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SUPREME COURT
STATE OF WASHINGTON
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DAVID KOENIG,
Respondent/Cross-Petitioner,

v.

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

BRIEF OF AMICUS CURIAE

WASHINGTON COALITION FOR OPEN GOVERNMENT

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government ("WCOG") is an independent, nonpartisan, nonprofit organization dedicated to promoting and defending the public's right to know in matters of public interest and in the conduct of government in the state of Washington. It represents a cross-section of the public, press and government. WCOG has long been an advocate for open government as envisioned by the state's Public Records Act, RCW 42.56 ("PRA").

WCOG's interest in this case is to ensure that citizens receive the rights entitled to them by the PRA. This interest stems from the public's need to receive full access to information regarding conduct of the people's business through their government. The public can only ensure that the government is complying with its obligations to act in the public interest and to do so in a transparent and ethical manner if such information is made available.

WCOG promotes the public good through open government and increased awareness of issues important to the public welfare. WCOG advocates for transparent government and the free flow of discussion regarding government actions through the promotion of the PRA and other open-government laws. WCOG's experience in promoting open government will assist the Court by providing an important perspective on

the broader public policy impacts of the case that the individual parties cannot provide.

II. STATEMENT OF THE CASE

This case started when Respondent/Cross-Petitioner David Koenig ("Mr. Koenig") submitted a Public Records Act ("PRA") request to the Thurston County Prosecuting Attorney ("County"). CP 142. The request related to a criminal case, in which the defendant was accused of voyeurism, a sexual offense. CP 32-35. The County provided documents but withheld two critical items from the prosecutor's files related to the defendant's sentencing (the defendant pleaded guilty): the victim impact statement ("VIS") and the Special Sex Offender Sentencing Alternative ("SSOSA") evaluation. CP 52, 56. The County asserted that RCW 42.56.240(1) (then RCW 42.17.310(1)(d)) exempted both documents from disclosure. *Id.* The County did not cite other PRA exemptions. *Id.*

A VIS is a document the victim may submit to the Court for consideration during sentencing. RCW 7.69.030(13). The prosecuting attorney, as a party to the case, receives a copy. *Id.* The VIS also goes in all presentence reports and is "permanently included in the [offender's] files." *Id.* The SSOSA is an evaluation the offender undergoes in an effort to obtain an alternative sentence. RCW 9.94A.670. It also is

submitted to the trial court for use in sentencing, and the prosecutor receives a copy. *Id.*

Mr. Koenig filed a PRA action to obtain the withheld documents and moved for summary judgment. CP 74-79; 177-200. The trial court found both documents exempt. CP 244-250. It did not order redacted production of either document. *Id.*

Mr. Koenig appealed the order to Division Two, which issued rulings that are the subject of the petitions to this Court. In sum, a divided panel held that the VIS is exempt in its entirety under RCW 42.56.240(1) as "essential to effective law enforcement," while the SSOSA is not exempt under the same statute. *Koenig v. Thurston County*, 155 Wn. App. 398, 229 P.3d 910 (2010), *review granted*, 170 Wn.2d 1020 (2011).

The County petitioned this Court for review of the SSOSA ruling. Mr. Koenig cross-petitioned for review of the VIS ruling. This Court accepted review, and the parties provided supplemental briefs. Because WCOG believes Division Two's ruling and the supplemental briefs raise concerns about Washington's commitment to transparent government, it files this amicus brief.

III. ARGUMENT

A. Summary of Argument

"Just trust us." That is essentially what the County asks this Court to do. The PRA, however, requires a different result. Because of WCOG's interest in transparency of government, it files this amicus brief to address issues of particular importance to requesters and to the integrity of the PRA. First, WCOG writes to emphasize the PRA's underlying principles of openness and access. Second, it addresses the requirement of *de novo* review and explains how the County's effort to rely on its own employees as "experts" would upend that important standard. Third, it discusses the applicability of this Court's recent decisions to the VIS, and how those decisions require disclosure, particularly disclosure of redacted documents when only some portions are exempt. Finally, WCOG addresses how awards of attorney's fees are critical to maintaining the PRA's vitality and how agencies cannot escape such awards by changing their asserted exemptions in the midst of a lawsuit.

B. The PRA Requires Transparency and Presumes Disclosure

"The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Those words from the PRA embody the fundamental principles at issue on this appeal. Because transparency is essential to

good government, "[t]he 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." *Id.*

As this Court has recognized many times, the PRA is "a strongly worded mandate for broad disclosure of public records." *Bainbridge Island Police Guild v. City of Puyallup*, ___ Wn.2d ___, 2011 WL 3612247, *3, ¶12 (Aug. 18, 2011), *quoting Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Courts must construe the PRA liberally and construe exemptions narrowly "to assure that the public interest will be fully protected." RCW 42.56.030. The party trying to block access must cite specific statutory exemptions and bears the burden of proving that the statute prohibits disclosure. RCW 42.56.550(1).

Unless an exemption applies, the agency must produce records, even if disclosure "may cause inconvenience or embarrassment." RCW 42.56.550(3). If the statute exempts portions of a document, the agency must redact those portions and release the remainder of the record. RCW 42.56.210(3); *see also BIPG*, ___ Wn.2d ___, 2011 WL 3612247, **6-7, ¶¶ 24-30. An agency's "promise of confidentiality or privacy is not adequate to establish the nondisclosability of information; promises cannot override the requirements of the disclosure law." *Hearst*, 90 Wn.2d at 137

(1978); *see also Spokane Police Guild v. State Liquor Control Bd.*, 112 Wn.2d 30, 33, 769 P.2d 283 (1989).

C. The PRA's *De Novo* Review Standard Prohibits Deference to Public Agencies

The PRA principles of openness described above dictate the standard of review here. An appellate court reviews a decision to withhold records *de novo* unless the trial court heard live witness testimony and made findings of fact. *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 791, 246 P.3d 768 (2011). Because no witnesses testified in this case, the Court must take a fresh look at the asserted exemptions, whether they apply, and whether the agency must release at least portions of the documents in redacted form.

The County attempts to flip this standard on its head by asking the Court to defer to supposedly unrebutted "expert" declarations. First, the declarations are not statements of fact but expressions of opinion on how the PRA should be applied. Second, even if the declarations included statements of fact, the agency cannot characterize its declarations as expert testimony. The declarants are agency employees or other interested lay persons, none of whom the County proffered as experts under ER 702. The Court should not defer to their opinions on what the PRA exempts. *See King County v. Sheehan*, 114 Wn. App. 325, 339-41, 57 P.3d 307

(2002) (discounting declarations provided by agency regarding the "essential to law enforcement" exemption); *cf. Newman v. King County*, 133 Wn.2d 565, 573, 947 P.2d 712 (1997) (finding declarations useful when they address factual questions, such as whether a criminal investigation remains open).

Moreover, deferring to agency declarants would undermine the PRA's fundamental goal of access. As a practical matter, a citizen requester cannot obtain contrary declarations from within an agency. Thus, giving credit to the County (or other agencies) for providing "evidence" from within its ranks would establish a hurdle no requester could overcome. Such a standard would defeat access, rather than encourage it.

As this Court explained long ago, "leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization." *Hearst*, 90 Wn.2d at 131. The PRA exists so the public can monitor government actions, such as the sentencing of sex offenders. Allowing agency declarations to stand as persuasive "evidence," much less "expert" evidence, of whether the law applies would defeat the statute's purpose. "[G]overnment of the people, by the people, for the people, risks becoming government of the people, by the

bureaucrats, for the special interests." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994) ("PAWS").

This Court must conduct a *de novo* review of the exemptions without deferring to the County's declarations. Such a review is the only way to ensure the integrity of the PRA and its promise of open government.

D. The PRA Requires Disclosure of Records, Such as the VIS, That Courts Rely Upon for Sentencing

The PRA stands as a crucial vehicle for the public to use in learning how its government makes decisions, including the processes the government follows and the reasoning it relies upon. This is particularly important in the criminal justice realm, where Courts must, constitutionally, act in public. *See* Const. art. I, § 10. This public interest heightens even more when Courts consider diversion sentences for sex offenders. The public has a right to know why a Court is issuing (or not issuing) such a sentence and the facts or arguments it relies on in reaching that decision.

Division Two concluded that VIS are exempt from disclosure in their entirety under RCW 42.56.240(1), because the records supposedly are "specific investigative records compiled by . . . law enforcement . . ., the nondisclosure of which is essential to effective law enforcement." The

County also argues before this Court that the records (again, in their entirety) are shielded by the same exemption because withholding them "is essential . . . for the protection of any person's right to privacy."

Applying either prong of the investigative records exemption would encroach on the public's right and duty to act as watchdog for government. In essence, Division Two and the County would require the public to trust that prosecutors and judges will act correctly, while denying access to the very documents used by both branches of government. This result is anathema to the PRA, which requires disclosure.

1. Disclosure, at Least in Redacted Form, Would Not Violate Privacy.

The County argues that RCW 42.56.240(1) exempts the VIS from disclosure because revealing any portion of the VIS whatsoever would violate privacy rights. A party seeking to withhold records on privacy grounds must show that the information is both (1) highly offensive to a reasonable person and (2) not of legitimate concern to the public. RCW 42.56.050. The County's interpretation of the exemption ignores the important second requirement and conflicts with this Court's authority.[1]

[1] WCOG agrees with Mr. Koenig, amicus WNPA, and one member of the Division Two panel that a VIS is not an "investigative record" and so the exemption is simply inapplicable. WCOG incorporates WNPA's argument on that point and addresses in this brief the additional ways in which the exemption does not apply.

In *Bainbridge Island Police Guild v. City of Puyallup* ("BIPG"), this Court required disclosure of documents regarding sexual assault allegations against a police officer, allowing redaction of only the officer's name. ___ Wn.2d ___, 2011 WL 3612247, *6-7, ¶¶ 24-30. The police officer had argued for withholding the entire document on privacy grounds. *Id.* This Court, however, found that the public had a legitimate interest in how the government responded to the allegations and investigated them, even though the investigation ultimately found the allegations unsubstantiated. *Id.* Thus, the PRA required disclosure of the records. *Id.* The Court did find that no legitimate public interest existed in the officer's name (because the allegations were unsubstantiated) and therefore ordered redaction. *Id.* The fact that redacting the name might not fully shield the officer's identity did not justify withholding entire documents, however, because the public had a legitimate interest in the remaining information. *Id.*

Similarly, *Koenig v. City of Des Moines*, 158 Wn.2d 173, 181, 142 P.3d 162 (2006), involved records about a child victim of sexual assault. Again, the public had a legitimate interest in how the government investigated such crimes. *Id.* In that case, a statute required redaction of the child's name. *Id.* The Court recognized that, because of the nature of the request and the documents, redacting the name would not conceal the

child's identity. *Id.* Yet the PRA required disclosure of the remaining records regardless of the identity issue, and this Court therefore ordered disclosure. *Id.*

These cases mirror the current lawsuit, but the County argues for an inconsistent result here. It is beyond dispute that the public has a legitimate interest in the sentencing of convicted sex offenders, especially the choice of alternative sentencing schemes. It also is beyond dispute that the public has a legitimate interest in the documents that the sentencing court relies on in reaching the sentencing decision. If the public cannot access such documents, the sentencing court will operate as a star chamber, with no public oversight. The PRA prohibits such a result. It requires disclosure of the VIS, which the victim submits to the Court and the prosecutor, and which the Court considers during sentencing.[2]

The County focuses almost exclusively on victims' rights, arguing that redaction of a victim's name or other personal details will not adequately protect the victim. But the victim's interests do not alter the PRA's commands or the public's overriding interests in open courts and

[2] WCOG understands that the parties stipulated that the sealing of the court copy of the VIS has no effect on Mr. Koenig's rights under the PRA. WCOG agrees that a sealing order (particularly one improperly obtained, such as in this case) cannot restrict Mr. Koenig's rights under the PRA to the copy held by the prosecutor's office. *See Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 804-05, 246 P.3d 768 (2011). WCOG discusses the court copy of the VIS, however, to point out the lack of logic in the County's position that a document filed in open court can become private or essential to law enforcement when it also is placed in the prosecutor's file.

transparency in the criminal sentencing process. If any items within a VIS truly implicate a victim's privacy rights as defined by the PRA, the answer is simple -- redact those details (such as the victim's name) from the VIS. RCW 42.56.210(3) mandates such a result, as do this Court's decisions. *See, e.g., BIPG*, 2011 WL 3612247, *6-7, ¶¶ 24-30; *PAWS*, 125 Wn.2d at 261; *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 646-47, 115 P.3d 316 (2005); *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 206, 189 P.3d 139 (2008).

The County does not dispute that the VIS contains information of legitimate public concern and therefore not "private" under the PRA exemption, such as the victim's recommendation about a sentence, whether the victim believes an alternative sentence is appropriate, and why (or why not) the victim made the statement. This information is essential for the public to understand whether the ultimate sentence is fair and reasonable. The County cannot use an exemption to shield information that the PRA requires it to disclose. The County's privacy argument should be rejected.

2. The VIS Are Not Essential to Effective Law Enforcement.

Nor is withholding the VIS "essential to effective law enforcement" under RCW 42.56.240(1), as Division Two concluded. The victim provides the VIS to the sentencing judge; it is an open court record

that the prosecutor also receives. A party must show a compelling interest to seal portions of the court copy of a VIS, much less the whole thing. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). Yet the County wants to automatically exempt from public disclosure copies of VIS held by the prosecutor's office, simply because the prosecutor uses them. This presumption of non-disclosure reverses the PRA's mandate of openness. Contrary to the County and Division Two, the PRA requires a presumption of access to agency records, just as the Washington constitution requires a presumption of access to the same records filed with the court.

Setting aside the logical disconnect of exempting from disclosure a document presented in open court, the County cannot show that the VIS is "essential to effective law enforcement." As explained above, the VIS is a pleading filed by the victim. The prosecutor's office receives it, just as it receives copies of all the court pleadings. But the presence of pleadings in the prosecutor's files does not render them exempt from disclosure. Otherwise anything filed in the case would somehow become exempt. The County must prove an exemption applies to each particular record.

The County fails its burden. It provides declarations stating that if requesters can obtain the VIS, then future victims will not submit a VIS, and the prosecutors will not make adequate sentencing recommendations.

Thus, it reasons, nondisclosure is "essential to effective law enforcement." This makes little sense, as a VIS is entirely optional in every case. RCW 7.69.030(13) (giving victim right to submit statement to court, but not requiring victim to do so). Prosecutors make sentencing recommendations today when victims decline to submit a VIS and when victims choose to make an oral statement (again in open court) instead. Because the VIS is optional, it cannot, by definition, be essential.

The declarations also lack force because they come from agency employees who are speculating on the law. As discussed above in Section III.C, "leaving interpretation of the [PRA] to those at whom it was aimed would be the most direct course to its devitalization." *Hearst*, 90 Wn.2d at 131. That is exactly what the County asks this Court to do. The Court should not defer to conclusions from the very agency seeking to avoid disclosure. *See Sheehan*, 114 Wn. App. at 339-41 (not deferring to agency declarations regarding whether withholding officer names was essential to law enforcement). Otherwise, agencies will follow an easy route toward defeating any PRA request: gather a multitude of declarations from their own employees who predict doomsday outcomes if the public obtains documents. The Court's duty under the PRA is to remain skeptical of such tactics and to interpret the exemption narrowly, as the PRA requires.

The reality is that victims can and do file statements in open court. *See Sheehan*, 114 Wn. App. at 341 (officers' names not essential to effective law enforcement because were provided in open court). The fact that some may choose not to in some cases cannot justify withholding all VIS records in all cases. In fact, the County can show only that one victim, several years after the fact, says she would not have completed a VIS if she knew any portion of it would later be produced. This is not enough to show a threat to the criminal sentencing process. As discussed above, a VIS is optional in any event. Prosecutors make quality sentencing recommendations without a VIS today, they did so in the past, and they will do so in the future. They may prefer total secrecy, but that preference cannot overcome the PRA's requirements. Essential and preferable are not the same.

Finally, Division Two and the County ignore the PRA's mandate that an agency disclose redacted documents if some information would indeed undermine law enforcement. RCW 42.56.210(3). It is implausible that every detail of every VIS must remain secret from the public to ensure a functioning criminal justice system. The public is entitled to obtain at least redacted versions of the VIS so it can ensure transparency and fairness in the criminal sentencing process. Division Two's ruling to the contrary should be reversed.

E. The PRA Requires an Award of Fees When a Requester Prevails, Not Just When the Requester Obtains Documents

WCOG agrees with Division Two that the PRA requires disclosure of the SSOSA and agrees with WNPA's positions on the SSOSA. However, even if this Court finds that the document is exempt, WCOG writes to emphasize the importance of a fee award for Mr. Koenig.

RCW 42.56.210(3) requires an agency to cite applicable exemptions and explain why those exemptions apply. An agency that fails to do so violates the PRA. *See Sanders v. State*, 169 Wn.2d 827, 847-48, 240 P.3d 120 (2010). Here, the County failed to cite the "health care" issue when it responded to Mr. Koenig's PRA request years ago and raised it only on appeal. CP 51, 70. It cited RCW 42.56.240(1) (then RCW 42.17.310(1)(d)) instead. *Id.* By failing to cite all the applicable exemptions on which it would rely, the County kept Mr. Koenig guessing and wasted resources of the parties and the courts.

The PRA mandates that "[a]ny person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record . . . shall be awarded all costs, including reasonable attorney fees." RCW 42.56.550(4). This provision is crucial to the vitality of the PRA. Individual requesters cannot afford the often lengthy litigation required to assert their rights under the PRA. An attorney's fee provision

encourages lawyers to pursue PRA cases and provides an incentive for agencies to fully comply with the law.

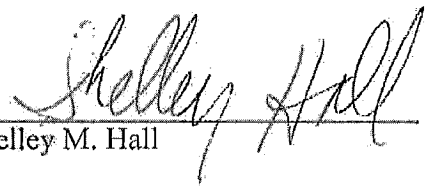
This case provides a prime example of the importance of the attorney's fee provision. The provision does not require that the requester obtain any documents, but just that he or she prevail in an action. Mr. Koenig has prevailed in showing that the County failed to comply with RCW 42.56.210(3).

As noted above, the PRA requires disclosure of the SSOSA. But if this Court concludes that the SSOSA is exempt on the "health care" grounds, or for any reason other than the exemption the County cited in its response to Mr. Koenig's PRA request, then Mr. Koenig is entitled to an award of fees. He will have prevailed on showing a violation of the PRA and have prevailed on the exemptions the County raised when it responded to his request. Mr. Koenig's court action caused the County to assert additional exemptions. The County should not be rewarded for hiding the ball. Such a result would discourage requesters from asserting their rights and would undermine the PRA's guarantee of access.

IV. CONCLUSION

WCOG urges this Court to fulfill the PRA's mandate and purpose by reversing Division Two's conclusion that VIS are exempt from disclosure. The public has a legitimate interest in the records, and

withholding the records in their entirety is not essential to effective law enforcement. The County should be ordered to produce the VIS and the SSOSA unless, on remand, the County asserts that particular parts of the VIS and SOSSA are exempt and produces redacted copies of those records. Either way, Mr. Koenig should receive an award of attorney's fees and penalties.

By: 
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 6th day of September, 2011, I caused a true and correct copy of the foregoing document, "*Brief of Amicus Curie - Washington Coalition for Open Government*," to be delivered via email to the following counsel of record:

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