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NO. 74354-6-I
(consolidated with No. 74355-4-I)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JOHN DOE,

Respondent.

THE DEPARTMENT OF CORRECTIONS' PETITION FOR DISCRETIONARY REVIEW

ROBERT W. FERGUSON
Attorney General

TIMOTHY J. FEULNER
WSBA #45396
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504
(360) 586-1445

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I. INTRODUCTION AND IDENTITY OF PETITIONER

The Court of Appeals erroneously affirmed an injunction that requires the Department of Corrections (Department) to withhold Special Sex Offender Sentencing Alternative (SSOSA) evaluations in their entirety from a public records requester, even though these forensic documents are created primarily to aid a court in a sentencing decision.

In 2012, a majority of this Court concluded that SSOSA evaluations were not exempt in their entirety from public disclosure under the investigative records exemption of the Public Records Act (PRA). *Koenig v. Thurston Cnty.*, 175 Wn.2d 837, 287 P.3d 523 (2012). In doing so, this Court "decline[d] to protect [from public disclosure] documents that are created to aid a court in its sentencing decision." *Id.* at 849-50. Although the issue of the application of the Uniform Health Care Information Act (UHCIA) was discussed in one of the dissenting opinions, the majority opinion did not address the issue. This case raises that issue directly.

The *Koenig* decision signaled to public agencies that SSOSA evaluations could not be withheld in their entirety and public agencies, like the Department have released SSOSA evaluations in response to PRA requests. In 2014, Donna Zink submitted a public records request to the Department for SSOSA evaluations. Plaintiffs, a class of Level I sex

offenders, filed this lawsuit, and the trial court entered a permanent injunction preventing the Department from releasing the evaluations of Level I sex offenders. In a published decision, Division One of the Court of Appeals concluded that the trial court correctly prevented the release of SSOSA evaluations because they contain health care information protected by the UHCIA.

The Court of Appeals conclusion will have a widespread impact on public agencies, citizens, and lower courts. The Court of Appeals application of the UHCIA to a forensic record created for the purpose of sentencing will create confusion about the scope of the UHCIA's application to other forensic records and will require agencies to guess about the type of information that should be redacted or withheld from such records. This Court should grant review to clarify these important issues and reverse.

II. COURT OF APPEALS DECISION

The Department seeks review of the published decision of the Washington Court of Appeals, Division I, in *John Doe v. Department of Corrections, et al.*, Cause No. 74354-6-I. The case was consolidated with Court of Appeals Cause No. 74355-4-I. The published decision was filed on January 23, 2017, and is attached to this Petition as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Does a forensic evaluation performed to aid a court in a sentencing decision qualify as "health care information" under the UHCIA, RCW 70.02?

2. Even if SSOSA evaluations contain some "health care information" under the UHCIA, did the Court of Appeals correctly affirm the injunction that required these SSOSA evaluations to be withheld in their entirety without remanding to address the issue of non-exempt information?

IV. STATEMENT OF THE CASE

A. The SSOSA Process

The legislature enacted the SSOSA as part of the Sentencing Reform Act of 1981. A SSOSA is a special sentencing procedure by which a sentencing judge can suspend an individual's felony sentence and impose certain conditions if the individual meets certain statutory criteria. RCW 9.94A.670(5)(a); *State v. Canfield*, 154 Wn.2d 698, 701 n.1, 116 P.3d 391 (2005). The court must impose, among other things, 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).

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 assigned Community Corrections Officer (Officer) will review documents related to the offender's criminal history, including the probable cause statement and police report. CP 509, 513-514. If an Officer needs to obtain information from a medical provider because the individual is subject to court-ordered mental health treatment, the Officer asks the offender to sign a release of information in order to obtain the mental health treatment information. CP 509. In contrast, either

the prosecuting attorney or the defense attorney provides the Officer with a copy of the SSOSA without getting a release. CP 509. The Officer 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

In 2014, Ms. Zink submitted a public records request to the Department for all SSOSA evaluations maintained by the Department since 1990. CP 192, 195-197. The Department responded to Ms. Zink within five business days. CP 192. Because the Department did not believe SSOSA evaluations were exempt in their entirety, the Department intended to review each individual SSOSA evaluation and redact the information that it believed was exempt, such as the names of victims. CP 192-193.

A few weeks later, Plaintiffs, a class of Level I sex offenders, filed this action to prevent the release of their SSOSA evaluations. 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. CP 192-93.

On October 30, 2015, the trial court entered a permanent injunction preventing the Department from releasing the SSOSA evaluations of Level I sex offenders. The trial court, without conducting any analysis of whether such evaluations were "health care information" as defined by RCW 70.02.010(16), found that SSOSA evaluations were exempt under RCW 70.02.250 and 71.05.445. CP 734-38. The Department and Ms. Zink appealed. On appeal, the Department argued, among other things, 1) that the trial court specifically erred in construing RCW 70.02.250 and 71.05.445 as independent, standalone "other statute" exemptions that covered SSOSA evaluations and 2) that SSOSA evaluations were not protected by the general provisions of the UHCIA.

The Court of Appeals in a published decision concluded that SSOSA evaluations contain protected "health care information" under the UHCIA. Additionally, although it indicated SSOSA evaluations may contain non-exempt information, the court declined to address that issue and affirmed the trial court's order preventing the release of such

evaluations in their entirety.[1] The Department now asks this Court to review the Court of Appeals decision.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Department requests that the Court grant review because this case presents issues of substantial public interest under RAP 13.4(b)(4) and the Court of Appeals decision conflicts with prior decisions of this Court under RAP 13.4(b)(1). The Court of Appeals decision is based on an interpretation of the UHCIA and the PRA, two statutory schemes of significant public importance. Specifically, the Court of Appeals erroneously applied the UHCIA to a forensic document that is created as part of the criminal process to aid a court in a sentencing determination. This expansion of the UHCIA conflicts to some extent with cases that distinguish between records created for forensic purposes and records created for health care purposes. It will also have a widespread impact on courts, public agencies, and the general public.

In the alternative, the Court should grant review because the Court of Appeals decision to affirm the injunction without remanding to address the issue of non-exempt information is contrary to prior decisions by this

[1] Although the Court of Appeals discussed the fact that Level I sex offenders pose the lowest risk to the public, it is unclear if these considerations affected its legal analysis. Nothing in the Court of Appeals analysis of the UHCIA explains why its reasoning would not also apply to Level II and Level III sex offenders.

Court. RAP 13.4(b)(1). This Court should grant review to clarify these important issues and provide guidance to state and local agencies.

A. The Application of the UHCIA and the PRA to SSOSAs Is an Issue of Substantial Public Interest

The appropriate treatment of SSOSA evaluations under the PRA is an issue of substantial public interest because it represents the confluence of the PRA, the UHCIA, and the criminal justice system. In fact, this Court addressed the treatment of SSOSA evaluations under the PRA within the last five years in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012). Although three judges discussed the application of the UHCIA to SSOSAs in that case, the majority opinion did not directly address that issue. Still the majority opinion did approve the disclosure of a SSOSA to a member of the public in response to a public records request. *Koenig*, 175 Wn.2d at 849-50. This case provides an opportunity for this Court to address this issue that the *Koenig* case did not squarely resolve.

Furthermore, both the PRA and the UHCIA are statutory schemes that impact the lives of Washingtonians and public agencies on a daily basis. This Court has repeatedly recognized the importance of open

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government, especially in the context of the criminal justice system.[2] In the last five years, this Court has twice addressed the PRA and sex offender records. *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 374 P.3d 63 (2016); *Koenig v. Thurston Cnty.*, 175 Wn.2d 837, 287 P.3d 523 (2012). In both cases, this Court granted review and found that such records were not exempt from public disclosure.

Additionally, absent this Court's review, the implications of the Court of Appeals analysis will be widespread. The Court of Appeals held below that the Department cannot disclose SSOSA evaluations because they contain health care information protected by the UHCIA. In doing so, the Court of Appeals expanded the scope of the UHCIA and narrowed the scope of the PRA to prevent the disclosure of records that are routinely relied upon by criminal courts to make sentencing decisions. The decision's expansion of "health care information" will impact courts, who routinely review and discuss such evaluations in open court, and public agencies, who must confront the Court's expansive and ambiguous definition of "health care information." In fact, there are two similar cases

[2] *See Dreilling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004) ("Again, the operations of the courts and the judicial conduct of judges are matters of utmost public concern."); *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) ("Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity."). The principle of open courts is enshrined in article 1, Section 10 of the Washington Constitution.

involving local counties, classes of level I sex offenders, and Ms. Zink currently in Division II of the Court of Appeals. Appendix B, Statement of Related Cases. The existence of such cases, as well as prior examples where this Court has taken review to correct lower court decisions that have extended broad protection to sex offender records, demonstrate that this case presents issues of substantial public interest. As a result, this Court should grant review under RAP 13.4(b)(4).

B. The Court of Appeals Erroneously Applied the UHCIA to a Forensic Document Used in a Sentencing Proceeding

Although the Court of Appeals correctly outlined the framework of the UHCIA, it erroneously interpreted that framework to apply to forensic documents created primarily to aid a court in a sentencing decision. The Court of Appeals began its analysis by correctly recognizing that information in SSOSA evaluations could only be covered under the UHCIA if the offenders receiving the evaluations are "patients," the information identifies "or can be readily associated with" an offender's identity, and the evaluation "directly relates' to the offender's health care." Appendix A, at p. 10. The Court of Appeals nonetheless concluded that SSOSA evaluations retained by the Department are health care information, even though the evaluations are forensic in nature, the Department is not a health care provider in these circumstances, and the

subject of the SSOSA evaluation is not the Department's patient. Appendix A, at p. 10 n.31. In reaching this conclusion, the Court of Appeals indicated in a conclusory fashion that the PRA incorporates the UHCIA.[3] Appendix A, at p. 10 n.31. However, even assuming these basic principles are correct, it does not explain how a forensic document received from a non-health care provider as part of a public court proceeding could be protected "health care information."

The Court of Appeals decision ignored the nature of a SSOSA evaluation and the traditional treatment of forensic records. In other contexts, courts have long recognized a distinction between a forensic evaluation and a medical evaluation in which a person is seeking medical care and treatment. *See Hertog v. City of Seattle*, 88 Wn. App. 41, 48, 943 P.2d 1153 (1997) ("Where communications are made for the purpose of reporting to an agency or court, they are not privileged" under the psychiatrist-patient privilege); *State v. Sullivan*, 60 Wn.2d 214, 223, 373 P.2d 474 (1962). This Court recognized a distinction between forensic examinations and examinations for the purpose of treatment over fifty years ago in *State v. Sullivan*, 60 Wn.2d 214, 223, 373 P.2d 474 (1962). In the context of the physician-patient privilege, the *Sullivan* Court explained

[3] The Court of Appeals also stated that the broad definition of the term "patient" did not show any legislative intent to limit the definition of "health care information." Appendix, at p. 10. However, in order to be protected under the UHCIA, the information must both pertain to a patient and be directly related to the individual's health care.

that the physician-patient privilege does not apply to forensic evaluations because "the relationship of doctor and patient does not exist; the examination is *not for the purpose of treatment, but for the publication of results*." *Id.* (emphasis added).

This same, long-standing distinction exists under the UHCIA and impacts the disclosure of SSOSA evaluations. A SSOSA evaluation is a forensic evaluation designed to aid a court in sentencing, not for the purpose of treatment. The *Koenig* majority implicitly recognized the forensic purpose of SSOSA evaluations when it noted that a SSOSA evaluation "principally provides a basis for the court to impose sentencing alternatives." *Koenig*, 175 Wn.2d at 849. The SSOSA scheme itself draws a line between the provider who conducts the forensic evaluation and the provider who treats the offender after the sentence. RCW 9.94A.670(1)(a), (13).

Furthermore, SSOSA evaluations are routinely filed in the public court file. Indeed, at least one county requires SSOSA evaluations to be filed in the court file, *see* Spokane County Superior Court Local General Rule 0.31, and another county, Pierce County, makes such evaluations available through its online court records system. These practices demonstrate that superior courts do not typically view such documents as confidential health care information. Despite the well-established

distinction between forensic documents and traditional health care information, the Court of Appeals decision erroneously held that SSOSA evaluations could qualify as protected health care information.

The Court of Appeals analysis not only conflicts with the traditional distinction between forensic and traditional medical records, but it also is contrary to the language of the UHCIA read in context. To be health care information, the information must be directly related to a care, service, or procedure provided by a health care provider to diagnose a patient's physical or mental condition. *See* RCW 70.02.010(14)(a) (defining health care); RCW 70.02.010(16) (defining health care information). This definition requires some inquiry into the purpose of the care, service, and procedure. Appendix A, at p. 12 n.38. The Court of Appeals merely indicated that SSOSA evaluations can have more than one purpose, but it did not examine the importance of the evaluations' forensic purpose. Appendix A, at p. 12. The Court of Appeals conclusion also ignores that it renders a host of other statutory provisions superfluous. *See* RCW 10.77.210 (providing confidentiality to competency evaluations); RCW 70.02.010(21) (defining information and records related to mental health services as applying to documents of specific legal proceedings that do not include SSOSA proceedings). None of those statutory provisions would be necessary if the general protections in the UHCIA applied to

forensic evaluations. Simply put, when the legislature has intended to provide confidentiality to forensic records, it has done so. The legislature has not done so for SSOSA evaluations.

Moreover, the practical effect of the Court of Appeals published ruling is potentially widespread. The decision will confound public agencies and lower courts because it raises many unresolved and troublesome questions. Under the Court of Appeals definition of "health care information," are public agencies obligated to completely withhold SSOSA evaluations from requesters, as Plaintiffs have argued? Have health care providers been routinely violating the UHCIA by sharing this information with the Court and the Department without a release? When a criminal court conducts a sentencing proceeding involving a SSOSA, is the criminal court required to close the courtroom or seal the SSOSA? If the latter is one of the implications of the Court of Appeals decision, it will raise serious constitutional questions. *See In re Det. of D.F.F.*, 172 Wn.2d 37, 47, 256 P.3d 357 (2011) (invalidating court rule that required involuntary commitment proceedings to be closed to the public). Finally, what are the implications, if any, for records created by medical providers as part of other judicial and administrative proceedings, from workers' compensation to tort cases? Must public agencies redact court records that refer to such forensic evaluations prior to releasing documents under the

PRA? Public agencies and courts will have to grapple with these issues if the Court of Appeals decision stands. The importance of these issues cannot be understated for entities caught between the potential liability of the UHCIA and the PRA.

The obligation of an agency to disclose SSOSA evaluations is an issue of substantial public interest. The Court of Appeals analysis is premised on the application of two important statutory schemes to a document created as part of the criminal justice system. Because the Court of Appeals expansion of the UHCIA to forensic records is an issue of substantial public interest and conflicts to some extent with prior decisions drawing a distinction between medical treatment and forensic evaluations, this Court should grant review under RAP 13.4(b)(4) or (b)(1).

C. The Court of Appeals Should Have Remanded for Further Proceedings to Determine What Information in SSOSA Evaluations Is Exempt or Provided Some Guidance on This Question

The Court of Appeals affirmed the trial court's injunction based on the Court of Appeals conclusion that SSOSA evaluations contain "health care information" protected by the UHCIA. Appendix A, at 15. Yet, the Court of Appeals also repeatedly used language showing that it believed some information in SSOSA evaluations is non-exempt. Appendix A, at 2 ("Without redaction of this information, [the SSOSA evaluations] are thus

exempt from PRA disclosure."); Appendix A, at 8 ("We agree with Doe that the unredacted evaluations that the Department intended to release are exempt from the PRA's general disclosure provision. . . ."). Despite these statements that strongly suggest the Court of Appeals understood there is non-exempt information in a SSOSA evaluation, the Court of Appeals declined to either remand to the trial court or provide any guidance to the parties about what portions of a SSOSA evaluation could be released. The Court of Appeals instead simply affirmed the injunction because "[both sides] framed exemption and disclosure as all or nothing propositions." Appendix A, at p. 14.[4]

At the very least, in light of its acknowledgment that SSOSAs contain some nonexempt information, the Court of Appeals should have remanded to the trial court for further proceedings. The failure to do so runs contrary to this Court's prior case law. This Court has long recognized that an agency must redact a record if redaction of the record can make it non-exempt. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015); *Resident Action Council v. Seattle*

[4] The Court of Appeals lamented the fact that the record did not contain a SSOSA evaluation. The parties do not generally dispute the content of the evaluations, but rather disagree about the nature of the document itself. Yet if a review of a SSOSA evaluation was necessary for its determination, the Court of Appeals could have requested the parties file sample evaluations or it could have remanded for additional review in the trial court. It did neither. In the event this Court accepts review, it also could require the parties to file examples of SSOSA evaluations, if such evaluations are necessary to the Court's determination. Moreover, if this Court grants review, either party could move to supplement the record.

Hous. Auth., 177 Wn.2d 417, 437, 327 P.3d 600 (2013); *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 210, 189 P.3d 139 (2008); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994). The Court of Appeals recognized this principle and its potential application to this case. Appendix, at p. 14. However, contrary to this Court's prior case law, the Court of Appeals decided to affirm the trial court's injunction without consideration of whether the SSOSA can be appropriately redacted.

Third party PRA injunctions, like the one Plaintiffs brought here, allow third parties to try to prevent the release of records by showing that such records are exempt and meet the other criteria in RCW 42.56.540. Under such circumstances, the party opposing release bears the burden of proving that all or part of the records in question are exempt from disclosure. *See Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 370-71, 374 P.3d 63 (2016); *Ameriquest Mortg. Co. v. Office of Attorney Gen. of Wash.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013).

In this case, Plaintiffs took the position that SSOSA evaluations were exempt in their entirety and did not ask for any other relief, such as the redaction of certain information. Specifically, Plaintiffs asserted that SSOSA evaluations are exempt in their entirety because the entire document contains information that is relied upon as part of the

evaluation. Oral Argument, at 12:48-14:06, 14:41-15:20.[5] Therefore, Plaintiffs bore the burden of showing that the records were exempt in their entirety.

If the Court grants review on this ground and concludes that further factual finding is indeed required, it should also provide guidance to the trial court and public agencies prior to remanding. This Court has stressed the importance of clear guidance for public agencies related to public records issues. *See e.g.*, *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013) ("In this difficult area of the law, we endeavor to provide clear and workable guidance to agencies insofar as possible."). Here, guidance would be necessary for a trial court to determine what portions or categories of information should be redacted from a SSOSA, if any. For example, should redactions be limited to just the evaluator's diagnosis? Should redactions protect broader categories of information, such as the individual's family history, drug and alcohol history, or the description of the underlying crime? Is the ability of the public to examine any of these elements so clearly in the public interest that it should not be redacted under RCW 42.56.540?

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[5] Audio *available at https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20161103.*

Ultimately, the Court of Appeals decision failed to provide any clarity to these important issues because its decision essentially boils down to a conclusion that the SSOSA evaluations are exempt health care information to the extent that they contain exempt health care information. This logic is circular and fails to directly address the practical problems that this reasoning creates for public agencies and lower courts. The Department, other similarly situated public agencies, and lower courts will be left to guess what the Court of Appeals meant when referring to non-exempt information. Such guesswork will engender needless additional litigation. Thus, even if this Court concludes that some information in SSOSAs should be withheld from public disclosure, it should also take the opportunity to provide guidance as to what information remains available to public records requesters. And again, at the very least, this Court should accept review and remand for further proceedings so that trial court can provide guidance about the information that must be disclosed.

VI. CONCLUSION

The Department respectfully requests that this petition be granted under RAP 13.4(b)(1) and (4). This Court should reverse and conclude that SSOSAs are not exempt under the UHCIA because they are forensic documents created to aid a court in a sentencing determination. But even if this Court believes some information in SSOSAs should be redacted, it

should still grant review, remand for further proceedings, and provide guidance to public agencies and lower courts as to what portions of SSOSAs can be disclosed.

RESPECTFULLY SUBMITTED this 22nd day of February, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
TIMOTHY J. FEULNER, WSBA #45396
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
TimF1@atg.wa.gov

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed THE DEPARTMENT OF CORRECTIONS' PETITION FOR DISCRETIONARY REVIEW 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:

☒ Via Email

BEN GOULD	bgould@KellerRohrback.com
PRACHI V. DAVE	pdave@aclu-wa.org
DONNA ZINK	dlczink@outlook.com
JEFF ZINK	jeffzink@outlook.com

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

EXECUTED this 22nd day of February, 2017, at Olympia, WA.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant
Corrections Division, OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
CherrieK@atg.wa.gov

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN DOE G, JOHN DOE I, and JOHN DOE H, as individuals and on behalf of others similarly situated, Respondents, v. DEPARTMENT OF CORRECTIONS, STATE OF WASHINGTON, Appellant, DONNA ZINK, a married woman, Appellant.	No. 74354-6-I (Consolidated with No. 74355-4-I) DIVISION ONE PUBLISHED OPINION FILED: January 23, 2017

LEACH, J. — The Department of Corrections (Department) and Donna Zink each appeal a trial court order enjoining disclosure of certain special sex offender sentencing alternative (SSOSA) evaluations. Zink submitted a Public Records Act (PRA)[1] request for all SSOSA evaluations since 1990. The respondents (collectively Doe), a class of level I sex offenders, sued to prevent the Department from disclosing their evaluations. The trial court enjoined the Department from releasing SSOSA evaluations of level I sex offenders who, as of the request date, had complied with their conditions of supervision. Because each evaluation necessarily includes a diagnosis of the offender's mental

[1] Ch. 42.56 RCW.

APPENDIX A

conditions, it contains confidential health care information under Washington's Uniform Health Care Information Act (UHCIA).[2] Without redaction of this information, they are thus exempt from PRA disclosure. Because experience and logic show that allowing plaintiffs to use pseudonyms in these circumstances does not implicate the Washington Constitution, the trial court did not err in allowing the plaintiffs to proceed under pseudonyms. And because the PRA does not prohibit plaintiffs from suing as class representatives, the trial court did not err in certifying the class here. We affirm.

FACTS

The Washington Legislature enacted SSOSA as part of the Sentencing Reform Act of 1981.[3] SSOSA provides a sentencing alternative for first time sex offenders.[4] It allows a trial court to suspend an offender's felony sentence if the offender meets certain statutory criteria.[5] When doing this, the court must impose certain conditions, including sex offender treatment and a term of community custody.[6]

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[2] Ch. 70.02 RCW.

[3] State v. Canfield, 154 Wn.2d 698, 701 n.1, 116 P.3d 391 (2005); ch. 9.94A RCW.

[4] State v. Pannell, 173 Wn.2d 222, 227, 267 P.3d 349 (2011).

[5] RCW 9.94A.670(2), (4); Pannell, 173 Wn.2d at 227.

[6] RCW 9.94A.670(5)(a)-(d).

To be considered for a SSOSA, an eligible offender must undergo an evaluation to determine whether the offender is "amenable to treatment."[7] An offender is amenable to treatment if the offender and the community will benefit from community-based treatment given the offender's background, history, social and economic circumstances, and psychological condition.[8] With narrow exceptions, the evaluation must be performed by a health professional certified by the Department of Health (DOH) to examine and treat sex offenders.[9] The statute generally prohibits the same provider from treating the offender if the offender receives a SSOSA.[10]

The SSOSA evaluation assesses "the offender's amenability to treatment and relative risk to the community."[11] The evaluation must contain, at a minimum, the offender's and the official versions of the crime, the offender's criminal history, "[a]n assessment of problems in addition to alleged deviant behaviors," information about the offender's employment and social life, and any

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[7] RCW 9.94A.670(3).

[8] RCW 9.94A.670(3); State v. Oliva, 117 Wn. App. 773, 780, 73 P.3d 1016 (2003).

[9] RCW 9.94A.670(1)(a), .820(1); RCW 18.155.020.

[10] RCW 9.94A.670(13) ("unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical"). The statute sets exacting standards for eligible offenders: the offender had no prior sex crime convictions or convictions for violent crimes in the previous 5 years; the offense did not result in bodily harm; the victim was not a stranger to the offender; and the offender's crime did not mandate a sentence of 11 years or more. RCW 9.94A.670(2).

[11] RCW 9.94A.670(3)(b).

other evaluation measures the provider used.[12] Based on these factors, the provider must assess the appropriateness of community treatment, summarize

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[12] RCW 9.94A.670(3)(a). DOH regulations impose more specific requirements, including:

> (i) A description of the current offense(s) or allegation(s) including, but not limited to, the evaluator's conclusion about the reasons for any discrepancy between the official and client's versions of the offenses or allegations;
>
> (ii) A sexual history, sexual offense history and patterns of sexual arousal/preference/interest;
>
> (iii) Prior attempts to remediate and control offensive behavior including prior treatment;
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> (iv) Perceptions of significant others, when appropriate, including their ability and/or willingness to support treatment efforts;
>
> (v) Risk factors for offending behavior including:
> (A) Alcohol and drug abuse;
> (B) Stress;
> (C) Mood;
> (D) Sexual patterns;
> (E) Use of pornography; and
> (F) Social and environmental influences;
>
> (vi) A personal history including:
> (A) Medical;
> (B) Marital/relationships;
> (C) Employment;
> (D) Education; and
> (E) Military;
>
> (vii) A family history;
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> (viii) History of violence and/or criminal behavior;
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> (ix) Mental health functioning including coping abilities, adaptation style, intellectual functioning and personality attributes; and
>
> (x) The overall findings of psychological/physiological/medical assessment if these assessments have been conducted.

WAC 246-930-320(2)(e).

its "diagnostic impressions," assess factors affecting risk to the community, assess the offender's willingness to participate, and propose a treatment plan.[13]

If the offender meets the statutory criteria and undergoes an evaluation, the trial court then must consider a number of circumstances, including the victim's opinion in particular, and decide if a SSOSA sentence is appropriate.[14]

The Department supervises offenders who receive a SSOSA.[15] Unlike other mental health treatment information, the Department does not receive a SSOSA evaluation from the provider. Rather, either the prosecutor or defense attorney usually provides the evaluation to the community corrections officer investigating the offender's history.

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[13] WAC 246-930-320(2)(f), (g). The plan must contain:

> (i) Frequency and type of contact between offender and therapist;
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> (ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;
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> (iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;
>
> (iv) Anticipated length of treatment; and
>
> (v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

RCW 9.94A.670(3)(b).

[14] RCW 9.94A.670(4).

[15] RCW 9.94A.501(4)(f).

Doe submitted unrebutted expert testimony that SSOSA sentences are effective. A 2005 study commissioned by the legislature found that offenders who complete SSOSA sentences have the lowest recidivism rates for any type of crime, including sex offenses—rates less than one third those of other offenders.[16] Nonetheless, SSOSA sentences are increasingly rare in practice even among eligible offenders. In 2005, 35 percent of offenders who met the statutory criteria received SSOSA sentences, down from 59 percent in 1986. In 2012, only 95 offenders in the state received a SSOSA sentence.

In July 2014, Donna Zink made a PRA request for all SSOSA evaluations "maintained, in the possession of or owned by the Washington State Department of Corrections from January 1, 1990 to the present." The Department responded that it would produce the evaluations after reviewing each one to determine if it contained exempt information, including victims' names. Doe filed this action to enjoin the Department from releasing evaluations of level I sex offenders.

The plaintiffs are current or former level I sex offenders who underwent SSOSA evaluations. Level I offenders are those who the Department's end-of-sentence review committee determines pose the lowest risk to the public.[17]

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[16] The recidivism rate for sex offenders sentenced to prison terms was 16.9 percent; the corresponding rate for sex offenders who received a SSOSA sentence was 4.7 percent. These rates measure the percentage of offenders convicted of a new felony within five years of their release.

[17] RCW 72.09.345(6); RCW 13.40.217(3).

The trial court first granted a temporary restraining order and then a preliminary injunction against the Department.[18] It also allowed the plaintiffs to use pseudonyms and to represent a certified class of compliant level I offenders who have received SSOSA evaluations since 1990.[19]

Later, the trial court granted summary judgment for the plaintiffs, finding that RCW 71.05.445 and ch. 70.02 RCW exempt the evaluations from disclosure. The court permanently enjoined the Department from fulfilling Zink's request. Zink and the Department appeal.

STANDARD OF REVIEW

This court reviews de novo a trial court's PRA decisions about exemptions and injunctions.[20] This court also reviews the record de novo in PRA cases where "the record consists of only affidavits, memoranda of law, and other documentary evidence, and where the trial court has not seen or heard testimony requiring it to assess the witnesses' credibility or competency."[21] When a party seeking summary judgment initially shows the absence of any material issue of

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[18] Because the restraining order applied only to level I offenders, the Department began producing the evaluations of level II and III offenders per Zink's request.

[19] The plaintiff class is divided into two subclasses: offenders who actually received a SSOSA sentence and those who did not.

[20] Ameriquest Mortg. Co. v. Office of Att'y Gen., 177 Wn.2d 467, 478, 300 P.3d 799 (2013).

[21] Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 407, 259 P.3d 190 (2011).

fact for trial, the party opposing summary judgment must produce evidence of specific facts sufficient to show a material issue.[22]

ANALYSIS

Health Care Information Exemption

The PRA requires state agencies to make records "available for public inspection and copying" unless the records are exempt under the PRA or an "other statute which exempts or prohibits disclosure of specific information or records."[23] Doe asserts that both the PRA and two "other statute[s]" exempt the records Zink requested. We agree with Doe that the unredacted evaluations that the Department intended to release are exempt from the PRA's general disclosure provision because they contain confidential health care information. We do not decide if the records can be sufficiently redacted to protect this information.

As a preliminary matter, and contrary to Zink's arguments, the Supreme Court's decision in Koenig v. Thurston County[24] does not dispose of Doe's exemption arguments. The Supreme Court considered only whether the PRA exemption for investigative records applies to SSOSA evaluations and victim

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[22] Hash v. Children's Orthopedic Hosp., 49 Wn. App. 130, 134-35, 741 P.2d 584 (1987), aff'd, 110 Wn.2d 912, 757 P.2d 507 (1988).

[23] RCW 42.56.070(1).

[24] 175 Wn.2d 837, 287 P.3d 523 (2012).

impact statements.[25] "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."[26]

The PRA includes an exemption for patients' health care information.[27] This exemption incorporates the confidentiality provisions of Washington's UHCIA.[28] This act protects health care information and information about mental health services.

The UHCIA prohibits disclosure of "health care information about a patient" without the patient's consent.[29] This prohibition applies to "a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider." "Health care information" includes "any information . . . that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health

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[25] See RCW 42.56.240.

[26] Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

[27] RCW 42.56.360.

[28] RCW 42.56.360(2). RCW 42.56.360(1) lists types of health care information that are exempt. RCW 42.56.360(2) states, "Chapter 70.02 RCW [the UHCIA] applies to public inspection and copying of health care information of patients." The Supreme Court has interpreted this language to incorporate RCW 70.02.020. Prison Legal News, Inc. v. Dep't of Corr., 154 Wn.2d 628, 644, 115 P.3d 316 (2005) (discussing former RCW 42.17.312, which is identical to current RCW 42.56.360(2)).

[29] RCW 70.02.020(1).

care."[30] Thus, information in SSOSA evaluations is confidential under the UHCIA and exempt under the PRA if the offenders receiving the evaluations are "patients," that information identifies "or can readily be associated with" an offender's identity, and the evaluation "directly relates" to the offender's health care.[31] Information in the evaluations satisfies each of these requirements.

First, offenders are "patients" under the UHCIA. The act defines a "patient" as "an individual who receives or has received health care."[32] This broad definition shows no intent for the term "patient" to limit what qualifies as "health care information."[33] Instead, the Supreme Court's decisions interpreting

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[30] RCW 70.02.010(16). The UHCIA separately provides that "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." RCW 70.02.230(1). But because the statute defines mental health records as "a type of health care information," RCW 70.02.010(21), we do not need to decide whether SSOSA evaluations also qualify as mental health records. If they are health care information, they are exempt under RCW 70.02.020(1); if they are not health care information, then they are not mental health records either.

[31] RCW 70.02.010(16). Although RCW 70.02.020(1) applies only to "a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider"—categories that likely would not include the Department—RCW 42.56.360(2) incorporates RCW 70.02.020 into the PRA and thus restricts disclosures by the Department. Prison Legal News, 154 Wn.2d at 644.

[32] RCW 70.02.010(32).

[33] Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356, 366-67, 112 P.3d 522 (2005), is distinguishable. There, this court held that the predecessor to the UHCIA did not apply to the results of an employee's contractually required drug test, in part because the test was not given to the employee as a "patient." Among other distinctions, unlike a mandatory drug test, a SSOSA evaluation determines an offender's amenability to treatment and must include a treatment plan.

RCW 70.02.020 note only two requirements for "health care information": patient identifiability and information about patient health care.[34]

Second, SSOSA evaluations identify offenders. A party opposing PRA disclosure must show "each patient's health care information is 'readily associated' with that patient" for the exemption to apply.[35] "Where there is a dispute over whether health care information is readily identifiable with a specific patient even when that patient's identity is not disclosed, the trial court can use in camera review should it need to examine unredacted records to make its independent determination."[36] This review was not necessary here because the Department does not intend to redact offenders' names from evaluations. The evaluations are thus "readily associated" with offenders.

Finally, some information in SSOSA evaluations directly relates to offenders' health care. "'Health care' means 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."[37]

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[34] Prison Legal News, 154 Wn.2d at 645; see also Wright v. Jeckle, 121 Wn. App. 624, 630, 90 P.3d 65 (2004).
[35] Prison Legal News, 154 Wn.2d at 645 (emphasis omitted).
[36] Prison Legal News, 154 Wn.2d at 645-46.
[37] RCW 70.02.010(14).

The Department would interpret "to" in this definition to mean "for the sole purpose of." It thus contends that the evaluations do not directly relate to offenders' health care because the evaluations are not for the sole purpose of treating offenders. It asserts that the evaluations are only "mandatory forensic evaluation[s]" to assist a court in making a sentencing decision. Doe responds that the evaluations can have more than one purpose. We agree with Doe.

Nothing in the statute supports the Department's narrow interpretation of health care.[38] The SSOSA statute requires an evaluation to include "[a]n assessment of problems in addition to alleged deviant behaviors," information about the offender's employment and social life, and any other evaluation measures the provider used.[39] DOH regulations further require that the evaluation include, among other information, "[a] sexual history, sexual offense history and patterns of sexual arousal/preference/interest," "[r]isk factors for offending behavior," and medical, marital, relationship, and family histories. The evaluations must also address "[m]ental health functioning including coping abilities, adaptation style, intellectual functioning and personality attributes" and

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[38] The relevant definition of "to" is "used as a function word to indicate purpose, intention, tendency, result, or end." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2401 (2002).

[39] RCW 9.94A.670(3)(a)(iii), (iv), (v).

include "overall findings of psychological/physiological/medical assessment if these assessments have been conducted."[40]

The evidence Doe submitted also indicates that the evaluations contain medical, mental health, substance abuse, and sexual histories; results of physical and psychological tests; amenability to treatment; and information about the offenders' families, as well as their victims.[41] The Department introduced no evidence to rebut the facts in these declarations.

Thus, governing law and our review of the record both indicate that SSOSA evaluations include a "service[ ] or procedure provided by a health care provider" to "diagnose . . . a patient's . . . mental condition."[42] They therefore directly relate to offenders' health care.

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[40] WAC 246-930-320(2)(e). To assess a medical condition is to diagnose it. BLACK'S LAW DICTIONARY 548 (10th ed. 2014) (defining "diagnosis" as "[t]he determination of a medical condition (such as a disease) by physical examination or by study of its symptoms").

[41] Doe submitted declarations from two attorneys who represent sex offenders, one of whom is a member of the Sex Offender Policy Board; from the board of the Washington Association for the Treatment of Sexual Abusers; from the executive director of the national Association for the Treatment of Sexual Abusers; from two psychologists and certified sex offender treatment providers; and from several plaintiffs. The declarations described the information offenders disclose in the evaluations. Together they indicate, as the trial court found, "SSOSA evaluations contain significant medical, mental health, and other personal information, along with the evaluator's diagnostic assessment of that information."

[42] RCW 70.02.010(14).

Because SSOSA evaluations contain health care information, if not redacted, they are exempt from PRA disclosure under RCW 42.56.360(2) and RCW 70.02.020(1). Because we hold that these statutes exempt the evaluations that the Department proposed releasing, we do not reach Doe's alternative arguments that RCW 71.05.445 and RCW 70.02.250 are "other statute[s]" that exempt the evaluations from PRA disclosure.

We do not decide whether some portion of a SSOSA evaluation would fall outside the exemption. "In general, the PDA does not allow an agency to withhold exempt records in their entirety. Rather, agencies must withhold only those portions of individual records which come under a specific exemption and disclose the rest."[43]

Here, the Department's only declaration in opposition to the preliminary injunction suggested that names of victims may be exempt. A footnote in the Department's brief stated that the Department would also redact information that "clearly qualifie[s] as medical information." But the Department takes the position, which it stated firmly at oral argument, that the evaluations contain no medical information. Similarly, Doe did not identify any information that would not be exempt under his interpretation of the UHCIA. Both sides thus framed exemption and disclosure as all or nothing propositions.

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[43] Tacoma Pub. Library v. Woessner, 90 Wn. App. 205, 224, 951 P.2d 357 (1998).

Doe showed that the evaluations contain health care information. Our record does not include any SSOSA evaluations. We have nothing before us that would allow us to decide if any specific portions are not exempt. As a result, because the evaluations contain exempt health care information that the Department has refused to redact, we affirm the trial court.[44]

Pseudonyms

In Zink's separate appeal, she contends that the trial court improperly sealed court records when it allowed the plaintiffs to use pseudonyms. She asserts that the trial court had to hold a hearing in open court and apply the five factors from Seattle Times Co. v. Ishikawa[45] before allowing this. We disagree.

The Washington Constitution creates a presumption of openness in trial court proceedings.[46] "Whether an Ishikawa analysis is necessary depends on

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[44] We leave open to Zink the opportunity to ask the trial court for an in camera review of the evaluations to decide if they include nonexempt information subject to disclosure.

[45] 97 Wn.2d 30, 640 P.2d 716 (1982). Under Ishikawa,

> (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests, (4) the court must weigh the competing interests of the public and of the closure, and (5) the order must be no broader in application or duration than necessary.

John Doe 1 v. Prosecuting Att'y, 192 Wn. App. 612, 617, 369 P.3d 166 (2016) (citing Ishikawa, 97 Wn.2d at 37-39).

[46] CONST. art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay.").

whether article I, section 10 applies."[47] And "[w]hether article I, section 10 applies depends on application of the experience and logic test."[48] Thus, we ask whether, under the experience prong, "'the place and process have historically been open to the press and general public.'"[49] We then ask whether, under the logic prong, "'public access plays a significant positive role in the functioning of the particular process.'"[50]

The title of a complaint must "include the names of all the parties."[51] The federal courts have a substantively identical rule.[52]

But plaintiffs' real names have not "historically been open to the press and general public" when the nature of the action shows that compelling them to use their real names would chill their exercise of their right to seek relief. Numerous opinions from the Supreme Court[53] and this court[54] demonstrate this

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[47] State v. S.J.C., 183 Wn.2d 408, 412, 352 P.3d 749 (2015).

[48] S.J.C., 183 Wn.2d at 412-13 (citing In re Det. of Morgan, 180 Wn.2d 312, 325, 330 P.3d 774 (2014)).

[49] S.J.C., 183 Wn.2d at 417 (internal quotation marks omitted) (quoting Morgan, 180 Wn.2d at 325).

[50] S.J.C., 183 Wn.2d at 430 (internal quotation marks omitted) (quoting Morgan, 180 Wn.2d at 325).

[51] CR 10(a)(1)..

[52] FED. R. CIV. P. 10(a).

[53] John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 819 P.2d 370 (1991) (recipient of HIV-infected (human immunodeficiency virus) blood sought name of donor); John Doe v. Finch, 133 Wn.2d 96, 942 P.2d 359 (1997) (Doe sued psychologist for outrage over psychologist's romantic relationship with Doe's wife); John Doe v. Gonzaga Univ., 143 Wn.2d 687, 24 P.3d 390 (2001) (student sued university over investigation of sexual assault claims against him), rev'd, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002); Jane Doe v.

longstanding and previously uncontroversial practice in Washington. The experience prong thus shows that a routine and desirable practice exists among Washington courts to allow parties, when appropriate, to proceed under pseudonyms.

The logic prong also supports pseudonymity in this case. Certain circumstances require pseudonymity at the time a complaint is filed to allow Washington courts to provide any practical relief. While in general "[t]he people

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Dunning, 87 Wn.2d 50, 549 P.2d 1 (1976) (unwed mother sued to obtain certified copy of conventional birth certificate for child).

[54] See, e.g., John Doe v. Grp. Health Coop. of Puget Sound, Inc., 85 Wn. App. 213, 932 P.2d 178 (1997) (employee brought UHCIA and invasion of privacy claims over health care provider's disclosure of name and consumer numbering in training exercise on processing mental health claims); Jane Doe v. Boeing Co., 64 Wn. App. 235, 823 P.2d 1159 (1992) (transgender employee sued employer for disability discrimination), rev'd, 121 Wn.2d 8, 846 P.2d 531 (1993); John Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 780 P.2d 853 (1989) (plaintiffs with AIDS (acquired immune deficiency syndrome) brought class action suit against producers and distributors of blood products); Jane Doe v. Fife Mun. Court, 74 Wn. App. 444, 874 P.2d 182 (1994) (class of plaintiffs convicted of alcohol-related offenses sought to recover court costs); John Doe v. Dep't of Transp., 85 Wn. App. 143, 931 P.2d 196 (1997) (sexual harassment suit by ferry worker); Jane Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 141 Wn. App. 407, 167 P.3d 1193 (2007) (plaintiffs sued stepfather and church over alleged sexual abuse by stepfather).

A number of unpublished opinions also reflect this practice. See Jane Doe v. Pierce County, noted at 125 Wn. App. 1017 (2005) (plaintiff requested public records regarding employment office's investigation of her); John Doe v. Wash. State Bd. of Accountancy, noted at 150 Wn. App. 1036 (2009) (accountant sought declaration that he had mental health disability covered by Americans with Disabilities Act of 1990, 43 U.S.C. § 12101); John Doe v. Zylstra, No. 71123-7-I, (Wash. Ct. App. Feb. 9, 2015) (unpublished), http://www.courts.wa.gov/opinion/pdf/711237.pdf (patients sued medical clinic over employee's intentional conduct).

have a right to know who is using their courts," "[t]here are exceptions."[55] Washington courts have explained their reasoning only briefly. The Supreme Court has noted that "a plaintiff may proceed under a pseudonym to protect a privacy interest."[56] In one case, it adopted a substitute case name "[t]o avoid revealing the name of either the mother or child" when the mother was seeking a birth certificate.[57] Where an employee sued his employer for sexual harassment, this court used a pseudonym "[b]ecause of the nature of the allegations in th[e] case."[58] Our courts may not have analyzed this issue before because the use of pseudonyms has gone unchallenged in these cases. They may not have addressed the issue because the measure's practical necessity is obvious. For example, in a case bearing some similarities to this one, an employee used a pseudonym in bringing UHCIA and invasion of privacy claims where his health care provider used his name and consumer number in a training exercise for processing mental health claims.[59] There, as here, the plaintiff opposed the disclosure of what he claimed was confidential health care information; and

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[55] John Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997).

[56] N. Am. Council on Adoptable Children v. Dep't of Soc. & Health Servs., 108 Wn.2d 433, 440, 739 P.2d 677 (1987) (holding that court could not appoint organization as guardian ad litem for unnamed children whom the organization did not know and could not describe).

[57] Dunning, 87 Wn.2d at 50 n.1.

[58] Dep't of Transp., 85 Wn. App. at 143 n.1.

[59] Grp. Health, 85 Wn. App. at 214-15.

there, as here, compelling the plaintiff to use his real name would have greatly impaired the court's ability to provide relief.

The federal appellate courts that have considered this matter all agree with this logic. Although federal law lacks a provision like Washington's article I, section 10, federal courts recognize parallel rights under the First Amendment.[60] We therefore look to those courts for guidance. The Eleventh Circuit has explained that pseudonyms are appropriate where "the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity."[61] To this end, federal courts have adopted balancing tests: the Eleventh, Tenth, and Fifth Circuits allow a plaintiff to proceed pseudonymously where "the plaintiff has a substantial privacy right which outweighs the customary and constitutionally-embedded presumption of openness in judicial proceedings."[62] The Ninth and Second Circuits ask whether "the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity."[63]

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[60] Thomas Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981) ("First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings.").

[61] Bill W. Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992).

[62] Jane Roe II v. Aware Woman Ctr. For Choice, Inc., 253 F.3d 678, 685 (11th Cir. 2001); see M.M. v. Zavaras, 139 F.3d 798, 803 (10th Cir. 1998) (quoting Frank, 951 F.2d at 324); Stegall, 653 F.2d at 186 (applying substantively similar standards).

[63] Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000); Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189-90 (2d Cir. 2008) (providing nonexhaustive list of ten factors).

Experience and logic thus show that allowing plaintiffs to proceed under pseudonyms does not implicate article 1, section 10 where the public's interest in the plaintiffs' names is minimal and use of those names would chill their ability to seek relief. Here, the trial court found that "[f]orcing [p]laintiffs to disclose their identities to bring this action would eviscerate their ability to seek relief"; that the plaintiffs demonstrated a significant risk of harm if their identities are disclosed; that the individual names "have little bearing on the public's interest in the dispute or its resolution"; that pseudonymity would not prejudice the Department; that the plaintiffs' interests in anonymity outweighed the public's interest in knowing their names; and that "no reasonably viable alternatives" existed. While Zink assigns error to these findings, she does not explain how they are incorrect. Nor did she submit evidence to contradict them. Our review of the record shows that substantial evidence supports the trial court's findings and that the trial court did not abuse its discretion in applying the Ishikawa factors.[64]

Class Certification

Zink also asserts that the PRA prohibited the trial court from certifying a class of level I sex offenders "who are either compliant with the conditions of registration or have been relieved of the duty to register, and who underwent an evaluation to determine if they were eligible for a [SSOSA] after January 1,

[64] S.J.C., 183 Wn.2d at 412-13.

1990."[65] We review statutory interpretation issues de novo[66] and decisions to certify classes of plaintiffs for abuse of discretion.[67] Here, the trial court properly interpreted governing law and did not abuse its discretion in certifying a class.

Because "the PRA statutes do not create a special proceeding subject to special rules," the normal civil rules apply to PRA proceedings.[68] Thus, the rule governing class certification, CR 23, controls here. Courts interpret that rule liberally.[69]

As Zink does not contend that the class certification did not comply with CR 23, the trial court did not err in certifying the class of plaintiffs unless the PRA prohibits class actions altogether. It does not.

Zink relies on the PRA's statement that a court can enjoin disclosure "upon motion and affidavit by an agency or its representative or a person who is named in the record or to whom the record specifically pertains."[70] She does not

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[65] Considering the same argument from Zink, the Supreme Court recently noted in John Doe A v. Washington State Patrol, 185 Wn.2d 363, 385-86, 374 P.3d 63 (2016), that "even if the class were improperly certified, a decision decertifying the class or remanding to the trial [court] would serve no purpose and would cost the litigants time and money, as the issue on which the class members brought suit has been decided."

[66] City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009).

[67] Miller v. Farmer Bros. Co., 115 Wn. App. 815, 820, 64 P.3d 49 (2003).

[68] Neigh. All. of Spokane County v. County of Spokane, 172 Wn.2d 702, 716, 261 P.3d 119 (2011).

[69] Moeller v. Farmers Ins. Co. of Wash., 173 Wn.2d 264, 278, 267 P.3d 998 (2011).

[70] RCW 42.56.540.

dispute that the class of plaintiffs are named in their SSOSA evaluations or that the evaluations specifically pertain to them.

We construe the class action rule "liberally in favor of permitting certification."[71] When a court certifies a class, the representative plaintiffs stand in for all other members of the class; those members are treated as parties to the litigation.[72] A decision in the case then binds all unexcluded members of the class.[73] Because the plaintiffs represent an entire class, even statutes the legislature phrases in individual terms allow for class actions.[74] The plaintiffs here can thus form a class to bring this PRA action.[75]

Temporary Restraining Order and Preliminary Injunction

Zink asks that we decide the proper standard for issuing a preliminary injunction in a PRA case. That issue became moot when the trial court issued a permanent injunction.[76] We decline to address it.

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[71] Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 256, 63 P.3d 198 (2003).

[72] Sitton, 116 Wn. App. at 250.

[73] CR 23(c)(3).

[74] See Smith v. Behr Process Corp., 113 Wn. App. 306, 346, 54 P.3d 665 (2002) (allowing relief for represented class members, not merely named plaintiffs, even though the Consumer Protection Act, ch. 19.86 RCW, authorizes relief for those who "bring a civil action," RCW 19.86.090); Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979) (allowing for class certification under federal rules even where statute refers to an "individual").

[75] RCW 42.56.540.

[76] See State ex rel. Carroll v. Simmons, 61 Wn.2d 146, 149, 377 P.2d 421 (1962).

Fees and Costs

Finally, because Zink does not prevail in this appeal, we deny her request for appellate costs under RAP 14.1. And because the respondents do not ask for attorney fees, we do not award them any either.

CONCLUSION

We affirm the trial court order enjoining disclosure of level I sex offenders' SSOSA evaluations.

Leach, J.

WE CONCUR:

Spearman, J.

Cox, J.

APPENDIX B

NO. 74354-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN DOE G, JOHN DOE I AND JOHN DOE H, as individuals and on behalf of other similar situated,

Respondents,

v.

DONNA ZINK and JEFF ZINK,

Respondents,

v.

DEPARTMENT OF CORRECTIONS,

Petitioner.

DEPARTMENT OF CORRECTIONS' STATEMENT OF RELATED CASES

COMES NOW Petitioner, State of Washington Department of Corrections (DOC), by and through its attorneys ROBERT W. FERGUSON, Attorney General, and TIMOTHY J. FEULNER, Assistant Attorney General, and submits this Statement of Related Cases.

The Department of Corrections is aware of two other cases that are currently pending before Division II of the Court of Appeals that involve

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APPENDIX B

the issue of the application of the Uniform Health Care Information Act and the Public Records Act to SSOSA evaluations:

John Does v. Thurston County and Donna Zink, Division II Cause No. 48000-0-II.

John Does v. Pierce County and Donna Zink, Division II Cause No. 48378-5-II.

RESPECTFULLY SUBMITTED this 22nd day of February, 2017.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
TIMOTHY J. FEULNER, WSBA #45396
Assistant Attorneys General
Corrections Division OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
TimF1@atg.wa.gov