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NO. 71039-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JONATHAN BLOEDOW,
APPELLANT,

v.

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, et al.,
RESPONDENTS.

RESPONDENTS' RESPONSE BRIEF

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INTRODUCTION

The Respondents (hereinafter referred to as “respondents” or “providers”) are six health care organizations that provide abortion services to women in Washington. Pursuant to state law requirements, they provide reports to the Washington Department of Health (“DOH”) that contain health and demographic information about each patient that receives an abortion at one of their facilities. Jonathan Bloedow requested the information providers submitted to DOH from certain facilities pursuant to the Public Records Act, RCW 42.56 (“PRA”). Prior to disclosure, and due to the sensitive nature of the information, DOH notified each of the providers about Bloedow’s requests, and sent each provider a spreadsheet showing the information DOH proposed to disclose to Bloedow. Although mindful of the PRA disclosure requirements, the providers are also keenly aware of their responsibility to ensure that their patients’ identities are protected to the maximum extent allowed by law. The women are private citizens exercising their “fundamental right” to a legal medical procedure.¹ There can be no margin of error when it comes to protecting their identity. Because the information DOH proposed to release contains identifying information or is otherwise protected information under Washington regulations, the providers filed this

¹ RCW 9.02.100(2) (“Every woman has the fundamental right to choose or refuse to have an abortion. . .”).

action to ensure all appropriate steps are followed to protect the identity of their patients.

STATEMENT OF THE CASE

Washington State collects “population-based, health-related data,” to assess health care in the State. RCW 43.70.050. Pursuant to this authority, DOH requires providers of abortions to submit a monthly report detailing for each abortion performed, the “age of the patient, geographic location of the patient’s residence, patient’s previous pregnancy history, the duration of the pregnancy, the method of abortion, any complications such as perforations, infections and incomplete evacuations, the name of physician or physicians performing or participating in the abortion and such other relevant information as may be required by the secretary.” WAC 246-490-100.

Per additional instructions by DOH, providers of abortion services send DOH the following information for each abortion patient: location of facility where the procedure took place, patient identification number, her city, county and state of residence, age, date of service, whether the abortion was surgical or medical, race, whether she is of Hispanic origin, prior spontaneous abortions, prior live births, prior abortions, and complications (if any). *See* CP 287-291. Providers also report fetal abnormalities that they are aware of. *Id.* In complying with this requirement, the providers rely on the assurances of confidentiality made by DOH in its Handbook for Reporting

Induced Abortions. *Id.*, ¶ 4. In addition, DOH regulations specifically prohibit DOH from publicly disclosing information in the reports “in such a manner as to identify any individual without their consent ... nor in such a manner as to identify any facility” WAC 246-490-110.

DOH compiles the data submitted by the providers, and, using the data in aggregated form, publishes comprehensive statistical reports regarding abortions performed in Washington State. The reports appear on the website DOH publishes and are available to the public.² Importantly, the published reports are not patient specific; they are a statistical compilation of the demographic information collected by DOH about the patients who had an abortion in Washington. They do not identify the facility where an abortion was performed. The published reports do not reflect any information about individual patients.

Jonathan Bloedow made a series of record requests to DOH seeking “data extracts” of the Reports of Induced Terminations of Pregnancy that the providers had submitted to DOH. DOH compiled the data in response to the request. Prior to releasing the information to Bloedow, DOH notified each of the providers of Bloedow’s record request, enclosing the data DOH intended to release to Bloedow, and informing each provider of its right to seek an

² CP 275-286, ¶ 10

injunction to prevent the disclosure of their patients' health information, pursuant to RCW 42.56.540.

Unlike the reports published on its website, the data DOH would provide Bloedow is patient specific. There are separate spreadsheets for each facility where abortions were performed, and each spreadsheet contains demographic information for every patient that had an abortion during the specified time period, including patient health care information that is considered identifying under state and federal law. Specifically, each spreadsheet includes for each patient: the state's patient identifier, date of service, age, city and county of residence, race/ethnicity, number of prior abortions, number of prior births, complications from the abortion, if any, and gestational age of fetus. Because all or part of the information in the DOH spreadsheets is exempt from disclosure under the PRA, the providers filed this lawsuit to protect the health information and identity of their patients.

On April 23, 2013, providers filed this action in King County Superior Court for Declaratory Judgment and Injunctive Relief under RCW 42.56.540 against DOH to prevent the release of records pursuant to Bloedow's requests. CP 169-177. The Complaint sought to prevent DOH from releasing the records on the basis that they identified specific abortion facilities and patients.

On April 25, 2013, the Providers filed their First Amended Complaint to add additional providers as Plaintiffs and name Jonathan Bloedow as a Defendant. CP 178-187. On April 26, 2013, the Providers presented a motion for Temporary Restraining Order (“TRO”) before Commissioner Nancy Bradburn-Johnson, who granted the motion and entered the TRO. CP 229-241, 188-190. The parties then entered a stipulation to continue the TRO until the assigned judge could hear arguments on the Motion for Preliminary Injunction. CP 242-246.

On June 10, 2013, the Providers filed a Second Amended Complaint, adding an additional provider. CP 1-10. On June 14, 2013, Bloedow filed his Answer to Second Amended Complaint. CP 11-20. On June 20, 2013, DOH filed its Answer to Second Amended Complaint. CP 21-24.

On June 28, 2013, the Providers filed a Motion for Summary Judgment and Permanent Injunction. CP 25-47. On September 4, 2013, the court held a telephone status conference/hearing at which Judge Lum indicated he was granting the Providers’ summary judgment motion and permanently enjoining the release of the records. The Order on Summary Judgment was entered on September 12, 2013. CP 151-156. On September 18, 2013, Judge Lum entered an order sealing records submitted by DOH for *in camera* review. CP 167. Bloedow filed a notice of appeal leading to the instant case on October 11, 2013. CP 157.

STATEMENT OF ISSUES

1. Whether the trial court correctly enjoined DOH from releasing spreadsheets containing data about abortions performed because doing so would violate WAC 246-490-110 by necessarily disclosing the identity of clinics that have performed abortions.

2. Whether the trial court correctly enjoined DOH from disclosing the date of patients' abortion procedures as well as patients' city and county of residence on the alternative basis that this information is exempt from disclosure under the Health Care Information Act, because that Act protects information that would be protected under the federal Health Insurance Portability and Accountability Act.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT LIMITING THE INFORMATION THAT CAN BE RELEASED TO BLOEDOW

A. STANDARD OF REVIEW

This Court reviews an Order granting summary judgment using *de novo* review and engages in the same inquiry as the trial court. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). "All

questions of law are reviewed de novo.” *Berger v. Sonneland*, 144 Wn.2d 91, 103, 26 P.3d 257 (2001).

B. THE REQUESTED INFORMATION MAY NOT BE DISCLOSED UNDER THE PRA BECAUSE IT FALLS UNDER PRA EXEMPTIONS FROM DISCLOSURE.

The PRA provides that “[e]ach agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.” RCW 42.56.070(1). “The PRA’s mandate for broad disclosure is not absolute.” *Resident Action Council v. Seattle Housing Authority*, --- P.3d ----, 2013 WL 7024095 (Wash., 2013). The PRA’s exemptions “are provided solely to protect relevant privacy rights or vital governmental interests that sometimes outweigh the PRA’s broad policy in favor of disclosing public records.” *Id.* The records at issue here fall within exemptions of the PRA. RCW 42.56.070(1) and 42.56.360(2).

C. WASHINGTON LAW DOES NOT PERMIT THE RELEASE OF HEALTH DATA COLLECTED BY THE STATE IN SUCH A MANNER AS TO IDENTIFY THE FACILITY WHERE AN ABORTION WAS PERFORMED.

RCW 43.70.050 authorizes the State to collect health-related data, and requires health care providers to submit certain data. The statute strikes a

balance between the governmental interest advanced by collecting and assessing health data on the one hand, and the need to protect patient privacy and the confidentiality of the sensitive data on the other. RCW 43.70.050(2) requires that state agencies which collect health-related data “shall use it in accordance with state and federal confidentiality laws and ethical guidelines” and that “[s]uch data in any form where the patient or provider of health care can be identified shall not be disclosed, subject to disclosure under RCW 42.56.”³

Pursuant to RCW 43.70.050, the Secretary of Health has adopted WAC 246-490-100 which requires the providers to furnish certain data related to abortion services. To ensure “accuracy and completeness in reporting” abortion data, WAC 246-490-110 specifically guarantees abortion providers (and their patients) that “information received by the board or the department through filed reports or as otherwise authorized, *shall not be disclosed publicly in such a manner as to identify any individual without their consent, except by subpoena, nor in such a manner as to identify any facility* except in a proceeding involving issues of certificates of approval.”⁴ *Id.* (emphasis added). The regulatory framework protects patients and the location at which

³ This statute explicitly instructs that the State use data only in compliance with state and federal confidentiality laws, making clear that the records may not be disclosed in a manner contrary to state or federal privacy laws, including the HCIA and HIPAA, discussed *infra*.

⁴ The assurance of confidentiality is particularly compelling where, as here, patients have exercised a fundamental right of privacy guaranteed by the Washington State Reproductive Privacy Act, RCW 9.02.010, and the U.S. Constitution.

they had their procedure. This restriction on disclosure is incorporated into the PRA through RCW 42.56.070(1), which exempts records from disclosure when they are otherwise prohibited by law from disclosure.

RCW 43.70.050 and WAC 246-490-100 reflect a legislative effort to further the public good and public health by allowing for the collection of aggregate information about medical services. However, in recognition of the fact that those laws enable the State to obtain data it otherwise would not be able to access, they incorporate protections as to how that data may be used and disclosed, allowing for the advancement of the State's public health objectives while still protecting providers and their patients.

Here, the information DOH seeks to release will, *per se*, disclose the identity of the facility where an abortion was performed, in contravention of WAC 246-490-110, as a result of the facilities having been specifically named in Bloedow's requests. As the requests have been crafted, providing information in response is barred by the specific guarantee in WAC 246-490-110, and for this reason, the data is exempt from disclosure in its entirety.⁵

Bloedow asserts that the spreadsheets themselves do not identify the facility and in any event the identification of each facility was "done

⁵ There are a number of ways the spreadsheets could be released without disclosing the facility at which each woman had her abortion without violating WAC 246-490-110 and Bloedow is not foreclosed from requesting information in a manner that would not violate the regulation. For example, data could be released in one spreadsheet containing the information from *all* the facilities combined, ensuring that no patient can be connected to a particular facility and that no particular facility is disclosed as having provided abortions.

innocently.”⁶ Brief of Appellant at 17 (“App. Br.”). While it is true that the name of the clinic does not appear on the spreadsheet to be disclosed, this argument ignores the fact that the clinics’ identities will nonetheless be disclosed through other means. More importantly, it ignores the distinct regulatory construction that is present here: the *quid pro quo* that exists between the State’s requirement that providers submit the abortion reports in WAC 246-490-100, and the promise of confidentiality in WAC 246-490-110 intended to ensure “accuracy and completeness in reporting.” Moreover, even if the individual spreadsheet (or CD containing the spreadsheet) is not labeled with the name of the facility, it will be accompanied by a cover letter that will disclose the facility. This is not permissible. WAC 246-490-110 prohibits DOH from publicly disclosing the information in the reports “*in such a manner ... as to identify any facility.*” By its plain language, the regulation prohibits disclosure *in any manner* that identifies a facility, whether that be on the face of a document or by indirect means.

Bloedow argues that the decisions in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006) (involving a PRA request of an investigation of sexual assault of a minor) and *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d. 398, 259 P. 3d 190 (2011) (involving a PRA

⁶ Bloedow also asserts, without any support or citation, that WAC 246-490-110 is “a limited pledge of confidentiality.” App. Br. at 17. This characterization is made of whole cloth and is entitled to no more weight than any personal opinion.

request of two internal reports investigating allegations of sexual abuse by a police officer) do not permit the information to be withheld. App. Br. at 17-19.

This case is unlike *Bainbridge Island* or *Koenig*, because the health information at stake was given to the State by providers pursuant to RCW 43.70.050's express assurance of confidentiality and WAC 246-490-110's specific guarantee that DOH will not disclose the information publicly "in such a manner as to identify any facility." The unique dynamic of this trade-off, whereby providers voluntarily report on patients' sensitive health information in exchange for a promise that the identities of the clinic and the patients will be protected, sets this case apart from *Koenig* and *Bainbridge Island*, where the information at issue was not gained through an assurance of confidentiality. See CP 275-286 at ¶4.

In addition, the reasoning that led the Supreme Court to order records released in *Bainbridge Island* and *Koenig* is limited to the specific facts and exemptions involved in those cases. In *Bainbridge Island*, the Court found that a police officer's identity contained in reports of unsubstantiated sexual abuse was exempt from disclosure under former RCW 42.56.230(2), which exempted from disclosure "personal information" when disclosure of that personal information would violate a person's right to privacy. See *Bainbridge*, 172 Wn.2d at 417-18. But, the Court held that the records could

not be withheld in their entirety, even though disclosure could result in others learning the officer's identity, because there was a legitimate public interest in how the Police Department investigated the allegations, precluding a finding that disclosure of the reports would violate the officer's right to privacy. Under RCW 42.56.050, which the Court incorporated into the definition of "personal information" in RCW 42.56.230, a person's "right to privacy" ... is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, *and* (2) is not [a matter] of legitimate public concern..." *Bainbridge*, 172 Wn.2d at 417 (emphasis in original). Having found the release of the report was "a matter of legitimate public concern" the court concluded that disclosure of the information was not an invasion of the police officer's privacy, the "personal information" exemption in former RCW 42.56.230(2) was deemed inapplicable, and the records were ordered to be released with redaction. *Id.* Moreover, the "personal information" exemption in that case cannot be compared to the regulatory rights of patients and clinics to confidentiality.

Koenig is likewise distinguishable. In *Koenig*, the public records exemption at issue, former RCW 42.17.31901 (1992), exempted "[i]nformation revealing the identity of child victims of sexual assault." 158 Wn.2d at 181. The statute further defined "[i]dentifying information" as "the child victim's name, address, location, photograph, and in cases in which the

child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.” *Id.* Relying on the express language of the statute, the Court held that RCW 42.17.31901 exempted *only* the enumerated pieces of identifying information and not the entire report. *Koenig* at 182-3. Where none of the specific pieces of information were contained within “the four corners of the records” set to be disclosed, the exemption did not provide authority for withholding the records entirely. *Id.*

In contrast, WAC 246-490-110 confers a unique protection to a facility where a woman’s abortion is performed, broader than the protections involved in *Koenig* and *Bainbridge Island*. It prohibits disclosure “*in such a manner as to identify any facility,*” regardless of whether that identification is accomplished on the four corners of records or otherwise. *Id.* (emphasis added). In sum, the decisions in *Bainbridge Island* and *Koenig* are limited to the unique facts in each case and in no way negate the prohibition contained in WAC 246-490-110.

Finally, the prohibition against identifying a facility where a woman had an abortion also assures clinics that detailed information about the number of procedures performed by any particular facility also will not be disclosed. Thus, disclosure here in violation of WAC 246-490-100 will compromise more than the mere fact that a facility performs abortions.

D. WITHOUT REDACTION, THE INFORMATION IS EXEMPT UNDER THE PUBLIC RECORDS ACT, RCW 42.56.360(2), WHICH PROHIBITS DOH FROM DISCLOSING PRIVATE HEALTH INFORMATION PROTECTED UNDER THE WASHINGTON HEALTH CARE INFORMATION ACT.

1. THE HEALTH CARE INFORMATION ACT GOVERNS THE DISCLOSURE OF HEALTH CARE INFORMATION.

If this Court determines that data is not exempt from disclosure in its entirety pursuant to WAC 246-490-110⁷, the disclosure still cannot be made without further redaction to ensure compliance with state and federal laws protecting the privacy of patient health information. The PRA specifically incorporates the Health Care Information Act, RCW 70.02 *et seq.* (“HCIA”). RCW 42.56.360(2) (“Chapter 70.02 RCW applies to public inspection and copying of health care information of patients.”)⁸ *See also, Prison Legal News v. Dep’t of Corrections*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005) (observing that the PRA exempts disclosure of health care information and incorporates the HCIA into the PRA). The HCIA in turn is a strong statement

⁷ Respondents also note that as of July 1, 2014, this information will be exempt from disclosure in its entirety under amended RCW 70.02.050(2)(a). *See* Laws of 2013, ch. 200, § 3. The Legislature recently amended the HCIA to clarify that information provided to public health authorities, such as the reports the providers gave to DOH, is exempt from the Public Records Act.

⁸ The identity of patients is also protected under WAC 246-490-110, which states that information received by DOH “shall not be disclosed publicly in such a manner as to identify any individual without their consent” *See* RCW 42.56.070(1), which exempts records from disclosure when they are otherwise prohibited by law from disclosure.

of the public policy to protect the confidentiality of a patient's health information.⁹ In enacting the HCIA, the Washington Legislature specifically recognized the sensitivity of health care information, and the harm that would ensue if it is improperly released:

Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.

In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not improperly disclosed and in having clear and certain rules for the disclosure of health care information.

RCW 70.02.005 (1), (3). Likewise, the Washington Legislature recognized the critical importance of protecting health care information when, as here, it is in the possession of an entity other than the provider.

Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. *It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.*

RCW 70.02.005(4) (emphasis added). Finally, the Legislature recognized a "compelling need" for uniform laws and procedures for the use and disclosure of health care information:

⁹ The public policy of patient confidentiality is no less compelling than the policy of disclosure and transparency in the PRA.

The movement of patients and their health care information across state lines, access to and exchange of health care information from automated data banks, and the emergence of multistate health care providers creates a compelling need for uniform law, rules, and procedures governing the use and disclosure of health care information.

RCW 70.02.005(5). Thus, the HCIA's restrictions on disclosure of health care information apply broadly to persons and entities other than health care providers, including DOH. RCW 70.02.005(4).¹⁰

2. THE HCIA MUST BE INTERPRETED SO AS TO BE CONSISTENT WITH HIPAA'S STANDARD FOR DETERMINING WHEN HEALTH CARE INFORMATION CAN LEAD TO IDENTIFICATION OF THE PATIENT.

In order to determine how the HCIA applies to DOH and how to apply the HCIA exemption to a Public Records Act request, it is necessary to examine how the HCIA is applied to the health care providers. The HCIA governs the use and disclosure of "health care information" by health care providers and health insurance payors in Washington State. RCW 70.02.020, .045. It defines "health care information" as "any information...that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care...." RCW 70.02.010(7). The HCIA does not specify

¹⁰ The providers did not violate this provision by turning over medical records to DOH because RCW 70.02.050(2) makes an exception to the general rule against disclosure by requiring health care providers to turn over health care information when such reporting is required by federal, state, or local law. This exemption further ensures that the public health benefits achieved through health care provider reporting requirements, discussed *supra* in Section I(C)(1). The exception does not carry over to state disclosure of patients' health care information to individuals.

how to determine whether the information can be readily associated with the patient's identity.

The HCIA, however, cannot be read alone; it must be interpreted in conjunction with its federal counterpart, the federal Health Insurance Portability and Accountability Act (HIPAA), the federal law governing the use and disclosure of health information. 45 C.F.R. Parts 160 and 164. The HCIA must be read so as to provide at least as much, if not more, protection of patients' health care information than what is provided for by HIPAA. Where patient privacy is concerned, HIPAA preempts contrary state law that provides less protection to patient confidentiality. 45 C.F.R. § 160.202-203 ("A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law" unless a state privacy law "is more stringent," meaning it "provides greater privacy protection for the individual who is the subject of the individually identifiable health information.").¹¹ Thus, as a matter of statutory construction, the HCIA's threshold for determining when information is considered "identifying" or could be "readily associated" with a patient's identity under the HCIA must provide at least as much, if not more,

¹¹ Thus, to read the HCIA in a manner that would confer fewer protections than HIPAA requires, would lead to applications of the HCIA which would be preempted by HIPAA – a result the Legislature could not have intended.

protection than the HIPAA standards for determining when information is considered “individually identifiable.”

3. THE INFORMATION SET TO BE RELEASED IS CONSIDERED “IDENTIFIABLE” UNDER HIPAA, AND IS THEREFORE “HEALTH CARE INFORMATION” EXEMPT FROM DISCLOSURE UNDER THE HCIA AND PRA.

HIPAA’s definition of “individually identifiable health information” is similar to the HCIA. It protects information “that identifies the individual” or “with respect to which there is no reasonable basis to believe that the information can be used to identify the individual.” 45 C.F.R. § 164.514(a).

Unlike the HCIA, HIPAA establishes a means to determine if information could be used to identify a patient. Specifically, HIPAA provides two methods under which information is considered safely de-identified. The first, “expert determination,” requires a scientific and statistical expert to conduct an analysis to ensure that the risk of identification is very small, documenting the methods and results of the analysis that justify its determination. 45 C.F.R. §164.514(b)(1). The second, the “safe harbor” method, requires the removal of 18 types of identifiers, specifically including identifiers which are included in the records DOH intends to disclose to Bloedow (the patient’s city and county of residence and date of service performed). 45 C.F.R. § 164.514(b)(2).

Because information that is considered “individually identifiable” under HIPAA is also considered “identifying” under the HCIA, the State cannot release information which has not been de-identified pursuant to one of the two methods outlined in HIPAA.

DOH has not procured an expert determination that the risk of identification is very small. Instead, it relies only on the lay assessment of staff who lack the expertise needed for a statistical analysis. Absent a statistical analysis to ensure that patient confidentiality is protected, DOH must utilize the safe harbor method described in HIPAA and incorporated into the HCIA and remove all of the 18 categories of identifiers. The safe harbor method uses an objective standard to ensure that sensitive patient health information will be protected and the information disclosed to Bloedow will not identify any patients. *See* CP 301-305. It serves both the interests of the PRA by promoting disclosure of public records, as well as the interests of the HCIA by maintaining the confidentiality of patient health information.

Bloedow acknowledges that the HIPAA safe harbor identifiers “would be considered to directly identify a particular patient or narrow the field so drastically as to have that effect” but contends that the categories at issue here, city and county of residence and date of service, do not risk re-identification.

App. Br. at 28.¹² While Bloedow is singularly unqualified to assess what information can or cannot identify a patient, and his subjective view on this is unavailing, his argument actually proves why the safe harbor is so appropriate. Using the HIPAA safe harbor standards removes the subjectivity out of evaluating whether health information is identifying, and allows for a uniform treatment of patient information that will meet the objectives of the HCIA in protecting patients.

Bloedow also correctly points out that DOH is not a “covered entity” under HIPAA, and, therefore, “HIPAA does not apply to DOH.” Appellant Br. at 26-27. The providers do not contend otherwise. But this argument oversimplifies the analysis by ignoring the way in which HIPAA and the HCIA interact. Although DOH is not a covered entity in this context, it can only disclose information in accordance with HCIA, and, as discussed above, HCIA must be interpreted to provide a level of patient confidentiality at least as great as HIPAA. HCIA’s primary subjects of regulation are health care providers, which are prohibited from disclosing protected “health care information” both by the HCIA and HIPAA, and which undisputedly could

¹² Bloedow cites to *Kitsap County Prosecuting Attorney’s Guild v. Kitsap County*, 156 Wn. App. 110, 116-118, 231 P.3d 219 (2010) as support for the release of the city and county of residence. App. Br. at 22-23. *Kitsap* cannot be read as requiring disclosure of the city of residence of public employees. First, because of a procedural quirk, the only issue before the court was whether the requesters were entitled to attorneys’ fees and costs. The appeals court never reached the merits of the PRA request. Moreover, here, the issue is not simply the right to privacy. Disclosure of the city and county of residence is specifically disallowed by HIPAA, and therefore not permitted by HCIA, because it is identifying information.

not disclose the information at issue here unless it had been de-identified. RCW 70.02.020; 45 C.F.R. § 164.502(a). The HCIA’s definition of “health care information” cannot be read in such a way that one standard, consistent with HIPAA, applies to patients’ privacy rights when records are in the hands of health care providers, but some other lesser standard applies when a non-HIPAA covered entity like the DOH is in possession of the same health care information.¹³ Such a construction not only runs afoul of HCIA’s strong statement of policy protecting health information regardless of who holds it, but would be irrational and contrary to the consistency required by the HCIA. RCW 70.02.005 (3), (5).

In fact, the HCIA’s declaration of statutory intent provides that patients do not surrender their privacy rights when their records are in the hands of those other than their health care providers, including a state agency such as DOH. RCW 70.02.005(4) articulates a public policy that “a patient’s interest in the proper use and disclosure of the patient’s health care information survives even when the information is held by persons other than health care providers.”).

The HCIA’s definition of “health care information” must be interpreted so as to have one consistent meaning – a meaning that harmonizes

¹³ Such a contrary reading would mean patients would arbitrarily lose their state law privacy rights under the HCIA when their information was reported to the government as required by law.

with HIPAA's de-identification method and does not lead to applications in which the HCIA's definition would be preempted by HIPAA. The law cannot be construed in multiple ways depending on what type of entity it is being applied to. *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wn.2d 619, 635, 279 P.3d 173 (2012) ("we avoid interpretations that yield unlikely, absurd or strained consequences."); *McClarty v. Totem Elec.*, 157 Wn.2d 214, 220, 137 P.3d 844 (2006) ("To provide a single definition of 'disability' that can be applied consistently throughout the WLAD, we adopt the definition of disability set forth in the federal ADA."), overturned by statute, as recognized by *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 198 P.3d 1021 (2009). Instead, the statute must be read to have one consistent interpretation.

In sum, if information is provided to Bloedow, it must be redacted further to remove the city and county where patients reside, and their dates of service.¹⁴

4. THE INFORMATION IS ALSO "READILY ASSOCIATED" WITH PARTICULAR PATIENTS' IDENTITIES UNDER THE HCIA AND IS EXEMPT FROM DISCLOSURE ON THAT ADDITIONAL BASIS.

¹⁴ Bloedow also cites RCW 42.56.210 for the notion that "no exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons." His reliance on this provision is misplaced. First, this is not statistical information. It is demographic information about specific patients. To the extent the demographic information does not fall in the HIPAA safe harbor, it is identifying and cannot be disclosed, pursuant to the HCIA.

Additionally, even apart from the safe harbor rule, and its application to the HCIA, it would still be clear that the records to be disclosed could be “readily associated” with a patient’s identity and cannot be disclosed. In addition to patients’ residence and date of service (both of which are identifiers which must be removed under HIPAA’s safe harbor method), DOH plans to release other information which would allow the health data to be “readily associated” with patients’ identities. The information to be released contains various pieces of personal information about the providers’ patients that could be used to associate the records with individual patients, including where they had the abortion, patients’ city of residence, age, ethnicity, weeks’ gestation, number of children, date of their abortion procedure, and of course, the clinic where their procedure occurred. As the specificity of the identifying information increases, the risk that patient confidentiality will be breached also increases. CP 301-305.

Moreover, once the information is in the hands of Mr. Bloedow, nothing would prevent him from publishing the information in its raw form, or highlighting it in such a way so as to make it even easier to identify particular individuals. If Mr. Bloedow were to publish the information, it could lead to even more avenues through which an individual’s identity could be determined. For instance, an individual who was known by others to be pregnant, but whose abortion was not known by others, could be exposed if

one were to piece together the date of her abortion, her age, residence, race, and number of children she has – all of which are in the data set. The legislative findings in the HCIA, RCW 70.02.005, make clear that the Washington Legislature could never have intended the PRA to allow this potential risk to patient privacy.

If any disclosure is to be required at all, the agency should be enjoined from releasing the data without redaction consistent with the HIPAA safe harbor method to ensure that the data released is not able to be associated with particular patients or a particular clinic and that clinic's address. *See Prison Legal News v. Dep't of Corrections*, 154 Wn.2d 628, 644 (2005); WAC 296-490-110 (prohibiting DOH from identifying facilities that perform abortions).

E. DISCLOSURE OF INFORMATION THAT IS NOT SUFFICIENTLY DE-IDENTIFIED IS NOT IN THE PUBLIC INTEREST AND WOULD “SUBSTANTIALLY AND IRREPARABLY DAMAGE” INDIVIDUALS WHOSE HEALTH CARE INFORMATION COULD BE IDENTIFIED.

RCW 42.56.540, which allows the providers to seek to enjoin the release of information, further requires that the providers must demonstrate that the release of information that could identify a patient or which violates a carefully crafted regulatory scheme is (1) not in the public interest and (2) would “substantially and irreparably damage any person.”

The records at issue contain information that is deemed identifying under the HCIA and the HIPAA safe harbor rule, and therefore could disclose the identity of women who had abortions, causing substantial and irreparable damage to those individuals. This court need look no further than the Legislature’s findings in the HCIA: “health care information is personal and sensitive information that, if improperly used or released, may do significant harm to a patient’s interests in privacy, health care, or other interests.” RCW 70.02.005(1). Surely, reproductive health services are among the most sensitive and personal services a woman receives.¹⁵

Bloedow does not directly dispute the harm that would ensue if the identities of women who had abortions were disclosed. Indeed, he seems to concede that it would be highly offensive to disclose publicly that a woman had an abortion. App. Br. at 30-32. He simply re-states his own personal opinion that the information concerning a patient’s city and county of residence and place and date of service, in his subjective opinion, is not identifying. App. Br. at 32-33.

¹⁵ Washington State law ensures the strongest possible protections to the reproductive privacy of individuals. See RCW 9.02.100 (also known as the Reproductive Privacy Act). The law makes clear that every woman has the fundamental right to choose or refuse to have an abortion and that the state shall not deny or interfere with a woman’s fundamental right to choose or refer abortion prior to viability of the fetus.” *Id.*; *State v. Koome*, 84 Wn.2d 901 , 530 P.2d 260 (1975). The PRA must also be read in conjunction with the rights conferred by the Reproductive Privacy Act.

It bears repeating: there can be no margin of error when it comes to protecting the identity of patients and their health information: if a patient's identity is revealed by the release of data, and her private health information were to be made known to the public, that would cause her substantial harm. RCW 70.02.005(1).

Moreover, the information about where the providers' patients live, or the actual date she had a medical procedure, and the facility at which she had the procedure are not of legitimate public concern. Nor is there a legitimate public interest in disclosing information that could result in re-identification. The public has no legitimate concern about the health of any individual woman, particularly where the State of Washington was not part of the care she received. *See, e.g., Tiberino v. Spokane County*, 103 Wn. App. 680, 690-91, 13 P.3d 1104 (Wash. Ct. App. 2000) (fact that public employee sent 467 personal e-mails over a 40 working-day time frame is of legitimate interest; what she said in those e-mails is of no public significance.) Her healthcare is a private matter concerning a private citizen. The public interest DOH has in studying the aggregated and statistical data regarding abortions in Washington simply does not extend to the individual patients and information that could identify them.

Even Bloedow cannot articulate a public interest in the identifying details of individual patients, other than general references to the purposes of

the PRA.¹⁶

The health care information set to be released by DOH may not be released if it could identify women who have had abortions or the providers' facilities. If disclosure is not proscribed entirely, redaction of the records must be ordered to prevent the release of identifying information, consistent with the HCIA and HIPAA safe harbor. RCW 42.56.070(1).

CONCLUSION

Based on the foregoing, the Providers urge this Court to affirm the trial court's grant of summary judgment and a permanent injunction enjoining DOH from disclosing private medical records pertaining to their patients.

RESPECTFULLY SUBMITTED this 5th day of May, 2014.



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¹⁶ Inexplicably, Bloedow references Laws of 2001, ch. 98, which pertains to criminal acts related to terrorism, a topic wholly unrelated to private patient health information. App. Br. at 33. The public's need to have information about hazards or threats, is not at issue here, and certainly has no bearing on the lack of public interest in private health information.

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CERTIFICATE OF SERVICE

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