NO. 74354-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant,

v.

JOHN DOE,

Respondent.

REPLY BRIEF OF APPELLANT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

The trial court erroneously concluded that RCW 70.02.250 and RCW 71.05.445 independently exempt Special Sex Offender Sentencing Alternative (SSOSA) evaluations. The plain language and legislative history demonstrate that these provisions merely ensure that certain information that is otherwise confidential prior to being shared with the Department of Corrections (Department) remains confidential once it is shared with the Department. Plaintiffs' interpretation would expand these two statutory provisions beyond their intended purpose. Because the trial court adopted Plaintiffs' erroneous interpretation, the trial court erred in finding SSOSAs exempt based solely on those provisions.

In elevating RCW 70.02.250 and RCW 71.05.445 to independent "other statute" exemptions, the trial court did not address the key question in this case, i.e. whether SSOSA evaluations are confidential prior to being shared with the Department. They are not. SSOSA evaluations are forensic evaluations conducted to allow an individual to receive a reduced sentence and are documents that are filed in open court. As such, SSOSA evaluations do not qualify as health care information under the Uniform Health Care Information Act (UHCIA). Because the trial court erred in determining that SSOSA evaluations are exempt, this Court must reverse.

II. ARGUMENT

A. Plaintiffs' Proposed Interpretation of RCW 70.02.250 and 71.05.445 Ignores the Express Language of Those Provisions and the Relevant Statutory Framework

Under the Public Records Act (PRA), information or records can be exempt through a specific PRA exemption or an "other statute" exemption. RCW 42.56.070(1). However, the "other statute" provision does not allow courts to imply exemptions. *See Doe ex rel. Roe v. Washington State Patrol*, 185 Wn.2d 363, 374 P.3d 63, 2016 WL 1458206, at *3 (2016). In order for a provision outside of the PRA to qualify as an "other statute" exemption, it must expressly prohibit or exempt the release of records. *Id.* The language in RCW 70.02.250 and RCW 71.05.445 lack the explicit language that is required to make those provisions stand-alone, "other statute" exemptions. The plain language, related statutory provisions, and the legislative history show that RCW 70.02.250 and RCW 71.05.445 do not provide an independent, other statute exemption. Department's Opening Brief, at pp. 20-34. In context, these provisions simply provide that records that were otherwise confidential prior to being shared with the Department will remain confidential after they have been shared with the Department. Plaintiffs do not address the legislative history or related statutory provisions relied upon by the Department. Instead, they make a number of arguments about

why these two provisions are independent, "other statute" exemptions. None are persuasive.

1. The Department's Interpretation Gives All of the Statutory Language Some Meaning; Plaintiffs' Interpretation Renders Language Superfluous

Statutes must be construed to give all of the language an effect and to not render any provision superfluous. *Prison Legal News, Inc., v. Dep't of Corr.*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005). Plaintiffs argue that the Department's interpretation ignores language in both provisions requiring that certain records and information must remain confidential. Plaintiffs' Brief, at p. 21 & 30. This is incorrect. In fact, it is the Department's interpretation that gives full effect to the statutory language.

Both RCW 70.02.250 and RCW 71.05.445 provide that "[t]he information received by the department of corrections under this section [must/shall] remain confidential and subject to the limitations on disclosure outlined in chapter [71.34 RCW and chapter 71.05 RCW], except as provided in RCW 72.09.585." RCW 70.02.250(5); RCW 71.05.445(4). The language "must/shall remain confidential" in these provisions only indicates that records that are otherwise confidential under other statutory provisions will remain confidential when shared with the Department pursuant to these two provisions. The second clause in RCW 70.02.250(5) and RCW 71.05.445(4) explicitly references other

confidentiality provisions. RCW 70.02.250 ("The information…must remain confidential *and subject to the limitations on disclosure outlined in chapter 71.34 RCW,* except as provided in RCW 72.09.585." (emphasis added)); RCW 71.05.445 ("The information…shall remain confidential *and subject to the limitations on disclosure outlined in chapter 71.05 RCW,* except as provided in RCW 72.09.585." (emphasis added)). Plaintiffs' interpretation that the first clause by itself bestows confidentiality upon some documents would render the second clause of these provisions superfluous. In contrast, the reference to other confidentiality provisions makes sense under the Department's interpretation, which provides protection to documents that were confidential prior to being shared with the Department. Because Plaintiffs' interpretation would render language superfluous, this Court should reject it.

2. The Legislature Has Not Consistently Used "Must Remain Confidential" or "Shall Remain Confidential" to Mean the Same Thing

Plaintiffs also argue that the legislature has consistently used the phrases "must remain confidential" and "shall remain confidential" to signal that records should be confidential and that these provisions do not require a record to have already been confidential. Plaintiffs argue that such consistent usage demonstrates that the use of "remain confidential"

signifies that RCW 70.02.250 and RCW 71.05.445 are independent, "other statute exemptions." Plaintiffs' Brief, at pp. 22-23. As an initial matter, this argument ignores the legislative history cited by the Department that supports the Department's position. This legislative history demonstrates that RCW 70.02.250 and RCW 71.05.445 were intended to provide continued confidentiality to information that is otherwise confidential under the Involuntary Treatment Act and the UHCIA when such information is shared with the Department. Department's Opening Brief, at pp. 22-28. Plaintiffs' argument also ignores the many other provisions that appear to use the words "remain confidential" in the same sense proposed by the Department, i.e. that documents that were confidential prior to being shared with an individual or entity should remain confidential once shared. *See e.g.*, RCW 70.230.130[1]; RCW 74.13.075.[2] Such inconsistent usage of the words "remain confidential" indicates that those words must be construed in light of the remaining statutory language and legislative history. In this case, the other statutory language and the

[1] "Copies of such records shall be made available to the medical quality assurance commission, the board of osteopathic medicine and surgery, or the podiatric medical board, within thirty days of a request, *and all information so gained remains confidential in accordance with RCW 70.230.080 and 70.230.120* and is protected from the discovery process." RCW 70.230.130 (emphasis added).

[2] "A juvenile's status as a sexually aggressive youth, and any protective plan, services, and treatment plans and progress reports provided with these funds are confidential and not subject to public disclosure by the department. This information shall be shared with relevant juvenile care agencies, law enforcement agencies, and schools, but remains confidential and not subject to public disclosure by those agencies." RCW 74.13.075(5).

entire statutory framework governing health care information and mental health care records demonstrate that the Department's interpretation of these statutes is the correct.

Furthermore, the four provisions cited by Plaintiffs do not support their argument. One of the provisions cited by Plaintiffs, RCW 70.96A.150, was repealed in 2016. The second provision, RCW 43.190.110, merely ensures that another provision of the same statutory scheme is implemented. Specifically, RCW 43.190.030 provides that the long-term care ombuds must "establish procedures to assure that files maintained by ombuds programs shall be disclosed only at the discretion of the ombuds having authority over the disposition of such files, except that the identity of any complainant or resident of a long-term care facility shall not be disclosed by such ombuds unless" two specific circumstances are met. RCW 43.190.030(5). Reading these provisions together, RCW 43.190.110 is not an independent source of confidentiality but merely implements the more express confidentiality provision in RCW 43.190.030.

Another of the provisions, RCW 43.33A.025(A), deals with criminal history record checks of the State Investment Board. It states in the relevant part "Otherwise the reports, and information contained therein, shall remain confidential and shall not be subject to the disclosure

requirements of RCW 42.56 RCW." RCW 43.33A.025(A). Unlike RCW 70.02.250 and RCW 71.05.445, this provision explicitly references the PRA and expressly states that the information referenced in that provision shall not be subject to the PRA. Consequently, this provision is not similar to either RCW 70.02.250 or RCW 71.05.445, which do not use such explicit language. Rather RCW 43.33A.025(2) demonstrates that the legislature knows how to draft a clear "other statute" exemption to the PRA and that by not using such language in RCW 70.02.250 and RCW 71.05.445, it did not intend to create such an exemption.

Finally, Plaintiffs rely upon RCW 70.87.310, a statute that protects the identity of a whistleblower who submits a complaint to the Department of Labor and Industries or a public subdivision that regulates conveyances. Plaintiffs argue that the identity of a whistleblower cannot have already been confidential because the whistleblower may have already complained to his or her employer. Plaintiffs' Brief, at p. 23. This assertion is entirely speculative. It is just as likely that a whistleblower had not complained to his or her employer and that the identity of the whistleblower is known only to the agency which received the complaint. Certainly, it is possible that no one other than the whistleblower and the agency would know the identity of a person who submitted a whistleblower complaint. In that circumstance, the identity of the whistleblower is unknown to the general

public, and the use of "remain confidential" signifies that the identity of the whistleblower should remain that way. Thus, these statutes do not support Plaintiffs' argument that the legislature has consistently used the phrases "remain confidential" in a specific manner.

3. The Case Law Relied Upon by Plaintiffs Is Not Persuasive

Plaintiffs also rely upon *Cornu-Labat v. Hosp. Dist. No. 2 Grant Cnty.*, 177 Wn.2d 221, 238, 298 P.3d 741 (2013) to support their interpretation of RCW 70.02.250 and 71.05.445. *Cornu-Labat* is inapposite. That case dealt with RCW 70.44.062 which explicitly indicates that meetings, proceedings, and deliberations of the hospital board shall be confidential. *Cornu-Labat*, 177 Wn.2d at 235-38. This language explicitly identified a type of record that was confidential by the use of the word "proceedings." *Id.* at 238 (describing the meaning of proceedings in this context). In contrast, the language that Plaintiffs rely upon in these two provisions is "relevant records and reports" released to the Department. This language is not a term of art and does not have sufficient specificity to exempt documents under the PRA. The term "relevant reports and records" without further definition is not sufficient to identify the records that are purportedly exempt. A provision that does not explicitly identify

the record or information that is purportedly exempt is not an "other statute." *See Doe ex rel. Roe*, 2016 WL 1458206, at *3.

The amorphous nature of this exemption is confirmed by the consequences of Plaintiffs' proposed interpretation. For example, Plaintiffs propose that this statutory language in RCW 70.02.250(2) must be construed without reference to RCW 70.02.250(1). Plaintiffs' Brief at p. 19. Under Plaintiffs' interpretation, the source of the documents does not matter. A SOSSA evaluation or any other document that falls within the regulations defining "relevant records and reports" is confidential regardless of the source once DOC receives it. Plaintiffs' Brief, at p. 19-20 ("[RCW 70.02.250(2)] thus applies to all 'relevant records and reports,' *id.*, including SSOSA evaluations, no matter whose hands those records and reports are in."). For example, if a DOC employee pulled a SSOSA from a public court file, that document would be exempt under Plaintiffs' interpretation. This would expand the meaning of these two provisions beyond their intended purpose, which was to provide for greater information sharing with the Department. Therefore, Plaintiffs argument that RCW 70.02.250 and RCW 71.05.455 are similar to the provision at issue in *Cornu-Labat* is unsupported.

/ / /

/ / /

4. The Implementing Regulations of RCW 70.02.250 Do No Support Plaintiffs' Arguments

In support of their arguments related to RCW 70.02.250, Plaintiffs rely heavily on regulations passed by the Department of Social and Health Services defining "relevant report and records." Plaintiffs' Brief, at p. 16-19. These regulations, however, confirm that the Department's interpretation of the statutory framework is correct. Specifically, the regulations confirm that RCW 70.02.250 merely provides that information that qualifies as confidential mental health information prior to being shared with the Department remains confidential once it is shared with the Department. The regulations make this interpretation explicit: "In order to enhance and facilitate the department of corrections' ability to carry out its responsibility of planning and ensuring community protection, mental health records and information, as defined in this section, *that are otherwise confidential* shall be released by any mental health service provider to the department of corrections personnel for whom the information is necessary to carry out the responsibilities of their office as authorized in RCW 71.05.445 and 71.34.225." WAC 388-865-0600 (emphasis added). This regulation confirms that the statutory provisions are only intended to protect documents that were previously confidential

prior to being shared with the Department and is not intended to bestow confidentiality to documents that are not otherwise confidential.

Plaintiffs use the regulations to argue that SSOSA evaluations qualify as protected information because they could fit in a number of categories of documents in WAC 388-865-0610. However, nothing in WAC 388-865-0610 explicitly references SSOSA evaluations, even though other forensic and legal documents are explicitly mentioned. Plaintiffs argue that these regulations define the relevant records and reports with exactness. Plaintiffs' Brief, at p. 20. If the regulations are intended to define the relevant records with exactness, the absence of an explicit mention of SSOSAs shows that such evaluations are not covered, particularly in light of the fact that other forensic evaluations are mentioned. Plaintiffs' reliance on these regulations is unpersuasive as a result.

Because RCW 70.02.250 and RCW 71.05.445 are not independent "other statute" exemptions, the trial court erred in granting a permanent injunction based on these two provisions.

B. SSOSA Evaluations Used to Determine If Someone Is Eligible For a Reduced Sentence Are Not Exempt as Health Care Information Under the UHCIA

UHCIA includes a general prohibition on the disclosure of health care information. RCW 70.02.020. Under the UHCIA, health care

information is information that can be readily associated with the identity of a patient and that directly relates to the patient's health care. RCW 70.02.010(16). Health care is further defined as "any care, service, or procedure provided by a health care provider: (a) To diagnose, treat, or maintain a patient's physical or mental condition; or (b) That affects the structure or any function of the human body." RCW 70.02.010(14). SSOSA evaluations do not fall within the definition of health care because the purpose of such evaluations is not to provide treatment but rather to provide information to the Court and the State in order to determine whether an individual should receive a reduced sentence. *See Hines v. Todd Pac. Shipyards, Corp.*, 127 Wn. App. 356, 368 (2005) (examining the purpose of the evaluation to determine if it qualifies as health care information). Although the issue that the forensic evaluator is addressing is an individual's "amenability to treatment," this term is not a medical concept and it encompasses much more than traditional medical treatment. *See State v. Oliva*, 117 Wn. App. 773, 780, 73 P.3d 1016 (2003).

Plaintiffs argue that a SSOSA evaluation is health care information because the evaluation is performed by a health care professional who treats the offender as a patient and the evaluator employs normal clinical methods to produce an assessment. Plaintiffs' Brief, at p. 14. Plaintiffs rely heavily on the testimony of treatment providers who argue that

SSOSA evaluations are confidential medical records and should be treated as such. However, the testimony of treatment providers cannot settle the issue of statutory interpretation that lies at the heart of this case, i.e. whether a SSOSA evaluation is exempt in its entirety as health care information. Additionally, the fact that certain treatment providers would treat SSOSA evaluations as protected health information is not dispositive. Treatment providers may opt to protect information for a number of reasons even if the information is technically not covered under the UHCIA.[3]

Furthermore, Plaintiffs argue that SSOSA evaluations serve multiple purposes. Plaintiffs' Brief, at p. 13. Although Plaintiffs appear to concede that one of the purposes of the SSOSA evaluation is to aid a sentencing decision, Plaintiffs' Brief, at p. 13, Plaintiffs argue that the SSOSA is also a health care evaluation. This argument ignores the fact that the health care provider that performs the evaluation is prohibited under state law, absent specific circumstances, from providing the actual treatment if the individual ultimately receives a SSOSA. RCW 9.94A.670(1)(a), (13). It also ignores that fact that SSOSA evaluations cover concepts beyond traditional medical care. WAC 246-930-

[3] The treatment providers assert that they require releases to provide this information to a third party. CP 72-74 This assertion is undermined by the fact that DOC receives SSOSAs without releases and the fact that SSOSAs are filed in open court. CP 509-10, 522-23.

320(2)(e)(i)-(ii), (iv), (viii). Therefore, even if a SSOSA evaluation could possibly be used in later treatment, its primary purpose is forensic in nature, not the provision of medical care. Because the purpose of the SSOSA evaluation is not treatment, SSOSA evaluations are not directly related to a patient's health care and they do not fall within the definition of health care information as a result.

Moreover, the fact that the SSOSA evaluation was conducted by a certified health care professional is not dispositive of the issue. Although the involvement of a certified medical professional might be necessary for something to be considered health care, it is not sufficient by itself. This is consistent with how courts have interpreted the definition of health care in Washington law. *See King v. Garfield Cnty. Pub. Hosp. Dist. No. 1.*, 17 F. Supp. 3d 1060, 1071-72 (E.D. Wash. 2014) (interpretation of drug test was not medical treatment even though it was conducted by medical provider), *reversed on other grounds by* 2015 WL 9459747 (9th Cir. 2015).

Finally, Plaintiffs contend that SSOSAs are protected as "information and records related to mental health services" under RCW 70.02.230. Plaintiffs did not make this argument or rely on this statutory provision in the trial court. Regardless, the provision would not protect SSOSA evaluations for two primary reasons. First, to be protected by RCW 70.02.230, information must be health care information as defined

by UHCIA. RCW 70.02.010(21) (defining information as records related to mental health services as a type of health care information). For the reasons discussed above, SSOSAs are not health care information. Second, the individual who receives a SSOSA evaluation is not receiving services for a mental illness. Nowhere in Plaintiffs' briefing do they identify any mental illness for which individuals who are receiving an initial SSOSA evaluation are being evaluated. Therefore, the Court should reject Plaintiffs' untimely argument that SSOSAs are protected by RCW 70.02.230.

Because SSOSA evaluations are not protected health information, they are not protected by the UHCIA.

C. The Policy Arguments Made by Plaintiffs Are Not a Basis for Affirming the Trial Court's Ruling

An injunction under RCW 42.56.540 requires the moving party to show that the information or record is exempt under a PRA exemption or other statute. *See Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 755, 174 P.3d 60 (2007). Throughout their response brief, Plaintiffs make a number of policy arguments about the effect that "mass disclosure" of SSOSA evaluations would have on sex offenders, victims, and the SSOSA system. These arguments are irrelevant to the primary issue in the case, i.e. whether SSOSA evaluations are exempt under a PRA exemption or "other

statute" exemption. Such policy issues are best left to the province of the legislature not the courts. *Doe ex rel. Roe*, 2016 WL 1458206, *7 n.3 (2016); *Koenig v. Thurston Cnty.*, 175 Wn.2d 837, 847, 287 P.3d 523 (2012) (noting that the court did not doubt the value of SSOSA evaluations but the key question was whether the documents fit the exemption). Furthermore, if the legislature had been concerned about harassment of individuals who underwent a SSOSA evaluation, it could have expressly created an exemption to protect such individuals. *Doe ex rel. Roe*, 2016 WL 1458206, at *7. The absence of an express exemption is particularly noteworthy for SSOSA evaluations as the legislature—if it desired to exempt SSOSA evaluations—could have enacted an express exemption after the Supreme Court rejected the argument that SSOSAs were exempt under other provisions in *Koenig*.[4] It did not. Because the policy arguments cannot create an exemption where one does not exist, these policy arguments do not provide a basis for affirming the trial court's decision.

[4] To the extent these arguments are relevant to the other requirements of an injunction under RCW 42.56.540 and the trial court's factual findings, they are unsupported. Plaintiffs argue that "mass disclosure" of SSOSA evaluations would injure the public and discourage offenders from obtaining a SSOSA. However, Plaintiffs acknowledge that SSOSA evaluations are publically available in court files. *See, e.g.*, CP 426. Since the documents are available in courts files to anyone who wants to find them, Plaintiffs' argument that "mass disclosure" in response to public records requests would deter sex offenders from seeking a reduced sentence or cause any other harm is speculative and unsupported.

D. The Department's Appeal Is Focused on the Permanent Injunction and It Has No Position on The Issues Raised by Ms. Zink in Her Opening Brief

The Department filed a notice of appeal of the issuance of the permanent injunction and its opening brief only addressed those issues. CP 745-756. Ms. Zink's notice of appeal and her opening briefing raised additional issues and Plaintiffs' response brief addresses those issues. These issues include the issuance of the preliminary injunction, the trial court's decision to allow Plaintiffs to certify a class, and the trial court's decision to allow Plaintiffs to proceed via a pseudonym. CP 757-785. Although the Department agrees that the preliminary injunction was improperly issued because Plaintiffs did not show a likelihood of success on the merits, that issue is moot in light of the trial court's issuance of the permanent injunction. However, the issuance of the permanent injunction should be reversed for the reasons stated above. The Department does not have a position regarding the class certification and use of pseudonym issues. It did not appeal those decisions.[5] Therefore, unless the Court requests further response from the Department, the Department does not intend to address those issues.

/ / /

[5] The Department did not oppose either motion in the trial court. The Department did, however, provide some briefing to assist the trial court in making an informed decision.

III. CONCLUSION

RCW 70.02.250 and RCW 71.05.445 are not other statutes that provide additional confidentiality to records without any analysis of the UHCIA's general confidentiality provisions. Furthermore, SSOSA evaluations are not covered under the general confidentiality provisions of the UHCIA. Because the trial court erred in finding SSOSA evaluations are exempt, this Court should reverse the issuance of a permanent injunction and remand for the trial court to enter judgment in the Department's and Ms. Zink's favor.

RESPECTFULLY SUBMITTED this 5th day of August, 2016.

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

CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the **REPLY BRIEF OF APPELLANT** 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
VANESSA T. HERNANDEZ	vhernandez@aclu-wa.org
DONNA ZINK	dzink@centurytel.net

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

EXECUTED this 5th day of August, 2016, 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