

71039-7

71039-7

NO. 71039-7

---

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

---

JONATHAN BLOEDOW, an individual,

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,  
MOUNT BAKER PLANNED PARENTHOOD, STATE OF  
WASHINGTON DEPARTMENT OF HEALTH,

Respondents.

---

**STATE OF WASHINGTON DEPARTMENT OF HEALTH'S  
RESPONSE TO BRIEF OF APPELLANT JONATHAN BLOEDOW**

---

ROBERT W. FERGUSON  
Attorney General

LILIA LOPEZ, WSBA #22273  
Assistant Attorney General  
PO Box 40109  
Olympia, WA 98504-0109  
(360) 664-4967  
OID# 91030

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAY -5 AM 11:14

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ISSUES.....2

III. STATEMENT OF THE CASE .....2

    A. Pregnancy Termination Reporting.....2

    B. Bloedow Request For Records.....4

IV. STANDARD OF REVIEW.....5

V. ARGUMENT .....6

    A. Injunctions Under The Public Records Act .....6

    B. Under RCW 43.70.050(2), DOH Is Prohibited From  
    Disclosing Data That Would Identify A Patient Or Health  
    Care Provider .....7

    C. The Courts Have Not Yet Addressed Whether A Targeted  
    Request For Abortion Facility Information Is Exempt  
    From Disclosure Under RCW 43.70.050.....10

    D. Patient Health Care Information That Can be Readily  
    Associated With The Identity Of A Patient Is Protected  
    From Disclosure.....13

    E. Information Contained In The Requested Records May  
    Be Readily Associated With The Identity Of Specific  
    Patients When HIPAA Is Applied By Analogy .....17

    F. RCW 42.56.050 Has No Application To This Case .....20

VI. CONCLUSION .....21

APPENDIX A

## TABLE OF AUTHORITIES

### Cases

<i>Ameriquest Mortg. Co. v. Washington State Office of Attorney General,</i> 170 Wn.2d 418, 241 P.3d 1245 (2010).....	5
<i>Amren v. City of Kalama,</i> 131 Wn.2d 25, 929 P.2d 389 (1997) .....	21
<i>Anaya v. Graham,</i> 89 Wn. App. 588, 950 P.2d 16 (1998).....	18
<i>Bainbridge Island Police Guild v. City of Puyallup,</i> 172 Wn.2d 398, 259 P.3d 190 (2011).....	passim
<i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. # 405,</i> 164 Wn.2d 199, 189 P.3d 139 (2008).....	12
<i>Employco Personnel Servs., Inc. v. City of Seattle,</i> 117 Wn.2d 606, 817 P.2d 1373 (1991).....	8
<i>Forbes v. City of Gold Bar,</i> 171 Wn. App. 857, 288 P.3d 384 (2012).....	18
<i>Francis v. Washington State Dept. of Corrections,</i> 178 Wn. App. 42, 313 P.3d 457 (2013).....	18
<i>Hearst Corp. v. Hoppe,</i> 90 Wn.2d 123, 580 P.2d 246 (1978) .....	6
<i>Heinsma v. City of Vancouver,</i> 144 Wn.2d 556, 29 P.3d 709 (2001).....	10
<i>In re Rosier,</i> 105 Wn.2d 606, 717 P.2d 1353 (1986).....	21
<i>Kofmehl v. Baseline Lake, LLC,</i> 177 Wn.2d 584, 305 P.3d 230 (2013) .....	5, 6

<i>Koenig v. City of Des Moines</i> , 158 Wn.2d 173, 142 P.3d 162 (2006) .....	10, 11, 13
<i>Morgan v. City of Fed. Way</i> , 166 Wn.2d 747, 213 P.3d 596 (2009).....	7
<i>Predisik v. Spokane School District No. 81</i> , 319 P.3d 801 (2014).....	12
<i>Prison Legal News, Inc., v. Dep't of Corr.</i> , 154 Wn.2d 628, 115 P.3d 316 (2005).....	16
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash., (PAWS)</i> , 125 Wn.2d 243, 884 P.2d 592 (1994).....	5, 6, 7
<i>Sheikh v. Choe</i> , 156 Wn.2d 441, 128 P.3d 574 (2006).....	6
<i>Soter v. Cowles Publ'g Co.</i> , 162 Wn.2d 716, 174 P.3d 60 (2007).....	7
<i>Spokane Police Guild v. Wash. State Liquor Control Bd.</i> , 112 Wn.2d 30, 769 P.2d 283 (1989) .....	7
<i>State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dep't of Transportation</i> , 142 Wn.2d 328, 12 P.3d 134 (2000).....	8
<i>State v. O'Neill</i> , 103 Wn.2d 853, 700 P.2d 711 (1985).....	8

**Statutes**

42 USC § 1320d-7(b).....	19
RCW Chapter 18.130 .....	15
RCW Chapter 42.56 .....	15
RCW Chapter 70.02 .....	2, 14

RCW 18.130.230 .....	2
RCW 42.56.030 .....	6, 20
RCW 42.56.050 .....	20, 21
RCW 42.56.070(1).....	6, 7
RCW 42.56.210(1).....	6
RCW 42.56.230(3).....	12
RCW 42.56.240(5).....	10, 11
RCW 42.56.360(2).....	14
RCW 42.56.540 .....	5, 6, 7
RCW 42.56.550 .....	5
RCW 43.70.005 .....	1
RCW 43.70.050 .....	2, 7, 9, 10
RCW 43.70.050(2).....	passim
RCW 43.70.050(5).....	8
RCW 70.02.005(1).....	14
RCW 70.02.010(5).....	19
RCW 70.02.010(7).....	15, 17
RCW 70.02.020 .....	14, 16
RCW 70.02.050 .....	14
RCW 70.02.050(2)(a) .....	2, 14, 15
RCW 70.02.050(2)(b) .....	15

**Regulations**

45 CFR § 160.103.....	19
45 CFR § 164.512(b).....	19
45 CFR § 164.512(b)(1)(i).....	19
45 CFR § 164.514(a)(2)(ii).....	19
45 CFR § 164.514(b)(2)(i).....	19
<i>Privacy Year in Review: Developments in HIPAA, 1 I/S: J.L. &amp; Pol’y for Info. Soc’y 347 (2005), 45 CFR Pt. 164, Subpart E.....</i>	18
WAC 246-490-100 .....	3
WAC 246-490-110.....	passim

## I. INTRODUCTION

The Washington State Department of Health Center for Health Statistics (“DOH”) collects reports of pregnancy terminations from facilities performing lawful induced abortions as part of a health-related data collection program. Appellant submitted public disclosure requests to DOH for pregnancy termination data extracts from seven specific facilities. In response, DOH proposed to produce the records with some information redacted. Because the requests related to particular facilities, DOH also notified the facilities of the request. The facilities then filed a lawsuit in King County Superior Court against DOH and Appellant seeking to enjoin DOH from releasing the records. The court granted summary judgment in favor of Plaintiffs and DOH is currently enjoined from producing the records pursuant to a permanent injunction. Clerk’s Papers (CP) at 154.

Among DOH’s primary responsibilities are “the preservation of public health, monitoring health care costs, the maintenance of minimal standards for quality in health care delivery, and the general oversight and planning for all the state’s activities as they relate to the health of its citizenry.” RCW 43.70.005. DOH’s responsibilities involve working to provide public health protection at both the individual and statewide level.

These activities involve the acquisition and use of health care information. *See generally* RCW 43.70.050 (establishing a health-related data collection program), RCW 18.130.230 (requiring licensed health care providers to produce records on request of a disciplining authority) RCW 70.02.050(2)(a) (requiring health care providers to share health care information with public health authorities). This case presents the question of how to interpret a statute that prohibits DOH from producing health-related data where the patient or health care provider can be identified.

## II. ISSUES

(1) Whether RCW 43.70.050(2) and WAC 246-490-110 protect from public inspection and copying records related to specific abortion facilities in response to a public records request that asks for records from a particular facility?

(2) Whether the Health Insurance Portability and Accountability Act's method of de-identifying healthcare information applies by analogy to release of information associated with a patient's identity under the Uniform Health Care Information Act, chapter 70.02 RCW?

## III. STATEMENT OF THE CASE

### A. Pregnancy Termination Reporting

Under RCW 43.70.050, DOH assesses the quality, cost, and accessibility of health care throughout the state. In support of this goal, DOH administers a program of health-related data collection.

WAC 246-490-100 describes the pregnancy termination data that abortion facilities are expected to provide to DOH:

Each hospital and facility where lawful induced abortions are performed during the first, second, or third trimester of pregnancy shall, on forms prescribed and supplied by the secretary, report to the department during the following month the number and dates of induced abortions performed during the previous month, giving for each abortion the age of the patient, geographic location of patient's residence, patient's previous pregnancy history, the duration of the pregnancy, the method of abortion, any complications, such as perforations, infections, and incomplete evacuations, the name of the physician or physicians performing or participating in the abortion and such other relevant information as may be required by the secretary. All physicians performing abortions in non-approved facilities when the physician has determined that termination of pregnancy was immediately necessary to meet a medical emergency, shall also report in the same manner, and shall additionally provide a clear and detailed statement of the facts upon which he or she based his or her judgment of medical emergency.

Given the sensitivity of the data, RCW 43.70.050(2) prohibits release of data in any form that would identify a patient or health care provider. DOH has also passed a rule, WAC 246-490-110, which implements RCW 43.70.050(2) as it relates to abortion data. The rule directs that DOH shall not disclose information identifying the patient or facility where the abortion is performed, except in certain limited circumstances not applicable here.

## **B. Bloedow Request For Records**

In November 2013, DOH received separate, but identical, requests from Appellant for data extracts of reports of induced terminations of pregnancy that had occurred during the most recent 12-month period available for each of six facilities: Planned Parenthood, Everett; Feminist Women's Health Center, Renton; Aurora Medical Services, Seattle; Planned Parenthood, Kenmore; All Women's Health Center North, Seattle; and Seattle Medical and Wellness Center.<sup>1</sup> See CP at 28. The data extracts contain 33 columns of information for each patient including items such as unique file numbers, termination date, age, city of residence, county of residence, state of residence, race, previous spontaneous abortions, previous live births, previous induced abortions, estimate of gestation in weeks, and any anomalies. CP at 167, 168.

In response to the requests, DOH proposed to produce custom data extracts with certain identifying information redacted. Following DOH's notice to the affected facilities and their initiation of this lawsuit, the superior court conducted an *in camera* review of the records, (CP at 151-155) and ruled that the data extracts were exempt in their entirety under WAC 246-490-110 because disclosure would necessarily identify the clinics

---

<sup>1</sup> In May 2013, Appellant submitted a seventh request to DOH for the abortion records for the Bellingham Planned Parenthood for the most recent 36-month period. DOH added this request to the six previously pending requests. CP at 167, 168.

that performed specific abortions. The superior court further ruled that DOH was prohibited from releasing three categories of patient identifying information (city of residence, county of residence, and termination date) under the Uniform Health Care Information Act in the context of this case. Finally, the court ruled that Respondent clinics and their patients would be substantially and irreparably damaged by disclosure of the records. CP at 154, 155.

#### IV. STANDARD OF REVIEW

Judicial review of action under the Public Records Act, including the injunction statute, RCW 42.56.540, is de novo. RCW 42.56.550; *Bainbridge Island Police Guild v. City of Puyallup*, 72 Wn.2d 398, 407, 259 P.2d 190 (2011). More specifically, where the trial court record consists solely of documentary evidence, as here, review of Public Record Act decisions is de novo. *Ameriquest Mortg. Co. v. Washington State Office of Attorney General*, 170 Wn.2d 418, 241 P.3d 1245 (2010) citing *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 414, 259 P.3d 190 (2011); *Progressive Animal Welfare Soc'y v. Univ. of Wash., (PAWS)*, 125 Wn.2d 243, 257, 884 P.2d 592 (1994).

Similarly, the standard of review for an order granting or denying summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584,

594, 305 P.3d 230, 236 (2013); *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

## V. ARGUMENT

### A. Injunctions Under The Public Records Act

The Public Records Act (PRA) requires state agencies to produce all public records upon request, unless the record falls within a PRA exemption or other statutory exemption. RCW 42.56.070(1); *PAWS*, 125 Wn.2d at 250. To the extent exempt information can be deleted or redacted from the record sought, the remainder of the record must be produced. RCW 42.56.210(1). The PRA is “a strongly worded mandate for broad disclosure of public records.” *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978). Accordingly, the PRA is to be “liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.” *Id.* See also, RCW 42.56.030.

Under the PRA injunction statute, RCW 42.56.540, the person to whom the record pertains may seek a judicial determination that the records are exempt from production when the agency intends to produce the records. Not only must the person seeking to enjoin disclosure demonstrate that “examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions” but he or she must also

demonstrate that an appropriate statutory exemption applies to the challenged records. RCW 42.56.540; *See Morgan v. City of Fed. Way*, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009); *See also Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 757, 174 P.3d 60 (2007); *PAWS*, 125 Wn.2d at 257. The party seeking to enjoin production bears the burden of proof. *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

**B. Under RCW 43.70.050(2), DOH Is Prohibited From Disclosing Data That Would Identify A Patient Or Health Care Provider**

The PRA provides that records may be withheld under a PRA exemption or other statutory exemption. RCW 42.56.070(1). Under RCW 43.70.050(1), DOH is required to create an ongoing program of data collection and, as part of this program, collects pregnancy termination data. In addition to establishing the data collection program, RCW 43.70.050 addresses disclosure of the health-related data that DOH receives. First, RCW 43.70.050(2) provides:

The secretary's access to and use of all data shall be in accordance with state and federal confidentiality laws and ethical guidelines. Such data in any form where the patient or provider of health care can be identified shall not be disclosed, subject to disclosure according to chapter 42.56 RCW, discoverable or admissible in judicial or administrative proceedings.

Second, RCW 43.70.050(5) provides:

Any data, research, or findings may also be made available to the general public, including health professions, health associations, the governor, professional boards and regulatory agencies and any person or group who has allowed the secretary access to data.

Whenever possible, statutes are to be read together to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes. *State ex rel. Peninsula Neighborhood Ass'n v. Washington State Dep't of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000), *citing*, *Employco Personnel Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991) (quoting *State v. O'Neill*, 103 Wn.2d 853, 862, 700 P.2d 711 (1985)). Reading RCW 43.70.050(2) and (5) together indicates that the data are generally available on request but may not be disclosed when disclosure would identify a patient or health care provider. In this manner, the statute balances DOH's need for the data, the public's access to the data, and the sensitivity of the information.

Accordingly, the regulation regarding disclosure of pregnancy termination data, WAC 246-490-110, states:

To assure accuracy and completeness in reporting, as required to fulfill the purposes for which abortion statistics are collected, information received by the board or the department through filed reports or as otherwise authorized, shall not be disclosed publicly in such a manner as to identify any individual without their consent, except by subpoena, nor in such a manner as to identify any facility

except in a proceeding involving issues of certificates of approval.

Clearly, the law prohibits producing the data where the patient or provider “can be identified.” However, neither the statute nor the rule defines “identified” leaving the statute open to interpretation. The question for the court is to what extent RCW 43.70.050 and WAC 246-490-110 afford protection from production; in other words, how much of the abortion data extracts are exempt from production because production would identify specific patients or health care providers.

In this case, Appellant requested patient data for seven specific facilities that provide abortion services. This kind of “targeted” request means that the service provider will necessarily be identified if any of the requested record is produced. There is also a risk that individual patients could be identified. Thus, this case involves two contexts in which the question of the scope of the protection from disclosure under RCW 43.70.050(2) arises. One is with respect to the targeted nature of the request. The other concerns the fact that the records pertain to abortion services provided to individual patients and contain individual patient health care information.

When determining the meaning of undefined terms, courts “will consider the statute as a whole and provide such meaning to the term as is in harmony with other statutory provisions.” *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709 (2001). In addition, as discussed in subsection F below, courts may look to interpretations of analogous federal laws for guidance on issues of statutory construction.

**C. The Courts Have Not Yet Addressed Whether A Targeted Request For Abortion Facility Information Is Exempt From Disclosure Under RCW 43.70.050**

Appellant correctly argues that on their face the pregnancy termination data extracts do not identify any particular facility. He then relies on two Supreme Court cases that held, when interpreting other statutory provisions, that mere contextual association of records with a targeted request cannot justify total withholding of records under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 414, 259 P.3d 190 (2011); *See also, Koenig v. City of Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). The case he most relies on is *Koenig v. City of Des Moines, supra*.

In *Koenig*, the requester sought records concerning a child victim of sexual assault and the request identified the child’s name and the case number. The city attempted to withhold the records in their entirety citing RCW 42.56.240(5) (formerly RCW 42.17.31901) which provides:

Information revealing the identity of child victims of sexual assault who are under age eighteen is confidential and not subject to public disclosure. Identifying information means the child victim's name, address, location, photograph, and in cases where the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator.

The city argued that production of even redacted records in response to a request identifying the child by name would violate the privacy protections in RCW 42.56.240(5). Thus, only a total withholding of records would be appropriate. *Koenig*, 158 Wn.2d at 182. The court rejected the city's argument holding that the records could not be withheld in their entirety and had to be produced with redactions applied only to those specific identifying items enumerated in the statute.<sup>2</sup> *Id.* at 183-84.

The Supreme Court has more recently addressed the issue of targeted requests in the case of *Bainbridge Island Police Guild, supra*. In *Bainbridge Island*, a citizen accused a police officer of sexual misconduct during the course of a traffic stop. Two agencies investigated the allegations and both issued investigative findings that the allegations were unsubstantiated and the officer was ultimately exonerated. Subsequently, several requestors sought records associated with the investigations and

---

<sup>2</sup> Notably, the Supreme Court also reversed the Court of Appeals' *sua sponte* effort to protect the child's privacy interests by ordering the redaction of sexually-explicit information. The court held that the details of the crime, including sexually-explicit information, are of legitimate concern to the public and must be disclosed. *Koenig*, 158 Wn.2d at 187.

identified the officer by name. The officer sought to enjoin the release of the records arguing that any production would necessarily reveal his identity in association with unsubstantiated allegations of sexual misconduct and violate his right to privacy under RCW 42.56.230(3).<sup>3</sup>

The court held that despite the targeted nature of the requests, the records had to be produced with the officer's identity redacted. *Bainbridge Island*, 172 Wn.2d at 418. In reaching its conclusion, the court favorably cited *Koenig v. City of Des Moines, supra* and relied on similar reasoning:

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. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production.

*Bainbridge Island*, 172 Wn.2d at 414. See also *Predisik v. Spokane School District No. 81*, 319 P.3d 801 (2014).

No court has yet addressed the question of targeted requests in the context of the broad exemption under RCW 43.70.050(2). However, based

---

<sup>3</sup> The officer relied on the rule established in *Bellevue John Does 1-11 v. Bellevue Sch. Dist. # 405*, 164 Wn.2d 199, 189 P.3d 139 (2008) holding that teachers enjoyed a right to privacy under RCW 42.56.230(3) in the withholding of their identity in connection with unsubstantiated allegations of sexual misconduct.

on existing case law, when DOH received the Appellant's request, DOH narrowly construed the exemption prohibiting disclosure of provider identifying information under RCW 43.70.050(2). Having said that, DOH does not necessarily disagree with the superior court's ruling which gives effect to the plain language of the statute prohibiting disclosure of "such data *in any form* where the patient or *provider of health care* can be identified." RCW 43.70.050(2).<sup>4</sup>

Specifically, unlike in *Koenig*, the statute that prohibits release of identifying information does not enumerate specific identifying items, thus leaving it open to a broader interpretation in terms of what is considered identifying information. When facility information is requested by name, any production of the records necessarily identifies the facility providing the abortion services. This is arguably inconsistent with the confidentiality protections provided by RCW 43.70.050(2) and WAC 246-490-110.

**D. Patient Health Care Information That Can be Readily Associated With The Identity Of A Patient Is Protected From Disclosure**

The second context in which the question of the scope of the protection provided under RCW 43.70.050(2) arises is with respect to the

---

<sup>4</sup> Whether health care information that is responsive to a targeted request is readily associated with a patient's identity is an issue that the courts have not yet addressed. While there may be an argument that a targeted request for health care information renders the requested document readily associated with the patient's identity under the Uniform Health Care Information Act, the question of a targeted request for a patient's health care information is not raised in this case.

patient health care information contained in the abortion data extracts. Under RCW 42.56.360(2), the PRA provides that “[c]hapter 70.02 RCW applies to public inspection and copying of health care information of patients.” Chapter 70.02 RCW, the Uniform Health Care Information Act, is Washington’s law regarding confidentiality of patients’ health care information. According to the statute’s legislative findings, “[h]ealth care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.” RCW 70.02.005(1).

RCW 70.02.020 prohibits disclosure of health care information unless the patient authorizes disclosure or disclosure falls under an exception to the prohibition under RCW 70.02.050. Under one of these exceptions, RCW 70.02.050(2)(a), health care information must be disclosed to “federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information; when needed to determine compliance with state or federal licensure, certification or registration rules or laws; or when needed to

protect the public health[.]”<sup>5</sup> The statute balances the prohibition against unauthorized disclosure with the recognition that public health authorities require health care information in order to protect public health. This allows DOH, for example, to regulate health care providers and to conduct public health surveillance and data collection programs. It further allows DOH to share health care information with its public health partners. These efforts help to ensure that public health is protected.<sup>6</sup>

Under RCW 70.02.010(7), “health care information” is defined as:

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, including a patient's deoxyribonucleic acid and identified sequence of chemical base pairs. The term includes any required accounting of disclosures of health care information. (Emphasis added).

Accordingly, records containing health care information are generally considered partially exempt from public inspection. *See generally,*

---

<sup>5</sup> Effective July 14, 2014, RCW 70.02.050(2)(a) will require disclosure to “federal, state, or local public health authorities, to the extent the health care provider is required by law to report health care information; when needed to determine compliance with state or federal licensure, certification or registration rules or laws, or to investigate unprofessional conduct or ability to practice with reasonable skill and safety under chapter 18.130 RCW. Any health care information obtained under this subsection is exempt from public inspection and copying pursuant to chapter 42.56 RCW”. RCW 70.02.050(2)(b) will require disclosure “[w]hen needed to protect the public health.” While subsection (a) includes an exemption from disclosure, it refers to “health care information,” thus, pointing back to the definition of the term under RCW 70.02.010(7).

<sup>6</sup> The ability to acquire health care information and to share it with public health partners is very important to DOH’s ability to meet its mandate to work to ensure public health protection. Coordinating the acquisition and sharing of health care information helps to ensure that public health is protected both individually and state-wide.

*Prison Legal News, Inc., v. Dep't of Corr.*, 154 Wn.2d 628, 115 P.3d 316 (2005). They may not, however, be entirely exempt if redactions can sufficiently protect patient identity.

In *Prison Legal News*, the agency responded to a request seeking records containing health care information by redacting “all references to medical information concerning inmates, including names, treatments, medical conditions, etc. . . .” *citing* RCW 70.02.020. *Prison Legal News*, 154 Wn.2d at 644. The court held that this blanket approach in redacting all health care information violated the PRA and conflicted with the requirement to construe exemptions narrowly. *Id.* at 645. The court went on to state:

Further, the broad mandate favoring disclosure under the [PRA] requires the agency demonstrate that each patient’s health care information is “readily associated” *with that patient* in order to withhold the health care information under RCW 70.020.010[7]. Where there is a dispute over whether health care information is readily identifiable with a specific patient even when the patient’s identity is not disclosed, the trial court can use in camera review should it need to examine unredacted records to make its independent determination.

*Id.* at 645-46 (internal citation omitted).

In this case, the Department made its best effort to ensure that the data extract records did not contain identifiers that could be “readily associated” with a particular patient. Subsequently, Respondent clinics

expressed concern that other information within the records could be associated with particular patients. In response, the superior court conducted an *in camera* review of the data extracts. The court reviewed the records both as the Department proposed to release them to Appellant and as Respondent clinics argued they should look if they were going to be released (with city of residence, county of residence, and termination date redacted). The court concluded not only that the records were exempt from production under the abortion data regulatory framework but went on to rule that the three specified categories of patient information were exempt from disclosure under the Uniform Health Care Information Act by analogy to the federal Health Insurance Portability and Accountability Act (HIPAA).

**E. Information Contained In The Requested Records May Be Readily Associated With The Identity Of Specific Patients When HIPAA Is Applied By Analogy**

Respondent clinics urged an interpretation of the Uniform Health Care Information Act based on application by analogy of the federal HIPAA to implementation of the Uniform Health Care Information Act. As described in RCW 70.02.010(7), health care information is information that (1) identifies or can readily be associated with the identity of a patient and (2) directly relates to the patient's health care. The Uniform Health Care Information Act does not define what the phrase "can be readily

associated with the identity of a patient” means. In such instances, courts may look to interpretations of analogous federal laws for guidance on issues of statutory construction. *Anaya v. Graham*, 89 Wn. App. 588, 950 P.2d 16 (1998) (employment discrimination); *Forbes v. City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (2012) (because the PRA closely parallels FOIA, interpretations of that act can be helpful in construing the PRA); *but see Francis v. Washington State Dept. of Corrections*, 178 Wn. App. 42, 313 P.3d 457 (2013) (courts do not consider FOIA cases in interpreting PRA provisions that do not correspond to analogous FOIA provisions). DOH is not a covered entity under HIPAA, but HIPAA’s privacy requirements may be applied by analogy.<sup>7</sup>

Congress passed HIPAA in 1996. A portion of HIPAA’s implementing regulations became known as the Privacy Rule. *Privacy Year in Review: Developments in HIPAA*, 1 I/S: J.L. & Pol’y for Info. Soc’y 347 (2005), 45 CFR Pt. 164, Subpart E. The Privacy Rule prohibits disclosure of “individually identifiable information.” This information is defined as information that relates to an individual’s health care and “[t]hat identifies the individual; or [w]ith respect to which there is a reasonable basis to believe the information can be used to identify the individual.” 45 CFR §

---

<sup>7</sup> The Department of Health Center of Health Statistics is not a covered entity. As an agency, DOH is considered a hybrid entity under HIPAA because it houses one program, not involved in this case, whose functions make it a covered entity.

160.103. Section 164.514(a) provides the HIPAA standard for de-identification of protected health information. Under the “safe harbor” method of de-identification, 18 pieces of information are considered “information that identifies the individual” and are removed. 45 CFR 164.514(b)(2)(1). The 18 identifiers are set forth in Appendix A.<sup>8</sup>

At the same time as it sought to preserve the confidentiality of an individual’s protected health information, HIPAA also recognized the need to balance protecting individual health care information with the need to ensure public health protection. 42 USC § 1320d-7(b), 45 CFR § 164.512(b).<sup>9</sup> Like the Uniform Health Care Information Act, it does not require patient authorization of disclosure for public health activities.<sup>10</sup> *Id.* Given the similarities between the Uniform Health Care Information Act and HIPAA, HIPAA’s implementing rule may offer guidance in terms of

---

<sup>8</sup> In addition, the covered entity must not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. 45 CFR § 164.514(a)(2)(ii). Similarly, effective July 14, 2014, the Uniform Health Care Information Act will include a definition of “de-identified” which states that “de-identified” means health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual. RCW 70.02.010(5).

<sup>9</sup> 42 USC § 1320d-7(b) provides that “[n]othing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.”

<sup>10</sup> Under 45 CFR § 164.512(b)(1)(i) patient health information may be used and disclosed “for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions[.]”

what is considered a “readily associated” identifier under the Uniform Health Care Information Act. This, in turn, may provide guidance as to what is considered patient identifying information under RCW 43.70.050(2) and WAC 246-490-110. While there may be situations in which not all of the HIPAA identifiers would be readily associated identifiers, taking them into consideration when a request for health care information is made may help ensure that the patient’s privacy is fully protected.

**F. RCW 42.56.050 Has No Application To This Case**

Appellants argue that release of the requested records would not constitute an invasion of privacy under RCW 42.56.050. However, RCW 42.56.050 has no application to this case. RCW 42.56.050 sets forth the test for determining when the right to privacy is violated, but does not explicitly identify when the right to privacy exists. *Bainbridge Island Police Guild*, 172 Wn.2d at 398. By its own terms, RCW 42.56.050 is merely a definition and does not provide a freestanding exemption to prevent invasions of privacy:

The provisions of this chapter dealing with the right to privacy in certain public records do not create any right of privacy beyond those rights that are specified in this chapter as express exemptions from the public's right to inspect, examine, or copy public records.

*See also, Amren v. City of Kalama*, 131 Wn.2d 25, n.9, 929 P.2d 389 (1997) (noting that the legislature amended RCW 42.56.050 (formerly RCW 42.17.255) to explicitly supersede the Supreme Court's interpretation that a general privacy exemption existed within the PRA as articulated in *In re Rosier*, 105 Wn.2d 606, 717 P.2d 1353 (1986)). This court, therefore, need not consider the Appellant's arguments related to RCW 42.56.050.

## VI. CONCLUSION

DOH has an obligation to protect health care information that can identify patients or health care providers. DOH likewise has a mandate to comply with the disclosure requirements of the Public Records Act. The Respondent clinics have expressed their concern that the records should not be produced because they contain identifying information. The superior court agreed with the clinics. If this court also agrees, then the records

//

//

//

//

//

//

should continue to be enjoined from disclosure. If this court disagrees, then DOH is prepared to release the records subject to any restrictions placed on their release.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of May, 2014.

ROBERT W. FERGUSON  
Attorney General



LILIA LOPEZ, WSBA #22273  
Assistant Attorney General  
PO Box 40109  
Olympia, WA 98504-0109  
(360) 664-4967  
OID# 91030

## Appendix A

(A) Names	
(B) All geographic subdivisions smaller than a state, including street address, city, county, precinct, ZIP code, and their equivalent geocodes, except for the initial three digits of the ZIP code if, according to the current publicly available data from the Bureau of the Census:  (1) The geographic unit formed by combining all ZIP codes with the same three initial digits contains more than 20,000 people; and  (2) The initial three digits of a ZIP code for all such geographic units containing 20,000 or fewer people is changed to 000	
(C) All elements of dates (except year) for dates that are directly related to an individual, including birth date, admission date, discharge date, death date, and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older	
(D) Telephone numbers	(L) Vehicle identifiers and serial numbers, including license plate numbers
(E) Fax numbers	(M) Device identifiers and serial numbers
(F) Email addresses	(N) Web Universal Resource Locators (URLs)
(G) Social security numbers	(O) Internet Protocol (IP) addresses
(H) Medical record numbers	(P) Biometric identifiers, including finger and voice prints
(I) Health plan beneficiary numbers	(Q) Full-face photographs and any comparable images
(J) Account numbers	(R) Any other unique identifying number, characteristic, or code, except as permitted by paragraph (c) of this section [Paragraph (c) is presented below in the section "Re-identification"]
(K) Certificate/license numbers	

NO. 71039-7

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

JONATHAN BLOEDOW, an  
individual,

Appellant,

v.

PLANNED PARENTHOOD OF THE  
GREAT NORTHWEST, FEMINIST  
WOMEN'S HEALTH CENTERS d/b/a  
CEDAR 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.

CERTIFICATE OF  
SERVICE

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 MAY -5 AM 11:14

I, MARILYN WHITFELDT, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On May 5, 2014, I served a true and correct copy of this **STATE OF WASHINGTON DEPARTMENT OF HEALTH'S RESPONSE TO BRIEF OF APPELLANT JONATHAN BLOEDOW** and this

**CERTIFICATE OF SERVICE** by electronic mail and U.S. mail service

to the following parties of this case:

DANIELLE FRANCO-MALONE  
KATHLEEN PHAIR BARNARD  
SCHWERIN CAMPBELL BARNARD  
IGLITZIN & LAVITT, LLP  
18 WEST MERCER ST., SUITE 400  
SEATTLE, WA 98119-3971  
Email: [franco@workerlaw.com](mailto:franco@workerlaw.com)  
Email: [barnard@workerlaw.com](mailto:barnard@workerlaw.com)

US Mail Postage Prepaid  
via Consolidated Mail Svc

Email

LAURA EINSTEIN  
PLANNED PARENTHOOD OF  
THE GREAT NW  
2001 EAST MADISON ST.  
SEATTLE, WA 98122  
Email: [laura.einstein@ppgnw.org](mailto:laura.einstein@ppgnw.org)

US Mail Postage Prepaid  
via Consolidated Mail Svc

Email

CATHERINE GLENN FOSTER  
ALLIANCE DEFENDING FREEDOM  
801 G STREET NW SUITE 509  
WASHINGTON DC 20001  
Email: [cfooster@alliancedefendingfreedom.org](mailto:cfooster@alliancedefendingfreedom.org)

US Mail Postage Prepaid  
via Consolidated Mail Svc

Email

TODD M. NELSON, WSBA #18129  
NELSON LAW GROUP PLLC  
600 STEWART ST. SUITE 100  
SEATTLE, WA 98101  
Email: [todd@nelsonlawgroup.com](mailto:todd@nelsonlawgroup.com)

US Mail Postage Prepaid  
via Consolidated Mail Svc

Email

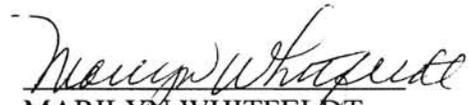
MICHAEL J. NORTON  
ALLIANCE DEFENDING FREEDOM  
7951 E MAPLEWOOD AVE, SUITE 100  
GREENWOOD VILLAGE, CO 80111  
Email: [mjnorton@alliancedefendingfreedom.org](mailto:mjnorton@alliancedefendingfreedom.org)

US Mail Postage Prepaid  
via Consolidated Mail Svc

Email

I certify under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

Dated this 5th day of May, 2014, at Tumwater, Washington.

  
MARILYN WHITFELDT  
Legal Assistant 3