Review of Division I Cause #74354-6-I
consolidated with Cause #74355-4-I

No. 94203-0

SUPREME COURT 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,

v.

DONNA ZINK, a married woman,

Appellant.

PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

DONNA ZINK
Pro Se Appellant
P.O. Box 263
Mesa, WA 99343
(509) 265-4417
dlczink@outlook.com

Table of Contents

TABLE OF AUTHORITIES

Washington State Supreme Court

Washington State Constitution

Revised Code of Washington

Rules of Appellate Procedure

Rules of General Applicability

I. IDENTITY OF PETITIONER

Petitioner is Donna Zink, a pro se appellant in this cause of action. Zink respectfully asks this court to accept review of the Court of Appeals published opinion, terminating review as designated in section II of this petition.

II. COURT OF APPEALS DECISION

Zink seeks review of *John Doe G, John Doe I and John Doe H v. Department of Corrections v. Donna Zink*, No. 74354-6-I, ___ Wash. App. ____, ___ P.3d ___ (2017) WL 319048 (January 23, 2017), a published decision of Division I of the Court of Appeals. A motion for reconsideration has been submitted through U.S. postal service on the date the motion was to be filed in the court and as such was untimely filed pursuant to Rules of Appellate procedure (RAP) 18.6(c). The decision of Division I was filed within the last 30 days (RAP 13.4(a)). A copy of the opinion is attached to this request for review at Appendix A; pages A1 through A23.

III. ISSUES PRESENTED FOR REVIEW

1. Is a court required to apply all requirements of RCW 42.56.540 in determining whether to enjoin public records?
2. Are Special Sex Offender Sentencing Alternative (SSOSA) evaluations sentencing documents open to the public under the Sentencing Reform Act of 1981 Chapter 9.94A RCW or health care information under RCW 42.56.360(2) and Chapter 70.02 RCW?
3. Does the opinion properly the define "Patient" and "Healthcare Provider" and interpret RCW 42.56.360(2) as intended by our Legislature?

4. Is the Department of Corrections (DOC) a healthcare provider subject to the mandates of RCW 70.02.020(1)?
5. Are SSOSA evaluations exempt from disclosure to the public?
6. Does the decision of Division I distinguishes between requesters in violation of RCW 42.56.080?
7. Under the strongly worded mandate of the Public Records Act (PRA), is redaction of public records by public agencies optional and are records exempt if an agency refuses to redact confidential information and disclose the remaining information in the document?
8. Is allowing parties to file lawsuits anonymously without an identified sealing rule or statute, application of General Rule (GR 15) or the *Ishikawa Factors* implicate the Washington State Constitution Article 1, §10?
9. Are convicted criminals entitled to a privacy right or confidentiality in their identity as convicted criminals?
10. Does the language in RCW 42.56.540 prohibit Class Action to enjoin entire classes of records?

IV. STATEMENT OF THE CASE

This case arose out of a request made by Donna Zink on July 28, 2014, to the DOC for access to SSOSA evaluations related to those convicted of sex offenses (A1; A6). On August 6, 2014, DOC delayed release of the requested records until September 18, 2014 (CP 192).

On September 16, 2014, John Doe G, I and H (collectively Doe), a class of Level I sex offenders compliant with registration, filed a class action suit to enjoin the requested records from production (A1). On October 3, 2014, the Honorable Judge Linde of the King County Superior Court sealed the identity of the offenders without application of GR 15 and the *Ishikawa Factors* (A7; A15-16)

and certified a class of Level I sex offenders to enjoin records under RCW 42.56.540 (A7; A20).

On November 6, 2015, the Honorable Judge Chun of the King County Superior Court ordered the permanent injunction of all SSOSA evaluations of Level I sex offenders, who had complied with their conditions of supervision, as of the date of Zink's request (A1; A7). Zink timely appealed to Division I.

On January 23, 2017, Division I filed a published opinion of their review of the issues surrounding the exemption of the requested SSOSA evaluations, sealing court records without application of the *Ishikawa Factors*[1] and certification of a class under the strict mandates of the PRA (A1-23). Division I determined the SSOSA evaluations are part of the Sentencing Reform Act of 1981, providing a sentencing alternative for first time sex offenders (A2). An offender is granted a suspended prison sentence of up to 11 years under the SSOSA if the trial court finds the community will benefit from community-based treatment, rather than prison-based treatment,[2] based on any given offender's background, history, social and economic circumstances and psychological condition (A3).

DOC does not receive SSOSA evaluations from a medical provider and does not use the SSOSA evaluation to treat a medical condition (A5). The DOC receives SSOSA evaluations from the Prosecuting Attorney in order to supervise

---

[1] Although Zink's request for review included argument for the application of General Rule (GR) 15, the Court of Appeals only addressed the issue of application of the *Ishikawa Factors*.

[2] *In re Det. of Taylor*, 132 Wn. App. 827, 134 P.3d 254 (2006).

offenders receiving a community based SSOSA sentence who are not in prison (A5). Division I, citing to a twelve-year-old study, noted that SSOSA sentences are effective and have the lowest recidivism rate. Yet, only 35% of offenders met the statutory criteria to receive SSOSA sentencing. Finally, Division I noted that Level I offenders pose the lowest risk to the public (A6). Based on these facts, Division I mandated that:

> [B]ecause each evaluation necessarily includes a diagnosis of the offender's mental conditions, it contains confidential health care information under Washington Uniform Health Care Information Act (UHCIA). 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."

(A1-2). Division I did not determine whether Doe is named in the record or whether the record specifically pertains to Doe, whether an examination of the records is clearly not in the public interest and whether review would substantially and irreparably damage any person, or would substantially and irreparably damage any vital governmental function as required by RCW 42.56.540.

The decision and mandate of Division I is in conflict with numerous Supreme Court Decisions and published opinions of the Court of Appeals, makes final and binding mandates concerning significant questions of law under the Constitution of the State of Washington (Article 1, §10) and involves issues of substantial public interest that are better determined by the Supreme Court.

V. ARGUMENT WHY REVIEW SHOULD BE EXCEPTED

1. Grounds for Direct Review

Rules of Appellate Procedure (RAP) 13.1 allow a party to request discretionary review of a Court of Appeals decision terminating review. A petition for review will be accepted only if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals, a significant question of law under the Constitution of the State of Washington is involved or the petition involves an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(1-4))). Our courts are required to be mindful of Legislative intent and Supreme Court mandates interpreting that intent even if opposed (*Newton v. Pac. Highway Transp. Co.*, 18 Wn.2d 507, 515, 139 P.2d 725 (1943)). As argued below, Division I published a decision in conflict with decisions of the Supreme Court and published decisions of the Court of Appeals, a significant question of law under the Washington State Constitution, Art. 1, §10 is involved and the decision involves issues of substantial public interest.

2. The Request Is a Public Record Request to a Public Agency for Public Sentencing Documents and Not Medical Records From a Medical Provider

Division I opined that SSOSA evaluations can have more than one purpose (A12) stating that "the Supreme Court's decision in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012) does not dispose of Doe's medical exemption argument since the issue of exemption as medical records was not properly raised; citing to *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No.*

I, 124 Wn.2d 816, 824, 881 P.2d 986 (1994)(A8, *fn.* 24). Division I's opinion, designating SSOSA evaluations to be medical records ignores the fact that the Supreme Court determined SSOSA evaluations to be sentencing documents. Even if a SSOSA evaluation has more than one purpose, Zink's request is for the purpose of obtaining public criminal sentencing records (RCW 42.56.010(3)) maintained by a penal agency (RCW 42.56.010(1)), found by the *Koenig* Court to be sentencing documents used by a sentencing court to sentence a convicted sex offender,[3] required to be maintained by the trial court and the prosecuting attorney[4] and open to public inspection.[5] Zink's request was not made to a medical provider for medical records; public or private. Clearly, Division I cannot simply ignore the decision made in *Koenig v. Thurston County,* by the Supreme Court that SSOSA evaluations are sentencing documents.

3. The Opinion Distinguishes Between Requesters in Opposition to RCW 42.56.080 and Conflicts with Supreme Court Decisions

The Supreme Court in *Koenig v. Thurston County* mandated that SSOSA evaluations are not exempt, redaction was not necessary and the SSOSA

---

[3] [T]he SSOSA evaluation principally provides a basis for the court to impose sentencing alternatives. *Koenig v. Thurston County*, 175 Wn.2d 837, ¶30, 287 P.3d 523 (2012). It is used by a sentencing court to determine whether a defendant charged with a sex offense is amenable to treatment (*Id.*¶26). Because the PRA requires that exemptions be narrowly construed, we decline to protect documents that are created to aid a court in its sentencing decision (*Id.* ¶31).

[4] Both the sentencing judge and the prosecuting attorney's office shall each retain or receive a completed copy of each sentencing document as defined in this section for their own records. RCW 9.94A.480.

[5] Any and all recommended sentencing agreements or plea agreements and the sentences for any and all felony crimes **shall be made and retained as public records** if the felony crime involves: (2) Any most serious offense as defined in this chapter…RCW 9.94A.475(2)(emphasis added).

evaluations must be disclosed to Koenig (*Id.* ¶31-32). Here, Division I opined that Zink is not entitled to even redacted SSOSA evaluations (A2; A14). Division I's decision distinguishes between requesters, in conflict with Supreme Court decisions and violates the Legislative mandate that requesters be treated equally ("Agencies shall not distinguish among persons requesting records…") RCW 42.56.080; (identity of requester irrelevant since agencies shall not distinguish among requesters) *Cornu-Labat v. Hosp. Dist. No. 2 of Grant County*, 177 Wn.2d 221, ¶33, 298 P.3d 741 (2013); (inquiry into the legitimacy of the public's concern cannot take into account the identity of the requesting party or the purpose of the request) *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, ¶44, 189 P.3d 139 (2008); (agencies shall not distinguish among persons requesting records) *Koenig v. City of Des Moines*, 158 Wn.2d 173, ¶33, 142 P.3d 162 (2006). Division I's opinion that *Koenig v. Thurston County*, is not dispositive here is in conflict with other Supreme Court decisions.

4. Redaction of Public Records is Not Optional it is Mandatory

Division I, citing to *Tacoma Pub. Library v. Woessner*, 90 Wn. App. 205, 224, 951 P.2d 357 (1998) (A14, *fn.* 43), opined that if an agency refuses to redact exempt information from public records, the records are exempt (A2; A8; A14; A15; A23). Division I's opinion is in conflict with Supreme Court decisions and the strongly worded mandate of our Legislature, at the behest of the public,[6] for an open and transparent government that reflects the belief that the public should

[6] *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, ¶17, 261 P.3d 119 (2011).

have full access to information concerning the working of the government (*Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997)); (purpose of the PDA is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them. (*Newman v. King* County, 133 Wn.2d 565, 570, 947 P.2d 712 (1997). Agencies cannot withhold records by refusing to redact exempt information.

Division I, again noting the decision in *Tacoma Pub. Library*, determined the PRA does not allow agencies to withhold records in their entirety (A14), yet mandated that a court was not required to decide whether some portion of the SSOSA evaluation would fall outside the exemption since Doe and DOC framed exemption and disclosure as all or nothing propositions (A14). Division I noted that no evidence was provided as to whether SSOSA evaluations contained exempt information (A13-14); leaving open an opportunity for Zink to ask for in-camera review to determine whether any of the records contained non-exempt material responsive to her request (A15, *fn.* 44). Division I did not address the issue of Zink's request, her status as a party to this action[7] or the burden of proof requirement under the PRA[8]. Division I's opinion regarding redaction of public records is in opposition to numerous Supreme Court decisions.

---

[7] A requester is a mandatory and necessary party to an action to enjoin records under RCW 42.56.540. *Burt v. Dep't of Corr.*, 168 Wn.2d 828, ¶24, 231 P.3d 191 (2010).

[8] The party seeking to enjoin production bears the burden of proving an exemption or statute prohibits production in whole or in part. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, ¶13, 259 P.3d 190 (2011).

In *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 327 P.3d 600 (2013), the Court interpreted the PRA to require agencies to redact and disclose public records.

> [T]he PRA provides that exemptions "are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought." RCW 42.56.210(1); see also RCW 42.56.070."

(*Id.* ¶16). The Court based its opinion on *PAWS v. UW.*, 125 Wn.2d 243, 261, 884 P.2d 592 (1994) (portions of records which do not come under a specific exemption must be disclosed) and *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978) (exemptions are inapplicable to the extent that exempt materials in the record can be deleted). Clearly, Division I's decision that SSOSA evaluations are exempt if an agency refuses to redact exempt information is in conflict with case law mandating exemption of entire records is not allowed if exempt information can be redacted.

5. Definition of "Patient" and Healthcare Provider" as Defined by Division I is in Opposition to Deep-Rooted Case Law Clearly Mandating Courts Are To Be Vigilant in Construing Legislature Intent

Division I interpreted RCW 70.02.010(31)[9] very broadly to include anyone who has or will be a patient. "The act defines a "patient" as "an individual who receives or has received health care"" (A10). Based on this broad definition of "patient," Division I opined that SSOSA evaluations are exempt from disclosure under the UHCIA (citing RCW 70.02.010(32))(A10, *fn.* 32). Division I stated

[9] RCW 70.02.010(32) defines "payment."

DOC is included in the definition of a "health care provider" as the language of RCW 42.56.360(2) incorporates Chapter 70.02 RCW into the PRA which prohibits public inspection and copying of "health care" information of "patients" (A9; A10, *fn.* 31). This is in conflict with deep-rooted case law instructing courts on the proper interpretation of statutes which focuses on Legislative intent.

a) Interpretation of Statutes

A Court's purpose in interpreting a statute is to determine and enforce our "Legislature's Intent" (*City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006)). In construing a statute, the Courts are instructed to be vigilant that a statute is construed so as to carry out its purpose as determined by our Legislature. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). The Court in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012), identified the Legislative intent of the creation of SSOSA evaluations as "sentencing" documents (*Id.* ¶26). Without consideration of the Court's decision in *Koenig* (A8), Division I determined "offenders" are "patients" when they receive an SSOSA evaluation and DOC is a "health care provider" under RCW 42.56.360(2).

Supreme Court decisions mandate that Legislative intent is primarily revealed by the statutory language. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997). The plain meaning controls if it is unambiguous. *Nissen v. Pierce County*, 183 Wn.2d 863, ¶27, 357 P.3d 45 (2015). However, if the Legislature omits language, whether intentionally or accidentally, **courts "will not read into the statute the language that it believes was omitted."** (*State v. Moses*, 145 Wn.2d 370, 374, 37

P.3d 1216 (2002 citing to *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981))(emphasis added).

Our Courts are required to look at the act in its entirety. *Ockerman v. King County Dep't of Developmental & Envtl. Servs.*, 102 Wn. App. 212, 217, 6 P.3d 1214 (2000). All provisions of an act must be considered, construed together (with all language used) and harmonized in relation to each provision of the act to assure proper construction of each provision. *State ex rel. Royal v. Board of Yakima County Comm'rs*, 123 Wn.2d 451, 459, 869 P.2d 56 (1994). "An interpretation that produces "absurd consequences" must be rejected, since such results would belie legislative intent. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983)." *Troxell v. Rainier Pub. Sch. Dist.*, 154 Wn.2d 345, ¶7, 111 P.3d 1173, (2005).

Division I only defined one provision of an act to discern Legislative intent, finding: a "patient" is defined as anyone who receives or has received health care. Further, Division I determined the language in RCW 42.56.360(2) (Chapter 70.02 RCW applies to public inspection and copying of health care information of patients) to include words that the statute simply does not contain (the DOC is a health care provider). Both of these determinations produce absurd consequences and must be rejected.

b) Combing Definition of Patient and Health Care Provider Under RCW 70.02.020(1)

The language of the UHCIA clearly limits nondisclosure of medical records to those records maintained by a health care provider without the consent of the provider's patient. In order to find SSOSA evaluations exempt from disclosure

under RCW 42.56.360(2), as noted by Division I (A10, *fn.* 31), the agency must be defined as a "health care provider."

> Except as authorized elsewhere in this chapter, 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 may not disclose health care information about a **patient** to any other person without the **patient's** written authorization.

RCW 70.02.020(1). "Health care provider" is defined as "a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession" RCW 70.02.010(18)). No evidence was provided demonstrating DOC uses SSOSA evaluations to provide health care or that DOC correction officers are "authorized" to provide health care. Clearly, when read in conjunction with other provisions of Chapter 70.02 RCW, the Legislative intent in defining a "patient" does not to include "offenders" as "patients" or DOC as a "health care provider."

Division I, opined that RCW 42.56.360(2) incorporates RCW 70.02.020 into the PRA and thus restricts disclosure of SSOSA evaluations by the DOC (A10, *fn.*31). There is no language in RCW 42.56.360(2) indicating our Legislature intended our penal system be considered a "health care provider." as previously discussed, the DOC is tasked with supervising offenders receiving a SSOSA sentence and not with health care of offenders (RCW 9.94A.501(4)(f))(A5, *fn.* 15).

DOC does not meet the statutory definition a "health care provider" under RCW 70.020.010(18). The DOC receives a copy of the SSOSA evaluation form

another penal agency; the prosecuting attorney (A5). The prosecuting attorney receives a copy of the SSOSA evaluation to recommend sentencing. A sentencing court receives a copy of the SSOSA evaluation to determine whether an offender meets the qualifications for a suspended sentence (*Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012)). None of these duties are related to "health care" and none of the participants in the sentencing and supervision of offenders are authorized to provide health care as defined by RCW 70.02.010(18).

The Court in *John Doe v. WSP*, 185 Wn.2d 363, 374 P.3d 63 (2016) clarified that an exemption must be explicit, and the Court may not imply one mandating that it did not:

> [M]ake sense to imagine the legislature believed judges would be better custodians of open-ended exemptions because they lack the self-interest of agencies. The legislature's response to our opinion in Rosier makes clear that it does not want judges any more than agencies to be wielding broad and mal[l]eable exemptions. The legislature did not intend to entrust to ... judges the [power to imply] extremely broad and protean exemptions ... .

(Id. ¶43). That Court found that an "other statute" exemption must be explicit; a court may not imply one. (*Id.*). Division I inserted language into RCW 42.56.360(2) that is not there and implies an exemption where no exemption exists and is thus in conflict with Supreme Court decisions.

c) The Definition of "Patient" and "Healthcare Provider" as Determined by Division I is in Conflict with the Sentencing Reform Act of 1981

Under the Sentencing Reform Act of 1981, the "Sentencing Court" and "Prosecutor's Office" must each retain a copy of each SSOSA evaluation in their official record (RCW 9.94A.480(1)) open to public inspection (RCW

9.94A.475(2)). When these provisions of the Sentencing Reform Act are read together and harmonized, our Legislature clearly intended SSOSA evaluations, as sentencing documents (Special Sex Offender Sentencing Alternative), to be available for public inspection in the court of sentencing and associated prosecutor's office.

Division I interpreted RCW 42.56.360(2) to exempt SSOSA evaluations from public disclosure as medical records under RCW 42.56.360(2), the UHCIA and RCW 70.02 opining that possession of SSOSA qualifies an agency as a "health care provider" under RCW 70.02.020(1). This is in conflict with the clear Legislative intend that sentencing documents are to be retained and available for public inspection under the Sentencing Reform Act of 1981 Chapter 9.94A RCW (RCW 9.94A.475; .480).

6. Prison Legal News Inc. v. Dep't of Corr., 154 Wn.2d 624, 644, 155 P.3d 316 (2005)

Division I, citing to *Prison Legal News Inc. v. Dep't of Corr.*, 154 Wn.2d 624, 644, 155 P.3d 316 (2005), determined the Supreme Court mandated only two requirements must be met to determine whether records are "health care information" and exempt under RCW 70.02.020(1);" patient identifiability and information about patient health care (*Prison Legal News*, 624)(A11, *fn.* 34).

In *Prison Legal News*, the requested records clearly related to "medical care" and were requested from "medical providers." The Court found **DOC must prove that each patient's health care information would readily be identifiable with that specific patient in order to withhold the requested medical records** (*Id.* ¶48).

In this case, the requested documents are used by a sentencing court to determine "whether the community will benefit from use of the SSOSA alternative, which requires treatment in exchange for reduced prison time. RCW 9.94A.670(4)(5)" *Koenig v. Thurston County*, 175 Wn.2d 837, ¶26, 287 P.3d 523 (2012). The records were requested from a penal agency and not from a medical provider (A5). SSOSA evaluations are used by DOC to supervise offenders released back into the community after sentencing (A5). At no time are the SSOSA evaluations used by the prosecuting attorney, sentencing court or the DOC, to provide "health care" or to "diagnosis" a medical condition (A13). SSOSA evaluations are used to punish sex offenders for a crime committed against the people.

Based on the definition of "health care" found in RCW 70.02.010(16) Division I determined SSOSA evaluations identify "offenders" and, when coupled with DOC's refusal to redact offender names, SSOSA evaluations are "readily associated" with offenders and meet the requirement of "patient identifiability" (A11). Division I noted that "A party **opposing** PRA disclosure must show each patient's health care information is readily associated with that patient for the exemption to apply (A11, *fn.* 35) but did not further discuss Doe's burden of proof. Division I's opinion is in conflict with the decision in *Prison Legal News*.

Next, Division I found SSOSA evaluations relate to "health care" because they meet the definition in RCW 70.02.020(14)(a)(A11). Division I reasoned that because the SSOSA requires an evaluation to include an assessment of various life issues surrounding criminal activity, amenability to treatment and overall

findings of psychological/physiological/medical assessment, if conducted, it meets the definition of "health care" (A12-13). Specifically finding "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"" (A13, *fn.* 42). No legal authority has been provided indicating committing a sex offense is a diagnosable mental health disorder (A13). Does had the burden of proof to prove "offenders" are "patients" being treated for a "mental health disorder" and failed (A15).

While it is debatable that when read in conjunction with other provisions of Chapter 70.02 RCW, as argued above, SSOSA evaluations would not meet the definition in RCW 70.02.010(14), the legal question is not whether the records meet the definition. RCW 70.02.010(14) is merely a defining statute and does not confer an exemption to disclosure under the PRA. RCW 70.02.020(1) is the only statute identified by Division I's to apply to non-disclosure of "health care" information. RCW 70.02.020(1) specifically applies to "health care providers" as discussed above (see RCW 70.02.010(18)). Supervising sex offenders receiving a suspended sentence under the SSOSA program in exchange for community placement with treatment does not qualify the DOC as a "health care provider."

Division I's opinion is in conflict with the decision in *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 112 P.3d 522 (2005). After mandatory drug testing came back positive, Hines' employment with Todd was contingent on obtaining a drug evaluation and successfully completing any recommended treatment (*Id.* ¶4). Division I, opined that mandatory drug testing and SSOSA

evaluations are dissimilar because an SSOSA evaluation determined an offender's amenability to treatment and must include a treatment plan while a drug screen test is a part of employment. (A10, *fn.* 33).

The *Hines* Court found Todd was not a "health care provider" and the drug screening test was administered as a condition to employment and not related to health care or medical treatment (*Id.* ¶19)(emphasis added). This is the exact same circumstances surrounding a SSOSA evaluation. The DOC is not a "health care provider" and a SSOSA is sought by a convicted sex offender seeking a suspended sentence through a treatment option.[10] The SSOSA evaluation is ordered and administered prior to the start of mandatory treatment imposed by a sentencing court if certain conditions are met; including sex offender treatment and a term of community custody (RCW 9.94A.670(5)(a-d)(A2). Clearly, as in *Hines v. Todd*, SSOSA evaluations are not medical records.

7. The Opinion is in Conflict with Numerous Supreme Court Decisions Addressing Injunction Under RCW 42.56.540

Division I's decision overlooks the strongly worded mandates of our Legislature and misapprehends the decisions of the Supreme Court concerning injunction of public records under the PRA. Pursuant to current case law, application of RCW 42.56.540 is the sole means by which a third party can enjoin public records (*Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d

---

[10] Hines successfully completed the 28-day in-patient treatment program on May 31, 1999. Todd allowed Hines to return to work after completing in-patient treatment on condition that he agreed to enter into an Agreement for Continuation of Employment *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 112 P.3d 522 (2005).

398, ¶12, *fn.* 2, 423, 259 P.3d 190 (2011)). In *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011), the Court determined RCW 42.56.540, is not an exemption, it is a procedural statute authorizing a trial court to enjoin the release of a specific record if it falls within a specific exemption and granting the right to seek an injunction against disclosure to whom it applies (*Id.* ¶78).

The Supreme Court interpreted the Legislative intend in enacting RCW 42.56.540 to require a "court to find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, ¶64, 174 P.3d 60 (2007) (clarifying that a Court cannot merely determine an exemption applies. A Court is required to find an exemption applies and disclosure is not of public interest and disclosure would irreparably damage a person or a vital government interest) (see also: *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, ¶78, 246 P.3d 768 (2011)(emphasis added)(see also; *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, ¶36, 259 P.3d 190 (2011); *Seattle Times Co. v. Serko*, 170 Wn.2d 581, ¶18, 243 P.3d 919 (2010)).

Despite a plethora of case law concerning the interpretation and application of RCW 42.56.540, Division I decided to not apply RCW 42.56.540 to this cause of action. Division I reasoned that as SSOSA evaluations include a diagnosis of the offender's mental health conditions, without redaction of the information, SSOSA evaluation were exempt from PRA disclosure (A1); refusing to decide whether

the requested records can be sufficiently redacted and disclosed (A8; A14). Division I did not determine whether the records are of public interest or whether disclosure would irreparably damage any person or vital government interest. Division I's opinion is in conflict with entrenched case law interpreting the Legislative intend of RCW 42.56.540.

8. SSOSA Evaluations Are of Great Public Importance

DOC is authorized to release information concerning convicted sex offenders pursuant to RCW 4.24.550 under the sentencing reform act (RCW 9.94A.846). DOC is required to release records under the strict requirements of the PRA (RCW 42.56.070(1)(A8, *fn.* 23). As previously argued, by Legislative mandate, SSOSA evaluations are to be maintained as public records by the sentencing court and the prosecuting attorney's office (RCW 9.94A.475; .480). Clearly, our Legislature intended for information concerning conviction of sex offenses to be open and available for public inspection; including SSOSA evaluations used for sentencing.

In the opinion, Division I, citing to a twelve-year-old study measuring recidivism rates for any new felony convictions within five years of release (A6, *fn.* 16), noted only 35% of offenders meet the statutory criteria to receive SSOSA sentences (A6). Without access to SSOSA evaluations the public cannot scrutinize sentencing decision concerning the SSOSA program or related studies. These issues are of paramount concern to public safely.[11]

---

[11] The legislature further finds that the penal and mental health components of our justice system are largely hidden from public view and that lack of information from either may result in failure

9. The Decision of Division I Includes a Question of Law Under the Washington State Constitution Article 1, §10

Division I, citing to *State v. S.J.C.*, 183 Wn.2d 408, 352 P.3d 749 (2015), opined that filing suit under pseudonym without application of General Rules (GR) 15 and the *Ishikawa Factors* is dependent on whether the Washington State Constitution, Article 1, §10 applies (A15-16).

The question in *State v. S.J.C.* was whether an *Ishikawa* analysis is required under Article 1, §10 in addition to statutory requirements for sealing court records found in RCW 13.50.050 (*S.J.C.* ¶5). Based on an extensive "Legislative history" of the manner in which juvenile records have been handled in our judicial system (*Id.* ¶6-46), the Court determined: "Where an individual seeks to seal a juvenile court record but does not meet the statutory requirements, the Ishikawa Factors may still guide the court's decision. ... However, treating former RCW 13.50.050 as a prerequisite that must be satisfied before the juvenile court can consider the *Ishikawa Factors* inserts an additional step into the ordinary process for sealing records under GR 15 ..." (*Id.* ¶50, *fn.* 6)(emphasis added).

Unlike the circumstance in *S.J.C.*, no statute concerning setting conditions to seal court records has been identified relieving the court of its duty to seal court records pursuant to GR 15 and *Ishikawa*. Here, Division I, without citation to authority, determined that "compelling [sex offenders] to use their real names would chill their exercise of their right to seek relief" (A16; A20). This not an

---

of both systems to meet this paramount concern of public safety. RCW 4.24.550 Laws of 1990 c 3 § 117.

appropriate application of Article 1, §10 and is in conflict with *S.J.C.* as well as other case law concerning the sealing of court records.

a) Experience Prong

Division I found that historically, a party's real name has not been open to the press and general public (A17) that our Courts have not analyzed because it has gone unchallenged (A18). Claiming our Courts have a "longstanding and previously uncontroversial practice in Washington" of allowing use of pseudonym if use of a party's real name would chill a right to seek relief in the court (A17), Division I determined that routine use of pseudonym is a desirable practice that exists to allow parties, when appropriate, to proceed under pseudonym and therefore satisfies the experience prong of the test set forth in *S.J.C.* (A17). Division I's decision is in conflict with *State v. S.J.C.*, 183 Wn.2d 408, 352 P.3d 749 (2015) as well as *Hundtofte v. Encarnación*, 181 Wn.2d 1, 330 P.3d 168 (2014); [J]ustice in all cases shall be administered openly. Const. art. I, § 10. Any exception to this "vital constitutional safeguard" is appropriate only in the most unusual of circumstances" (*Id.* ¶11); "A court must use the Ishikawa steps and evaluate a motion to seal or redact court records on a case-by-case basis." (*Id.* ¶13).

b) Logic Prong

In analyzing the logic prong to determine whether Article 1, §10 applies to the sealing of the records in this case, Division I determined that while generally the people have a right to know who is using the courts, certain circumstances require pseudonymity at the time a complaint is filed to allow courts to provide practical

relief (A17-18). Division I, determined that a party may proceed in pseudonym to protect a privacy interest, citing to *N. Am. Council on Adoptable Children v. Dep't of Soc. & Health Servs.*, 108 Wn.2d 433, 440, 739 P.2d 677 (1987). In *N. Am. Council*, the Court found that a court could not appoint guardian ad litem to unnamed children who were unknown and could not be described (*Id.*). The Court was not discussing use of pseudonym to seal court records and the *N. Am. Council* is not dispositive of this case. Further, no "privacy interest" has been identified.

Division I states that federal appellate courts agree with this logic and have adopted a balancing test where a plaintiff has a substantial right to privacy that outweighs the presumption of openness in judicial proceedings under the Constitution (A19); which satisfies the logic prong (A20). Division I ignores the fact that Zink is asking for the balancing tests (GR 15 and *Ishikawa* analysis) to be properly applied by the trial court to determine whether Doe has a privacy right to secrecy in our judicial system.

Finally, after setting forth an analysis of the application of Article 1, section 10 using the "experience and logic test," Division I contradicts its own opinion stating "the trial court did not abuse its discretion in applying the *Ishikawa Factors*." (A 20). As clearly noted, Zink requested review of the trial court's refusal to apply the *Ishikawa Factors* and GR 15 to seal court records (A15). Division I's opinion that the trial court properly applied the *Ishikawa Factors* cannot stand in light of fact the trial court did not apply *Ishikawa* or GR 15.

10. Class Action Suit Under RCW 42.56.540

Division I, citing to *John Doe v. WSP*, 185 Wn.2d 363, 385-86, 374 P.3d 63 (2016)(A21, *fn.* 65), opined under RCW 42.56.540 a class of unknown individuals can file a cause to enjoin a specific type of record. The Court in *John Doe v. WSP*, considering the same argument, determined that the "issue was moot" since the requested records were determined to not be exempt and were to be released. Therefore, "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" *Id.* The Court did not determine the underlying question of whether a class can be certified to enjoin all records of a specific type or class under RCW 42.56.540. In this case, Division I found the requested records are exempt. Therefore, Division I was required to properly analyze whether RCW 42.56.540 allows for class certification.

The plain language of RCW 42.56.540 allows "a person who is named in the record or to whom the record specifically pertains" to file a motion asking the superior court to enjoin disclosure of a specific public record. *Ameriquest Mortgage Co. v. Washington State Office of Attorney General*, 170 Wn.2d 418, ¶58, 241 P.3d 1245 (2010). A third party must prove they have a right under RCW 42.56.540 to enjoin a specific record. *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, ¶78, 246 P.3d 768 (2011)(emphasis added). Assuming, as Division I has here, that RCW 42.56.540 has no special procedures attached (A21) requiring "a person who is named in the record or to whom the record

specifically pertains" to seek injunction, renders a significant portion of RCW 42.56.540 superfluous. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

Division I, citing to *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, ¶20, 261 P.3d 119 (2011), determined the PRA statutes do not create a special proceeding subject to special rules, therefore the normal civil rules apply to PRA proceedings (A 21). The Court misapprehends the question before it and the Supreme Court decision in *Neighborhood Alliance*. In *Neighborhood Alliance*, our Supreme Court, relying on their decision in *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005) found that "unless express procedural rules have been adopted by statute or otherwise, the general civil rules control (*Id.*). RCW 42.56.540 is an express procedural rule that has been adopted by statute. Clearly, Division I's opinion is in conflict with the Court's decision in *Neighborhood Alliance* and the issue of "Class Certification" under the PRA needs to be properly analyzed.

VI. CONCLUSION

Our courts are not to legislate from the bench. None the less, the published decision and mandate of Division I completely rewrites and reinterprets the strongly worded mandate of the PRA, ignoring Supreme Court interpretation and instruction. This is of paramount public importance. If left to stand as legal authority, public agencies will use the decision to withhold records based on the fact they contain exempt material even if redaction would allow release and negate exemption. Further, the opinion shifts the burden of proof that a record is

exempt from the agency to the requester; who must now prove a public record contains non-exempt material in order to access public records. Furthermore, as interpreted by Division I, any public agency can be considered a "medical health provider" subject to confidentiality requirements of the UHCIA under RCW 42.56.360(2). Finally, the decision omits language from RCW 42.56.540 to allow for class action. Division I's mandates to the lower courts is of great public importance and need of review by the Supreme Court in order to harmonize previous case law interpreting the PRA with the mandates issued in this case.

Division I's opined that a party to an action can file suit anonymously if knowing of their identity would "chill" their ability to seek relief in the court. Division I found that historically plaintiff's names are not open to the public or press; claiming this is a routine and desirable practice of our Courts evidenced by a long-standing, previously unchallenged, history of allowing use of pseudonym without application of GR 15 and an Ishikawa analysis. Division I's mandate that parties can initiate action in our judicial system without check is in opposition to case law established by the Supreme Court, court rules and the Washington State Constitution mandating open justice and undermines our justice system. If, as claimed by Division I, the issue of secrecy in our judicial system has gone unchallenged, the issue of secrecy is ripe and needs to be addressed by the Supreme Court.

The issues presented in this petition are of paramount public concern and will affect the application of the PRA by our public agencies and courts as well as foster secrecy in our judicial system. For all of the reasons set forth in this

petition, Zink respectfully requests this court to review the opinion and mandates of Division I to our lower courts.

RESPECTFULLY SUBMITTED this 22nd day of February 2017.

By _____

Donna Zink
Pro se

VII. CERTIFICATE OF MAILING

I, Donna Zink, declare that on February 22, 2017, I did send a true and correct copy of Appellant Zink's request for "*Petition for Discretionary Review to Supreme Court*" to the following parties via e-mail to the following e-mail Service Addresses:

- BENJAMINE COULD
  WSBA #44093
  Keller Rohrback LLP
  1201 Third Avenue, Suite 3200
  Seattle, WA 98101
  Phone: 206-623-1900/Fax: 206-623-3384
  Email: bgould@kellerrohrback.com;

- PRACHI VIPINCHANDRA DAVE, ESQ
  WSBA #
  ACLU of Washington Foundation
  901 5th Ave, Suite 630
  Seattle, WA 98164
  Phone: 206-624-2184/Fax:
  Email: vhernandez@aclu-wa.org; and

- TIMOTHY J. FEULNER
  WSBA #45396
  Washington State Attorney General
  Corrections Division OID #91025
  800 Fifth Avenue, Suite 2000
  PO Box 40116
  Olympia, WA 98504-0116
  Phone: 306-586-1445/Fax:
  Email: TimF1@atg.wa.go.

Dated this 22nd day of February, 2017.

By Donna K Zink
Donna Zink
Pro Se

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.

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]

---

[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

---

[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

---

[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;
>
> (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;
>
> (viii) History of violence and/or criminal behavior;
>
> (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.

---

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

> (i) Frequency and type of contact between offender and therapist;
>
> (ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;
>
> (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]

---

[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

---

[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

[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

---

[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

---

[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.

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

---

[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.

---

[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.

---

[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

---

[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

---

[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

---

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

---

[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]

---

[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

---

[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.

---

[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.