

71039-7

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No. 71039-7-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JONATHAN BLOEDOW, Appellant,

v.

PLANNED PARENTHOOD OF THE GREAT NORTHWEST,
FEMINIST WOMEN'S HEALTH CENTERS d/b/a CEDAR RIVER
CLINICS, AURORA MEDICAL SERVICES, SEATTLE MEDICAL
AND WELLNESS CLINIC, ALL WOMEN'S HEALTH NORTH,
PLANNED PARENTHOOD MOUNT BAKER, STATE OF
WASHINGTON DEPARTMENT OF HEALTH, Respondents.

REPLY BRIEF OF APPELLANT JONATHAN BLOEDOW

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In the State of Washington, public records are subject to “broad disclosure.” Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). The Public Records Act (RCW 42.56) is to “be liberally construed and its exemptions narrowly construed.” RCW 42.56.030.

For Plaintiffs to succeed in blocking the release of the Department of Health’s (DOH) proposed response to Appellants’ Public Records Act request, they must demonstrate that “[1] examination would **clearly** not be in the public interest and [2] would substantially and irreparably damage [a] person” under RCW 42.56.540 (emphasis supplied), and also that [3] a relevant statutory exemption applies to the challenged records. See, e.g., Morgan v. City of Fed. Way, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009) (“**If one of the PRA’s exemptions applies**, a court can enjoin the release of a public record only if disclosure ‘would clearly not be in the public interest and would substantially and irreparably damage any person, or . . . vital governmental functions.’”) (citing RCW 42.56.540; Soter v. Cowles Publ’g Co., 162 Wn.2d 716, 757, 174 P.3d 60 (2007)) (emphasis supplied). The plaintiff bears the burden of proof – a burden that these plaintiffs cannot meet. See, e.g., Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

I. The Public Interest Mandates Transparency.

The public interest weighs heavily in favor of transparency. “This balance [of the general public interest in access to governmental information against the specific privacy interests asserted] is to be **tilted in favor of disclosure.**” Hearst, 90 Wn.2d at 137 (citing Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971)) (emphasis supplied). “The people insist on remaining informed . . . [and so the Public Records Act] shall be **liberally construed** . . . to assure that the public interest will be fully protected.” RCW 42.56.030 (emphasis supplied).

Plaintiffs boldly assert, without citation to authority, “The public policy of patient confidentiality is no less compelling than the policy of disclosure and transparency in the [Public Records Act].” Resp. Br. at 15, n.9. The Public Records Act and Washington courts counsel otherwise. See, e.g., Hearst, 90 Wn.2d at 137 (mandating that the balance “be tilted in favor of disclosure”). “No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons,” RCW 42.56.210(1) (emphasis supplied), because the legislature has found that:

public health and safety is promoted when the public has knowledge that enables them to make informed choices about their health and safety. . . . [A]s a matter of public

policy, . . . the public has a right to information necessary to protect members of the public from harm caused by alleged hazards or threats to the public.

Laws of 2001, ch. 98, § 1 (emphasis supplied).¹ Even in the case of mere potential or alleged health harms, as abortion may be, “the public has a right to information.” Id.

Moreover, the way the State tracks public health issues such as abortion is of legitimate interest to the citizens of Washington. Because government functioning mechanisms such as “the nature of . . . investigations [are] a matter of legitimate public concern, disclosure of that information is not a violation of a person’s right to privacy . . . [and thus] does not fall into the category of [exempt] ‘personal information.’” Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 417-18, 259 P.3d 190 (2011). Plaintiffs admit this. See Response Brief at 12 (“Resp. Br.”) (“there was a legitimate public interest in how the Police Department investigated the allegations”).²

¹ Plaintiffs disregard Bloedow’s legitimate concerns about possible harm caused by abortion in order to argue here that “[t]he public’s need to have information about hazards or threats, is not at issue” Resp. Br. at 27, n.16. Again, Bloedow has no interest in or need of private health information, but is concerned about the harm he believes arises from abortion.

² In addition to Bloedow’s request not resulting in potential disclosure of embarrassing personal information, even a “highly offensive” airing of “intimate details” may be required if there is a public interest in it:

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely

Plaintiffs have not disproven the legitimate public interest at stake here, nor could they. They claim only that information such as city and county of residence, facility location, and date of procedure “are not of legitimate public concern” – they attempt to shift the focus to public “concern about the health of any individual woman,” Respondents’ Resp. Br. at 26, which is simply not what is at stake. Bloedow does not seek to identify any abortion patients; he did not request and did not want to receive data identifying individual abortion patients. Rather, he seeks the very “aggregated and statistical data regarding abortions in Washington” that Plaintiffs admit is subject to legitimate “public interest.” Resp. Br. at 26.

Transparency and the people’s right to know merit great deference. The public interest alone mandates the disclosure of the requested records.

II. Release of the Requested Records Would Not “Substantially and Irreparably Damage” Any Person.

The data extracts requested by Bloedow and proposed for release by DOH consist of spreadsheets with data related to dates of procedure,

private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

Hearst, 90 Wn.2d at 136 (“adopt[ing] the Restatement [(Second) of Torts § 652D. (1977)] standard as the controlling one” and quoting Restatement, at 386) (emphasis supplied).

age, city and county of residence, race/ethnicity, number of prior abortions, number of prior births, complications if any, and gestational age of the baby, with identification numbers to associate each column of data with the next. This information is general, higher-level epidemiological data. None of the records requested by Bloedow contain specific patient identifiers, e.g., names, addresses, phone numbers, drivers license numbers, or social security numbers; he relied upon DOH's redaction of any identifying information pursuant to, e.g., RCW 42.56.230 (protecting social security numbers, contact information, and financial information); RCW 42.56.350 (protecting social security numbers, residential address, and residential telephone number of healthcare providers).

Even assuming, as Plaintiffs assert, that it would "substantially and irreparably damage" a woman were some third party to conduct an investigation and eventually suspect she might have had an abortion, Resp. Br. at 25-26, mere conceivable association does not suffice for "substantial[] and irreparabl[e] damage"; "though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks." Bainbridge Island, 172 Wn.2d at 414. "An agency should look to the contents of the [requested] document [to be released] and not the knowledge of third parties when deciding if the subject of a report has a

right to privacy in their identity.” Id. at 414; see also Koenig v. City of Des Moines, 158 Wn.2d 173, 184, 142 P.3d 162 (2006).

Further, in order for a disclosure to violate a person’s right to privacy under the Health Care Information Act, an “entire” record must “reveal[] information about a person,” be “highly offensive,” and be “not [a matter] of legitimate concern.” See Bainbridge Island, 172 Wn.2d at 417 n.12 (internal citation omitted). Information such as, for example, county employees’ “names, number of years of employment with the County, department assigned to within the County, job title, office phone number, annual pay rate, and **town of residence**” is not exempt:

There is no question here that the information . . . requested did not fall under one of the [Public Records Act’s] precise, specific, and limited exceptions. Indeed, on appeal, the County does not contend that its employees’ towns of residence were exempt from disclosure.

Kitsap Cnty. Prosecuting Attorney’s Guild, 156 Wn. App. at 114, 119 (emphasis supplied) (citing Spokane Research & Def. Fund v. City of Spokane, 155 Wn.2d 89, 102, 117 P.3d 1117 (2005)). While Plaintiffs correctly note, Resp. Br. at 20, n.12, that “the sole issue before [the Kitsap court was] whether the trial court properly imposed attorney fees and penalties . . . under the PRA,” Kitsap, 156 Wn. App. at 117, the court’s determination of the “government agency wrongfully den[ying]

disclosure,” Kitsap, 156 Wn. App. at 122, was intrinsic and vital to its analysis of attorneys’ fees and fines.

Quite simply, the release of aggregated statistical data regarding abortions does not “substantially and irreparably damage” any individual, even if there is some remote possibility that the “outside knowledge” of some third party may allow her to “fill in the blanks” and make an educated guess. See Bainbridge Island, 172 Wn.2d at 414.

III. No Relevant Statutory Exemption Applies to These Records.

Either the failure of Plaintiffs to prove lack of public interest or their failure to prove “substantial[] and irreparabl[e] damage” would prove fatal to their attempt to hinder the release of the requested records. Yet they also fail to identify a statutory exemption that applies to these records, either as regards the records’ association with individual clinics, or as regards their alleged association with individual women.

A. The Actual Records – the Only Permissible Consideration – Do Not Identify Specific Abortion Facilities.

Abortion facilities are **required to disclose** certain data relating to abortions to DOH. See WAC 246-490-100. In order to encourage “accuracy and completeness” and discourage false reporting, DOH

separately provides that it will not usually publicly disclose information “in such a manner as to identify any facility.”³ WAC 246-490-110.

The statute does not specify what “identify” means. But on their face, the contents of the proposed DOH responses would not identify any particular facility. As stated *supra*, upon information and belief, DOH’s proposed responses include the patient’s dates of procedure, age, city and county of residence, race/ethnicity, number of prior abortions, number of prior births, complications if any, and gestational age of the baby, with identification numbers to associate each column of data with the next. The only way the responses could potentially be associated with a particular facility would be via their mere responsiveness to a specific request, which does not justify the records’ exemption from disclosure. See, e.g., Bainbridge Island, 172 Wn.2d at 414 (not exempting records relating to a police officer exonerated of allegations of sexual misconduct); Koenig, 158 Wn.2d at 182-83 (not exempting redacted records relating to a child sexual assault victim).

³ Plaintiffs attacked Bloedow’s characterization of WAC 246-490-110 as a “limited pledge of confidentiality” as “made of whole cloth,” Resp. Br. at 10, n.6, but the very language of the statute makes clear that it is not absolute, as the information may be disclosed by consent, by subpoena, or in a proceeding involving certificates of approval. Defendant DOH agrees: “DOH shall not disclose information identifying the patient or facility where the abortion is performed, except in certain limited circumstances” State of Washington Department of Health’s Response to Brief of Appellant Jonathan Bloedow at 3 (“DOH Resp. Br.”). Plaintiffs, in referencing WAC 246-490-110, include the consent exception but then end with an ellipsis rather than providing the other exceptions. Resp. Br. at 14, n.8.

Plaintiffs weakly argue that this case is distinguishable from Bainbridge Island and Koenig. Resp. Br. at 11-13. Yet in both Bainbridge Island and Koenig, deeply personal information was protected by statute, but was nonetheless released in response to a targeted request. Whether the information at issue was obtained from internal or external sources, and the nature of how it was obtained (Plaintiffs go so far as to claim that their **mandated** disclosures are “voluntar[y],” Resp. Br. at 11), is immaterial. The agency must look to the contents of the response itself. See Bainbridge Island, 172 Wn.2d at 414. And “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 (citing Petkas v. Staats, 163 U.S. App. D.C. 327, 501 F.2d 887 (1974); Robles v. EPA, 484 F.2d 843 (4th Cir. 1973); Pharmaceutical Mfrs. Ass’n v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976)) (emphasis supplied).

Plaintiffs contend that “**in such a manner** as to identify any facility,” Resp. Br. at 10 (citing WAC 246-490-110), in actuality and necessarily means “**in any manner** that identifies a facility, whether that be on the face of a document or by indirect means” such as, e.g., the additional steps of acquisition and use of intimate third-party data. Resp. Br. at 10. This stretches the phrase “in such a manner” to its breaking

point. Plaintiffs would ask this Court to look far afield, “in such a manner” beyond Koenig’s four corners of the document, to search for any possible combination of response and additional facts that could lead to a suspicion that an individual woman may have had an abortion. But such wholly indirect means are not clearly implicated in WAC 246-490-110, and are expressly forbidden by Koenig. 158 Wn.2d at 183.

As discussed in Appellant’s Brief at 18-19 (“App. Br.”), association with an individual as a necessary part of the response does not preclude responsiveness, but rather advances transparency and serves the public interest in administrative efficiency. But as in Koenig, here, Plaintiffs

cite[] no statutory language or case law to support the notion [a court] may look beyond the four corners of the records at issue to determine whether they were properly withheld. Nor does it provide any authority to support disclosing records to some requesters but not others, depending on how the request is made.

Koenig, 158 Wn.2d at 183. Despite the targeted nature of the Bainbridge Island requests, and the inherently personal nature of records relating to alleged sexual assault, the court required that the records be produced with the officer’s name redacted, despite the fact that they were responsive to a targeted request. Other parties might “figure[e] out Officer Cain’s identity. However, it is unlikely that these are the only circumstances in which the

previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone.” Bainbridge Island, 172 Wn.2d at 418.

An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity. Even though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks.

Bainbridge Island, 172 Wn.2d at 414.

And DOH may not take into account outside knowledge, whether the requested records are internal or external, or the reason for the confidentiality statute in responding to a public records request, or else some requesters would be rewarded and others subject to stricter scrutiny. Bloedow logically framed his requests by facility because each facility submits a separate report to DOH. But neither the breadth of Bloedow’s request nor his potential outside knowledge should preclude DOH from responding in full.

B. The Records Do Not “Readily” Identify Any Abortion Patient.

Plaintiffs identified no statute that applies here so as to exempt DOH’s proposed responses from full disclosure.

The Health Care Information Act provides that information that “identifies or can readily be associated with the identity of a patient and

directly relates to the patient's health care," RCW 70.02.010(7) (incorporated into the Public Records Act via RCW 42.56.360), is partially exempt from public inspection. See generally Prison Legal News, Inc., v. Dep't of Corr., 154 Wn.2d 628, 644-45, 115 P.3d 316 (2005) (holding that a blanket exemption for all medical information, redacting "names, treatments, medical conditions, etc." violated the narrow exemption requirements of the Public Records Act). This could include DNA data, a patient's name, specific street address, telephone number, or email: information "readily" associable with a specific individual.

Where a requester could "cross reference" a list . . . to determine patient identity[, p]resumably [based on] additional information," the information is not "readily associated" with a particular patient, as required by the statute. Prison Legal News, Inc., 154 Wn.2d at 325 n.17. Similarly, while conceivably, with great effort, someone could identify a specific woman and her abortion date and location if armed with numerous additional data points, the response would not be "readily associable" within the meaning of the exemption.

Plaintiffs attempt to hang their hat on the Federal Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat. 1936 ("HIPAA"), but the relevant department of DOH, the Center of

Health Statistics, is not a covered entity under HIPAA,⁴ as Plaintiffs have conceded, Resp. Br. at 20; CP 39; RP July 26, 2013, p. 32, and so HIPAA does not apply to this Center.⁵ Plaintiffs press on by claiming that although DOH is not a covered entity in this context, HIPAA nonetheless requires the Health Care Information Act to match its level of confidentiality. Resp. Br. at 20.⁶ This is not so. As discussed in App. Br. at 27-28, the respective specific standards of the Health Care Information Act and HIPAA are unquestionably different, but they are not contrary and do not conflict because they do not apply irreconcilable standards to the same organization.⁷ Thus, 45 C.F.R. § 160.202-203 (“A standard . . .

⁴ Plaintiffs continue to contend HIPAA applies here under RCW 43.70.050(2), *see* Resp. Br. at 8, n.3, but that applies only to the secretary’s use of data: “**The secretary’s** access to and use of all data shall be in accordance with state and federal confidentiality laws and ethical guidelines.” (Emphasis supplied.)

⁵ Only one program within DOH, not involved in this case, has functions covered by HIPAA, leaving DOH generally as a hybrid entity but the Center of Health Statistics as a non-covered entity. *See* DOH Resp. Br. at 18, n.7.

⁶ Plaintiffs further assert, “The HCIA’s definition of ‘health care information’ must be interpreted so as to have one consistent meaning – a meaning that harmonizes with HIPAA’s de-identification method and does not lead to applications in which the HCIA’s definition would be preempted by HIPAA,” Resp. Br. at 21-22, but unilateral preemption without foundation is exactly what Plaintiffs are attempting to effect here.

⁷ *See Freedom Foundation v. Wash. State Dept. of Transp.*, 168 Wn. App. 278, 296 n.18, 276 P.3d 341 (2012) (in which, unlike here, the federal statute’s confidentiality provisions did apply to the information in question) (“Federal preemption of state law may occur in three circumstances: (1) if Congress passes a statute that expressly preempts state law, (2) if Congress preempts state law by occupation of the entire field of regulation, or (3) if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.”) (citing *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 326-27, 858 P.2d 1054 (1993)); 45 C.F.R. § 160.203 (“A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law” unless certain conditions are met, such as where a state privacy law “is more stringent,” but setting no baseline for non-conflicting state law).

contrary to a provision of State law preempts the provision of State law” unless the state privacy law “provides greater privacy protection for the individual”) does not apply. Plaintiffs’ assertion that “[b]ecause information that is considered ‘individually identifiable’ under HIPAA is also considered ‘identifying’ under the HCIA,” Resp. Br. at 19, is incorrect.

Since the Health Care Information Act uses an entirely distinct standard as compared to HIPAA to prevent the release of improper health care information, some HIPAA Safe Harbor exempt categories of information may appear in DOH’s proposed response. Yet the response fully adheres to the Health Care Information Act, which actually applies here. Applying HIPAA where it does not belong would throw a wet blanket over the State of Washington’s commitment to transparency, create an unnecessary conflict with the Public Records Act, and create a chilling effect on the release of public records. The Court should decline Plaintiffs’ invitation to grasp at a non-applicable standard with a pretense of achieving uniformity, as this will only undermine Washington’s own sovereignty and its own duly passed Health Care Information Act.

IV. Conclusion

For the reasons stated above, Bloedow urges the reversal of the lower court’s grant of summary judgment and permanent injunction in this

matter, and further requests that this Court require production of the records he requested in the format proposed by DOH.

Respectfully submitted this 4th day of June, 2014.

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CERTIFICATE OF SERVICE

I, Catherine Glenn Foster, hereby certify that on the 4th day of June, 2014, I caused the foregoing REPLY BRIEF OF APPELLANT JONATHAN BLOEDOW to be served on the parties to this case by electronic mail service as agreed to by the following parties to this case:

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