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Case No. 37446-3-II

STATE OF WASHINGTON

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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DAVID KOENIG, *Appellant,*

v.

THURSTON COUNTY

*Respondent,*

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REPLY BRIEF OF APPELLANT

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## I. REPLY ARGUMENT

The Court should give little weight to the apparent consensus among prosecuting attorneys, victim advocates, and therapists that the victim impact statement (VIS) and SSOSA evaluation should be exempt from public disclosure. Those parties already have access to these documents and see no reason to have their own actions subjected to public scrutiny. Those parties do *not* represent the public whose interests the PRA was enacted to protect. As the Supreme Court stated almost 30 years ago, “leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization.” *Hearst v. Hoppe*, 90 Wn.2d 123, 131, 580 P.2d 246 (1978).

Relying on the self-serving opinions of individuals who oppose public disclosure, the County repeatedly asserts that it has presented “evidence” as to why the VIS and SSOSA should be exempt, and that Koenig has failed to rebut this “evidence.” *App. Br.* at 1, 5, 6, 7, 15, 21, 24-26, 29, 32, 33. The County erroneously assumes that the application of the PRA to whole classes of public records presents only questions of fact. The County’s conclusory declarations largely ignore the legal standards for exemptions and redaction under the PRA, and violate the well-established requirements that the PRA must be liberally construed to allow disclosure and its exemptions must be narrowly construed. *Progressive*

*Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995); RCW 42.56.030. The County's declarations presuppose an incorrect understanding of the legal function of a VIS, and advance hyperbolic allegations that the SSOSA system will fail if subjected to any public disclosure. These declarations are merely the biased opinions of lay persons on the legal question of how RCW 42.56.240(1) should be interpreted and applied to an entire class of public records. Because judicial review under the PRA is *de novo*, this Court is free to discount or reject those opinions.<sup>1</sup>

For example, in *King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002), the agency submitted declarations from police officers in an attempt to establish that nondisclosure of a list of police officers' names was essential to effective law enforcement. The Court of Appeals considered and rejected the officers' concerns. *Sheehan*, 114 Wn. App. at 339-341. It is for the Court, not the County's biased declarants, to decide whether nondisclosure of the SSOSA evaluation is truly essential to effective law enforcement. In making that determination, this Court "must take into account the policy of the act 'that free and open examination of

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<sup>1</sup> The County's discussion of the optional "show cause" procedure (Resp. Br. at 4) is pointless. As the County concedes, the summary judgment procedure is appropriate under the PRA. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 104-06, 117 P.3d 1117 (2005).

public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” *Sheehan*, 114 Wn. App. at 336 (quoting RCW 42.56.550(3); former RCW 42.17.340(3)).

Under *Koenig v. Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006), the public has the right to scrutinize the criminal justice system. The records at issue in this case are central to the process of sentencing felony sex offenders. The Court must hold that the VIS and SSOSA evaluation are not exempt from public disclosure under RCW 42.56.240(1).

**A. The VIS is not an investigative record for purposes of RCW 42.56.240(1).**

A record is not an “investigative record” for purposes of RCW 42.56.240(1) unless the record is (i) “compiled” by an investigative, law enforcement, penology or disciplinary agency (ii) “as a result of a specific investigation focusing with special intensity upon a particular party.” *Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628, 637, 115 P.3d 316 (2005); *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993) (quoting *Laborers Int’l Union, Local 374 v. Aberdeen*, 31 Wn. App. 445, 448, 642 P.2d 418, *review denied*, 97 Wn.2d 1024 (1982)). Police reports and witness statements, for example, are investigative

records under this test. *See Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 480, 987 P.2d 620 (2000). As the County admits, “[u]nlike a police report, a VIS is voluntarily provided by an individual who is *not* part of a law enforcement agency.” (Emphasis added). *Resp. Br.* at 9. Because the victim is not a law enforcement agency, the VIS is *not* an investigative record.

No case holds that a document filed in open court by a private party is an “investigative record.”

The County argues that the VIS is an investigative record because (i) the County receives a copy of the VIS and (ii) uses the VIS in sentencing the defendant. *Resp. Br.* at 6-9. These facts, even if true, do not convert a pleading filed by a private party into an “investigative record” of the prosecuting attorney.

**1. The manner in which the County obtains a copy of the VIS is irrelevant.**

Conceding that a VIS is written by the victim and filed in court, the County focuses on how the prosecuting attorney obtains a copy of the VIS. The County asserts that the “only evidence” is that:

- the prosecuting attorney sends the victim a form,
- the prosecuting attorney receives the VIS from the victim, and
- the prosecuting attorney files the VIS in court and keeps a copy.

*Resp. Br.* at 6. Koenig does challenge this “evidence” because it is irrelevant to the legal question of whether a VIS is an investigative record for purposes of RCW 42.56.240(1). In some cases, a victim impact statement is presented by an attorney representing the victim. *See State v. Lindahl*, 114 Wn. App. 1, 13-14, 56 P.3d 589 (2002). There is no authority for the proposition that such a pleading, received by the prosecuting attorney from another party, is an investigative record. The County cannot convert a VIS into an investigative record by acting as the secretary and/or legal messenger for the victim.

**2. The prosecutor’s use of a VIS at sentencing does not convert the VIS into an investigative record.**

The County variously asserts that it “obtains” a VIS and “uses” a VIS for purposes of making a sentencing recommendation. *Resp. Br.* at 6-8. The Court must carefully distinguish between the manner in which the prosecuting attorney “obtains” (or “compiles”) a VIS and the irrelevant question of how the prosecuting attorney “uses” a VIS.

The prosecuting attorney’s *use* of the VIS is irrelevant. The question of whether a VIS is an investigative record depends upon how and why the VIS was obtained or “compiled” by the prosecuting attorney. RCW 42.56.240(1); *Cowles Publishing Co. v. Pierce County Prosecutor’s Office*, 111 Wn. App. 502, 507-08, 45 P.3d 620 (2002). A prosecuting

attorney also *uses* case law, statutes, sentencing guidelines, and materials filed by the defendant in making a sentencing recommendation, but these materials are not investigative records. Because the victim is not a law enforcement agency, the VIS is not an investigative record unless the VIS is the *result* of the prosecutor's investigation of the defendant.

The VIS is not a tool by which the prosecuting attorney investigates the defendant. The prosecuting attorney cannot compel the victim to provide a VIS nor can it prevent the victim from filing a VIS with which the prosecutor may disagree. The constitutional purpose of a VIS is to give the victim an independent voice. Characterizing a VIS as the *result* of an investigation by the prosecuting attorney is contrary to the fundamental purpose of a VIS. The Court must recognize a fundamental distinction between a witness statement and a VIS. The former is an investigative record. The latter is not.

*Cowles Publishing Co., supra*, is easily distinguishable. The records at issue in that case were compiled by the prosecuting attorney as part of its statutory investigation of whether to seek the death penalty. *Cowles*, 111 Wn. App. at 508. In contrast, the County receives the VIS because it is a party to the criminal case in which it is filed. If receiving a pleading from a party were enough to make the pleading an investigative

record, then anything filed by the defendant would be an investigative record. No case has interpreted RCW 42.56.240(1) so broadly.

The County misinterprets Koenig's argument, stating that "If [Koenig's argument] were true, police reports filed with a court would suddenly no longer be deemed investigative records." *Resp. Br.* at 9. This argument is meaningless. Police reports in the possession of the County are clearly investigative records. *See Cowles Pub. Co*, 139 Wn.2d 472. Documents in the court file are not governed by the PRA under *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). The point, which the County fails to grasp, is that the County does not obtain a VIS as a result of its own investigation of the defendant. The County obtains a copy by virtue of being a party to the criminal case in which the VIS is filed.

A VIS gives a victim the right to address the court directly. Characterizing such statements as "investigative records" contradicts the language and purpose of the statute, and reduces victims to mere witnesses for the prosecution. Because a VIS is not the result of an investigation by a law enforcement agency, a VIS is not an investigative record.

**B. In the alternative, the VIS is not exempt under either prong of RCW 42.56.240(1).**

Assuming, *arguendo*, that a VIS is an investigative record under RCW 42.56.240(1), a VIS is not exempt under either prong of that statute.

**1. The VIS is not “private” for purposes of RCW 42.56.240(1).**

The County does not deny that there is no express provision for privacy or confidentiality in either Wash. Const. art. I, § 35 or RCW 7.69.030. Nor does the County deny that a VIS must be filed in court, provided to the defendant, and included in the defendant’s permanent file. With only a few exceptions, the County’s brief simply repeats its factual arguments to the trial court. *Resp. Br.* at 9-12; CP 182-85. Koenig has already addressed this material in his opening brief. *App. Br.* at 17-19.

The County asserts that Koenig seeks to “discredit” the persons who provided declarations in support of the County, and suggests that Koenig should have initiated an “evidentiary hearing” if he wished to challenge the opinions of these persons. *Resp. Br.* at 15. As explained in section II (above), the County erroneously assumes that the application of the PRA to an entire class of records — victim impact statements — is a question of fact. The declarations on which the County relies are merely the opinions of various persons on a question of law.

Koenig does not need to “discredit” the County’s declarants. This Court’s review is *de novo*. As in *Sheehan, supra*, Koenig and the Court are free to scrutinize, discount, and/or reject the opinions presented in those declarations if they are not persuasive.

**a. First Prong of Privacy Test: Not Highly Offensive to a Reasonable Person**

The first prong of the privacy test is not met because the victim (i) has total control over the content of a VIS and (ii) knows that the VIS will be available to the court and the defendant. *App. Br.* at 19. The County does not deny either point. Nor does the County deny that a victim is not required to present a VIS at all. Nonetheless, the County suggests that Koenig’s “solution” is “ludicrous,” and that it is imperative to allow a victim to communicate intimate details to the sentencing court. As explained in section II(B)(2) (below), the VIS is not a private communication between the victim and the court. Koenig’s “solution” may not be ideal from the victim’s viewpoint, but it is required by the PRA and the constitutional guarantee of open courts. The County’s position is nothing more than a policy argument against clear legislative choices that have already been made.

**b. Second Prong of Privacy Test: Legitimate Concern to the Public**

The County’s arguments regarding the second prong of the privacy test — legitimate public interest — are disposed of by *Koenig v. Des Moines, supra*. *App. Br.* at 21-22. *Koenig* explicitly held that the public’s interest in criminal justice was not outweighed by the harm of disclosing the sexually explicit details of a crime. *Koenig*, 158 Wn.2d at 187. The

public interest is even greater, and the potential harm even less, where details are selected for presentation in open court by the victim herself.

Attempting to distinguish *Koenig*, the County repeats an argument it previously employed to assert that a SSOSA evaluation is not of legitimate concern to the public. The County argues that public access to detailed police reports somehow obviates any legitimate public interest in the “personal impact” of the crime on the victim. *Resp. Br.* at 14.<sup>2</sup> Once again, the County simply ignores the essential fact that a VIS is used to sentence a criminal defendant in open court. Even if a VIS contains information that meets the first prong of the privacy test, a VIS is not private because the public has a legitimate interest in the VIS. As explained in section II(D)(1) (below), a VIS likely contains other important information, such as the victim’s statements about the sentence Lerud should have received and/or whether he should have received a SSOSA sentence. Police reports are not a substitute for access to the VIS.

**2. Nondisclosure of the VIS is not essential to effective law enforcement.**

As *Koenig* has explained, a VIS is routinely disclosed to the court, the defendant, defense counsel, and anyone else who happens to be present at sentencing. *App. Br.* at 25. There is no requirement that a

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<sup>2</sup> The County makes the same argument with respect to the SSOSA evaluation. *See* section II(C)(1), *infra*.

victim submit a VIS or that a VIS contain details that the victim does not wish to present in open court. Indeed, the trial court never fully explained how it concluded that nondisclosure was *essential* to effective law enforcement. CP 249. The first four pages of the County’s brief on this issue simply repeat the County’s factual arguments to the trial court. *Resp. Br.* at 15-19; CP 186-88. Koenig has already addressed this material in his opening brief. *App. Br.* at 25-26.

Quoting and responding to Koenig’s arguments about the privacy prong of RCW 42.56.240(1), the County asserts that Koenig’s position is “outrageous,” and suggests that the victim must have the right to communicate privately with the sentencing judge. *Resp. Br.* at 19. The County insists that a detailed, fully-confidential VIS is somehow *essential* to effective law enforcement. But the County cannot explain how the criminal justice system functioned for 100 years without victims having any right to present a VIS. Nor has the County explained how non-disclosure could be essential to effective law enforcement under *Sheehan*, 114 Wn. App. 325.

The County simply ignores the glaring legal problems created by its argument. The constitutional provision that creates the VIS clearly states that the right to present a VIS is “subject to the same rules of procedure which govern the defendant’s rights.” Wash. Const. art. I, § 35.

The County does not deny that the defendant has no right to communicate privately with the sentencing court, and has not explained how the victim could have such a right. Nor has the County explained how its argument can be reconciled with the constitutional requirement that “Justice in all cases shall be administered openly.” Wash. Const. art. I, § 10.

Nothing in the text of either Wash. Const. art. I, § 35 or Chapter 7.69 RCW supports the County’s assertion that a VIS is private and must not be disclosed. Nevertheless, the County presents a lengthy quotation from the statement of legislative intent in RCW 7.69.010. *Resp. Br.* at 19-20. Nothing in that intent section supports the County’s arguments. Although the section requires victims to be treated with “dignity, respect, courtesy, and sensitivity,” nothing in the section amends the requirement of open courts in Wash. Const. art. I, § 10 or the narrow interpretation of exemptions under the PRA. Nothing in the section states, or even implies, that a VIS is confidential or exempt from public disclosure.

The County also suggests that RCW 7.69.030(13) creates a “right” to present an “accurate” VIS, and that disclosure would violate this “right.” *Resp. Br.* at 20. First, the County did not make this argument in the trial court and cannot present such an argument for the first time on appeal. RAP 2.5(a). More importantly, nothing in RCW 7.69.030(13) creates a right to present a VIS that is exempt from the PRA. RCW

7.69.030(13) is not a statute “which exempts or prohibits disclosure of specific information or records” for purposes of the PRA. RCW 42.56.070(1). The Court cannot imply the existence of a PRA exemption from Chapter 7.69 where no exemption is expressly provided. Only specific exemptions in other statutes are incorporated into the PRA. *PAWS II*, 125 Wn.2d at 262 (citing *Brouillet v. Cowles Pub’g Co.*, 114 Wn.2d 788, 800, 791 P.2d 526 (1990)).

In a footnote, the County also suggests that disclosure of a VIS would violate RCW 7.69.030(4). *Resp. Br.* at 20, n.2. Not only is this a new argument raised for the first time on appeal, the County misleadingly paraphrases the statute it cites. RCW 7.69.030(4) does not guarantee protection from the “psychological harm” that is inevitable in an open court system. That section grants the victim the “protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the level of protection available.” RCW 7.69.030(4). Taken to its illogical extreme, the County interprets this statute to create a criminal justice system in which concern for the victim trumps all requirements for open courts, due process, and the rights of the defendant and the public.

Finally, the County asserts that many VIS are sealed, and points out that the VIS in this case was sealed on a motion brought by the County after Koenig's request was made. The County argues that the order to seal the file is "uncontested evidence" that nondisclosure is essential to effective law enforcement. *Resp. Br.* at 21. This argument is directly contrary to the *Stipulation and Order* dated February 25, 2008, which clearly states that the order to seal the file is not binding on Koenig and does not restrict disclosure under the PRA. CP 253. The County cannot evade this stipulation by re-characterizing the order as "evidence" on an issue of fact. Nor is the application of RCW 42.56.240(1) a question of fact. *See* section II (above).

In his opening brief Koenig noted that "The validity of [the order sealing file], as well as the circumstances under which this order was obtained, are disputed." *App. Br.* at 4-5. Lest this Court give any consideration to that flawed order, the Court should understand why the trial court did not accept the County's arguments about the order and why County was willing to stipulate that the order was not binding. First, the order was issued *ex parte* and without any notice to Koenig that it would affect his pending PRA request. CP 28, 38-39, 62, 87-88. Second, the Lerud court did not authorize the County to withhold records from Koenig. The court did not apply PRA standards to the VIS, and there is

no evidence that the court was even aware that a PRA request had been made to the prosecuting attorney. CP 44-50.

There is no basis for the County's opinion that "many" judges seal a VIS, and there is no reason to assume that files are sealed correctly. Documents filed in court are presumptively open to the public unless compelling reasons to seal a document are found under the standards set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *In re Treseler*, \_\_\_ Wn. App. \_\_\_, 187 P.3d 773 (2008). Nevertheless, a recent investigation by the Seattle Times revealed that many courts have sealed records without applying the correct legal standards. See Appendix.

Finally, there is a critical difference between court files and the same documents in the possession of an agency. As Koenig explained to the trial court, records held by an agency can be redacted prior to disclosure while court files are immediately available to the public unless they are sealed. CP 203. The County ignores this distinction.

**C. The SSOSA evaluation is not exempt under either prong of RCW 42.56.240(1).**

Contrary to the County's arguments, a SSOSA evaluation is ordered by the sentencing court. RCW 9.94A.670(3).<sup>3</sup> Although both the

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<sup>3</sup> Laws of 2008 c 231 § 31, made minor changes to RCW 9.94.670 and renumbered some subsections, effective August 1, 2009. Those changes are not material to this appeal.

prosecuting attorney and defendant obtain copies, the resulting report is prepared for the sentencing court. This is made clear by *State v. Bankes*, 114 Wn. App. 280, 287, 57 P.3d 284 (2002), which the County ignores.

**1. The SSOSA evaluation is not “private” under RCW 42.56.240(1).**

Koenig has assumed, *arguendo*, that the SSOSA evaluation meets the first prong of the PRA privacy test. *App. Br.* at 29. Consequently, the County’s arguments on this prong, as well as its factual assertions that a SSOSA evaluation is “private,” are irrelevant. *Resp. Br.* at 25-26.

Turning to the second prong of the PRA privacy test — legitimate public interest — the County simply repeats its argument that public access to police reports obviates the need to disclose the SSOSA. *Resp. Br.* at 27. As Koenig has already explained, police reports do not contain the same information as a SSOSA evaluation. *App. Br.* at 31. The County has not responded to this obvious flaw in its argument.

Nor has the County responded to Koenig’s points that (i) the content of SSOSA evaluations is discussed in appellate opinions, and (ii) sex offenders are required to register notwithstanding any concerns for their privacy. *App. Br.* at 30. Nor has the County addressed the fact that the effectiveness of SSOSA is a matter of public debate, and therefore a matter of legitimate public interest. The County has provided declarations

of various SSOSA insiders who assert that it works well, but that is just one side of the argument. CP 212-234.<sup>4</sup> It is not for this court to resolve the dispute over the wisdom of SSOSA. That is for the public to decide.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030.

The County also repeats its argument in the trial court that SSOSA evaluations are intended for “trained” professionals and that the public has no legitimate interest in such information. *Resp. Br.* at 26-27; CP 192-93.<sup>5</sup> This argument has no merit. As Koenig has explained:

- There is no requirement in RCW 9.94A.670 that the judges and attorneys who review a SSOSA evaluation have any particular professional qualifications.
- RCW 42.56.080 forbids any consideration of whether the requester is qualified to review a SSOSA evaluation.

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<sup>4</sup> The County ignores the content of the declaration at CP 212 in favor of an attack on the qualifications of the declarant. *Resp. Br.* at 29. The County’s assertion that Mr. Brown is not personally familiar with SSOSA is irrelevant to whether the efficacy of SSOSA is a matter of legitimate public interest.

<sup>5</sup> The *Brief of Appellant* contains an incorrect CP citation. The reference to “CP 16” on page 31 should be to CP 192-93.

- There is no statutory or regulatory basis for the declarant therapist's assertion that a SSOSA evaluation contains a statement against disclosure of the evaluation.

*App. Br.* at 31. The County makes no attempt to address these flaws in its argument. The County simply repeats the groundless assertions that it made to the trial court. *Resp. Br.* at 26-27.

The County also asserts that the judge who issued the order to seal the Lerud SSOSA evaluation “agree[d]” that the SSOSA “should not be provided to the public through a public disclosure request.” *Resp. Br.* at 26-27. Setting aside the fact that the County *stipulated* that the order to seal the court file is not binding on Koenig, CP 253, **this assertion is false**. First, the question of whether the SSOSA evaluation should be sealed was never discussed in the hearing. CP 44-50. The prosecuting attorney added language sealing the SSOSA evaluation to the order he presented to the court for signature. CP 63. Second, the transcript of the hearing clearly shows that the court understood that it was **not** issuing a ruling to withhold records under the PRA. CP 48-49.

The County asserts, for the first time on appeal, that disclosure of the SSOSA without the defendant's authorization is not allowed under RCW 70.02.005(4) and RCW 70.02.050. *Resp. Br.* at 28. This argument

must be rejected for several reasons. First, the County is not permitted to raise a new issue for the first time on appeal. RAP 2.5(a).

Second, the County has not briefed this new theory in any meaningful way. The County simply assumes that a SSOSA evaluation is health care information. The County has not analyzed the detailed provisions of the statute it cites, RCW 70.02.050, which has numerous exceptions.<sup>6</sup> Appellate courts will not review issues that are not adequately briefed. *State v. Hughes*, 118 Wn. App. 713, 730 n.10, 77 P.3d 681 (2003); RAP 10.3(a)(6); RAP 10.3(b).

Third, the County's assertion cannot be correct in light of *State v. Bankes*, 114 Wn. App. 280, 287, 57 P.3d 284 (2002), which the County completely ignores. *Bankes* upheld a trial court's order to file a SSOSA report over the objections of the defendant. *Bankes*, 114 Wn. App. at 287. Under *Bankes*, the assertion that a sex offender must consent to public disclosure of a SSOSA evaluation is meritless.

Furthermore, even if the SSOSA is exempt under RCW 70.02.050, the County remains liable under the PRA. RCW 42.56.210(3) requires the County to cite specific exemptions and explain how exemptions apply to

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<sup>6</sup> There are no references to RCW 9.94A.670 in Chapter 70.02 RCW. Nor are there references to Chapter 70.02 RCW in RCW 9.94A.670. Nor are there references to Chapter 70.02 RCW in Chapter 18.155 RCW which regulates sex offender treatment providers.

particular records. If the Court were to hold that any part of the SSOSA evaluation were exempt for any reason other than RCW 42.56.240(1), the County will have violated RCW 42.56.210(3) and thereby wasted an enormous amount of the courts' time. The County would still be liable for fees under RCW 42.56.550(4). It is not necessary to reach such issues because the County's new argument lacks merit and must be rejected.

In a footnote, the County notes that RCW 4.24.550 allows agencies to release certain information about sex offenders and to maintain a web site of registered offenders. *Resp. Br.* at 28 n.4. First, the County cannot raise new exemption theories for the first time on appeal. RAP 2.5(a). Second, the Court cannot imply the existence of a PRA exemption where no exemption is expressly provided. *PAWS II*, 125 Wn.2d 243, 262, 884 P.2d 592 (1995). The section cited by the County does not create any PRA exemption. On the contrary, the section provides that "Nothing in this section implies that information regarding persons designated in subsection (1) of this section is confidential except as may otherwise be provided by law." RCW 4.24.550(9).

None of the County's privacy arguments have merit. A SSOSA evaluation is not "private" under RCW 42.56.240(1).

**2. Nondisclosure of the SSOSA evaluation is not essential to effective law enforcement.**

On the question of whether nondisclosure is essential to effective law enforcement, the County simply repeats its lengthy factual arguments to the trial court. *Resp. Br.* at 29-32; CP 193-96. Koenig has already addressed this material in his opening brief. *App. Br.* at 32.

The County argues that Koenig has failed to rebut the County's "evidence" that disclosure of a SSOSA evaluation would cause the County to "lose an effective tool." *App. Br.* at 32. As explained in section II (above), the question of how the PRA should be applied to an entire class of public records is not a question of fact. The Court is free to disregard the biased and exaggerated opinions of the County's declarants, and there are abundant reasons to do so. *Sheehan*, 114 Wn. App. at 339-341; RCW 42.56.550(3).

Koenig's brief explained that the trial court asked the wrong question and applied the wrong standard in determining that disclosure would "hinder" law enforcement. *App. Br.* at 32-33. The County has not attempted to defend the trial court's erroneous ruling.

Koenig's brief also explained that non-disclosure was not *essential* to effective law enforcement even if some defendants would decline SSOSA based on privacy concerns. Defendants who decline SSOSA will

be tried, and if guilty, sent to jail. The County's exaggerated concerns for the privacy of sex offenders presuppose that the ordinary criminal justice system does not work. *App. Br.* at 34. Again, the County has no response to the obvious flaws in its arguments.

Nondisclosure of the SSOA evaluation is not essential to effective law enforcement. The SSOSA evaluation is not exempt from the PRA.

**D. The County is required to provide redacted copies of any records that contain exempt information.**

As explained in Koenig's opening brief, the County may not withhold entire documents but must redact any exempt information and provide the rest of the document. This requirement is clearly established by both the PRA and the case law. *App. Br.* 35-36. The County's brief ignores the applicable law and relies on policy arguments to justify its refusal to provide redacted records as the PRA unambiguously requires. *Resp. Br.* at 21-25; 32-34.

**1. Exempt information in the VIS, if any, must be redacted.**

The County's brief repeats its lengthy factual arguments to the trial court.<sup>7</sup> *Resp. Br.* at 21-24; CP 188-191. Koenig has already addressed this material in his opening brief. *App. Br.* at 36.

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<sup>7</sup> In a new footnote, the County questions "whether the VIS is truly a 'public record' under RCW 42.56.010(2)." *Resp. Br.* at 22 n.3. The County did not raise this issue in the trial court and cannot raise it now. RAP 2.5(a). Furthermore, the County cannot

The County also repeats its argument, based on *Cowles, supra*, that redaction would leave nothing of public interest to disclose. *Resp. Br.* at 25; CP 191. After *Koenig, supra*, the holding in *Cowles* cannot be extended to entire documents that relate to the crime itself. The County continues to rely exclusively on *Cowles* while ignoring the more recent decision of the Supreme Court in *Koenig*.

Koenig has already explained, *twice*, that the VIS undoubtedly contains at least some non-exempt information, such as the victim's statements about the sentence Lerud should have received and/or whether he should have received a SSOSA sentence. *App. Br.* at 38; CP 208. The County has completely ignored this issue, but this Court cannot ignore the redaction requirement. On remand, the County must either produce the VIS or provide a redacted VIS in compliance with RCW 42.56.210(3).

Finally, the County suggests that RCW 7.69.010 and RCW 7.69.030(13) preclude any redaction of the VIS. *Resp. Br.* at 24-25. As explained in section II(B)(2) (above), neither of those sections creates any exemption from public disclosure.

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reconcile its assertion that the VIS is an investigative record used by the prosecutor in sentencing with the suggestion that the VIS does not meet the broad definition of "public record" in RCW 42.56.010(2). The VIS is also a pleading obtained by the prosecutor as a party to a public criminal case.

**2. Exempt information in the SSOSA evaluation, if any, must be redacted.**

The County's brief repeats its lengthy factual arguments to the trial court. *Resp. Br.* at 32-33; CP 196-97. Koenig has already addressed this material in his opening brief. *App. Br.* at 38. The County also repeats its argument, based on *Cowles, supra*, that redaction would leave nothing of public interest to disclose. *Resp. Br.* at 33-34. But a SSOSA evaluation must contain a large amount of non-exempt information, including:

- an assessment of the defendant's amenability to treatment
- a proposed treatment plan, including type and length of treatment, monitoring plans, and crime-related prohibitions.

RCW 9.94A.670(3)(b); *App. Br.* 39-40. The County's brief makes no attempt to explain why these elements of a SSOSA evaluation, which relate directly to the sentencing court's decision to grant or deny a SSOSA sentence, would be exempt from public disclosure.

Finally, the County asserts that "redaction is not permissible under RCW 70.02.005 with regard to health record information." *Resp. Br.* at 33. As explained in section II(C)(1) (above), the County's application of RCW 70.02.050 to the SSOSA evaluation lacks merit.

**3. The County must explain why specific portions of records must be redacted.**

On remand, if the County asserts that particular portions of the VIS and/or SSOSA evaluation are exempt then the County must produce redacted records and state why redacted portions are exempt as required by RCW 42.56.210(3). The County does not argue otherwise.

**E. Koenig is entitled to attorney's fees on appeal pursuant to RCW 42.56.550(4).**

No additional argument on this issue is necessary.

### **III. CONCLUSION**

This case must be remanded to the trial court with instructions to order the County to produce the VIS and SSOSA evaluation and to award Koenig attorney's fees and penalties under RCW 42.56.550(4). On remand, if the County asserts that particular portions of the VIS and/or SSOSA evaluation are exempt then the County must produce redacted copies of those records and state why the redacted portions are exempt as required by RCW 42.56.210(3).<sup>8</sup>

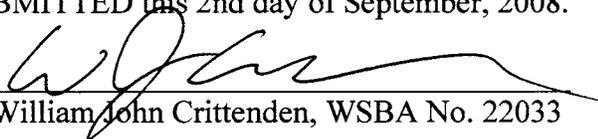
Koenig is also entitled to an award of fees on appeal.

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<sup>8</sup> Koenig reserves the right to in camera review of any redactions pursuant to RCW 42.56.550(3). CP 75.

RESPECTFULLY SUBMITTED this 2nd day of September, 2008.

By:

  
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Certificate of Service

I, the undersigned, certify that on the 2nd day of September, 2008, I caused a true and correct copy of this *Reply Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

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