate the purpose of the statute. This court must enforce statutes "in accordance with [their] plain meaning," and the plain meaning does not limit disclosure only to cases with filed lawsuits. *Armendariz*, 160 Wn.2d at 110.

Washington's privacy act aims to protect citizens from having their private conversations recorded without their consent. *See* RCW 9.73.030. However, the

legislature carved out some exceptions to this rule, including allowing police officers to record interactions with citizens with an in car video camera. RCW 9.73.090. In the same provision where it created the exception to the privacy act, the legislature included language preventing such videos from public disclosure. The plain interpretation of this language in the context of the privacy act is that the legislature created the exception to retain some of the privacy rights of the citizen who was videotaped by the police. The majority insists that the real legislative goal was to protect the integrity of law enforcement investigations and court proceedings but makes this inference from looking at the historical development of the provision. Majority at 13-14. When the plain reading of a statute is clear, inferences and historical trends have no place. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-11, 43 P.3d 4 (2002). An intent to exclude these videos from disclosure to retain the privacy of the citizens is clear from the text of the present statutory scheme, and the inquiry should end there.

The trial court and KOMO expressed concern about SPD's policy of destroying dashboard video recordings after three years—the same length of time as the statute of limitations for civil tort claims. It is conceivable that under this policy, SPD could destroy a recording before the recording would be subject to disclosure under RCW 9.73.090(1)(c). This hypothetical situation is not enough, however, to make RCW 9.73.090(1)(c) ambiguous. *See Watson*, 146 Wn.2d at 955 (The courts

"are not 'obliged to discern any ambiguity by imagining a variety of alternative interpretations.'" (internal quotation marks omitted) (quoting *State v. Keller*, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001))). Moreover, KOMO's concerns are unfounded because, under RCW 42.56.100, an agency is prohibited from destroying records scheduled for destruction if the agency receives a public record request "at a time when such record exists." If such a request is made, the agency "may not destroy or erase the record until the request is resolved." *Id.*; *see also O'Neill v. City of Shoreline*, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010) ("[T]he PRA does not allow agencies to destroy records that are subject to a pending records request."). Nothing prevents KOMO from making a public records request and from eventually obtaining dashboard video camera recordings. But KOMO, like other members of the public, must adhere to the delayed disclosure requirements of RCW 9.73.090(1)(c).

RCW 9.73.090 is an other statute that operates as an exemption to the PRA. The plain language of this statute instructs that in car video recordings should not be released to the public until final disposition of any criminal or civil litigation. The SPD retains any video that might be the subject of litigation for three years, and if no litigation has been filed by that time, the video may be destroyed. The legislature has determined that three years is sufficient time either for litigation to be commenced or for the SPD to be sure none will be filed regarding that video. Since

the statute plainly requires any litigation regarding an in car video to be final before any public disclosure, this three year time period is a logical application that ensures compliance with the statute.

CONCLUSION

RCW 9.73.090(1)(c) is an other statute that exempts or prohibits public disclosure of specific information. RCW 9.73.090(1)(c) is not in conflict with the PRA and specifically prohibits public disclosure of police dashboard video camera recordings in their entirety until final disposition of any criminal or civil litigation. The majority's overly narrow interpretation of RCW 9.73.090(1)(c) is contrary to the legislature's intent to prohibit public disclosure of police dashboard video camera recordings until final disposition of any criminal or civil litigation, which is clear from the plain language of the statute. Although "final disposition" has a couple of reasonable interpretations, no interpretation supports concluding that it means "actual, pending litigation." Majority at 12. I would affirm the trial court's conclusion that SPD did not violate the PRA by withholding the video recordings requested by Vedder.

Fairhurst, J.

Owens, J.

Wiggins, J.

Madsen, C.J.