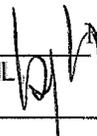


RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 26, 2011, 4:20 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL  No. 84940-4

THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG,
Respondent/Cross-Petitioner,

v.

THURSTON COUNTY and the THURSTON COUNTY
PROSECUTING ATTORNEY,
Petitioners/Cross-Respondents.

**THURSTON COUNTY'S ANSWER
TO BRIEF OF AMICI CURIAE ALLIED DAILY NEWSPAPERS
OF WASHINGTON, THE WASHINGTON NEWSPAPER
PUBLISHERS ASSOCIATION, THE SEATTLE TIMES, AND THE
WALLA WALLA UNION-BULLETIN**

JON TUNHEIM
THURSTON COUNTY PROSECUTING
ATTORNEY

JEFFREY G. FANCHER, WSBA #22550
Deputy Prosecuting Attorney
2424 Evergreen Pk Dr SW, Ste 102
Olympia, WA 98502
(360) 786-5574, ext. 7854

ORIGINAL

TABLE OF CONTENTS

	<u>PAGE</u>
I. ARGUMENT.....	1
A. Division II Correctly Determined The VIS Was An Investigative Record; Which Was Conceded To For Purposes Of The SSOSA Evaluation.....	1
B. The Only Evidence In The Record Provides That Non-Disclosure Is Essential To Effective Law Enforcement.....	7
C. The SSOSA Evaluation And VIS Are Not Of Legitimate Concern To The Public.....	12
D. The SSOSA Evaluation Is Health Care Information.....	14
E. Redaction Is Not An Option For The SSOSA Evaluation Or The VIS.....	19
II. CONCLUSION.....	20

TABLE OF AUTHORITIES

	<u>PAGE</u>
Cases	
<i>Cowles Publ'g v. Prosecutor's Office</i> , 111 Wn. App. 502, 45 P.3d 620 (2002)	1, 5, 7, 8, 9
<i>Hines v. Todd Pac. Shipyards</i> , 127 Wn. App. 356, 112 P.3d 522 (2005)	14
<i>Koenig v. City of Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006)	13
<i>Koenig v. Thurston County</i> , 155 Wn. App. 398, 229 P.3d 910 (2010)	3, 9
<i>Prison Legal News v. Dep't of Corr.</i> , 154 Wn.2d 628, 115 P.3d 316 (2005)	1, 4
Statutes	
RCW 9.94A.500(1)	8
RCW 18.155.040 (Laws of 1996, ch. 191 §86)	15
RCW 4.24.550	11
RCW 42.56.240(1)	1, 7, 19
ch. 70.02 RCW	15, 19
RCW 70.02.010	17, 18
RCW 70.02.010 (Laws of 1993, ch. 448, §1)	18
Other Authorities	
WAC 246-930-020(1)(2)	15
WAC 246-930-030(1)	16
WAC 246-930-040	16
Rules	
CR 56	13
CR 56(e)	9, 10
RAP 10.2(g)	1

Pursuant to RAP 10.2(g), Thurston County submits the following answer to the Brief of Amici Curiae, the Allied Daily Newspapers of Washington, The Washington Newspaper Publishers Association, the Seattle Times, and the Walla Walla Union-Bulletin ("Amici Newspapers").

I. ARGUMENT

A. Division II Correctly Determined The VIS Was An Investigative Record; Which Was Conceded To For Purposes Of The SSOSA Evaluation.

The Washington State Supreme Court has defined what makes up the category "investigative records" under RCW 42.56.240(1).

"Records are 'specific investigative records' if they were 'compiled as a result of a specific investigation focusing with special intensity upon a particular party.'"

...

"[A] statute which is clear on its face is not subject to judicial interpretation . . ." *In re Marriage of Kovacs*, 121 Wn.2d 795, 804, 854 P.2d 629 (1993). The plain meaning of "investigative" counters WCOG's argument.

"Investigate" is defined by Webster's as "to observe or study closely; inquire into systematically . . ."

WEBSTER'S THIRD NEW INTERNATIONAL
DICTIONARY 1189 (2002).

Prison Legal News v. Dep't of Corr., 154 Wn.2d 628, 637, 115 P.3d 316 (2005) (Footnotes 6 & 7). The Court of Appeals decided *Cowles Publ'g v. Prosecutor's Office*, 111 Wn. App. 502, 45 P.3d 620 (2002), consistent with how the Supreme Court defined investigative record. *Id.* at 506-508.

The plurality decision of the Court of Appeals in this case properly followed the precedent of these two cases and pointed out that the County was the only party to provide facts regarding whether the VIS was compiled as a result of a specific investigation focusing with special intensity upon a particular party.

The victim impact statement is eligible for the RCW 42.56.240(1) exemption if it is an investigative record compiled by law enforcement agencies. Records fall within this category if they are “‘compiled as a result of a specific investigation focusing with special intensity upon a particular party.’” *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993) (quoting *Laborers Int'l Union, Local No. 374 v. City of Aberdeen*, 31 Wn. App. 445, 448, 642 P.2d 418 (1982)), *abrogated in part on other grounds by Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 755, 174 P.3d 60 (2007). A record need not be created by law enforcement to be compiled by law enforcement, and documents created for one purpose are not disqualified from being “‘compiled’” for another purpose. *Newman v. King County*, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997) (internal quotation marks omitted) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155, 110 S. Ct. 471, 107 L. Ed. 2d 462 (1989)); *Cowles Publ'g Co.*, 111 Wn. App. at 508.

...

While the county concedes that the sentencing court considers presentence reports, this is not determinative. Prosecutors also rely on these reports, and the victim impact statements they contain, as investigative records that assist them in making their sentencing recommendations.

...

A prosecutor's office victim advocate filed a declaration stating that she sends victim impact statement forms to crime victims as part of her job. The advocate testified that “[t]his is done for sentencing purposes.” Clerk's Papers (CP) at 278. The advocate provides the original impact

statement to the trial court and a copy to the deputy prosecutor handling the case. The deputy prosecutor in the *Lerud* case confirmed that victim impact statements provide his office with information about how crimes affect victims.

Koenig, believing this issue to be a purely legal one, *submitted no evidence to counter the facts in the county's declarations*. The trial court determined that the prosecuting attorney in the *Lerud* case procured the victim impact statement as part of his statutory duty to investigate and make sentencing recommendations to the court. The trial court concluded that "the victim impact statement is a record compiled by law enforcement." CP at 260.

We agree with the county that a victim impact statement held by a prosecutor's office and prepared for sentencing is an investigative record compiled by law enforcement. The prosecutor's office seeks out and compiles the statement as part of a specific investigation focused on a particular person. The prosecutor is entitled to argue for an appropriate penalty at sentencing. *See* RCW 9.94A.500(1). An important factor at sentencing is the seriousness of the offense, including the effect of the crime on any victims. RCW 9.94A.010(1); RCW 9.94A.500(1). Thus, one part of a prosecutor's investigation focuses on the crime's impact on the victim. That a victim impact statement is submitted to a court and potentially available as a court record does not preclude it from being an investigative record in the prosecutor's office compiled by law enforcement. The prosecutor and the trial court considered the victim impact statement at issue here in preparing for the *Lerud* sentencing. Accordingly, the victim impact statement qualifies as an investigative record compiled by law enforcement.

Koenig v. Thurston County, 155 Wn. App. 398, 404-406, 229 P.3d 910

(2010) (review pending) (footnotes omitted) [emphasis added]. The Court

of Appeals applied the facts provided in the case to the correct standard provided by the Supreme Court.

Amici Newspapers' response to this definition is to criticize the *Cowles* case as wrongly decided. Amici Newspapers state that "[i]nvestigative records' covered under this exemption have been limited to records used to identify a suspect and arrest him or her and refer the matter to the prosecutor for a charging decision." Brief of Amici Newspapers at pg. 5. However, this restrictive definition is not supported by this Court's analysis that the term "investigate" means " 'to observe or study closely: inquire into systematically. ...' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1189 (2002)." *Prison Legal News v. Dep't of Corr.*, 154 Wn.2d at 637. The definition of the term does not state, "to observe or study closely only for the purpose of identifying and arresting a suspect." This argument by Amici Newspapers must be rejected. Clearly, the investigation by the prosecutor for sentencing purposes of Mr. Lerud is a specific investigation/inquiry by law enforcement (the prosecuting attorney's office) focusing with special intensity upon a particular party (Lerud) with regard to criminal wrongdoing.

The cases cited by Amici Newspapers – for the proposition that investigative records only involve "ferreting-out" criminal activity – do not involve records created by third parties that were obtained by a prosecuting attorney's office for assisting the office in making a decision

on how to prosecute the case (negotiating a plea and making a sentencing recommendation are part of the prosecutorial function). Amici's citation to case law dealing with records regarding a *defense* expert, records involving employee misconduct and records on K-9 dogs are not records focusing with special intensity for law enforcement purposes upon a specific individual. Division II of the Court of Appeals, controlling precedent for Thurston County, clearly held that records gathered for prosecution by a prosecuting attorney's office do not need to "ferret-out" criminal activity in order to meet the test of an investigative record. *Cowles Publ'g v. Prosecutor's Office*, 111 Wn. App. 502, 507-508, 45 P.3d 620 (2002). It is unreasonable to have a jurisdiction second guess or ignore controlling precedent. Case law is an important guide for government in the realm of the Public Records Act.

For all of the reasons stated above, the SSOSA evaluation also meets the definition of investigative record. However, Koenig conceded this point in his original motion for summary judgment. CP 94 (lines 9-11). The Court need not decide this issue as Amici Newspapers ask. This Court's decision is limited to the facts and circumstances of this case, which includes the fact that Koenig conceded that a SSOSA evaluation used by the prosecutor for a sentencing decision is an investigative record. The County would be prejudiced by opening this already closed door as

the County did not have the opportunity to provide declarations in response to the motion for summary judgment with regard to the SSOSA evaluation's identity as an investigative record in the Lerud criminal matter. When Koenig conceded the issue in his opening summary judgment memorandum, the County was not required to address that issue.

If this court decides to address the issue of whether the SSOSA evaluation is an investigative record, the County would ask this Court to consider the following:

In my practice, when I recommend SSOSA to a client, I advise my client to obtain a psychosexual evaluation and permit me to share it with the prosecutor so that we can persuade the prosecutor to join in our request for a SSOSA;

...

I also tell clients who wish to plead guilty to a non-SSOSA eligible sex offense to seek a psychosexual evaluation so that we can use it for negotiations purposes;

...

In fact, it is the practice of the King County Prosecuting Attorney's Office to request psychosexual evaluations prior to extending a plea offer for a sex offense charge so that they can make an appropriate sentencing recommendation;

...

The evaluation is thus used both at sentencing and as part of the plea negotiations process;

CP 110-111 (Declaration of Amy I. Muth).

In prosecuting sex offenses, I was often asked by defense attorneys to consider the SSOSA option. In order to qualify for such an option, the defendant must demonstrate that he or she is amenable to treatment and can be safely treated in the community. These issues are addressed through the SSOSA evaluation process.

...
The reports often contain very private information such as the results of psychological testing and an account of the sexual history of the defendant. In addition, it may also contain detailed information about the victim (provided by the defendant) and particularly about the facts surrounding the offense.

...
These reports are generally provided to me in an effort to reach a settlement in the case. Requiring disclosure of these reports, in my view, would substantially hinder the plea negotiation process.

CP 106-107 (Declaration of Jon Tunheim, the attorney handling the prosecution of Mr. Lerud.) Clearly, the prosecutor used the SSOSA evaluation in the same way he used the VIS. Both the SSOSA (dated June 26, 2000) and the VIS (dated March 8, 2000) were obtained by the prosecutor prior to Mr. Lerud being found guilty on July 18, 2000 and prior to the sentencing hearing of October 23, 2000. CP 70; CP 132. For the reasons provided above with regard to the VIS, the SSOSA evaluation as used in this case is an investigative record under RCW 42.56.240(1).

B. The Only Evidence In The Record Provides That Non-Disclosure Is Essential To Effective Law Enforcement.

Amici Newspapers argue that because the criminal justice system will still work fine without SSOSA evaluations, they are not essential to effective law enforcement. Accordingly, Amici argue, the SSOSA evaluation in this case is not exempt. This short-sighted argument is not supported by Washington case law. In *Cowles Publ'g v. Prosecutor's*

Office, 111 Wn. App. 502, 507-508, 45 P.3d 620 (2002), the court found that disclosure of death penalty mitigation material “would have a chilling effect on the flow of such information to the prosecutor” and, thus, nondisclosure was essential to effective law enforcement. *Id.* at 510. However, many states do not have a death penalty and criminals still receive punishment. Further, the criminal justice system would still work even if the prosecutor did not receive a “free flow” of information favorable to a defendant facing a possible death penalty hearing. But the Court found that a possibility of limiting this *voluntarily provided* information used by the prosecuting attorney in meeting his or her duties to prosecute a case was enough to meet the “essential to effective law enforcement” test. The prosecutor's office seeks out and compiles information as part of a specific investigation focused on a particular person. The prosecutor is entitled to argue for an appropriate penalty at sentencing. *See* RCW 9.94A.500(1).

Sentencing decisions are part of the law enforcement process, and a victim impact statement is an important tool in reaching these decisions. *See Brouillet v. Cowles Publ'g Co.*, 114 Wn.2d 788, 796, 791 P.2d 526 (1990) (law enforcement involves imposition of sanctions for unlawful conduct, including a fine or prison term); *State v. Crutchfield*, 53 Wn. App. 916, 927, 771 P.2d 746 (1989), overruled on other grounds by *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) (sentencing court should consider crime's impact on victims).

Koenig v. Thurston County, 155 Wn. App. at 410. This is an important aspect of effective law enforcement. As in *Cowles*, making the SSOSA evaluation and/or VIS available to the public if in the hands of the prosecutor would have a chilling effect on the flow of such information to the prosecutor.

Additionally, Amici Newspapers argue that the County has not met its burden of proof regarding the effective law enforcement prong and, yet, argues that a requester should not be required to rebut the declarations submitted by the County. *See* Brief of Amici Newspapers at pg. 8. What Amici Newspapers are suggesting is that this court should rely only on the requester's declaration even if the declarant has no experience with victims, SSOSA evaluations, or criminal matters in general. When the County has the burden of proof in a case and the opposing party brings a *motion for summary judgment*, it would be malpractice not to defend the case with declarations on issues outside the expertise of the attorney handling the case. Determining the effect of public disclosure of SSOSA evaluations and VISs requires insight from those that work with SSOSA evaluations and VISs. How else could an agency meet its burden of proof?

Under CR 56(e):

Supporting and opposing affidavits shall be made on personal knowledge... The court may permit affidavits to be supplemented or opposed by depositions, answers to

interrogatories, or further affidavits... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings...

CR 56(e). Here, the Court treated the motion as a cross motion for summary judgment. Only the County presented declarations of individuals with education, training and personal knowledge of how SSOSA evaluations and VISs work in the criminal justice system. Koenig had his opportunity to depose the County's declarants, present interrogatories or object to the County's experts. He chose not to do so. Instead, Koenig rested upon mere allegations or denials; a strategy also used by Amici Newspapers.

Amici's attempt to become a declarant on issues involving SSOSA evaluations should not be accepted by this Court. Unlike the County's witnesses, Amici Newspapers have not shown any experience working with SSOSA evaluations or VISs. Further, providing information outside of the summary judgment record at this time prejudices the County. If Amici Newspapers presented expert testimony on behalf of Koenig, the County would have objected and, at a minimum, had a chance to depose the Newspaper Organizations and reply to their declaration with actual expert declarations of its own.

The County has thoroughly addressed why nondisclosure of the SSOSA evaluation and VIS is essential to effective law enforcement in its Petition For Review, Reply to Koenig's Answer, and Supplemental Brief, which have been filed with this Court. The County will not repeat the briefing here and stands by those arguments in response to Amici Newspapers. However, the County must respond to Amici Newspapers' misconception that the County is stretching "the concept of 'law enforcement' beyond the detection and prosecution of a crime... into treatment and prevention of recidivism..." See Brief of Amici Newspapers at pg. 10. This argument has no merit. As provided above, making sentencing recommendations is within the scope of the prosecutor's role.

Nondisclosure of the SSOSA evaluation and VIS does not create "secret" governance. The two records involved in this case have nothing to do with governance; they have to do with the judicial branch.

It must be remembered that the official court file is open to the public, the police records are public records, non-exempt material in the prosecutors file was provided to Koenig and *limited* sex offender information is distributed to the public under RCW 4.24.550. The County is not trying to operate in privacy. It is attempting to protect effective law enforcement, to prevent creating significantly more harm than the public would be served, and to recognize the privacy rights of members of the

public. The secret government conspiracy theory has no relevance to this case.

C. The SSOSA Evaluation And VIS Are Not Of Legitimate Concern To The Public.

Amici Newspapers add no new arguments that need to be addressed concerning whether SSOSA evaluations and/or VISs are of legitimate concern to the public. The County will not repeat the arguments made in its prior briefing to this court. *See* Thurston County's Petition for Review, Reply to Koenig's Answer, and Supplemental Brief, which have been filed with this Court. However, the County will respond to two related arguments made by Amici Newspapers.

First, Amici Newspapers spend much time telling this court that there is public interest in violent sex offenders. The County agrees with that statement; and as Amici point out, the public is given much information regarding violent sex offenders. However, this Court specifically defined when the standard of "legitimate concern to the public" is met.

Interpreting "legitimate" to mean "reasonable," we have also held that where "the public interest in efficient government could be harmed significantly more than the public would be served by disclosure," the public concern is not legitimate and disclosure is not warranted.

Koenig v. City of Des Moines, 158 Wn.2d 173, 185, 142 P.3d 162 (2006).

Clearly, there is more to the analysis than whether the public may be interested in the records. The County has provided argument as to why it meets this test in its prior briefing to this Court and will not repeat the argument here.

Second, Amici Newspapers state:

The County speculates victims may not make VIS and that some offenders may not opt for a SSOSA evaluation. The County has not shown how this truly harms the public interest, however, only that it harms the prosecutor's desire to operate in complete obscurity in his or her sentencing recommendations and shields the judge from scrutiny and public understanding of his or her sentencing decisions.

Brief of Amici Newspapers at pg. 14. Quite the opposite it true. The County chose not to speculate by deciding to obtain information from individuals that had *vast experience* with SSOSA evaluations and VISs to make sure that withholding the documents was warranted. As provided above, CR 56 allowed Koenig to submit his own declarations from experts, depose the County's experts/witnesses, and send out interrogatories. Instead, Koenig relied on argumentative assertions on issues outside his knowledge and failed to object to the County's use of experienced experts/witnesses.

Additionally, the County was not attempting to operate in complete obscurity. As a public office, the County Prosecutor was attempting to

protect effective law enforcement and the privacy of individuals involved in the case that submitted material to the County. The victim and defendant are not employees of the County. While the Court did seal the two records at issue, a member of the public can request the records to be unsealed. The fact that the records are exempt under the PDA, does not mean that the an individual can't attempt to gain them through the court, which is not an agency under the Act. With all of the information available to the public and which Thurston County did disclose in this case, the idea that the Thurston County Prosecutor is attempting to operate in "complete obscurity" is preposterous. This "Sky Is Falling" argument must be disregarded.

D. The SSOSA Evaluation Is Health Care Information.

Amici Newspapers misunderstand the County's argument regarding Mr. Lerud's health care information (SSOSA evaluation). Since the inception of the case, the County has stated that disclosure of the SSOSA evaluation would violate Mr. Lerud's right to privacy. The County used the health care information analysis to strengthen it's argument regarding the right to privacy issue. The County has never declared that the prosecuting attorney's office is a health care provider. *Hines v. Todd Pac. Shipyards*, 127 Wn. App. 356, 112 P.3d 522 (2005), cited by Amici Newspapers has no application to this case because the

County is neither presenting itself as a health care provider nor bringing an action under chapter 70.02 RCW. *Id.* at 368-369.

Amici Newspapers make unsupported argumentative assertions that a SSOSA *evaluation* is not a *diagnosis* of the defendant and that the evaluation is not administered to the defendant as a patient. *See* Brief of Amici Newspapers at pg, 15-16. To say that an evaluation for treatment by a Certified Sex Offender Treatment Provider is not diagnosis is not supported by the law.

Pursuant to former RCW 18.155.040 (Laws of 1996, ch. 191 §86), the Washington State Secretary of Health promulgated the following WAC provisions that make it clear that a Certified Sex Offender Treatment Provider is a health professional. The quoted language below are excerpts from WAC provisions in effect in 2000.

- (1) Under RCW 18.155.020(1), **only credentialed health professionals may be certified as providers.**
- (2) A person who is **credentialed as a health professional** in a state or jurisdiction other than Washington may satisfy this requirement by submitting the following:...

WAC 246-930-020(1)(2) [emphasis added].

- (1) An applicant shall have completed:
 - (a) A master's or doctoral degree in social work, psychology, counseling, or educational psychology from a regionally accredited institution of higher education; or
 - (b) A medical doctor or doctor of osteopathy degree if the individual is a board certified/eligible psychiatrist; or
 - (c) A master's or doctoral degree in an equivalent field

from a regionally accredited institution of higher education with documentation of thirty graduate semester hours or forty-five graduate quarter hours in approved subject content. Approved subject content includes at least five graduate semester hours or seven graduate quarter hours in (c)(i) and (ii) of this subsection and five graduate semester hours or seven graduate quarter hours in at least two additional content areas from (c)(i) through (viii) of this subsection:

- (i) Counseling and psychotherapy.
- (ii) Personality theory.
- (iii) Behavioral science and research.
- (iv) Psychopathology/personality disorders.
- (v) Assessment/tests and measurement.
- (vi) Group therapy/family therapy.
- (vii) Human growth and development/sexuality.
- (viii) Corrections/criminal justice.

...

WAC 246-930-030(1).

(1) To qualify for examination, an applicant must complete at least two thousand hours of **treatment and evaluation experience**, as defined in WAC 246-930-010. These two thousand hours shall include at least two hundred fifty hours of **evaluation experience** and at least two hundred fifty hours of **treatment experience**.

(2) All of the prerequisite experience shall have been within the seven-year period preceding application for certification as a provider.

WAC 246-930-040 [emphasis added.] The WAC provisions provide information that lead to the conclusion that a Certified Sex Offender Treatment Provider is a health care provider.

Turning to the record in this case, Robert Macy provides:

My practice, Robert Macy and Associates, is located at 7602 Henderson Blvd. S.E. Olympia, Washington. I have a

Masters Degree in clinical psychology and marriage, family and child counseling. I have been a sex offender treatment therapist since 1974 and have been providing evaluations and treatment to the sexual offender, their victims and their families in the state of Washington since 1979. I am one of the first treatment providers in the state of Washington to be granted certification as a **Fully Certified Sex Offender Treatment Provider**. My Certification number is FC0004. Since provisions were made in the State of Washington regarding the Special Sex Offender Sentencing Alternative (SSOSA) option I have been providing evaluations for those men and women who qualify for the SSOSA.

CP 100. [Emphasis added]

Several definitions from RCW 70.02.010¹ are also helpful in analyzing this issue.

"Health care provider" means a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.

"Health care information" means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care...

"Patient" means an individual who receives or has received health care...

"Health care" means any care, service, or procedure provided by a health care provider:

(a) to diagnose, treat, or maintain a patient's physical or mental condition; or

(b) That affects the structure or any function of the human body."

¹ For purposes of the quoted language from the definitions found in RCW 70.02.010, the language is the same now as it was in 2000.

Former RCW 70.02.010 (Laws of 1993, ch. 448, §1) & RCW 70.02.010.

Clearly, when a health professional evaluates someone for sex offender treatment, the examination provided is health care because it is a service provided by a health care provider to *diagnose* the defendant to determine if he or she is amenable to sex offender treatment. The defendant meets the definition of patient as he or she has received health care. There is nothing in the definitions of "patient" or "health care" that provides an exception if the health care information is ordered by the court or could be disclosed to the court.

Amici Newspapers also allege that the defendant knows he or she is not a patient of the evaluator. Brief of Amici Newspapers at pg. 17. This ignores the facts provided by the County declarants stating that SSOSA evaluations are not exclusively ordered by the Court. *There was no such order in the case at hand.* This is also supported by the declaration of Amy Muth.

In my practice, when I recommend SSOSA to a client, I advise my client to obtain a psychosexual evaluation and permit me to share it with the prosecutor so that we can persuade the prosecutor to join in our request for a SSOSA;

...

I also tell clients who wish to plead guilty to a non-SSOSA eligible sex offense to seek a psychosexual evaluation so that we can use it for negotiations purposes;

AR 110. A SSOSA evaluation need not be ordered by the Court and, therefore, Amici Newspapers' unsupported assertion to the contrary must be rejected.

As stated above, the County is not arguing that the SSOSA evaluation is exempt under chapter 70.02 RCW. The County has always maintained that the SSOSA evaluation is exempt under the privacy prong of the investigative records exemption. Understanding that a SSOSA evaluation is health care information provides another basis to hold that the privacy prong of RCW 42.56.240(1) has been met. The only cases provided by Amici Newspapers on this issue have nothing to do with RCW 42.56.240(1), and should be disregarded as the Thurston County Prosecuting Attorney's Office is not claiming to be a health care provider nor claiming an exemption based exclusively on chapter 70.02 RCW. The issues surrounding the privacy prong of RCW 42.56.240(1) have already been adequately briefed to this Court by the County. *See* Thurston County's Petition For Review, Reply to Koenig's Answer and Supplemental Brief, which have been filed with this Court.

E. Redaction Is Not An Option For The SSOSA Evaluation Or The VIS.

Amici Newspapers have not offered any new or different argument from Koenig's briefing regarding redaction. Amici's reliance on cases

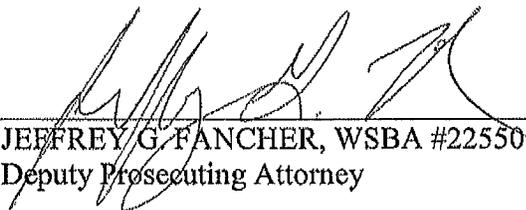
involving police reports drafted by agency employees has already been addressed by the County in its previous briefing to this Court. As the County has pointed out with argument and declarations, police reports generated by police officers as part of their job are not similar to sensitive documents provided voluntarily by third parties to the prosecutor. *See* Thurston County's Reply to Koenig's Answer at pg. 16-19. For the reasons presented to this Court in its previous briefing, redaction is not an option for the VIS and SSOSA evaluation.

II. CONCLUSION

For the reasons stated above and in its previous briefing to this Court, the County prays this Court finds the VIS and SSOSA evaluation in this case exempt under the Public Disclosure Act.

DATED this 26th day of September, 2011.

JON TUNHEIM
THURSTON COUNTY PROSECUTING
ATTORNEY



JEFFREY G. FANCHER, WSBA #22550
Deputy Prosecuting Attorney

A copy of this document was emailed per agreement of the attorneys of record to the following individual(s) on September 26, 2011.

William John Crittenden, WSBA #22033
Attorney at Law
300 East Pine Street
Seattle, WA 98122-2029
email: wjcrittenden@comcast.net
Attorney for Appellant

Amy I. Muth, WSBA #31862
Law Office of Amy Muth, PLLC
1111 Third Avenue, Suite 2220
Seattle, WA 98101
email: amy@amymuthlaw.com
Co-Counsel for Amici WDA & WACDL

Travis Stearns, WSBA #29335
Washington Defender Association
110 Prefontaine Pl. S., Suite 610
Seattle, WA 98104
email: stearns@defensenet.org
Co-Counsel for Amicus WDA & WACDL

Suzanne Lee Elliott, WSBA #12634
WA Assn of Criminal Defense Lawyers
1511 Third Avenue, Suite 503
Seattle, WA 98101
email: suzanne-elliott@msn.com
Co-Counsel for Amici WDA & WACDL

Michael C. Kahrs, WSBA #27085
Attorney at Law
5215 Ballard Ave NW Ste 2
Seattle, WA 98107-4838
email: mkahrs@kahrlawfirm.com
Co-Counsel for Amici WA Coalition for Open Government

Nancy L. Talner, WSBA #11196
Margaret Pak, WSBA #38982
Doug Klunder, WSBA #32987
American Civil Liberties Union
901 Fifth Ave, Ste 630
Seattle, WA 98164
email: talner@aclu-wa.org
email: mpak@correronin.com
email: klunder@aclu-wa.org

Shelly M. Hall, WSBA #28586
WA Coalition for Open Government
800 5th Ave, Ste 4000
Seattle, WA 98104-3099
email: shelly.hall@stokeslaw.com
email: alicia.cason@stokeslaw.com
Co-Counsel for Amici WA Coalition for Open Government

Michelle Earl-Hubbard, WSBA #6454
Chris Roslaniec, WSBA #40568
Allied Law Group
2200 Sixth Ave, Ste 770
Seattle, WA 98121
email: michelle@alliedlawgroup.com
email: chris@alliedlawgroup.com
Attorneys for Allied Daily Newspapers, et al.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Signature: 