

**NO. 48000-0-II
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

**Appeal from the Superior Court for Thurston County
Case No. 15-2-00094-0**

**DONNA ZINK,
Defendant/Appellant,**

v.

**JOHN DOE P; JOHN DOE Q; JOHN DOE R; and JOHN DOE S,
as individuals and on behalf of others similarly situated.**

Plaintiffs/Respondents,

and

**THURSTON COUNTY, a municipal organization, and its departments the THURSTON COUNTY
PROSECUTING ATTORNEY and THURSTON COUNTY SHERIFF,**

Defendants/Respondents.

BRIEF OF THURSTON COUNTY RESPONDENTS

JON TUNHEIM
PROSECUTING ATTORNEY

ELIZABETH PETRICH, WSBA #18713
Chief Civil Deputy Prosecuting Attorney

JOHN C. SKINDER, WSBA #26224
Senior Deputy Prosecuting Attorney

Thurston County Prosecuting Attorney's Office
Civil Division – Bldg. No. 5
2000 Lakeridge Drive S.W.
Olympia, WA 98502
Phone: (360) 786-5574 Fax: (360) 709-3006
Of Attorneys for Thurston County

September 7, 2016

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION.....	1
II. COUNTER STATEMENT OF THE FACTS.....	1
III. RESPONSE.....	3
A. SSOSA and SSODA Evaluations Are Not Health Care Information Under Ch. 70.02 RCW.....	3
B. SSODA Evaluations May Be Released Provided that the Identifying Information of the Juvenile and the Juvenile’s Family is Redacted.....	6
IV. CONCLUSION.....	7

TABLE OF AUTHORITIES

<u>STATE CASES</u>	<u>PAGE</u>
<i>Deer v. DSHS</i> , 122 Wn. App. 84, 93 P.3d 195 (2004).....	6, 7
<i>In re Meyer</i> , 142 Wn.2d 608, 16 P.3d 563, (2001).....	4, 5
<i>John Doe v. Washington State Patrol</i> , 185 Wn.2d 363, ___ P.2d. ___ (2016).....	3
<i>Koenig v. Thurston County</i> , 175 Wn.2d 837, 287 P.3d 523, 1 (2012).....	5
<i>State v. A.G.S.</i> , 182 Wn.2d 273, 340 P.3d 830 (2014).....	7
<i>State v. Sanchez</i> , 177 Wn.2d 835, 306 P.2d 935.....	6
<i>State v. Ward</i> , 123 Wn.2d 488, 870 P.2d 295 (1994).....	5
 <u>STATUTES</u>	
ch. 13.50 RCW.....	6, 7
ch. 42.56 RCW.....	2
ch. 70.02 RCW.....	1, 3, 6
RCW 4.24.550.....	1, 3
RCW 4.24.550(7)	5
RCW 9.94A.670.....	4
RCW 9.94A.670(3) and (4).....	4
RCW 10.97.010... ..	5
RCW 10.97.050(1)	5
RCW 13.40.162.....	4
RCW 13.40.162(2)(a)	6
RCW 13.40.162(2) and (3).....	4
RCW 13.50.050... ..	3
RCW 13.50.050(5)	7
RCW 42.56.070(1).....	6
RCW 70.02.010.....	4
RCW 70.02.020.....	4

I. INTRODUCTION

Mrs. Zink filed a Notice of Appeal on September 4, 2015 challenging the four orders of Thurston County Superior Court Judge Carol Murphy.¹ Thurston County agrees with Mrs. Zink that (1) the adult Special Sex Offender Sentencing (“SSOSA”) and juvenile Special Sex Offender Disposition Alternative (“SSODA”) evaluations should be released because these evaluations are not health care records under ch. 72.02 RCW; and (2) the juvenile SSODA evaluations may be released if redacted to protect the identity of the juvenile and the juvenile’s family. Thurston County will not be taking a position or responding to Mrs. Zink’s assignments of error related to Judge Murphy’s orders granting permission to proceed in pseudonym and certifying class action.

II. COUNTER STATEMENT OF THE FACTS

The Thurston County Sheriff’s Office is the local law enforcement agency tasked with gathering and releasing sex offender registration information pursuant to RCW 4.24.550. Both the Thurston County Prosecutor’s Office and the Thurston County Sheriff’s Office retain SSOSA evaluations and SSODA evaluations as part of their criminal files. On October 3, 2014, Mrs. Zink made a public records request to Thurston County for (a) all SSOSA evaluations; (b) all SSODA evaluations; (c) victim impact statements for sex offenders; (d) registration forms for all sex

¹ 1) Order on Summary Judgment (CP 665-671); 2) Order Granting Plaintiffs’ Motion for Preliminary Injunction (CP 674-680); 3) Order Granting Plaintiffs’ Motion for Permission to Proceed in Pseudonym (CP 682-684); and 4) Order Certifying Class (CP 686-689).

offenders registered in Thurston County; and (e) list and/or data base of all registered sex offenders registered in Thurston County (together “Requested Records”). CP 144.

Thurston County and Mrs. Zink engaged in a series of communications attempting to clarify and, if possible, streamline this extremely complex request. Mrs. Zink and Thurston County were able to reach agreement on some details of her request but not on others. The County informed Mrs. Zink that Thurston County would provide notice to all of the registered sex offenders in Thurston County as of a mutually agreed date of October 21, 2014 pursuant to ch. 42.56 RCW. In December 2014, notification was mailed to nearly 700 registered sex offenders in Thurston County advising them of Mrs. Zink’s public record request and providing them an opportunity to seek to enjoin Thurston County from releasing these records. CP 357.

On January 14, 2015, the Plaintiffs filed a class action complaint for declaratory and injunctive relief on behalf of all Level I Sex Offenders seeking to enjoin Thurston County from releasing their sex offender registration information and to enjoin Thurston County from releasing any of their SSOSA or SSODA records. CP 7-20.

On January 23, 2015, a hearing was held before the Honorable Judge Murphy in the Thurston County Superior Court. The Plaintiffs and Thurston County were present for the hearing. Mrs. Zink did not attend the hearing. After reviewing the written briefs and hearing oral argument, the Superior Court entered

an Order Certifying Class (CP 87-90), an Order Granting Plaintiffs' Motion for Permission to Proceed in Pseudonym (CP 91-92), and an Order Granting Plaintiffs' Motion for Preliminary Injunction (CP 80-86). On August 31, 2015, the Superior Court entered an Order Granting Plaintiffs' Motion for a Permanent Injunction which enjoined the release of sex offender registration records and the SSOSA and SSODA evaluations pursuant to the following "other statute" exemptions: (1) RCW 4.24.550 (Sex Offenders and Kidnapping Offenders – Release of Information to Public – Website); (2) ch. 70.02 RCW (Medical Records – Health Care Information Access and Disclosure; and (3) RCW 13.50.050 (records relating to commission of juvenile offense – maintenance of, access to, and destruction). CP 653-69.

On April 7, 2016 the Washington State Supreme Court determined that RCW 4.24.550 was not an "other statute" exemption, exempting registration records or information under the Public Records Act. *John Doe A v. Wash. State Patrol*, 185 Wn.2d 363 (2016). The remaining issues for this Court to decide are whether or not the SSOSA and SSODA evaluations are exempt as medical records pursuant to ch. 70.02 RCW and/or juvenile records pursuant to RCW 13.50.050.

III. RESPONSE

A. SSOSA and SSODA Evaluations Are Not Health Care Information Under Ch. 70.02 RCW.

Thurston County agrees with Mrs. Zink that SSOSA and SSODA evaluations are not health care information and, therefore, must be disclosed. 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. RCW 70.02.010. While the information in these SSOSA and SSODA evaluations may be sensitive information, these evaluations are proffered by individuals when they have been charged with a sex offense and hope for a more lenient community-based sentence. *See* RCW 9.94A.670(3) and (4) and RCW 13.40.162(2) and (3). These evaluations do not appear to fall within the definition of health care information because they relate to criminal sentencing, not the provision of health care.

It is true that pursuant to RCW 70.02.020, "a health care provider ... may not disclose health care information about a patient to any other person without the patient's written authorization." However, with regard to the requested records, Thurston County is not a health care provider. Further, as a practical matter, a SSOSA or SSODA evaluation is provided voluntarily by the defendant or respondent respectively in the hopes of receiving a favorable sentencing alternative.

These evaluations are used by the courts in determining the appropriate sentence for a sex offense in adult or juvenile court. *See* RCW 9.94A.670 and RCW 13.40.162. These court hearings occur in open court across the State of Washington. These hearing are open and public hearings.

In *In re Meyer*, the court examined whether sex offenders have a liberty interest in the information disclosed under the sex offender registration act. In rejecting this argument, the court stated:

The information disclosed to the public is largely, if not entirely, available from public sources like the court files on these individuals

as well as their correctional release plans. The information disclosed is not subject to any specific confidentiality protection. See RCW 10.97.010; RCW 4.24.550(7). Conviction records may be released without restriction. RCW 10.97.050(1); *Ward*, 123 Wn.2d at 502.

Moreover, the public interest in information about potentially dangerous individuals in local neighborhoods is legitimate. This court, the federal courts, and the Legislature all have recognized the validity of Washington's sex offender registration laws and the important role registration and community notification play in the protection of the public . . .

In re Meyer, 142 Wn.2d 608, 620-21, 16 P.3d 563, 569 (2001).

Interestingly, in *Koenig v. Thurston County*, the court ruled that neither a victim impact statement nor a SSOSA evaluation is an investigative record and, therefore, was subject to disclosure under the PRA. *Koenig v. Thurston County*, 175 Wn.2d 837, 849, 287 P.3d 523, 529 (2012), reconsideration denied (2012). In his dissent, Justice Chambers expressed concerns about the sensitivity of the information contained in these SSOSA evaluations. He stated:

Like the VIS, serious privacy concerns are implicated by the release of a SSOSA evaluation to the public. These SSOSA evaluations contain, among other things: a detailed sexual history section; mental health history; medical history; drug and alcohol history; a social history section which may contain details of "abuse the individual may have suffered in the past, including physical, sexual, and emotional abuse;" results of a polygraph examination, which may be "extremely detailed" regarding past and current sexual practices; and results of a phallometric test that measures the defendant's arousal response to a variety of pornography...

. . . This dissent does not have the force of law. Only the legislature can amend the act and establish appropriate protections. I urge the legislature to do so.

Koenig v. Thurston County, 175 Wn.2d 837, 854-855, 287 P.3d 523, 531 (2012).

The dissent of Justice Chambers is important because it is largely based on the concern that the SSOSA evaluation contained material that would be included in the definition of private health care information. The majority of the court did not adopt this reasoning and ruled that SSOSA evaluations must be provided pursuant to a public records request. The Legislature has not amended the public records act to protect the information contained in SSOSA evaluations as suggested by Justice Chambers.

In *State v. Sanchez*, 177 Wn.2d 835, 306 P.2d 935, the Supreme Court addressed the juvenile's privacy rights in SSODA evaluations:

A SSODA evaluation may contain sensitive, privileged, or embarrassing information, including details regarding a juvenile's social situation or alleged deviancy behaviors. *See* RCW 13.40.162(2)(a). Therefore, indiscriminately releasing such an evaluation to the public, or to an agency without need or authority to review it, could raise legitimate concerns.

Id., at 846. The court, later in its opinion, explicitly declined to address what would happen if there was a PRA request to the local sheriff's office for the SSODA evaluation; they declined to address this issue because there was no such PRA request in the *Sanchez* case and, therefore, it was not properly before the court. Finally, the court stated that ch. 70.02 RCW did not protect the disclosure of the SSODA evaluations under the facts of *Sanchez*. *Id.*, at 848-49.

B. SSODA Evaluations May Be Released Provided that the Identifying Information of the Juvenile and the Juvenile's Family is Redacted.

The Superior Court ruled that ch. 13.50 RCW is an "other statute" under RCW 42.56.070(1) that governs the disclosure of juvenile records. *See Deer v.*

DHSH, 122 Wn. App. 84, 94 (2004) (holding that ch. 13.50 RCW supplements a former version of the Public Records Act, as an “other statute”). CP 657. The Superior Court also took notice that the Supreme Court in *State v. A.G.S.* 182 Wn.2d 273, 340 P.3d 830 (2014) ruled that SSODA’s are not part of the official juvenile court file. CP 658. Finally, the Superior Court acknowledged that RCW 13.50.050(5) provides that “information not in an official juvenile court file concerning a juvenile or a juvenile’s family may be released to the public only when that information could not reasonably be expected to identify the juvenile or the juvenile’s family.” CP 658. RCW 13.50.050(5) clearly indicates that such identifying information could be redacted, and, if redacted, the remainder of the SSODA evaluation could be provided to the public.

IV. CONCLUSION

For the reasons stated above the SSOSA and SSODA evaluations are subject to disclosure under the Public Records Act and should be released to Mrs. Zink.

Respectfully submitted this 7th day of September, 2016.

JON TUNHEIM
PROSECUTING ATTORNEY

/s/ Elizabeth Petrich

Elizabeth Petrich, WSBA #18713
Chief Civil Deputy Prosecuting Attorney
Of Attorneys for Thurston County

A copy of this document was filed using the Court of Appeals Electronic Filing System. The Court's filing system will provide copies to the parties as indicated below:

Salvador A. Mungia, WSBA #14807
Reuben Schutz, WSBA #44767
Gordon Thomas Honeywell LLP
1201 Pacific Ave., Ste 2100
Tacoma, WA 98401-1157
Email: smungia@gth-law.com
Email: rschutz@gth-law.com
Co-Counsel for Plaintiffs

Sara Dunne, WSBA #34369
Vanessa Hernandez, WSBA #42770
ACLU of Washington
901 Fifth Ave, Ste 630
Seattle, WA 98164
Email: dunne@aclu-wa.org
Email: vhernandez@aclu-wa.org
Co-Counsel for Plaintiffs

Donna Zink
109 N. Rowell Avenue
Mesa, WA 99343
Email: dzink@centurytel.net
Pro se Requester/Defendant

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.

Date: 06/07/16

Signature: .s. Linda Olsen

THURSTON COUNTY PROSECUTOR

September 07, 2016 - 3:24 PM

Transmittal Letter

Document Uploaded: 1-480000-Respondents' Brief.pdf

Case Name: Zink v. Doe, et al.

Court of Appeals Case Number: 48000-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Brief of Respondents Thurston County, Thurston County Prosecuting Attorney and Thurston County Sheriff only.

Sender Name: Linda L Olsen - Email: olsenl@co.thurston.wa.us

A copy of this document has been emailed to the following addresses:

smungia@gth-law.com

rschutz@gth-law.com

dzink@centurytel.net

dunne@aclu-wa.org

vhernandez@aclu-wa.org

petrice@co.thurston.wa.us