

**X Expedite  
Hearing Set  
Date: March 18, 2005  
Time: 9:00  
Judge: Hicks**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THURSTON COUNTY

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STEFAN SHARKANSKY, a Washington citizen.,	)	No. 05-2-00251-1
	)	
	)	Reply to Defendant's Response
	)	To Plaintiff's Show Cause and
Plaintiffs,	)	Complaint for Violation of
vs.	)	Public Records Act <sup>1</sup>
	)	
SAM REED, in his official capacity as	)	
Secretary of State of the State of Washington,	)	
	)	
Defendants.	)	

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**I. Introduction:**

RCW 42.17.010 provides that "The provisions of this chapter shall be liberally construed to promote ... full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes." Sharkansky seeks "voter registration records with voters' dates of birth in a CD format" to assure public confidence in the fairness of elections

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<sup>1</sup>The Public Records Act [RCW 42.17.250 et seq.] is abbreviated PRA.

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and governmental processes in ensuring eligibility of voters. [Ex. C to Complaint]. The Secretary is willing to provide the information “with the exception of the voters’ date of birth.” [Ex. D to Complaint]

**II. Arguments in Reply:**

- A. The “derivative exemption” for birth dates under RCW 29A.08.710(2) is illogical since birth dates are available from other public agencies. It is also inconsistent with overall purpose of PRA exemptions.**

The PRA requires that each agency make all public records "available for public inspection and copying." RCW 42.17.260(1). However, RCW 42.17.260 makes an exception for records that are "within the specific exemptions" of the PRA or "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.17.260(1). Assuming such other statutes do not conflict with the PRA, the court treats them as supplementing the PRA.

Progressive Animal Welfare Society v. The University of Washington, 125 Wn.2d 243, 261-62, 884 P.2d 592 (1994). In the PAWs case, the State Supreme Court noted:

In fact, the Public Records Act contains no general exemptions. It provides only:

specific statutory exemptions from disclosure for those particular categories of public records most capable of causing substantial damage to the privacy rights of citizens or damage to vital functions of government if they are disclosed. These statutory exemptions were carefully drawn and have subsequently been changed and added to by the Legislature as it deemed necessary.

In re Rosier, 105 Wn.2d 606, 621, 717 P.2d 1353 (1986) (Andersen, J., dissenting in part, concurring in part).

Id., at 258.

The Court in PAWs then concluded:

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In sum, the Public Records Act contains only limited and specific exemptions. Treating section .330<sup>2</sup> as an exemption, that is, as a method of withholding otherwise disclosable public records, is the exact functional equivalent of the error underlying Rosier. It also contradicts the Legislature's command to construe the exemptions narrowly and would render portions of the Act superfluous.

Id., at 260-261.

Here, the Secretary relies on RCW 29A.08.710(2), arguing that it is an “other statute” exemption under RCW 42.17.260(1). RCW 29A.08.710(2) provides:

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<sup>2</sup>RCW 42.17.330

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The following information contained in voter registration records or files regarding a voter or a group of voters is available for public inspection and copying: The voter's name, gender, voting record, date of registration, and registration number. The address and political jurisdiction of a registered voter are available for public inspection and copying except as provided by chapter 40.24 RCW. No other information from voter registration records or files is available for public inspection or copying.<sup>3</sup>

Pursuant to RCW 29A.08.750, the Secretary creates a statewide computer file of registered voters from information provided by each county auditor. RCW 29A.08.760 sets forth a process for requesting a copy of the statewide file of registered voters and provides that the Secretary shall provide a copy to the Department of Information Services (DIS).

Coincidentally, RCW 46.20.157 states that the Department of Licensing “shall annually provide to the department of information services an electronic data file” on “all licensed drivers and identicard holders.” RCW 46.20.157. That data file specifically includes birth dates. Id. Consequently, DIS has two data files, one from the Secretary of voters that excludes birth dates and another from DOL of licensed drivers and identicard holders that includes birth dates. This is inconsistent to exclude from public disclosure information about a voter’s birth date when the DOL records have that information. This is especially true given the Motor Voter Law<sup>4</sup> provides individuals with the opportunity to register to vote at the same time

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<sup>3</sup>RCW 29A.08.710 was previously RCW 29.07.130 which specifically cross-referenced the PRA. 2003 c 111 § 246(3)

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t hat t hey apply for a dri ver's li cense or seek to renew a dri ver's li cense.

It is well established that the PRA does not exempt information merely because it is available from another source. Hearst Corp. v. Hoppe, 90 Wn.2d 123, 132 580 P.2d 246 (1978). In Hearst, some, but not all, of the requested information was available in other department records of the agency. Id. 90 Wn. App. 123. Here, the Secretary concedes that voter birth dates can be derived from documents other than the Voter File (e.g. death records, criminal records). [Complaint Ex. B at 4:1-2]

It is well established that the courts construe exemptions under the PRA narrowly. See, e.g. Deer v. DSHS, 122 Wn.App. 84, 90, 93 P.3d 195 (2004). "The general purpose of the exemptions to the Act's broad mandate of disclosure is to exempt from public inspection those categories of public records most capable of causing substantial damage to the privacy rights of citizens." Limstrom v. Ladenburg, 136 Wn.2d 595, 607, 963 P.2d 869 (1998). Given the availability of birth dates in other public records, exempting them from disclosure simply because they are part of a voter file (vs. license/indentcard data base, death records or criminal records), conflicts with the limited purpose of exemptions.

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<sup>4</sup>42 USC 1973 gg-5(a), (b), aka National Voter Registration Act

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**B. The PRA is available to obtain documents discoverable under the civil rules of procedure, including voting records with birth dates.**

In O’Conner v. DSHS , 143 Wn.2d 895, 25 P.3d 426 (2001) a plaintiff who was suing DSHS for damages sought DSHS records. The trial court quashed the request, ruling that the records were available only through a discovery request made pursuant to the civil rules of court. The Supreme Court reversed, holding that although the civil rules are incorporated into the "other statute" provision of RCW 42.17.260(1), the PRA also was available to obtain documents discoverable under the civil rules. Id., at 910.

In Quinn Const. Co. v. King County Fire Protection Dist. No. 26, 111 Wn. App. 19, 22, 44 P. 3d 865, 872-873, (2002) the Court stated:

Nevertheless, because the District is a public agency, the law is now clear that Quinn also had a right, under the PRA, to independently seek any public records kept by the District that did not fall within specific statutory exemptions. See O’Connor v. Dep’t of Soc. & Health Servs., 143 Wn.2d 895, 905, 25 P.3d 426 (2001) (holding court erred by ordering plaintiff in litigation to seek public records only through discovery; records available under discovery rules not exempt from PRA). The mere fact that a litigant could have obtained agency records under CR 26 did not preclude him or her from seeking those records under the PRA. O’Connor, 143 Wn.2d at 907. Only records that are protected from discovery under CR 26 need not be produced in response to a PRA request. Id. 143 Wn.2d 895

Here, the “voter file” was produced in Borders v. King County pursuant to a protective order that “would permit access through the Republican party or those working in concert with their part in the litigation.” [Complaint Ex. B & D]. Sharkansky has the right, under the PRA to independently seek any public record kept by the Secretary. He should not be forced to join

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litigation on one side or the other to secure public records.

### **III. Conclusion:**

It is serendipitous that this case would be heard during what the media has proclaimed as “Sunshine Week.” On March 13, “Sunshine Sunday,” The Olympian ran an editorial entitled “Right to know is under assault,” and quoted Andy Alexander, chairman of the Freedom of Information Committee for the American Society of Newspaper Editors as follows:

An alarming amount of public information is being kept secret from citizens, and the problem is increasing by the month. Not only do citizens have a right to know, they have a need to know. Our goal is to raise public awareness of this horrible trend that is hurting democracy.

Indeed, this concern is reflected in the PRA which was adopted via Initiative 276 in 1972:

The provisions of this chapter shall be liberally construed to promote ... full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes.

RCW 42.17.010.

The public’s confidence with the fairness of the last gubernatorial election has been shaken with daily revelations of mishandled and illegal votes.<sup>5</sup> Via his web-blog [www.soundpolitics.com], Sharkansky has attempted to identify the extent of illegal votes. Since voters may share the same name, birth dates are essential to identifying legal voters. Redacting birth dates from voter records when that information is available from other public

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<sup>5</sup>See, e.g. “Tally of mishandled ballots grows,” Seattle Times 3/15/05

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records, elevates form over substance and amounts to telling citizen activists who demand accountability in elections to “go fish.”

Date: March 15, 2005

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### DECLARATION OF SERVICE

I declare, under penalty of the laws of the State of Washington, that I delivered a copy of this reply to the plaintiff’s counsel at the Attorney General’s Office, on this date.

Date: March 15, 2005

Olympia, WA

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