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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 33064-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOHN DOE,
Appellant,

v.

BENTON COUNTY PROSECUTING ATTORNEY,
Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-2-01916-2

BRIEF OF RESPONDENT

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I. INTRODUCTION

John Doe has inexplicably linked his request to seal records associated with his petition for relief of the requirement to register as a sex offender with a public records request made by Donna Zink for a list of all level one sex offenders in Benton County. Ms. Zink's request has generated four cases currently stayed before this Court (Cause Nos. 32302-1-III, 32303-0-III, 32304-8-III and 325920-III) pending resolution by the Washington Supreme Court of a King County case, *John Doe A, et al, v. Washington State Patrol, et al,* No. 90413-8, with identical issues. The Benton County Prosecuting Attorney's Office (BCPA) is at a loss for how a motion to seal records relating to John Doe's request to be relieved of the requirement to register as a sex offender is related to a public records request made by a member of the public for a list of *all* level one sex offenders in the County. The judicial determination of whether records should be sealed from the public is separate and distinct from potential exemptions under the Public Records Act (PRA). The sealing of records invokes a much higher constitutional standard which simply is not present in the analysis of exemptions under the PRA. In short, records that may be exempt under the PRA may not meet the heightened criteria of sealing.

II. ARGUMENT

A. THE PUBLIC HAS A BROAD, CONSTITUTIONALLY-PROTECTED RIGHT TO OPEN COURT PROCEEDINGS THAT GENERALLY OVERRIDES INDIVIDUAL INTERESTS.

1. Standard of Review

This Court's review of the trial court's decision to seal records is for abuse of discretion. *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004).

2. The Washington State Constitution Mandates Courts Start With a Presumption of Openness When Reviewing a Request To Seal.

In determining whether court records may be sealed from public disclosure, courts must start with the presumption of openness. *Hundtofte v. Encarnación*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014) (quoting *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005)). Washington Constitution, article 1, section 10, states, "Justice in all cases shall be administered openly, and without unnecessary delay." Compliance with the constitutional provision article 1, section 10, is mandatory.

John Doe argues that because records that identify him as a sex offender have been enjoined from release in a separate matter, his petition for relief from registration, and any accompanying orders releasing him from the requirement, should be sealed. However, the public has a significant interest in knowing what individuals are removed from the sex offender registration list, as well as what factors the government used to make that determination. *See Rufer,* 154 Wn.2d at 542 ("Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government . . . .") (quoting *Allied Daily Newspapers of Wash. v. Eikenberry,* 121 Wn.2d 205, 211, 848 P.2d 1258 (1993)).

BCPA agrees that the public's right of access is not absolute. It may, in particular, be outweighed by the necessity of ensuring a criminal defendant's right *to a fair trial. Allied Daily Newspapers*, 121 Wn.2d at 210. But when the proposed grounds or need for closing a proceeding or sealing a record is based on a right other than the accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right. *Id.*, citing *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982) (articulating five-part test). John Doe has failed to make that showing here.

B. JOHN DOE HAS NOT SHOWN A "SERIOUS AND IMMINENT THREAT" TO A PERSONAL PRIVACY INTEREST THAT OUTWEIGHS THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS TO COURT FILES.

1. Mandatory *Ishikawa* Factors.

In recognition of the broad constitutional protection of the public's right of access to court files, a trial court must conduct the five-part individualized analysis articulated in *Ishikawa* before sealing a court record or closing a proceeding. *Dreiling*, 151 Wn.2d at 909 (citing *Ishikawa*, 97 Wn.2d at 36-39). It is up to the *proponent* of sealing to establish that these five factors apply. *Id.*; *accord State v. McEnry*, 124 Wn. App. 918, 924-27, 103 P.3d 857 (2004) (specifically addressing sealing court file).

According to *Ishikawa*, each time restrictions are sought on access to court records or on closing a proceeding, the court must weigh the following five factors:

> (1) The party who seeks to have the court record sealed must demonstrate his need for sealing by stating the interest that gives rise to that need as specifically as possible. *Ishikawa,* 97 Wn.2d at 37. When an interest does not involve a Sixth Amendment right to a fair trial, the quantum of proof necessary is a "serious and imminent threat" to some important interest. *Id.* Unless the

endangered interest involves the right to a fair trial, this burden is borne by the party seeking to infringe the public's right. *Id.*

(2) "Anyone present when the closure (and/or sealing) motion is made must be given opportunity to object to the suggested restriction." *Id.* at 38 (quoting *Federated Publications, Inc., v. Kurtz,* 94 Wn.2d 51, 615 P.2d 440 (1980)). For this opportunity to have meaning, the proponent of sealing must state the grounds for sealing with reasonable specificity for the objectors to have sufficient information to appreciate the damage that would result from free access to the record. *Ishikawa*, 97 Wn.2d at 38.

(3) "The court, the proponents, and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting interests threatened." *Id.* The proponent of sealing bears the burden of proposing effective alternatives if the allegedly endangered interests do not involve the right to a fair trial. *Id.*

(4) The court must then weigh the competing interests of the parties and the public, and consider any alternative method suggested. *Id.*

(5) Lastly, the closure or sealing order " 'must be no broader in its application or duration than necessary to serve its purpose. . . . .' If

the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing." *Id.* at 39, (quoting *Kurtz*, 94 Wn.2d at 64).

Accord In re Dependency of J.B.S., 122 Wn.2d 131, 138, 856 P.2d 694 (1993) (citing *Allied Daily Newspapers*, 121 Wn.2d at 210-11); *State v. Noel*, 101 Wn. App. 623, 628-29, 5 P.3d 747 (2000).

2. The Court Rule at GR 15 Does Not, and Constitutionally Cannot, Dilute or Supplant The Mandatory *Ishikawa* Factors.

Because the public's right of access is not absolute, a trial court can indeed seal court records. *State v. Breazeale*, 144 Wn.2d 829, 840-41, 31 P.3d 1155 (2001); *Noel*, 101 Wn. App. at 627-28; General Rule ("GR") 15. But sealing must still be in accordance with constitutional standards. *McEnry*, 124 Wn. App. at 920, 924-25; *Noel*, 101 Wn. App. at 628-29. That is, the trial court must read GR 15 together with, rather than as an alternative to, the constitutionally-required *Ishikawa* factors. *McEnry*, 124 Wn. App. at 920, 924-25; *Noel*, 101 Wn. App. at 628-29; *see also City of Auburn v. Brooke*, 119 Wn.2d 623, 632, 836 P.2d 212 (1992) ("court rules cannot diminish constitutional rights"). In addition, "even where no party opposes a closure or redaction request, the trial court has an 'independent obligation to safeguard the open administration of justice.' " *Hundtofte v.*

Encarnación, 169 Wn. App. 498, 508, 280 P.3d 513 (2012) (quoting *State v. Duckett*, 141 Wn. App. 797, 808, 173 P.3d 948 (2007)).

GR 15(c)(2), as recently amended, provides in pertinent part that after notice and hearing:

> [T]he [trial] court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:
>
> (A) The sealing or redaction is permitted by statute; or
>
> (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or
>
> (C) A conviction has been vacated; or
>
> (D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or
>
> (E) The redaction includes only restricted personal identifiers contained in the court record; or
>
> (F) Another identified compelling circumstance exists that requires the sealing or redaction.

(original emphasis retained).

In *State v. Waldon*, the court held that "revised GR 15 cannot constitutionally serve as a stand-alone alternative to *Ishikawa*. . . . [but] the

revised rule can be harmonized with *Ishikawa* to preserve its constitutionality." *State v. Waldon*, 148 Wn. App. 952, 966, 202 P.3d 325 (2009). Earlier, in *State v. Duckett*, this Court held that the standard for sealing documents under GR 15 is subject to the constitutional requirement of public records and proceedings set out in *Ishikawa*. *Duckett*, 141 Wn. App. at 808. Consistent with *Waldon* and *Duckett*, the trial court properly construed GR 15 as incorporating the *Ishikawa* factors within its analysis in determining whether the records at issue should be sealed. With that legal framework in mind, the trial court determined the fact that records of John Doe have been enjoined with respect to a public records request cannot stand alone as a basis for denying the public's right to access the court file in this matter.

3. Applying the *Ishikawa* Factors, John Doe Cannot Show a "Serious and Imminent Threat" To Privacy Interests On This Record That Outweighs the Public's Interest in Open Access to the Administration of Justice.

Applying the *Ishikawa* factors for sealing, John Doe has failed to establish that he faces a "serious and imminent threat" that justifies sealing the court record in this matter.

Most recently in *Hundtofte v. Encarnación*, 181 Wn.2d 1 (2014), the Supreme Court affirmed the Division One of the Court of Appeals' decision that reversed a trial court's ruling ordering the full names of the

defendants in an unlawful detainer action be replaced with their initials in the court's electronic records index (SCOMIS). The trial court in *Hundtofte* had granted the defendant's motion to redact the court record because it determined that it was bound by the decision in *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 215 P.3d 977 (2009). The trial court had applied both GR 15 and *Ishikawa* in granting the motion for redaction; however, the Supreme Court found that although the trial court engaged in the five-step *Ishikawa* analysis in ruling on the motion, it abused its discretion by determining that the defendants' purported privacy interest was sufficient to overcome the presumption of openness mandated by Washington Constitution, article 1, section 10. *Hundtofte*, 181 Wn.2d at 8-9. As the Court of Appeals explained, if the relief granted by the trial judge was deemed appropriate, then it would be available to all similarly-situated litigants and that because the public's right to open courts records is justifiable only in unusual circumstances, such broad-based relief is improper absent a showing that the identified interest is specifically protected by statute, court rule or other similar example of clear and well-established public policy. *Hundtofte,* 169 Wn. App. at 516-17.

In this case, John Doe provides the *potential* of his identity being revealed to an individual, Ms. Zink, who has requested a list of all level

one sex offenders from Benton County as the "sufficient privacy or safety concern" that weighed against the public interest justifies sealing of the court record under GR 15(c)(2)(F). John Doe further argues, completely unsupported by the record before the trial court, that because Ms. Zink allegedly stated that she wants to put a list of level one sex offenders on a website, that makes his request for sealing compelling when weighted against the public's constitutional interest of open justice. Even if that were true, John Doe would be in the same position as hundreds of other level one sex offenders whose identity on the list would be made public. Finally, John Doe argues that he is unique because unlike all other level one sex offenders, he was granted a permanent injunction with respect to Ms. Zink's request along with nine other sex offenders in his case. With respect to this point, John Doe is unquestionably not unique. John Doe was granted the same permanent injunctive relief provided to *all* level one sex offenders with respect to Ms. Zink's request (*See* permanent injunction orders referenced *supra* in Cause Nos. 32302-1-III, 32303-0-III, 32304-8-III and 32592-0-III).

Curiously absent from John Doe's argument before this Court is any mention of the standard of review. As noted *supra*, the standard of review of the trial court's decision to seal records is for an abuse of discretion. That is, to overturn the trial court in this matter this Court

would have to determine that its decision was manifestly unreasonable or was based upon untenable grounds or reasons. The record before this Court simply does not support such a finding. John Doe's circumstances are no different than any other sex offender who would like to be relieved of the requirement to register as a sex offender. Absent unusual, extreme and uniquely compelling circumstances, if this Court were to overturn the trial court's denial of John Doe's request to seal records, the trial court would likely have to make the same relief available to all level one sex offenders. Doing so would create an automatic class of sealed cases that would ultimately infringe upon the public's right to open courts. The Court of Appeals in *Hundtofte*, held that such an "automatic limitation" precludes the case-by-case analysis required by article 1, section 10, of the Washington State Constitution. *Hundtofte*, 169 Wn. App at 519-20; *see also In re Detention of D.F.F.*, 144 Wn. App. 214, 220, 183 P.3d 302 (2008) (citing *Dreiling*, 151 Wn.2d at 903-04). As such, the trial court did not abuse its discretion in denying John Doe's request to seal records in this matter. The trial court correctly determined that John Doe should not be allowed to petition for removal from the sex offender registration list under a veil of secrecy. To that effect, the trial court's order, after reviewing GR 15 as well as *Ishikawa*, was that John Doe had failed to identify sufficient, compelling privacy or safety concerns that outweigh

the public interest in access to court records in this matter. CP 63. Nothing in the record before the trial court would support a decision that the trial court's denial of a request to seal in this matter was manifestly unreasonable. The public has a legitimate right to know what individuals are removed from the sex offender registration list, as well as what factors the government used to make that determination.

Finally, in *McEnry,* Division II of the Court of Appeals reversed a trial court's order sealing a defendant's file because the defendant failed to demonstrate compelling circumstances for sealing them. *McEnry*, 124 Wn. App. 918. The defendant, McEnry, argued that compelling circumstances existed for sealing his court file because the records *might* adversely affect his current or possible future employment, although he conceded he was not currently looking for a job, did not know if his employer planned a background check, nor what the effect the conviction would have upon his employment status. *Id.* at 921. Division II reversed the order to seal, finding that McEnry had failed to establish a "serious and imminent threat" to an important interest, and instead found that the alleged threats were merely speculative and did not outweigh the public's right to the open administration of justice. *Id.* at 926.

The instant case cannot be significantly distinguished from *McEnry*. Here, as in *McEnry*, John Doe has failed to demonstrate a

serious and imminent threat to an important interest. Like *McEnry*, John Doe contends that his unsealed record *may* cause him harm in the future; however, his claims are similarly speculative. Article 1, section 10, of the Washington Constitution, as interpreted by the Washington State Supreme Court, mandates public access to court records absent unusual, extreme, or uniquely compelling circumstances. John Doe's apparent embarrassment and ongoing public records lawsuit do not meet the constitutionally mandated threshold for sealing.

III. CONCLUSION

Balancing the public's right of access to the judicial system with John Doe's failure to meet the rigorous standard of *Ishikawa* and GR 15, the public's right to demand transparency of its public officers should be deemed paramount. As such, for the foregoing reasons, the trial court's ruling denying John Doe's request to seal records in this matter should be affirmed.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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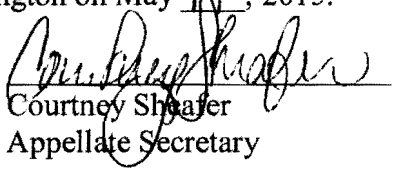
Signed at Kennewick, Washington on May 14, 2015.



Courtney Shaefer
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