

The below email contains the relevant citations and references to case law that involve ballot and ballot image disclosure.

Enjoy!!

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The information in this email is provided as a service to the public and to our county election partners and is for informational purposes only. The contents should not be construed as, and is not intended to be, legal advice. You should contact your attorney for assistance navigating the law.

From: Moss, Sheryl <sheryl.moss@sos.wa.gov>
Sent: Tuesday, August 11, 2020 4:21 PM
To: Moss, Sheryl <sheryl.moss@sos.wa.gov>
Subject: Public Records Requests

Distribution: County Auditors, County Election Administrators, OSOS

Dear Election Partners:

In this election season, you may receive one or more public record requests. While many documents produced in an election constitute public records, there are a few areas that are exempt from public disclosure. This communication is provided as an informational aid regarding the constitutional provisions, statutes, regulations and legal history that may be relevant to responding to elections-related public records requests. It is not intended to provide legal advice.

If you are asked for records that may fall into one of these areas, **we recommend consulting with your public records officer and Prosecuting Attorney**. If needed, your PA can consult with the Deputy Solicitors General for the Secretary of State, Tera Heintz (tera.heintz@atg.wa.gov) or Karl Smith (karl.smith@atg.wa.gov).

Public Records Requests Involving Ballots

Ballots and images of ballots are exempt from production under the Public Records Act. *White v. Clark Cty. II*, 199 Wn. App. 929, 401 P.3d 375 (2017). The Washington Court of Appeals has held that RCW 29A.60.110 and WAC 434-261-045 “provide an ‘other statute’ exemption for

tabulated ballots.” *Id.* at 934. RCW 29.60.110 provides that “all ballots counted at a ballot counting center must be sealed in containers” and provides that the containers “may only be opened by the canvassing board” for specified reasons. WAC 434-261-045 provides that “[v]oted ballots and voted ballot images may only be accessed in accordance with RCW 29A.60.110 and 29A.60.125.”^[1]

RCW 29A.04.008 defines a ballot to include paper ballots, facsimiles, and “a physical or electronic record of the choices of an individual voter in a particular primary, general election, or special election.” Cast vote records are also considered electronic records of ballots.

Additionally, Article 6, Section 6 of the Washington State Constitution requires “absolute secrecy in preparing and depositing” a ballot, and RCW [29A.04.206](#) (1)(b) require “absolute secrecy of the vote.”

All forms of ballots as defined by RCW 29A.04.008 must be secured after tabulation until they are destroyed after 22 months for a federal election or 60 days for all other elections. (DAN AU52-03C-72 and DAN AU52-03C-73).

Public Record Requests Involving VoteWA

Please be aware that the full VoteWA manual includes sensitive information that, if publicly disclosed, could compromise election security. A redacted version of the manual excluding such sensitive security information is available for public disclosure.

Public Record Requests Involving Tabulation Systems, Infrastructure and/or Security

RCW 42.56.420 exempts information from production because of system security risks. Section 4 of the RCW applies to tabulation systems and lists the types of information that is not a public record:

(4) Information regarding the public and private infrastructure and security of computer and telecommunications networks, consisting of security passwords, security access codes and programs, access codes for secure software applications, security and service recovery plans, security risk assessments, and security test results to the extent that they identify specific system vulnerabilities, and other such information the release of which may increase risk to the confidentiality, integrity, or availability of security, information technology infrastructure, or assets;

^[1] See also *White v. Skagit Cty.*, 188 Wn. App. 886, 898, 355 P.3d 1178, 1184 (2015) (“We conclude that in Washington, all ‘ballots,’ including copies, are exempt from production under the Public Records Act by Title 29A RCW—an ‘other statute.’ The exemption is necessary to protect the ‘vital governmental function’ of secret ballot elections”); *White v. Clark Cty.*, 188 Wn. App. 622, 636–37, 354 P.3d 38, 44 (2015) ([article VI, section 6 of the Washington Constitution](#), RCW 29.60.110, and [WAC 434–250–110](#) collectively “constitute an express ‘other statute’ exemption for ballots and ballot images under RCW 42.56.070(1)”).

Specifically this section applies to:

- Security risk assessments,
- Security test results, and
- “Other information the release of which may increase risk to the confidentiality, integrity, or availability of security, information, or assets.”

The following is some, but not all, of the information on your tabulation system that, if disclosed, could create security risks or compromise ballot secrecy and is thus exempt from public disclosure under RCW 42.56.420 and/or the constitutional, statutory and regulatory provisions governing vote and ballot secrecy:

- Electronic or digital ballot image files
- Ballot image file names
- Cast vote records
- Cast vote record file names
- Tabulation, computer, and event logs
- Upload and download logs

If you receive public records requests regarding your tabulation system or ballot/vote records, we strongly recommend that you consult with your public records officer and/or your Prosecuting Attorney before providing any records.

Sincerely,

Sheryl Moss

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