

1
2
3
4
5
6
7
8 STATE OF WASHINGTON
9 SNOHOMISH COUNTY SUPERIOR COURT

10 TIMOTHY WHITE,)
11) No. 14-2-01716-1
12 Petitioner,)
13 vs.) PETITIONER'S BRIEF RE: PUBLIC
14) RECORDS ACT SHOW CAUSE
15 SKAGIT COUNTY; ISLAND COUNTY,) HEARING
16 Respondents.)
17)

18 INTRODUCTION

19 Petitioner Timothy White is a long-time open elections advocate working to ensure
20 public oversight of the democratic process. Mr. White requested copies of ballot images and
21 associated metadata to return the instruments of our democracy to the people. Indeed, the
22 election context is where the Public Records Act and openness are most important. Public access
23 to this election information is critical to defend our democracy and curtail abuses.

24
25 The mandate to produce ballot images under the Public Records Act is a matter of first
26 impression in Washington, but other jurisdictions looking at this duty ruled in favor of
27 production. See Marks v. Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No.
28

29 PLAINTIFF'S RESPONSE BRIEF RE: PRA
SHOW CAUSE HEARING - 1

SMITH & LONEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 11SC816 (July 16, 2012); Price v. Town of Fairlee, 26 A.3d 26 (Vt., 2011). Given the especially
2 strong law favoring production in Washington State, the same result should happen here. The
3 counties have not met their heavy burden to identify any explicit exemptions to the Public
4 Records Act's strongly worded mandate for production.

5 ISSUES

- 6 1. Have Skagit and Island counties met their heavy burden to identify explicit
7 exemptions to production of the records requested under the PRA?
- 8 2. Are the potential exemptions unnecessary to protect individuals' right of privacy or
9 any vital governmental function?
- 10 3. Did Skagit and Island counties' PRA denials comply with the strict procedural
11 requirements of the Act?
- 12 4. Is Petitioner White a prevailing party, entitling him to his reasonable attorney fees
13 and costs? And should the court impose a daily penalty against Skagit and Island
14 Counties for their PRA violations?

15 FACTS

16 Petitioner Timothy White is a longtime open election advocate who spends much of his
17 time pursuing better policies to further the public interest. Second Declaration of Timothy White
18 ("Second White Decl."), ¶¶ 3-6. In furtherance of those efforts, Mr. White successfully brought
19 suit to enjoin the use of San Juan County's uncertified voting system which compromised ballot
20 anonymity, and remains involved with civic organizations such as San Juan County Citizens for
21 Fair Elections. *Id.* Mr. White understands that openness in the election process is a public good,
22 gets citizens involved, and provides oversight against error, fraud and abuse. *Id.* at ¶ 8.

23 On November 6, 2013, Petitioner White submitted a request to Skagit and Island
24 Counties under the Public Records Act for copies of public records, including copies of
25 "electronic or digital image files of all pre-tabulated ballots received, cast, voted or otherwise
26 used in the County's current Nov. 5, 2013 General Election." Declaration of Timothy White in

1 Support of Plaintiff's Show Cause Motion ("First White Decl."), ¶ 2, Ex. 2. Petitioner explained
2 that his request was "time-sensitive" and intended to "obtain a digital copy of each electronic or
3 digital ballot image file created or held by the county." *Id.*, Ex. 2. Petitioner's request further
4 described the records sought to include:

- 5 1. Ballots to be tabulated in whole or in part
- 6 2. Ballots not to be tabulated, with reason for rejection noted
- 7 3. Ballots and ballot declarations, attachments and the emails themselves for votes
8 received by email
- 9 4. Ballots and ballot declarations and sheets received by fax or other electronic
10 transmission
- 11 5. Duplicated ballots
- 12 6. Other sets of image files of ballots used in the election

13 I intend to request as "ballot images" all images created, received or used before
14 tabulation, of contents and enclosures of all Return Envelopes or other voting acts or
15 voting attempts, whether legal "ballots" or not, whether standard or not, whether valid or
16 not, whether to be tabulated or not.

17 This request intends to include the original metadata and Properties of the electronic or
18 digital files requested.

19 *Id.*

20 On December 6, 2013, Skagit County denied Petitioner's request and provided an
21 incomplete exemption log identifying some of the responsive records withheld. *Id.*, ¶5, Exs. 6
22 and 7. The exemption log did not contain any information about the "original metadata and
23 Properties of the electronic or digital files requested." *Id.* On November 12, 2013, Island
24 County denied Petitioner's request without providing an exemption log or index of responsive
25 records at all. First White Decl., ¶¶ 7-8, Ex. 8.

26 Both Skagit and Island County's denials identify certain state statutes they allege apply to
27 Petitioner's request, but do not explain how those exemptions apply to each of the records
28 requested. *Id.*, ¶¶ 5, 8, Exs. 6-8.

1 Petitioner White commenced this PRA case on January 2, 2014. *See* Complaint. To this
2 day, Petitioner White has not received any of the public records he requested. Second White
3 Decl., ¶ 9.

4 ANALYSIS

5 **I. The Counties Face an Extraordinary Burden to Overcome the Strong Presumptions** 6 **for Production Contained in the PRA.**

7 The regime created by the Public Records Act (“PRA” or “the Act”) requires that any
8 ambiguities in the duties of agencies must be resolved in favor of public access to records. The
9 counties have not and cannot meet their burden to overcome this strong presumptions favoring
10 production of public records. The intent of the voters and the Legislature, the text of the Act,
11 and the developed case law all mandate the broadest possible application of the Act and the
12 narrowest reading of its exemptions. When there is any doubt regarding the application of the
13 PRA, the court must find in favor of public access.
14
15

16 The Public Records Act (previously the “Public Disclosure Act”) was passed by popular
17 initiative in 1972 to preserve “the most central tenets of representative government, namely, the
18 sovereignty of the people and the accountability to the people of public officials and
19 institutions.” Progressive Animal Welfare Soc’y v. Univ. of Washington, 125 Wn.2d, 243, 251,
20 884 P.2d 592 (1994) (“PAWS II”). The PRA demands the Act be liberally construed to promote
21 the enumerated policy of public control:
22
23

24 The people of this state do not yield their sovereignty to the agencies that serve them. The
25 people, in delegating authority, do not give their public servants the right to decide what
26 is good for the people to know and what is not good for them to know. The people insist
27 on remaining informed **so that they may maintain control over the instruments that**
28 **they have created.** This chapter shall be liberally construed and its exemptions narrowly
29 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.

1 RCW 42.56.030.

2 The PRA requires all agencies, including counties, to make all public records available
3 for public inspection and copying, unless a specific exemption exists for a particular record.
4 RCW 42.56.070(1); RCW 42.56.010(1).¹ Agencies bear the burden to prove that an exemption
5 applies, which is a difficult task. RCW 42.56.550(1). Despite certain exemptions, “[t]he PRA’s
6 **purpose of open government remains paramount**, and thus, the PRA directs that its
7 **exemptions must be narrowly construed.**” Resident Action Council v. Seattle Housing Auth.,
8 300 P.3d 376, 382 (2013) (emphasis added). For emphasis, “the Legislature takes the trouble to
9 repeat three times that exemptions under the Public Records Act should be construed narrowly.”
10 PAWS II, 125 Wn.2d at 260 (citing the Public Disclosure Act).

13 The Act recognizes that an exemption may exist in an “other statute which exempts or
14 prohibits disclosure of specific information or records,” but those statutes are limited. RCW
15 42.56.070(1). “The rule applies only to those exemptions **explicitly identified** in other statutes;
16 **its language does not allow a court ‘to imply exemptions** but only allows specific exemptions
17 to stand.” PAWS II, 125 Wn.2d at 262 (quoting Brouillet v. Cowles Pub’g Co., 114 Wn.2d 788,
18 800, 791 P.2d 526 (1990)) (emphasis added). “[I]n the event of a conflict between the [Public
19 Records] Act and other statutes, the provisions of the Act govern.” PAWS II, 125 Wn.2d at 262
20 (citing Public Disclosure Act, RCW 42.17.920); *see also* RCW 42.56.030.

23 Yet these directives, designed to limit the *existence* of exemptions, were not enough to
24 ensure the Act’s paramount purpose of openness—the Act further permits courts to *ignore*
25 otherwise applicable exemptions when in the public interest. RCW 42.56.210(2). Indeed, a
26 court may disregard exemptions and allow records to be “inspected or copied if a court finds
27

28 ¹ Here, it is undisputed that the records Petitioner requests are “public records” under the Act. *See generally* Skagit
29 and Island Counties’ Show Cause Briefs.

1 'that the exemption of such records is clearly unnecessary to protect any individual's right of
2 privacy or any vital governmental function." Resident Action Council, 300 P.2d at 382 (quoting
3 RCW 42.56.210(2)) (additional citation omitted).²

4 Further consistent with the "strongly worded mandate for broad disclosure," Limstrom v.
5 Ladenburg, 136 Wn.2d 595, 603, 963 P.2d 869 (1998), even if an exemption applies to
6 information in a public record, "the PRA requires redaction and disclosure of public records
7 insofar as all exempt material can be removed." Resident Action Council, 300 P.3d at 379; *see*
8 *also* RCW 42.56.070(1).

9
10 The statutory mandate of the PRA is clear: any ambiguity in an agency's duty to produce
11 records must be resolved in favor of public access. In light of the regime established by the
12 PRA, in this case the counties cannot meet their heavy burden to justify withholding the
13 requested records.

14 15 **II. Appellate Precedent on Point Favors Production.**

16 While there is no Washington precedent directly on point, appellate decisions with
17 similar facts in other jurisdictions favor production of the requested ballot images. *See* Marks v.
18 Koch, 284 P.3d 118 (Colo. Ct. App., 2011), *cert. denied*, Colo. No. 11SC816 (July 16, 2012);
19 Price v. Town of Fairlee, 26 A.3d 26 (Vt. 2011); *See also* Access to Ballots Voted at an Election,
20 Op. Mich. Att'y Gen. No. 7247 (May 13, 2010)³ ("Voted ballots, which are not traceable to the
21
22
23

24 ² However, a court cannot create or imply exemptions, even to protect privacy or governmental function, which the
25 enumerated exemptions are already designed to protect. PAWS II, 125 Wn.2d at 258 ("[T]he Public Records Act
26 contains no general 'vital government function' exemption."). "The Legislature's response to our opinion in Rosier
27 makes clear that it does not want judges any more than agencies to be wielding broad and malleable exemptions."
28 *Id.* at 259-60 (referring to In re Rosier, 105 Wn.2d 606, 717 P.2d 1353 (1986) (overruled by legislation)). Nor may
Administrative Code or agencies themselves create exemptions to disclosure. WAC 44-14-06002(1) ("[T]he scope
of exemptions is determined exclusively by statute and case law. . . An agency cannot define the scope of statutory
exemption through rule making or policy." (citation omitted)).

29 ³ Available at <http://www.ag.state.mi.us/opinion/datafiles/2010s/op10324.htm>

1 individual voter, are public records subject to disclosure under the Freedom of Information
2 Act...). The Court should follow the lead of Colorado and Vermont and order production of the
3 image files and metadata requested. Marks provides a strikingly similar case where a citizen
4 requested copies of digital ballot images under the Colorado Open Records Act (CORA), a
5 similar statute to the PRA. *Id.* at 119. Price is also similar, where the court ordered citizen
6 access to the ballots themselves. Price, 26 A.3d at 35.

8 In Marks, the City of Aspen used a corporation, like the counties here, which provided a
9 similar service to tabulate ballots using tabulation software. Marks, 284 P.3d at 120. Ballots
10 were similarly scanned with the resulting digital image stored electronically and the agency
11 denied the records request on similar grounds. *Id.*⁴ The Appellate Court rejected the agency's
12 arguments and directed production of the images requested. *Id.* at 121-24.

14 First, the Colorado court found "the Colorado Constitution's secrecy in voting
15 requirement extends only to protect the identity of a voter and not the contents of his or her
16 ballot—assuming the voter's identity could not be discerned from the content of the ballot." *Id.*
17 at 121 (concluding the requirement does not bar the release of ballot contents). While the texts
18 of the Washington and Colorado Constitution's 'secrecy in voting' requirements are not
19 identical, the purpose of each provision is the same. *Compare*, Washington Constitution Art. 6,
20 sec. 6 with Colorado Constitution Art. 7, sec. 8.

22 Second, the Colorado court held the digital images are "not ballots" and that "releasing
23 them would not be contrary to [Colorado's] ballot storage and destruction provision." *Id.* at 122.
24 The Colorado court did not apply the "ballot storage and destruction provision" at all because the
25
26

27
28 ⁴ The agency asserted (1) the images were "in fact ballots themselves," (2) releasing the images would violate the
29 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.

1 requested images were not “ballots.” *Id.* The court did not opine on whether the “storage and
2 destruction provisions” would exempt production if the images were in-fact ballots. *Id.* In Price,
3 the court did classify the records as “ballots” and ordered their production. 26 A.3d at 35.

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

10 The same is true here. The images Petitioner requests were created after voters used
11 paper ballots to indicate their preference and after election officials scanned those ballots. Skagit
12 County Show Cause Brief (“Skagit Brief”) at 2:19-3:21; Island County Show Cause Brief
13 (“Island Brief”) at 2:17-3:14.⁵ Voters did not use the image files for any purpose whatsoever.
14 *Id.* Like in Colorado, the digital copies are not “ballots” because they are not the item with
15 which (or on which) an individual voter records his or her choices in an election. *See* RCW
16 29A.04.008(1)(c).

17 The ruling in Price is also instructive. There, the Vermont Supreme Court ordered
18 production of voted ballots under the Vermont PRA, even though Vermont law mandated ballots
19 “must be ‘securely sealed’ in containers...[and kept with] the town clerk, who shall safely store
20 them and shall not permit them to be removed from his or her custody or tampered with in any
21 way.” Price, 26 A.3d at 30. Citing nearly identical language as that used in Washington

22
23
24
25
26
27
28 ⁵ Here, paper ballots are printed and mailed to registered voters, voters mark their preferences on the paper ballots
29 and return them to the Auditor, paper ballots are then scanned, and the image files are tabulated with a computer
program. Skagit Brief at 2:19-3:21; Island Brief at 2:17-3:14.

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 access to the ballots. *Id.*

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

III. The Counties Need to Produce the Requested Records.

In attempting to meet their burden, the counties misread security directives as secrecy mandates in citing to Title 29A RCW and improperly rely on the Administrative Code to bridge a chasm of logic in treating Washington’s election laws as exemptions under the PRA. The counties have failed to meet their heavy burden to show any explicit exemptions apply to the records requested in light of the strong presumption of public access to public records.

A. The Counties Improperly Withheld Copies of Ballot Digital Image Files and Associated Metadata.

Skagit and Island counties acknowledged over 71,000 and 57,000 digital images responsive to Petitioner’s request, respectively,⁶ as well as metadata associated with each image, but failed to produce any of them, in violation of the PRA. *See* Skagit Brief at 4:24, 5:04-05; Island Brief at 5:01-02; First White Decl., Exs. 6-8.

1. The Counties Have Not Met Their Burden of Showing Explicit Exemptions to Production.

The Counties point to no authority explicitly exempting the requested records from production and ask the court to mistakenly imply a new exemption from the Constitution and the

⁶ Two images for each ballot cast. Skagit Brief at 5:16; Island Brief at 4:07

1 broad security regulations of Title 29A RCW. Under the clear mandate of the PRA, the counties
2 have violated the Act.

3 The Supreme Court has clarified that any exemptions outside the PRA must be
4 “**explicitly identified** in other statutes; [the PRA’s] language does not allow a court ‘to imply
5 exemptions...’” PAWS II, 125 Wn.2d at 262 (citation omitted). “**The PRA’s purpose of open**
6 **government remains paramount**, and thus, the PRA directs that its exemptions must be
7 **narrowly construed.**” Resident Action Council, 300 P.3d at 382 (emphasis added).⁷ It is
8 through this lens that the court must view the counties’ attempt to avoid the PRA’s strongly
9 worded mandate.
10

11 The counties’ assertion that “**Taken as a whole**,” the Constitution, Title 29A RCW and
12 relevant precedent “establish an exemption to the Public Records Act” does not satisfy the rule
13 that exemptions must be explicitly identified in statute. *See* Skagit Show Cause Brief at 2:08-10
14 (emphasis added); PAWS II, 125 Wn.2d at 262. The Court may not imply a PRA exemption
15 for image files and metadata from a broad statutory title “taken as a whole.”
16
17

18 **a. The Constitution Says Nothing About An Exemption and One**
19 **Cannot Be Inferred**

20 While ballot anonymity is certainly important, the counties have provided no evidence
21 that the records requested would permit identification of the person who cast a particular ballot.
22 *See generally* Skagit Brief at 7:18-8:03 ; Island Brief at 7:03-18. The counties simply have not
23
24
25
26
27

28 ⁷ To make its intent clear, “the Legislature takes the trouble to repeat three times that exemptions under the Public
29 Records Act should be construed narrowly.” PAWS II, 125 Wn.2d at 260 (citing the Public Disclosure Act).

1 met their burden under the PRA by making no assertion,⁸ or providing any evidence, that the
2 records Petitioner seeks contain any information destroying the anonymity of the ballot.⁹

3 The Washington Constitution does not place a general veil of secrecy over the election
4 process, as the counties claim. The election process is meant to be open and subject to public
5 oversight. *See* RCW 29A.40.130 (the record of voters who were issued ballots and who returned
6 a ballot is public); RCW 29A.60.170(2) (counting center is open to public observation); RCW
7 29A.64.041 (recounts open to public observation). The counties' claim that production would
8 violate a constitutionally mandated secrecy over elections is unsupported and wrong.¹⁰

9
10 Even if on reply Skagit County identifies information in the requested records which
11 would permit voter identification, Skagit must still produce the images with such identifying
12 information redacted. Resident Action Council, 300 P.3d at 379 ("the PRA requires redaction
13
14

15 ⁸ Island County asserts "voters occasionally sign their name on a ballot, write a clarification statement on a ballot
16 that identifies the voter in some way, or write their own names as a write-in candidate for a position, or in some
17 other way identify themselves on the ballot itself," but does not assert that any particular record requested contains
such information. Reagan Decl. at ¶ 7.

18 ⁹ In fact, Petitioner White intentionally excluded return envelopes, security envelopes or sleeves, and signature
19 images files from his request to avoid receiving any such information. First White Decl., Ex. 2. In addition, the
20 Legislature has established strict guarantees to ensure ballot anonymity. *See*, RCW 29A.36.111(1) (requiring ballot
21 uniformity and that "No paper ballot or ballot card may be marked...in any way that would permit the identification
of the person who voted that ballot."); RCW 29A.08.161 ("No record 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.").

22 ¹⁰ The counties' argument seems to be predicated on a faulty reading of Article 6, sec. 6, which provides:

23 "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to
24 every elector absolute secrecy in preparing and depositing the ballot."

25 This provision mandates that any "method of voting" will ensure a voter's anonymity—in other words, that someone
26 viewing a cast ballot must not be able to identify who voted with that particular ballot. Such guarantee is vital to
ensure free and fair elections.

27 Under the Constitution, the voting methods used in Skagit and Island counties must be a method that secures
28 absolute secrecy to every voter. It follows that viewing digital images of those cast ballots should not compromise
the secrecy of the vote. Yet the counties make the unfounded claim that fulfilling Petitioner's request for digital
ballot images compromises the secrecy-in-voting guarantees of Article 6, sec. 6. *See* Skagit Brief at 10:16-20.

29 Skagit County has not met its burden.

PLAINTIFF'S RESPONSE BRIEF RE: PRA
SHOW CAUSE HEARING - 11

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 and disclosure of public records insofar as all exempt material can be removed.”); RCW
2 42.56.070(1). By failing to timely do so, Skagit violated the PRA.

3 **b. Statutes Providing the Security of Ballots Do Not Create an**
4 **Exemption to Petitioner’s Request.**

5 The counties improperly rely on the ballot-security chapters of Title 29A RCW, which
6 are designed to ensure that people do not tamper with ballots, not to exempt scanned images and
7 associated metadata from production under the PRA.¹¹ The counties have failed to meet their
8 burden to show that those statutes contain an “explicit exemption” under the Act.
9

10 Indeed, the counties have made no assertion, nor provided any evidence that production
11 of the duplicate images would expose ballots to tampering or fraud—nor can they. The
12 requested records are mere copies of ballots. Skagit Brief at 3:21-23; Island Brief at 3:14-16.
13 The ballots themselves are in secure storage and will remain there until destruction. Skagit Brief
14 at 3:23-24; Island Brief at 3:18-20. To comply with Petitioner’s request, the counties need not
15 handle the original ballots at all and may simply copy the files to a DVD or memory stick.
16 Skagit Brief at 3:06-10; Island Brief at 2:24-3:01 (ballots scanned immediately after removal
17 from envelopes). Further, the election has already been certified. Cunningham Decl. at 2:24;
18 Island Brief at 3:13.
19
20

21 In fact, producing the requested records could help expose election errors, tampering or
22 fraud, providing an additional safeguard. Metadata for ballot images may show the date the file
23 was created and the date of any subsequent modification, information which may expose
24
25

26 ¹¹ See RCW 29A.40.160(13) (ballots transported in secure containers); RCW 29A.40.110(2) (ballots stored in
27 “secure locations”); RCW 29A.60.125 (duplicated damaged ballots kept in “secure storage”); RCW 29A.60.110
28 (after tabulation, ballots are sealed in containers until destruction); *see also* Skagit Brief at 7:18-20 (“[i]t is the
29 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.*” (quoting RCW 29A.04.205) (emphasis added))).

1 tampering. *See* O'Neill v. City of Shoreline, 170 Wn.2d 138, 143, 240 P.3d 1149 (2010).¹²

2 Making that information public furthers the goal of fair elections through additional oversight.

3 Nor does the general mandate to provide secure storage for certain records alter the
4 PRA's strongly worded obligation to provide public access. Virtually all public records are
5 stored in secure locations to ensure authenticity, yet agencies must still produce them when
6 requested under the PRA. *See, e.g.*, RCW 40.14.020(4) (The state archivist shall "insure the
7 maintenance and **security of all state public records** and to establish safeguards against
8 unauthorized removal or destruction." (emphasis added)); RCW 42.56.070. There is nothing
9 remarkable about providing for the security of public records, which is not a PRA exemption.
10 The counties have not met their burden. RCW 42.56.550(1).
11
12

13 It is also important to note that the Administrative Code cannot provide exemptions under
14 the PRA. "[T]he scope of exemptions is determined exclusively by statute and case law," so the
15 Court must disregard the Administrative Code at WAC 434-261-045 cited by the counties.
16 WAC 44-14-06002(1); *see also* Servais v. Port of Bellingham, 127 Wn.2d 820, 834, 904 P.2d
17 1124 (1995). WAC 434-261-045 cannot be an exemption under the PRA.¹³
18

19 Finally, it is not clear that the scanned images and metadata themselves are even "ballots"
20 under RCW 29A.04.008(1)(c), which would make the statutes cited inapplicable to the records in
21
22
23
24

25 ¹² Defining metadata is "'data about data' or hidden information about electronic documents created by software
26 programs."

27 ¹³ Although this Administrative Code cannot create a PRA exemption, its language helps illustrate that digital ballot
28 images are not "ballots" under Washington's election law, as discussed below. 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.

1 the first place.¹⁴ When facing this issue, the Marks court concluded that scanned ballot images
2 were not “ballots” under the similar laws of Colorado. 284 P.3d at 122-24.¹⁵

3 **c. The Counties Have Not Identified If Any Ballots are “Damaged”**
4 **Ballots**

5 The counties further rely on RCW 29A.60.125, which provides unique instructions for
6 “damaged” ballots, but the counties do not disclose whether any of the withheld records are in
7 fact copies of “damaged ballots.”¹⁶ First, failure to identify “damaged ballots” in their response
8 letters violated the PRA’s strict ‘identification’ and ‘explanation’ requirements. *See*, First White
9 Decl., Exs. 6 and 8; PAWS II, 125 Wn.2d at 270; RCW 42.56.210(3). Second, the counties do
10 not meet their burden by omitting reference to any “damaged ballots” in their Show Cause
11 Briefs. In order to show that RCW 29A.60.125 is an explicit exemption applying to any of the
12 records withheld—which Petitioner refutes regardless—the counties needed to show that they
13 withheld “damaged ballots.” The counties have not met their burden and RCW 29A.60.125 is
14 withheld “damaged ballots.” The counties have not met their burden and RCW 29A.60.125 is
15 inapplicable to the records requested.¹⁷
16
17
18

19 ¹⁴ “Ballot means, **as the context implies**. . . a physical or electronic record of the choices of an individual voter in an
20 election.” RCW 29A.04.008(1)(c) (bold text omitted by counties when quoting this provision). *See* Skagit Brief at
21 8:01-10; Island Brief at 7:08-18 (also citing State ex rel. Empire Voting Machine Co. v. Carrol, 78 Wash. 83, 85
(1914)).

22 ¹⁵ The different forms a “ballot” can take under the laws of Washington refer to the forms used for the different
23 “methods of voting” provided by the Legislature under Art. 6, sec. 6—not to each and every copy of a ballot or
24 record of cast votes. Indeed Carrol, cited by the counties, opens by quoting Art. 6, sec. 6 and evaluates whether a
25 vote by voting machine is a “vote by ballot” at all. Carrol, 78 Wash. at 84. RCW 29A.04.008(1)(c) and the holding
26 in Carrol is merely designed to give local authorities certain flexibility to determine which method of voting they
27 prefer. Carrol, 78 Wash. at 85. Such methods could be an analog voting machine, a digital voting machine, or paper
28 ballots, among others. So long as a method ensures voting in secret and complies with other standards, it is a “vote
29 by ballot” under Art. 6, sec. 6 and constitutional. *Id.*

30 ¹⁶ “Damaged” ballots are either “physically damaged” or “otherwise unreadable or uncountable by the tabulating
31 system.” RCW 29A.60.125

32 ¹⁷ The counties also rely on RCW 29A.60.110, which provides security directives for the storage of ballots after
33 tabulation. Petitioner refutes that this statute is an “explicit exemption,” but even assuming that it is, such
34 exemption would not apply to the images of *rejected* ballots which are never tabulated and were included in

1 **B. Potential Availability of Records from Other Source Does Not Justify Denial of**
2 **the Request.**

3 The counties wrongly argue: “Presuming that White requested records so that he could
4 challenge the election, he needed to obtain a court order to obtain the ballots...he should have
5 used the procedure the legislature set out for the release of ballots rather than the Public Records
6 Act.” Skagit Brief at 13:01-05; Island Brief at 12:08-12 (citing RCW 29A.60.110). The
7 counties miss the mark for several reasons.
8

9 First, the PRA is clear: “Agencies shall not distinguish among persons requesting records,
10 and such persons shall not be required to provide information as to the purpose for the request,
11 [except for very limited situations],” making such purposes “irrelevant.” Koenig v. City of Des
12 Moines, 158 Wn.2d 173, 190, 142 P.3d 162 (2006) (citing RCW 42.17.270, recodified as
13 42.56.080); *see also* King Co. v. Sheehan, 114 Wn. App. 325, 341 (Div. 1, 2002) (“[a citizen’s]
14 intended use of the information cannot be a basis for denying disclosure.”). Second, “the fact
15 that [information or documents] are readily available from another source is not a reason to deny
16 a request for disclosure.” Limstrom, 136 Wn.2d at 615 (citing Hearst Corp., 90 Wn.2d at 132).
17
18

19 Any procedures for viewing cast ballots as part of an election contest or dispute would
20 therefore *not* be exclusive. Those procedures, which the counties reference but do not cite, are
21 contained in RCW 29A.68, *et seq.*, and require a court to prevent and/or correct election fraud
22 and errors when shown. *See* RCW 29A.68.011; .020. The procedure provides safeguards
23 against fraud and errors, but do not contain a PRA exemption, nor narrow the PRA’s operation.
24 Even if under those procedures a citizen may only obtain a court order to view ballots for certain
25 reasons, the PRA provides for public access for virtually any reason. RCW 42.56.080. That the
26
27

28 Petitioner’s request. *See* RCW 29A. 60.040; RCW 29A.60.050. The counties violated the PRA by withholding the
29 digital files of rejected ballots, to which RCW 29A.60.110 does not apply.

PLAINTIFF’S RESPONSE BRIEF RE: PRA
SHOW CAUSE HEARING - 15

SMITH & LOWNY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

1 requested records may be available pursuant to RCW 29A.68, *et seq.*—or any other procedure—
2 is no reason to deny Petitioner’s request under the PRA. Limstrom, 136 Wn.2d at 615.

3 The counties’ reliance on Deer v. DSHS, 122 Wn. App. 84 (Div. 2, 2004), to the contrary
4 is misplaced, conflating the court’s two holdings. In Deer, the requestor sought copies of
5 juvenile dependency records, which contained sensitive personal information. 122 Wn. App. at
6 91. The Appellate Court held that a statute in that case exempted production under the PRA “by
7 strictly limiting the types of juvenile records that an agency may release and the parties to whom
8 it may release them, thereby preserving ‘anonymity and confidentiality.’” *Id.* The court’s
9 finding of an exemption had nothing to do with an “alternative means” of requesting the records,
10 as the counties contend. *Id.* The court discussed the “alternative means” solely to evaluate
11 whether the exemption already identified “conflict[ed] with the [PRA’s] purpose of holding
12 public officials and institutions accountable and providing access to public records.” *Id.* at 92.
13 An alternative means of requesting records does not create an exemption under the PRA.
14
15
16

17 **IV. Petitioner’s Request is Not Impossible to Fulfill.**

18 It is clear that the requested records exist and must be produced. The counties’
19 contention that there are no “ballot images” stored on data cards or hard drives is demonstrably
20 false and self-contradictory. *See* Skagit Brief at 5:10-14; Island Brief at 4:01-05. The counties’
21 own words show “ballot images” exist. *See* First White Decl., Ex. 6 (indicating Skagit’s
22 exemption log details “the *images* that are being exempted.”); Skagit Brief at 3:08-13; Island
23 Brief at 2:26-3:05 (ballots are “scanned” and “[i]f necessary, the *ballot images* can be ‘resolved’
24 in the ‘Ballot Now’ program...Resolution of ballots does not change the *image of the ballot.*”
25 (emphasis added)); Skagit Brief at 5:03-04; Island Brief at 4:17-18 (Hart program “used to *image*
26 and tabulate”). Their statement that “the data consists of 1s and 0s, not images” does not show
27
28
29

1 otherwise.¹⁸ Skagit Brief at 5:13-14; Island Brief at 4:04-05. Digital images are always stored
2 using binary code.¹⁹ The counties did not identify the file type of the withheld ballot images—
3 whether TIFF, JPEG, BMP, PDF, or other—which would obviate the need to discredit this
4 desperate argument.²⁰ See generally Skagit and Island Briefs.

5
6 Additionally, the counties' hardship claim that it would take "25 seconds per image" to
7 comply with the request does not excuse it from producing the records. Skagit Brief at 5:18;
8 Island Brief at 4:10. "Courts shall take into account the policy...that free and open examination
9 of public records is in the public interest, **even though such examination may cause**
10 **inconvenience** or embarrassment..." RCW 42.56.550(3); see also Rental Housing Ass'n of
11 Puget Sound v. City of Des Moines, 165 Wn.2d 525, 535, 199 P.3d 393 (2009) ("Administrative
12 inconvenience or difficulty does not excuse strict compliance with the PRA." (citation omitted)).
13 Despite the purported inconvenience of taking 25 second per image, the counties needed to take
14 the time and produce the records under the PRA.²¹
15
16
17

18
19 ¹⁸ See also 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...").

20 ¹⁹ "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/>).
21

22 ²⁰ The PRA defines "public record" broadly to include "any writing," which is broadly defined as "handwriting,
typewriting, printing, photostating, photographing, and every other means of recording any form of communication
23 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
24 recordings, magnetic punched cards, discs, drums, diskettes, sound recordings and any other document including
existing data compilations from which information may be obtained or translated." RCW 42.56.010(3)-(4).
25 Certainly the records requested exist as public records and the counties would not need to create a new record to
produce the records requested.

26 ²¹ The counties' claim that they cannot obtain metadata from "proprietary software" is also unsupported. See Skagit
27 Brief at 5:04-05; Island Brief at 4:18-19. RCW 29A.36.111(2) expressly forbids election officials from entering into
a contract in which ballot information is proprietary: "An elections [election] official may not enter into or extend
28 any contract with a vendor if such contract may allow the vendor to acquire an ownership interest in any data
pertaining to...any ballot."
29

1 **V. Production of the Records Serves the Public Interest and Should Be Permitted**
2 **Under RCW 42.56.210(2).**

3 Even assuming arguendo that explicit exemptions apply to the records, the court should
4 ignore them and order production of the records. The PRA empowers the court to order
5 production in situations like this, where exemptions are “unnecessary to protect any individual’s
6 right of privacy or any vital governmental function.”²² RCW 42.56.210(2).²³ This is a text-book
7 case where production of the records is in the public interest to restore public oversight of
8 elections, and where any exemptions are clearly unnecessary to protect privacy and vital
9 governmental interests.
10

11 Here, the exemptions proffered are clearly unnecessary because production poses no risks
12 to the anonymity of the ballot or to expose the election to fraud or tampering, as discussed above.
13 In fact, production of records is in the public interest because it would increase public oversight
14 of (and involvement with) this fundamental instrument of democracy. Production will facilitate
15 transparency and promote public confidence in the election process by permitting efficient public
16 verification of election results. Indeed, disclosure of anonymous ballot images will restore the
17 longstanding tradition of truly public processing and public counting of elections.
18
19

20 Before the days of voting by mail, email and fax, thousands of volunteers and public
21 observers mobilized to canvass every election at thousands of neighborhood precinct polling
22 places. *See generally* 2005 Washington Code, Title 29A. Each precinct was overseen by one
23

24 ²² It is important to highlight that the Legislature used the term “*vital* governmental function,” not the weaker
25 “important governmental function,” showing the governmental function need truly be *vital*.

26 ²³ *See also Resident Action Council*, 300 P.3d at 383 (“In the case of a categorical exemption, the legislature has
27 established a presumption [that an exemption is warranted]. That presumption can be overcome only if a court finds
28 the exemption is ‘clearly unnecessary’ to protect any privacy rights or vital governmental interests.”); *Soter v.*
29 *Spokane School Dist. No. 81*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007) (“[T]he 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 government interest.” (emphasis original)) (citing the similar provision at RCW
 42.56.540).

1 inspector and two citizen judges, RCW 29A.44.410 (2005), plus such additional persons as were
2 necessary, RCW 29A.44.420 (2005), and were watched over by additional political observers.
3 RCW 29A.60.110 (2005). Citizen election officers formed each precinct board which debated
4 and ruled on unclear or disputed ballots or votes, RCW 29A.60.050; .060 (2005), and did the
5 counting. RCW 29A.44.450 (2005). All this was out in the open, RCW 29A.44.250 (2005), and
6 those volunteers stayed to the wee hours if needed. RCW 29A.60.030 (2005).
7

8 Now, with the final 2011 consolidation and mandatory remote voting, the legislature
9 permanently dismantled the in-person election-day poll sites. *See* SB 5124, 62nd Leg., Reg.
10 Sess., 2011 Laws 10 (effective July 22, 2011) (repealing 96 election statutes and amending 83
11 others).²⁴ All precinct volunteer positions have been abolished and their functions assigned to a
12 small group of officials and temporary workers operating a highly mechanized and centralized
13 electronic canvass at each county's counting center. *Id.* Elections now run for weeks or months
14 to count tens of thousands of ballots on one vendor's voting system, with few or no public
15 observers actually watching.
16
17

18 Yet, the Legislature retains the desire to make elections accountable to the public with
19 observers. *See* 29A.60.170(2) (counting center must be open to observation, proceedings open to
20 the public). The only statutory restraints on open observation relate to touching ballots or their
21 containers, or operating the tabulation machine. *Id.* Producing digital copies of the requested
22 records is simply the electronic age equivalent of fulfilling the traditional openness to public
23 observation. Public access to the images does so while respecting the enumerated proscriptions:
24 hands-off the ballots, ballot containers and tallying equipment. Ballots have always been
25 processed, canvassed and counted in public. The digital ballot images created by the Hart
26
27

28 ²⁴ Available at [http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5124-](http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5124-S.SL.pdf)
29 [S.SL.pdf](http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Laws/Senate/5124-S.SL.pdf)

1 Intercivic voting system merely provides the opportunity to more efficiently reaffirm the power
2 of oversight for the public.

3 **VI. The Counties' Initial Responses Violated the Specific Requirements of the PRA.**

4 Independent of whether the counties' properly withheld records, their initial responses to
5 Petitioner's request violated the procedural rules of the Act. The PRA specifies detailed
6 requirements for agency responses to PRA requests, which the counties flatly ignored. Court
7 enforcement of these procedural rules, even when not ordering production of records, is critical
8 to keep the Act effective because the PRA "is only as reliable as the weakest link in the chain."
9 Sanders v. State, 169 Wn.2d 827, 846, 240 P.3d 120 (2010) (quoting PAWS II, 125 Wn.2d at
10 269-71). The court should therefore strictly apply the procedural requirements of the Act and
11 find the counties violated the PRA.

12
13
14 According to the Act, agencies must respond to each request within five business days,
15 RCW 42.56.520, but before doing so agencies must conduct an "adequate search" for requested
16 records in order to properly disclose responsive documents. Neighborhood Alliance of Spokane
17 County v. County of Spokane, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). Agencies claiming
18 exemptions to any request (in whole or in part) must compile "a withholding index provided to
19 the requestor." WAC 44-14-08004(6). "[T]he plain terms of the Public Records Act...make it
20 imperative that all relevant records or portions be identified with particularity." PAWS II, 125
21 Wn.2d at 270. An agency response must also include a "statement of the specific exemption
22 authorizing the withholding of the record...and a brief explanation of how the exemption applies
23 to the record withheld." RCW 42.56.210(3). "The brief explanation should provide enough
24 information for a requestor to make a threshold determination of whether the claimed exemption
25
26
27
28
29

1 is proper.” WAC 44-14-04004(4)(b)(ii). The court should hold the counties accountable for
2 their procedural wrongs and deter future violations.

3 **A. Skagit County’s Response Did Not Contain an Adequate Explanation of**
4 **Proffered Exemptions**

5 In denying Petitioner’s PRA request, Skagit County listed statutes and mentioned vague
6 concerns about the secure storage of ballots, falling far short of the explanation required under
7 RCW 42.56.210(3). *See* First White Decl., Ex. 6. To comply with the PRA, the counties needed
8 to explain how proffered exemptions apply to each withheld record to allow “a requestor to make
9 a threshold determination of whether the claimed exemption is proper.” WAC 44-14-
10 04004(4)(b)(ii); RCW 42.56.210(3). The explanation must do more than merely cite a claimed
11 exemption because “[a]llowing the mere identification of a document and the claimed exemption
12 to count as a ‘brief explanation’ would render [the PRA’s] brief-explanation clause superfluous.”
13 *Sanders*, 169 Wn.2d at 846.

14
15
16 The so-called “explanation” provided in Skagit County’s response letter was limited to
17 the following:

18 We regret that we are unable to provide the digital images that you have requested. It is
19 our understanding that Washington State Laws, specifically RCW 29A.60.110, RCW
20 29A.60.125 and WAC 434-261-045, which are other laws preventing disclosure pursuant
21 to RCW 42.56.070(1), bar us from providing you the requested records. These
22 Washington Statutes and Administrative Code detail that ballots must remain in secure
23 storage at all times, and may only be opened or accessed for specific authorized purposes.
Please note that enclosed with this letter is a log detailing the images that are being
exempted.

24 First White Decl., Ex. 6. Skagit’s response did not explain why secure storage provisions
25 exempt records from production at all, and did not explain why such provisions about “ballots”
26 apply to the images and metadata requested in the first place. *Id.* “Claimed exemptions cannot
27 be vetted for validity if they are unexplained.” *Sanders*, 169 Wn.2d at 846. Indeed, “[t]he Public
28

1 Records Act **clearly and emphatically** prohibits silent withholding by agencies of records
2 relevant to a public records request.” PAWS II, 125 Wn.2d at 270. Skagit’s response did not
3 contain enough information.

4 Petitioner White requested digital “image files,” and clarified “This request does not seek
5 to inspect or copy the paper ballots themselves.” *Id.*, Ex. 2. Skagit County made no attempt to
6 explain how the laws it cited, which it claimed required “ballots” to “remain in secure storage at
7 all times” applied to the “digital images” requested. *Id.*, Ex. 6. Such an explanation in Skagit’s
8 response was required to comply with the PRA. Sanders, 169 Wn.2d at 846; PAWS II, 125
9 Wn.2d at 270. Citizens must not be left guessing how claimed exemptions apply to their
10 requests. WAC 44-14-04004(4)(b)(ii).

11 It was not until Skagit County’s Show Cause Brief that it attempted to supply the
12 information needed to explain the purported exemptions. *See* Skagit Brief at 7 (citing to the
13 definition of “ballot” at RCW 29A.04.008(1)(c) and arguing digital scans should be treated as
14 paper “ballots”). The PRA mandates such an explanation in the response itself. RCW
15 42.56.210(3); WAC 44-14-04004(4)(b)(ii).

16
17
18
19 **B. Skagit County’s Response Did Not Identify the Metadata it Withheld**

20 Skagit also failed to identify the metadata it withheld, frustrating the purpose of the PRA.
21 The Supreme Court “consistently enforce[s] the PRA’s disclosure requirements to advance its
22 policy of public access.” Sanders, 169 Wn.2d at 846. The plain terms of the Act “make it
23 imperative that all relevant records or portions be identified with particularity.” PAWS II, 125
24 Wn.2d at 271. “Moreover, without a specific identification of each individual record withheld in
25 its entirety, the reviewing court’s ability to conduct the statutorily required de novo review is
26
27
28
29

1 vitiated.” *Id.* at 270. It is therefore crucial that the court hold Skagit County accountable for its
2 failure to identify the metadata it withheld.

3 In his PRA request, Petitioner White requested “the original metadata and Properties of
4 the electronic or digital files requested” from Skagit County. First White Decl., Ex. 2. Instead of
5 properly responding, Skagit County provided *no* information about the metadata and feigned
6 ignorance about what “metadata and properties” mean. *Id.*, Ex. 6. In asking for “clarification,”
7 Skagit tried to hide behind RCW 42.56.520 in bad faith.²⁵ See RCW 42.56.520 (if a request is
8 “unclear,” an agency may ask the requestor to clarify.). Skagit’s request for clarification was a
9 red herring and Skagit needed to identify all metadata withheld.
10
11

12 The facts show that Petitioner’s request for metadata was not “unclear.” The Washington
13 Supreme Court has plainly defined “metadata” *in a PRA case*: “Metadata is most clearly defined
14 as ‘data about data’ or hidden information about electronic documents created by software
15 programs.” *O’Neill*, 170 Wn.2d at 143.²⁶ Further, the Court unequivocally held, “metadata
16 associated with public records is subject to disclosure under the PRA,” with no trouble
17 understanding the term. *Id.* at 141. Skagit understood Petitioner’s request.
18

19 Skagit County attempted to explain this glaring omission of metadata in its Show Cause
20 Brief as follows:²⁷
21
22

23
24 ²⁵ The only reference to the requested “metadata and properties” in Skagit County’s response read: “In terms of your
25 request for the, ‘original metadata and properties of the electronic or digital files,’ we would appreciate clarification
26 of what you mean by ‘original metadata and properties.’” First White Decl., Ex. 6.

26 ²⁶ Skagit County cites to this Supreme Court case in its Show Cause Brief, further showing its awareness of this
27 definition. Skagit Brief at 17:05-15.

28 ²⁷ This explanation also shows that Skagit had no trouble understanding the meaning of “metadata.” Indeed, Island
29 County’s response acknowledged the existence of the metadata sought with no trouble, albeit in insufficient detail.
First White Decl., Ex. 8.

1 “[T]he [Hart Intercivic] software allows for **logs of information about images** to be
2 obtained, but it is unknown whether such logs include what White sought [sic] metadata,
3 which may constitute proprietary information, which would have required the county to
4 notify the vendor before releasing any records.”

5 Skagit Brief at 5. This acknowledgement about the existence of “logs of information about
6 images” needed to be in Skagit County’s response to comply with the PRA.²⁸ Neighborhood
7 Alliance of Spokane County, 172 Wn.2d at 721 (“records are never exempt from disclosure, only
8 production...”).²⁹

9 **C. Island County Did Not Provide An Exemption Log and Identify All Records**
10 **Individually.**

11 Island County’s denial was also out of compliance because it did not include an
12 exemption log identifying each of the withheld records with particularity. *See* First White Decl.,
13 Ex. 8. Like Skagit’s response, Island’s lack of detail denied Petitioner’s right to know what
14 records were responsive, and frustrated the court’s ability to conduct a de novo review. PAWS
15 II, 125 Wn.2d at 270.

16 Island’s response letter did not “adequately describe *individually* the withheld records.”
17 Rental Housing Ass’n, 165 Wn.2d at 539 (emphasis added). “[R]equiring a privilege log does
18

19
20 ²⁸ In addition, it appears from Skagit’s arguments that Skagit felt Petitioner’s request for metadata was too broad.
21 Skagit Brief at 5 (“White sought metadata, which may constitute proprietary information, which would have
22 required the county to notify the vendor before releasing any records. **Depending on White’s response, a simple**
23 **printout of a readily available log may have satisfied his request.**”). But “Agencies shall not deny a request for
24 identifiable public records solely on the basis that the request is overbroad.” RCW 42.56.080. It is clear from the
25 plain reading of Petitioner’s request that Mr. White sought “the original metadata and Properties of the electronic or
26 digital files requested.” First White Decl., Ex. 2. Petitioner did not request “some” of the metadata, he requested *all*
27 of “the original metadata.” *Id.* Viewing Petitioner’s request as too broad and potentially burdensome does not
28 justify a denial or an omission of a response. RCW 42.56.080; RCW 42.56.550(3); Sanders, 169 Wn.2d at 836.

29 ²⁹ Skagit further argues “[n]or were election staff aware of metadata associated with the images.” Skagit Brief at
16:23-24. If this is true, the lack of awareness does not justify withholding the metadata either, but rather shows it
did not conduct the mandated “adequate search” recognized in Neighborhood Alliance of Spokane County, 172
Wn.2d at 719-21 (“the search must be reasonably calculated to uncover all relevant documents.” “[A]n inadequate
search precludes an adequate response and production.”). Skagit now acknowledges that metadata exists, which it
would have known following the most basic search for responsive records. And if Skagit believed PRA exemptions
applied to the metadata requested, it needed to say so in its response to Petitioner’s request. RCW 42.56.210(3);
Skagit Show Cause Brief, Ex. 6.

1 not *add* to the statutory requirements, but rather effectuates them.” *Id.* at 540 (emphasis
2 original). Island County’s denial letter lacked the requisite detail, in violation of the Act.

3 **VII. The Court Should Award Fees, Costs and Penalties**

4 The PRA provides for Petitioner’s recovery of fees, costs and penalties from the counties
5 as a prevailing party. RCW 42.56.550(4); Sanders, 169 Wn.2d at 848. Petitioner is entitled to
6 fees and costs when prevailing on any claim of a PRA violation, including the Act’s procedural
7 rules. Sanders, 169 Wn.2d at 848 (“the agency’s failure to provide a brief explanation should be
8 considered when awarding costs, fees, and penalties...Such an interpretation serves the PRA’s
9 policy of disclosure by providing incentives for the agency to explain its claimed exemptions.”).
10 An award of fees is mandatory, even where an agency has acted in good faith. Amren v. City of
11 Kalama, 131 Wn.2d 25, 35, 929 P.2d 389 (1997).
12
13

14 For the reasons identified above, Skagit and Island counties have violated the PRA by
15 improperly withholding responsive records and failing to comply with the strict procedural rules
16 for an agency’s response/denial. The court should therefore award Petitioner White his
17 reasonable attorney fees and costs and impose a daily penalty against the counties.
18

19 **CONCLUSION**

20 For the foregoing reasons, Petitioner White respectfully request the court order
21 immediate production of all withheld records, award Petitioner’s reasonable fees and costs, and
22 impose a daily penalty for the counties’ PRA violations.
23

24 /

25 /

26 /

27 /

28 /

1 RESPECTFULLY SUBMITTED this 30th day of January, 2014.

2 **SMITH & LOWNEY, PLLC**

3
4 By:



5 Knoll/Lowney, WSBA No. 23457

6 Marc Zemel, WSBA No. 44325

7 Attorneys for Petitioner

8 2317 E. John St.

9 Seattle, WA 98112

10 Tel: (206) 860-2883

11 Fax: (206) 860-4187

12 E-mail: knoll@igc.org, marcz@igc.org

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2014, I served the foregoing and copies of the Second

Declaration of Timothy White to the following by e-mail:

Skagit County:

Melinda Miller - melindam@co.skagit.wa.us

Arne Denny - arned@co.skagit.wa.us

Judy Kiesser - judyk@co.skagit.wa.us

Island County:

Daniel Mitchell - D.Mitchell@co.island.wa.us

Patti Switzer - P.Switzer@co.island.wa.us



Jessie Sherwood