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Division I
State of Washington
NO. 74354-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF CORRECTIONS, *et al.*,

Appellants,

v.

JOHN DOES,

Respondents.

APPELLANT DEPARTMENT OF CORRECTIONS' OPENING BRIEF

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I. INTRODUCTION

An individual who is seeking a Special Sex Offender Sentencing Alternative (SSOSA) must participate in an evaluation prior to receiving a SSOSA. This evaluation is forensic in nature and is used by the court to determine whether a SSOSA is appropriate. In July 2014, Donna Zink submitted a public records request to the Department of Corrections (Department) for SSOSA evaluations. The Department planned to review these evaluations individually and make any redactions it believed were appropriate under the Public Records Act (PRA), such as the names of child victims. Plaintiffs filed this action and ultimately obtained a permanent injunction enjoining the release of the SSOSA evaluations of Level I sex offenders based on the trial court's conclusion that the evaluations are exempt under RCW 70.02.250 and RCW 71.05.445.

The trial court's decision must be reversed because SSOSA evaluations are not exempt from disclosure. First, SSOSA evaluations are forensic evaluations and are not directly related to any medical or mental health treatment. As such, they are not protected by the Uniform Health Care Information Act (UHCIA), RCW 70.02. Second, RCW 70.02.250 and RCW 71.05.445 do not provide an independent basis for exempting any records under the PRA. Those statutes simply indicate that documents that are otherwise confidential under the UHCIA remain protected when

shared with the Department. Finally, even RCW 70.02.250 and RCW 71.05.445 are "other statute" exemptions, those provisions would not apply to the SSOSA evaluations maintained by the Department. Because the trial court erred in determining that SSOSA evaluations are exempt, this Court must reverse.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in enjoining the Department from releasing SSOSA evaluations of Level I sex offenders.

2. The trial court erred in entering Finding of Fact #21. Specifically, the trial court erred in finding that SSOSA evaluations contain significant medical, mental health, or other personal information, along with the evaluator's diagnostic assessment of that information.

3. The trial court erred in entering Finding of Fact #22. Specifically, the trial court erred in concluding that the disclosure of SSOSA evaluations would not be in the public interest.

4. The trial court erred in entering Finding of Fact #23. Specifically, the trial court erred in concluding that the disclosure of SSOSA evaluations would substantially injure public safety.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Do the general confidentiality provisions in the UHCIA apply to SSOSA evaluations that are forensic in nature and are not conducted for the purpose of any medical or mental health treatment?

2. Are RCW 70.02.250 and RCW 71.05.445 independent other statutes that exempt public records from disclosure?

3. Do RCW 70.02.250 and RCW 71.05.445 apply to SSOSA evaluations the Department receives from non-medical providers?

4. Did the trial court err in entering a factual finding that the contents of SSOSA evaluations contain significant medical and mental health information when no such evaluations are in the record and the finding is supported only by conclusory statements?

5. Did the trial court err in entering factual findings 22 and 23 because such findings are based solely on speculation about the effects of releasing SSOSA evaluation?

IV. STATEMENT OF THE CASE

A. The SSOSA Process

The legislature enacted the SSOSA as part of the Sentencing Reform Act of 1984. A SSOSA is a special sentencing procedure by which a sentencing judge can suspend an individual's felony sentence if the individual meets certain statutory criteria. RCW 9.94A.670; *State v.*

Canfield, 154 Wn.2d 698, 701 n.1, 116 P.3d 391 (2005). If the sentencing court determines a SSOSA is appropriate, the court can suspend the sentence and impose certain conditions. RCW 9.94A.670(5)(a). The court must impose a term of community custody and sex offender treatment. RCW 9.94A.670(5)(b)-(c).

In order to receive a SSOSA, the sentencing court must find that the individual is amenable to treatment. *See State v. Young*, 125 Wn.2d 688, 695, 888 P.2d 142 (1995). The phrase "amenable to treatment" is not a medical term of art; rather the inquiry is whether the individual and the community will benefit from community treatment in light of the individual's background, history, social and economic circumstances, and psychological condition. *See State v. Oliva*, 117 Wn. App. 773, 780, 73 P.3d 1016 (2003). The individual must obtain an evaluation which informs the court about whether the person is amenable to treatment. RCW 9.94A.670(3). The evaluation is performed by a certified sex offender treatment provider, but the provider who conducts this evaluation is generally prohibited from providing the actual treatment if the individual ultimately receives a SSOSA. RCW 9.94A.670(1)(a), (13).

After the evaluation report is complete, the Court must determine whether a SSOSA is appropriate by considering a range of factors, including whether: (1) the offender and the community will benefit from

use of this alternative, (2) the alternative is too lenient in light of the extent and circumstances of the offense, (3) the offender has additional victims, (4) the offender is amenable to treatment, (5) the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and (6) the victim's opinion. RCW 9.94A.670(4). The sentencing court is required to give great weight to the victim's opinion, and the court must make specific findings about its reasons for imposing a SSOSA if the decision is contrary to the victim's opinion. *Id.*

The Department's role in the SSOSA process is limited. The Department prepares presentence investigations for offenders, including offenders who are seeking a SSOSA. CP 509, 513. As part of a typical presentence investigation, the Community Corrections Officer (CCO) assigned to the investigation will review documents related to the offender's criminal history including the probable cause statement and police report. CP 509, 513-514. If a CCO needs to obtain information from a medical provider because the individual is subject to court-ordered mental health treatment, the CCO asks the offender to sign a release of information in order to obtain mental health treatment information. CP 509. In contrast, a CCO does not use a release of information to obtain a SSOSA. CP 509. Instead, the SSOSA evaluation is provided to the CCO

either by the prosecuting attorney or the defense attorney. CP 509. The CCO then recommends in favor or against a SSOSA. CP 509-10. The Department also supervises individuals who receive a SSOSA. RCW 9.94A.501(4)(f).

B. Ms. Zink's Public Records Request and the Trial Court Proceedings

On July 30, 2014, Ms. Zink submitted a public records request to the Department. CP 192, 195-197. This request sought four items, including all SSOSA evaluations related to those convicted of sex offenses held, maintained, in the possession of, or owned by the Department from January 1, 1990, to the date of the request. CP 195. The Department responded on August 6, 2014. CP 192. In its response, the Department indicated that it would respond further by September 18, 2014. CP 192. The Department intended to produce SSOSA evaluations to Ms. Zink after reviewing each individual evaluation to determine if those evaluations contained information that was exempt under the PRA, such as victims' names. CP 192-193. Because SSOSA evaluations are not exempt in their entirety, the Department did not intend to withhold the entire evaluations.

On September 16, 2014, Plaintiffs filed this action. CP 1. The next day, Plaintiffs obtained a temporary restraining order that prevented the Department from releasing the SSOSA evaluations of Level I sex

offenders. CP 97-98. The restraining order did not apply to SSOSA evaluations of Level II and Level III sex offenders, and the Department began producing the evaluations of Level II and Level III offenders to comply with its obligations under the PRA. Plaintiffs then sought class certification and a preliminary injunction. CP 192-93.

The Court certified a class with two discrete subclasses.[1] The class was composed of "[a]ll individuals classified as sex offenders at Risk Level I, who on the date of the request at issue were either compliant with the conditions of registration or had been relieved of the duty to register, and who after January 1, 1990 underwent an evaluation to determine if they were eligible for a Special Sex Offender Sentencing Alternative." CP 265-66. This class was further divided into a subclass of individuals who received a SSOSA and a subclass of individuals who did not receive a SSOSA. CP 266.

At the preliminary injunction stage, Plaintiffs argued that SSOSA evaluations were exempt under 71.05.445; under state and federal law as medical records; and/or under RCW 4.24.550 as sex offender registration records. CP 277-83. The trial court found that SSOSA evaluations were exempt under RCW 71.05.445 and under 70.02 as medical records and enjoined the Department from releasing any SSOSA evaluations of Level I

[1] Although the Department has not appealed the class certification issue, the issue is important to understand the scope of the permanent injunction.

sex offenders. CP 256-61. The trial court, however, rejected Plaintiffs' argument that SSOSA evaluations were covered by RCW 4.24.550. CP 260.

On October 2, 2015, Plaintiffs filed a motion for summary judgment seeking a permanent injunction. In their motion, Plaintiffs argued that SSOSAs are exempt under RCW 70.02.250, 71.05.445, and/or 72.09.585. CP 276-83. In response, the Department argued that (1) these provisions are not "other statutes" exemptions; (2) these provisions—at the most—establish that documents that are confidential under the UHCIA remain confidential when shared with the Department; (3) SSOSA evaluations are not confidential under the UHCIA because they are forensic records, not intended for use in treatment, and thus are not health care information or records related to mental health services; and (4) the provisions relied upon by Plaintiffs did not apply to SSOSA evaluations. CP 491-505. At the summary judgment hearing, Plaintiffs abandoned their reliance upon RCW 72.09.585 and did not argue that SSOSA evaluations are health care information or records related to mental health services. CP 743-44; RP 5-8.[2] Instead, Plaintiffs relied solely upon their argument that RCW 70.02.250 and RCW 71.05.445 by themselves created an exemption

[2] The Department's citation to the report of proceedings refers to the only hearing that the Department identified in its statement of arrangements, the hearing on November 6, 2016. Ms. Zink has also designated certain proceedings.

for "relevant records and reports" shared with the Department and that SSOSA evaluations qualify as "relevant records and reports." CP 743-44.

Without conducting any analysis about whether SSOSA evaluations are health care information or records related to mental health services as defined by RCW 70.02.010, the trial court concluded that SSOSA evaluations are exempt under RCW 70.02.250 and 71.05.445. CP 734-38. The trial court permanently enjoined the release of SSOSA evaluations of Level I sex offenders who were compliant (as of the date of the request) with their conditions of supervision. CP 738. The Department and Ms. Zink both appeal from this determination. CP 757-85.

V. STANDARD OF REVIEW

Agency action taken or challenged under the PRA is reviewed de novo. RCW 42.56.550(3); *Ameriquest Mortg. Co. v. Office of the Attorney Gen.*, 177 Wn.2d 467, 478, 300 P.3d 799 (2013). The issuance of an injunction under RCW 42.56.540 is also reviewed de novo. *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

VI. ARGUMENT

The subject of the records may move for an injunction to prevent the release of records in response to a public records request where (1) a

specific exemption applies; (2) disclosure would not be in the public interest; (3) and disclosure would substantially and irreparably damage a person or government interest. RCW 42.56.540; *Ameriquest Mortg. Co.*, 177 Wn.2d at 486-87. The person seeking to prevent disclosure bears the burden of proof. *See Ameriquest*, 177 Wn.2d at 486-87; *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407-08, 259 P.3d 190 (2011).

The trial court erred in entering a permanent injunction because SSOSA evaluations are not exempt in their entirety. SSOSA evaluations are not health care or mental health care treatment records under the UHCIA; instead, they are forensic evaluations that are created to assist the court in making a sentencing decision. Neither RCW 70.02.250 nor RCW 71.05.445 are independent bases for withholding records; they only protect information that is otherwise confidential under the UHCIA's general confidentiality provisions. Because SSOSAs are not covered under the UHCIA general confidential provisions, they are not covered by RCW 70.02.250 and 71.05.445. Finally, even if the statutes relied upon by Plaintiffs were independent "other statutes," they would not apply to SSOSA evaluations that the Department receives because the Department receives evaluations from prosecutors and defense attorneys, not mental health providers. The trial court's concluded that SSOSA evaluations were

exempt without any analysis of the UHCIA's general confidentiality provisions. This was error. Because SSOSA evaluations are not exempt under the UHCIA's general confidential provisions or the provisions relied upon by Plaintiffs, this Court must reverse.

A. The UHCIA Does Not Protect SSOSA Evaluations

The PRA requires state and local government agencies to provide public records upon request unless the records fall within a specific PRA or "other statute" exemption. RCW 42.56.070; *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). When only a portion of a record is exempt from disclosure, an agency typically must redact the record as long as redacting the record would render the remainder nonexempt. *Resident Action Council*, 177 Wn.2d at 432-433. To further the purpose of the PRA, courts have traditionally interpreted exemptions narrowly. *Id.* at 431.

The UHCIA is the statutory scheme that governs both the disclosure of health care information and information related to mental health services. RCW 70.02.020; 70.02.230. The UHCIA is a PRA exemption. RCW 42.56.360(2). Even though the UHCIA exempts records under the PRA, it does not exempt SSOSA evaluations in their entirety

because the evaluations are neither health care information nor information about mental health services.[3]

1. A SSOSA Evaluation Is Not Health Care Information Because It Is Not Directly Related to an Individual's Health Care

Under RCW 70.02.020, the disclosure of health care information about a patient is generally prohibited without the patient's written authorization. RCW 70.02.020. In order for information to be covered under 70.02.020, the information must be readily associated with a patient and directly related to that patient's health care. RCW 70.02.010(16); *see also Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 645, 115 P.3d 316 (2005). Health care is defined as "any care, service, or procedure provided by a health care provider: (a) To diagnose, treat, or maintain a patient's physical or mental condition; or (b) That affects the structure or any function of the human body." RCW 70.02.010(14). When determining whether a document contains information directly related to a patient's health care, courts examine the purpose of the document and the corresponding service or procedure. *See Hines v. Todd Pac. Shipyards, Corp.*, 127 Wn. App. 356, 368 (2005) (finding UHCIA did not apply to

[3] Although it is possible a portion of an evaluation might contain some medical or mental health information, the Department intended to conduct an individual review of the evaluations and redact any information that might be clearly exempt, including information that was clearly qualified as medical information.

drug test because purpose of drug test was not health care or medical treatment). If the purpose is not for the provision of health care, the UHCIA does not apply. *Id.*

A SSOSA evaluation is not directly related to an individual's health care. A SSOSA evaluation is not related to any care or service that affects the structure or function of the human body, and it is not related to a patient's physical condition. Additionally, it is not related a person's mental condition because the purpose of a SSOSA evaluation is not to diagnosis, treat, or maintain a person's mental condition. *Cf. Hines*, 127 Wn. App. at 368. Instead, a SSOSA is a mandatory forensic evaluation to determine whether someone is amenable to treatment. The purpose of such evaluations is not treatment but to assist the court in making a sentencing decision and to allow an individual to obtain a more favorable sentence. Forensic or court-ordered examinations are distinct from examinations in which a person is seeking medical care and treatment. *See Poole v. S. Dade Nursing & Rehab. Ctr.*, 139 So.3d 436, 441-42 (Fla. Ct. App. 2014); *Johnson v. Weil*, 946 N.E.2d 329, 338-40 (Ill. 2011); *Trammel v. Bradberry*, 568 S.E.2d 715, 724-26 (Ga. Ct. App. 2002); *cf State v. Lopez*, 95 Wn. App. 842, 849, 980 P.2d 224 (1999) (recognizing distinction between statements made to social worker for forensic interview and statements made for diagnosis and treatment); *In re Jones*, 790 N.E.2d

321, 327 (Ohio 2003) (distinguishing between forensic evaluations to aid the court in decision making and court-ordered treatment).

The SSOSA evaluation process is also distinct from any kind of treatment received as part of a sentence. The treatment provider who performs the evaluation is usually prohibited from being the offender's treatment provider. RCW 9.94A.670(13). As such, the statutory scheme itself distinguishes between the evaluation which is designed to aid a court in determining whether a SSOSA is appropriate and the treatment that an offender undergoes if the offender receives a SSOSA. Although the evaluation contains a treatment plan, this treatment plan contains information that is unlike any traditional health care treatment plan. For example, the treatment plan is required to contain "[r]ecommended crime-related prohibitions and affirmative conditions" and "[m]onitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members." RCW 9.94A.670(3)(b)(iii), (v). These recommendations are more akin to conditions of supervision than medical treatment. *See* RCW 9.94A.703 (listing community custody conditions). The fact that the proposed treatment plan encompasses concepts well beyond any traditional version of health care demonstrates that the purpose of a SSOSA evaluation is forensic not health care. Because the evaluation is forensic in nature, it is

not directly related to diagnosis or treatment of a patient's mental condition. Therefore, the UHCIA does not apply.

The purpose of the UHCIA also supports the conclusion that SSOSA evaluations are not confidential under the UHCIA. In enacting the UHCIA, the legislature found that "*[i]n order to retain the full trust and confidence of patients*, health care providers have an interest in assuring that health care information is not improperly disclosed and in having clear and certain rules of the disclosure of health care information." RCW 70.02.005(4) (emphasis added). In essence, the UHCIA is intended to ensure that a patient feels comfortable providing sensitive information to a medical provider so that the medical provider can properly assess the individual's condition. This concern does not apply as strongly when the relationship between the individual and the medical professional is created by a court order. The incentive to provide full and accurate information to a SSOSA evaluator stems from the desire to receive a more favorable sentence not from a desire to receive medical care. This incentive remains regardless of the confidentiality of the evaluation because offenders will still receive the benefit of a more favorable sentence even if their SSOSA evaluations might be disclosed in response to public records requests.

Plaintiffs imply that individuals might be less candid if SSOSA evaluations are subject to public disclosure. However, Plaintiffs concede

and it is undisputed that the evaluation is shared with the court and the prosecutor. CP 157. The consideration of a SSOSA evaluation is not a closed proceeding and such evaluations are sometimes filed in the public court file. CP 522. Once the evaluation is filed in the public court file, any member of the press or public could obtain a copy of the evaluation or the information in the evaluation by looking at the court file. *See e.g.*, SK child molester gets jail time, Port Orchard Independent, *available at http://www.portorchardindependent.com/ news/19831879.html#* (discussing the SSOSA evaluation of an offender). Based on the availability of such information in public court files and the potential that such information is discussed in depth in public court proceedings, an individual who undergoes a SSOSA cannot have a reasonable expectation that such information will remain confidential.

Because SSOSA evaluations do not fit the statutory definition of health care information, the UHCIA does not apply to SSOSA evaluations.

2. A SSOSA Evaluation Does Not Qualify as a Confidential Mental Health Record

Information and records related to mental health services are confidential under RCW 70.02.230. Information and records related to mental health services is "a type of health care information that relates to all information and records compiled, obtained, or maintained in the

course of providing services by a mental health service agency or mental health professional to persons who are receiving or have received services for mental illness." RCW 70.02.010(21). The definition of information and records related to mental health services includes "documents of legal proceedings under chapter 71.05, 71.34, or 10.77 RCW, or somatic health care information." *Id.*

Because information and records related to mental health services is a specific type of health care information, the information must qualify as health care information in order to qualify as information and records related to mental health services. For the reasons discussed above in Section VI.A.1, a SSOSA evaluation is not health care information. Therefore, a SSOSA evaluation is not information and records related to mental health services.

Even if the information qualified as health care information, it would not qualify as information and records related to mental health services for two reasons. First, an individual who sees a provider for a SSOSA evaluation has not received and is not receiving services for a mental illness. Instead, the evaluation is a forensic evaluation to assist the Court in making a sentencing decision, not to determine whether or not someone is mentally ill. *See* discussion supra VI.A.1.

Second, RCW 70.02.010(21) should not be interpreted as including a SSOSA evaluation based on traditional canons of construction. When a statute expressly designates the things or classes of things upon which it operates, an inference arises that all things or classes of things omitted were intentionally omitted under the canon of construction maxim *expressio unius est exclusion alterius*. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). The definition of information and records related to mental health services expressly includes certain types of legal documents for legal proceedings under the involuntary treatment act (RCW 71.05), for proceedings governing competency and insanity in criminal matters (RCW 10.77), and the Mental Health Services for Minors Act (RCW 71.34). The SSOSA evaluations are not included in this list of documents of legal proceedings and the Court should infer that this exclusion was intentional. Because SSOSA evaluations are not information and records related to mental health services, they are not exempt from disclosure under the UHCIA as records related to mental health services.

B. RCW 71.05.445 and RCW 70.02.250 Are Not Independent "Other Statute" Exemptions

In order for a statute to qualify as an "other statute" exemption, the language in the other statute must evidence a clear intent to allow an

agency to withhold a record under the PRA. *Resident Action Council*, 177 Wn.2d at 447. The "other statute" must clearly identify the records or class of records that cannot be disclosed. *See Belo Mgmt. Servs., Inc. v. ClickA Network*, 184 Wn. App. 649, 660, 343 P.3d 370 (2014). The "other statute" provision does not allow courts or agencies to imply exemptions from general language or policy arguments. *See Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990). The purpose of the "other statute" provision is to avoid any inconsistency between the PRA and other state or federal statutes as well as to allow state and federal law to supplement the PRA's exemptions, when appropriate. *See Planned Parenthood of Great Nw. v. Bloedoe*, 187 Wn. App. 606, 666, 350 P.3d 660 (2015).

In interpreting a statute, courts look first to the plain meaning of the statute. *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 720-21, 328 P.3d 905 (2014). A statute's plain meaning is determined not only by looking at the statutory language but also by examining the context of the statute, including related statutes and other provisions of the same act. *Fisher Broadcasting-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 527, 326 P.3d 688 (2014). When the statute's meaning is plain on its face, then courts give full effect to the plain meaning. *Robbins, Geller, Rudman, & Dowd, LLP*, 179 Wn. App. at 720-21. When the plain

language is ambiguous, courts look to principles of statutory construction and legislative history. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 469, 98 P.3d 463 (2004).

RCW 70.02.250 and 71.05.445 do not constitute independent "other statutes" that exempt records from disclosure. These provisions do not expressly exempt any specific record(s) from disclosure. In context, these provisions simply provide that records that were otherwise confidential prior to being shared with the Department will remain confidential after they have been shared with the Department. Therefore, these two provisions do not provide an independent basis for withholding SSOSA evaluations.

1. RCW 71.05.445 Is Not an Independent "Other Statute" Because It Provides No Independent Confidentiality to Records

RCW 71.05.445 was intended to allow for greater sharing of information between the Department and mental health providers while ensuring that documents shared with the Department kept the same level of confidentiality that they previously had. It was not intended to provide heightened or new confidentiality for records shared with the Department. CP 219-20. This interpretation is confirmed by the plain language of RCW 71.05.445, the legislative history of RCW 71.05.445 and related provisions, and the implementing regulations. Consequently, RCW

71.05.445 must be considered in the context of the UHCIA's general confidentiality provisions. Because the UHCIA's general confidentiality provisions do not apply to SSOSAs for the reasons discussed above, RCW 71.05.445 does not provide a basis for withholding SSOSAs.

a. The Plain Language of RCW 71.05.445 Demonstrates That It Is Not an Independent Exemption

RCW 71.05.445 creates a mechanism to share information between the Department and treatment providers. As part of this information sharing, 71.05.445(1)(a) requires a mental health provider to ask an individual receiving court-ordered treatment if they are being supervised by the Department. And, if the individual is under the Department's supervision, the provider must notify the Department and must also notify the patient that the patient's treatment information will be shared with the Department. RCW 71.05.445(1)(b). In creating this mechanism for increased sharing of information, the legislature added language to ensure that information shared with the Department would receive the same level of confidentiality. Specifically, RCW 71.05.445(4) provides that "The information received by the department of corrections under this section shall remain confidential and subject to the limitations on disclosure outlined in chapter 71.05 RCW, except as provided in RCW 72.09.585." Reading this subsection in the context of the other portions of RCW

71.05.445 and related provisions, it was intended to protect only those documents that are otherwise confidential under the UHCIA. In other words, documents shared with the Department have no greater and no less confidentiality than the documents had prior to being shared with the Department. The second clause of the sentence confirms that RCW 71.05.445(4) is not an independent exemption. ("The information…shall remain confidential and *subject to the limitations on disclosure outlined in chapter 71.05 RCW, except as provided in RCW 72.09.585* (emphasis added)). Instead, for a document to be confidential in the hands of the Department, it must be confidential under the general confidentiality provisions in the UHCIA and RCW 71.05.

In the trial court, Plaintiffs relied upon RCW 71.05.445(2) which defines the information that is shared with the Department. Specifically, this subsection indicates that the information released to the Department "shall include all relevant records and reports, as defined by rule, necessary for the [Department] to carry out its duties." RCW 71.05.445(2). Plaintiffs argued that SSOSA evaluations are "relevant records and reports." However, this argument misconstrues the relationship between subsections 1 and 2. Subsection 2 is not separate mechanism for sharing information. Instead, subsection 2 further defines the information that is shared with the Department. Subsection 2 does not make any reference to

confidentiality, and this subsection does not expand the confidentiality provision in RCW 71.05.445(4). RCW 71.05.445(4) only protects records that were otherwise confidential prior to being shared with the Department. Furthermore, subsection 2's reference to "relevant records and reports" is too amorphous to constitute an "other statute" exemption. The reference to "relevant records and reports" cannot be an "other statute" because it fails to identify with any specificity these relevant records and reports.[4] Therefore, the "relevant records and reports" language does transform RCW 71.05.445 into an independent "other statute" that protects such records and reports.

Because the plain language of RCW 71.05.445 demonstrates that it is not an independent "other statute," the trial court erred in finding that SSOSA evaluations are exempt under that provision.

b. The Legislative History of RCW 71.05.445 and Related Provisions Confirm That It Is Not an Independent Exemption

Other portions of the Involuntary Treatment Act, codified in RCW 71.05, support the conclusion that RCW 71.05.445 is not an independent basis for confidentiality of records. Washington has provided some level of confidentiality to mental health treatment records since the passage of

[4] Interpreting RCW 71.05.445(2) as an "other statute" is also problematic because subsection 2 allows the DOC and DSHS to define the term "relevant records and reports" by rule. Courts have not traditionally allowed agencies to define the scope of exemptions. *See e.g., Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978).

the Involuntary Treatment Act of 1973. Under former RCW 71.05.390: "[T]he fact of admission and all information and records compiled, obtained, or maintained in the course of providing services to either voluntary or involuntary recipients of services at public or private agencies shall be confidential" and could only be disclosed under certain specific circumstances. RCW 71.05.390 (1999) *available at http://leg.wa.gov/CodeReviser/RCWArchive/Pages/1999RCWArchive.aspx* At the time of the passage of RCW 71.05.445, only very limited information could be shared with the Department. Specifically, only the fact, place, and date of involuntary admission; the fact and date of discharge, and the last known address could be disclosed upon request. RCW 71.05.390(7)(a) (1999). Any information beyond those basic details could only be disclosed after giving notice to the person and his counsel and upon a showing of clear, cogent, and convincing evidence that such information was necessary and that appropriate safeguards would be maintained. RCW 71.05.390(7)(c) (1999). The Department was also obligated to keep "such information confidential in accordance with [RCW 71.05]." RCW 71.05.390(7)(b) (1999).

With this backdrop, the legislature enacted RCW 71.05.445 in 2000 as part of Senate Bill 6487 "to enhance and facilitate the ability of the department of corrections to carry out its responsibility of planning

and ensuring community protection with respect to persons subject to sentencing under chapter 9.94A by authorizing access to and release or disclosure of necessary information related to mental health services." Laws of 2000, ch. 75, § 1. As originally enacted, RCW 71.05.445(2) read:

> Information related to mental health services delivered to a person subject to chapter 9.94A RCW shall be, upon request, released to the department of corrections by a mental health service provider for the purpose of completing presentence investigations, supervision of an incarcerated person, or determination of a person's risk to the community.

Laws of 2000, ch. 75, § 3. This language is substantially the same language as the language in current RCW 70.02.250. The new provision also contained a requirement that information received by the department "shall remain confidential and subject to the limitations on disclosure outlined in chapter 71.05 RCW." Laws of 2000, ch. 75, § 3, codified as RCW 71.05.445(5).

Read in the context of the other provisions of Senate Bill 6487, RCW 71.05.445 was intended to facilitate sharing of information and ensure that information that was otherwise confidential would remain confidential once it was shared with the Department. This bill was part of a comprehensive scheme to allow greater sharing between mental health service providers and the Department while still providing that information protected by the confidentiality provisions of RCW 71.05

would remain confidential after it was shared with the Department. For example, Senate Bill 6487 amended another of the Involuntary Treatment Act's former confidentiality provisions to explicitly recognize that RCW 71.05.445 created an exception to the general confidentiality rules. Laws of 2000, ch. 75, § 5. Nothing in the bill or bill report indicated that the legislature intended to create heightened confidentiality for information shared with the Department. CP 219-20. This Court should not interpret RCW 71.05.445 to do so.

Subsequent alterations of RCW 71.05.445 demonstrate that that provision is not an independent basis for withholding records. In 2004, the legislature added the language that is now RCW 71.05.445(1) related to people receiving "court-ordered treatment." Laws of 2004, Ch. 166, § 4. In the same bill, the legislature added a corresponding exception to the confidentiality provisions in RCW 71.05.390 that allowed information and records to be shared with the Department "for the purposes of completing presentence investigations or risk assessment reports, supervision of an incarcerated offender or offender under supervision in the community, planning for and provision of supervision of an offender, or assessment of an offender's risk to the community." Laws of 2004, Ch. 166, § 6. Again, in adding these provisions, the legislature altered the confidentiality scheme to allow the sharing of otherwise confidential information with the

Department while ensuring that information confidential under the general confidentiality provisions remained confidential in the hands of the Department.

In 2005, as part of a comprehensive bill, the legislature added an explicit reference to RCW 71.05.445 in another one of the confidentiality provisions in the Involuntary Treatment Act. Laws of 2005, Ch. 504, § 109. The portion of Senate Bill 5763 was intended to merge duplicative and scattered confidentiality provisions to clarify the exceptions to the confidentiality of mental health records. Final Bill Rep. Senate Bill 5763, *available at http://app.leg.wa.gov/dlr/billsummary/default.aspx?year=2005&bill=5763*. In explicitly identifying RCW 71.05.445 as an exception to the general rule of confidentiality as part of its effort to merge the confidentiality provisions, the legislature further confirmed that RCW 71.05.445 only provides confidentiality to documents that were already confidential under the general confidentiality provisions of the Involuntary Treatment Act.

In 2009, the legislature again passed a bill, HB 1300, designed to increase the ability of mental health service providers to share information with the Department. Laws of 2009, Ch. 320. This bill created a new provision, what would become RCW 71.05.385, that allowed greater sharing of information between mental health providers and law

enforcement agencies. Laws of 2009, Ch. 320 § 2. This new section consolidated some confidentiality provisions related to mental health records. Final Bill Rep. House Bill 1300, *available at* http://app.leg.wa.gov/dlr/billsummary/default.aspx?year=2009&bill=1300, at p. 2 ("The new section also consolidates the provisions throughout RCW 71.05 regarding the release of confidential information."). As part of this consolidation effort, the legislature also repealed the first two subsections of RCW 71.05.445. Laws of 2009, Ch. 320 § 4.

In 2013, the legislature again substantially reorganized the provisions regarding the confidentiality of health care information and information related to mental health services. Laws of 2013, Ch. 200. The bill consolidated the provisions regarding the disclosure of mental health treatment records into the UHCIA. The provisions that were formerly 71.05.390 and 71.05.630 were amended and moved to 70.02. Laws of 2013, Ch. 200, § 7, codified as RCW 70.02.230. Additionally, RCW 70.02.250 was enacted with substantially the same language as the first two subsections of former RCW 71.05.445. Laws of 2013, Ch. 200, § 9. The legislature's treatment of RCW 71.05.445 and the general confidentiality provisions of the Involuntary Treatment Act and the UHCIA confirm that RCW 71.05.445 is not a special or heightened confidentiality provision but is simply part of the general confidentiality

scheme of the UHCIA. Because the legislative history of RCW 71.05.445 and related provisions confirm that it does not provide additional or new confidentiality to records, the trial court erred in finding that RCW 71.05.445 is an independent "other statute" exemption.

c. The Regulations That Implement RCW 71.05.445 Confirm That It Is Not an Independent Exemption

The implementing regulations of RCW 71.05.445 confirm that it is not an independent basis for confidentiality. WAC 388-865-0600, et seq., implements RCW 71.05.445. The purpose of the regulations is "to enhance and facilitate the [Department's] ability to carry out its responsibility of planning and ensuring community protection, mental health records and information, as defined in this section, that *are otherwise confidential* shall be released by any mental health service provider" to Department personnel to carry out their job duties. WAC 388-865-0600 (emphasis added). Thus, these regulations recognize that RCW 71.05.445 does not provide any additional confidentiality and simply provides confidentiality to documents that were already confidential.

Based on the plain language, legislative history, and implementing regulations, RCW 71.05.445 is not an independent basis for confidentiality. Instead, it ensures that records that were otherwise confidential prior to being shared with the Department will remain

confidential after they have been shared with the Department. The trial court erred in finding that RCW 71.05.445 was an independent "other statute" and in determining that it exempted SSOSA evaluations under the PRA without any analysis of the UHCIA's general confidentiality provisions. The trial court also erred in its ultimate conclusion because SSOSA evaluations are not exempt under the UHCIA. Thus, the Court's decision must be reversed.

2. RCW 70.02.250 Is Not an Independent "Other Statute" Because It Provides No Independent Confidentiality to Records

Like RCW 71.05.445, RCW 70.02.250 is intended to facilitate the sharing of information between the Department and mental health providers. Like RCW 71.05.445, RCW 70.02.250 is not an independent other statute. Like RCW 71.05.445, RCW 70.02.250 must be considered in the specific context that SSOSA evaluations are forensic evaluations that are not covered under the UHCIA's general confidentiality provisions.

RCW 70.02.250 requires mental health service agencies to release "information and records related to mental health services" to the Department when such information is necessary to carry out the Department's responsibilities. RCW 70.02.250(1). RCW 70.02.250 requires a written request from the Department. *Id.* RCW 70.02.250 also provides that "[t]he information received by the department of corrections

under this section must remain confidential and *subject to the limitations on disclosure outlined in chapter 71.34 RCW, except as provided in RCW 72.09.585*." RCW 70.02.250(5) (emphasis added). The second clause of subsection 5 specifically refers to confidentiality requirements found elsewhere.[5] Like the similar language in RCW 71.05.445, this provision does not provide additional confidentiality but simply ensures that records that were previously confidential remain confidential in the hands of the Department.

In the trial court, Plaintiffs relied upon subsection 2 to argue that SSOSA evaluations are exempt under RCW 70.02.250. However, RCW 70.02.250(2) simply defines the scope of the information that is shared with the Department. Specifically, similar to RCW 71.05.445, it states "[t]he information to be released to the [Department] must include all relevant records and reports, as defined by rule, necessary for the [Department] to carry out its duties, including those records and reports identified in subsection (1) of this section." RCW 70.02.250(2). Plaintiffs' interpretation of this provision misconstrues the relationship between subsections 1 and 2 because these subsections are not separate mechanisms for sharing information with the Department. Rather, they are

[5] The reference to RCW 71.34 is somewhat ambiguous in the context. RCW 71.34 is the chapter related to mental health services for minors. It is unclear why the legislature would refer only to the confidentiality provisions related to minors when the remainder does not appear to be limited to minors.

two part of the same mechanism. Section 1 establishes the ability of mental health service agencies to share information and the purpose for which such information must be shared; section 2 ensures that mental health service agencies share all relevant information and allows the Department and the Department of Social and Health Services to identify what constitutes relevant information through regulations.

Like the language in RCW 71.05.445, subsection 2's reference to "relevant records and reports" is too amorphous to constitute an "other statute" exemption.[6] Also like in RCW 71.05.445, the reference to "relevant records and reports" does not alter the confidentiality provision that is found elsewhere in the provision. *See* RCW 70.02.250(5). Therefore, RCW 70.02.250(2) is not an independent "other statute."

Furthermore, RCW 70.02.250 is located in the UHCIA. The current UHCIA governs the confidentiality and disclosure requirements of health care information and mental health care information. In the UHCIA, the term "information and records related to mental health services" is a term of art. RCW 70.02.010; RCW 70.02.230(2). When RCW 70.02.250(1) uses that phrase, it is using that phrase as defined by the UHCIA. By using that phrase, RCW 70.02.250 is expressly

[6] Again, agencies are not typically allowed to define the scope of their own exemptions. *See e.g., Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978).

incorporating the general confidentiality provisions of the UHCIA, not creating a new, independent confidentiality provision.

The legislative history as well as related provisions of RCW 70.02 and 71.05 confirm this. RCW 70.02.250 is a relatively new provision; it was enacted in 2013 as part of the reorganization of the confidentiality of health records discussed above. *See* supra Section VI.A.1. The statutory language currently in RCW 70.02.250 originally appeared in RCW 71.05.445. The location of RCW 70.02.250 in the UHCIA and the fact that it reenacts portions of RCW 71.05.445 confirms that it is not an independent confidentiality provision but a piece of the confidentiality framework established by the UHCIA's general confidentiality provisions.

Finally, RCW 70.02.230 confirms that RCW 70.02.250 is not an independent "other statute" but rather protects only information that is otherwise confidential under the UHCIA. RCW 70.02.230 is the UHCIA's general confidentiality provision for mental health care information. RCW 70.02.230 explicitly identifies RCW 70.02.250 as an exception to the general confidentiality provisions. RCW 70.02.230(1) ("Except as provided in this section…RCW 70.02.250, the fact of admission to a provider for mental health services and all information and records compiled, obtained, or maintained in the course of providing mental health services to either voluntary or involuntary recipients of services at public

or private agencies must be confidential."). Thus, both the plain language, legislative history, and the surrounding provisions of the UHCIA demonstrate that RCW 70.02.250 is not an independent "other statute."

The complicated legislative history of RCW 70.02 and RCW 71.05.445 show that the legislature has repeatedly attempted to allow greater information sharing between mental health providers and the Department while simplifying the confidentiality provisions governing mental health care information. This legislative effort culminated in 2013 when the legislature consolidated the mental health provisions into the UHCIA. Based on this legislative history, RCW 70.02.250 and RCW 71.05.445 do not create heightened confidentiality for records received by the Department. Rather, if records received by the Department are confidential under the UHCIA's general confidentiality provisions, they remain confidential in the Department's hands. Plaintiffs' interpretation to the contrary would complicate the legislative scheme that the legislature has repeatedly attempted to simplify. It would also require courts to interpret not the general provisions of the UHCIA but the ambiguous term "relevant records and reports" as well as determine how the Department obtained each individual record. Because the trial court erred in concluding that RCW 70.02.250 and RCW 71.05.445 are independent "other statutes," its decision must be reversed.

C. Even If RCW 70.02.250 and RCW 71.05.445 Exempted Some Documents, These Provisions Would Not Cover SSOSA Evaluations

Even if the Court concludes that RCW 70.02.250 and 71.05.445 are "other statute" exemptions and provide confidentiality beyond the general confidentiality provisions of the UHCIA, RCW 70.02.250 and RCW 71.05.445 would not apply to the SSOSA evaluations in the possession of the Department. RCW 70.02.250 only applies to records that are released by *mental health service agencies* in response to written requests by the Department. RCW 70.02.250(1). The Department typically receives SSOSA evaluations from prosecuting attorneys or defense attorneys, and it does not submit any formal written request for those evaluations. CP 509. In other words, SSOSA evaluations are not shared with the Department pursuant to RCW 70.02.250 and the provision, by its plain language, would not apply to SSOSA evaluations the Department obtains from another source.

With respect to RCW 71.05.445, that provision is part of the Involuntary Treatment Act and only applies to "court ordered mental health treatment." As such, RCW 71.05.445 only applies to individuals who have been ordered to undergo treatment pursuant to the Involuntary Treatment Act. It does not apply to a court-ordered SSOSA evaluation. This interpretation is confirmed by other references to court-ordered

treatment in related provisions of the Involuntary Treatment Act. For example, RCW 71.05.132 requires a court to notify individuals who are ordered to receive treatment that their mental health treatment information must be shared with the Department if they are subject to or become subject to the Department's supervision. That provision is triggered "[w]hen any court orders a person to received treatment *under this chapter*." RCW 71.05.132 (emphasis added). SSOSA evaluations are not ordered under the Involuntary Treatment Act and there is no explicit reference to sex offender treatment or SSOSAs in RCW 71.05. Moreover, RCW 71.05.445 does not apply to SSOSA evaluations shared with the Department because the SSOSA evaluations are not shared with the Department by any treatment provider. CP 509. Because RCW 70.02.250 and RCW 71.05.445 would not apply to SSOSA evaluations maintained by the Department even if these two provisions are independent "other statutes," the trial court erred in determining these provisions exempted the SSOSAs maintained by the Department.

D. Factual Finding 21 Is Based on Conclusory Evidence and the Finding Is Not Dispositive of the Statutory Interpretation Issue

The trial court made a factual finding that "SSOSA evaluations contain significant medical, mental health, or other personal information, along with the evaluator's diagnostic assessment of that information." CP

752. As an initial matter, this factual finding is subject to de novo review and is essential superfluous to this Court's review as a result. *See Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, 259 P.3d 190 (2011). Based on the arguments made in the previous sections, SSOSA evaluations are not exempt.

Furthermore, the finding is supported only by conclusory evidence. A factual finding cannot be sustained based solely on conclusory testimony. *See Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988) (noting conclusory facts are not facts of evidentiary value); *Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn. App. 433, 445-46, 161 P.3d 428 (2007) (finding that a finding of fact could not be sustained based solely on conclusory declarations). Plaintiffs did not submit any SSOSA evaluations to the trial court, and the trial court did not examine any SSOSA evaluations to decide this case. Although Plaintiffs filed declarations that asserted SSOSA evaluations contained some medical or mental health information, these declarations contain mostly conclusory statements. The mere fact that individuals have asserted that SSOSAs contain sensitive information or that an organization has taken the position that SSOSA evaluations are protected medical or mental health information is insufficient to conclude that a SSOSA qualifies as medical or mental health information under the UHCIA. A

party cannot avoid a question of statutory interpretation merely by providing declarations that parrot the statutory language in a conclusory fashion Such conclusory statements are not dispositive of the statutory interpretation question. Because the Court's finding is supported only by conclusory testimony and such testimony is not dispositive of the statutory interpretation issue, this Court should not rely cannot rely upon Finding of Fact No. 21 in deciding this appeal.

E. Factual Findings 22 and 23 Are Unsupported Because They Are Based Purely on Speculation

In Factual Findings 22 and 23, the trial court concluded that the disclosure of SSOSA evaluations would not be in the public interest and would actually injure public safety respectively. CP 752-53. Speculative allegations of harm are insufficient to support a finding that disclosure would be injurious to the public. *Cf Belo Mgmt. Servs., Inc v. ClickA Network*, 184 Wn. App. 649, 662-63, 343 P.3d 370 (2014) (finding that broadcasters allegations of harm were too conclusory to support an injunction under RCW 42.56.540); *Does v. King Cnty.*, __ Wn. App. __, 366 P.3d 936, 946 (2015) (declining to enter injunction because the plaintiffs' arguments were entirely speculative). These two factual findings are only supported by speculative evidence.

Factual Finding #22 states that disclosure of SSOSA evaluations would not be in the public interest because disclosure would harm victims; discourage sex offenders from seeking and receiving treatment; and discourage SSOSA offenders from being candid with the evaluator. CP 752-53. This finding is pure speculation. The Supreme Court in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012), ruled against a public agency that was withholding SSOSA evaluations. Some public agencies, including the Department, have been releasing SSOSA evaluations since *Koenig*. CP 191-92, 537. There is no evidence that the release of those evaluations has resulted in the consequences that Plaintiffs assert will result from dissemination of evaluations. With respect to the concern about protecting victim's information, the Department intends to conduct an individual review of each evaluation and redact information that it understands to be exempt, such as the names of child victims. This approach alleviates that concern. Finally, this factual finding must be viewed in light of the fact that the standard of review is de novo.

Similarly, Factual Finding #23 states that the release of SSOSA evaluations would be injurious to the public because releasing SSOSAs would undermine the SSOSA system and discourage reintegration of Level I sex offenders. CP 753. Such a finding is again pure speculation and not based on any concrete, specific evidence. There is no evidence

that the release of SSOSA evaluations has undermined the SSOSA system. There is no evidence that the *Koenig* decision resulted in a sudden decrease of SSOSAs or resulted in harm to Level I sex offenders. As such, the finding that the release of SSOSA evaluations would be injurious to the public is speculative. Because factual findings 22 and 23 are based only speculative statements, this Court should not rely on such findings in deciding this appeal

VII. CONCLUSION

The trial court erred in determining that SSOSA evaluations are exempt from disclosure under the PRA. The trial court erred in its methodology because it treated RCW 70.02.250 and RCW 71.05.445 as other statutes that provide additional confidentiality to records without any analysis of whether SSOSA are covered under the UHCIA's general confidentiality provisions. The trial court also erred in its ultimate conclusion because SSOSA evaluations are not covered by the UHCIA. Instead, SSOSA evaluations are forensic evaluations undertaken to assist a court in determining an individual's eligibility for a preferential sentence. Because the trial court erred in finding SSOSA evaluations are exempt, this Court should reverse the

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issuance of a permanent injunction and remand for the trial court to enter judgment in the Department's and Ms. Zink's favor.

RESPECTFULLY SUBMITTED this 4th day of April, 2016.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the **APPELLANT DEPARTMENT OF CORRECTIONS' OPENING BRIEF** with the Clerk of the Court using the electronic filing system and I hereby certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 4th day of April, 2016, at Olympia, WA.

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