

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

DAVID KOENIG, *Appellant,*

v.

THURSTON COUNTY
Respondent,

BRIEF OF APPELLANT

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I. INTRODUCTION

This case arises out of appellant David Koenig’s request for public records from the Thurston County Prosecuting Attorney (hereafter “County”) pursuant to the Public Records Act, RCW Chapter 42.56 (“PRA”).¹ By agreement of the parties, the substantive issues have been narrowed down to whether two specific records — a victim impact statement (“VIS”) and a SSOSA² evaluation — are exempt from public disclosure pursuant to RCW 42.56.240(1) (former RCW 42.17.310(1)(d)). That section permits an agency to withhold investigative records where nondisclosure is essential to effective law enforcement or a person’s right to privacy. On Koenig’s motion for partial summary judgment, the trial court ruled that both the VIS and SSOSA evaluation are exempt from public disclosure.

The trial court’s ruling on the VIS was based on an incorrect understanding of the nature and purpose of a VIS. Under a 1989 amendment to the Washington constitution, a crime victim has the right to make a statement at the defendant’s sentencing. Contrary to the County’s arguments, a VIS is not a means of relaying information to the prosecutor.

¹ The public records provisions of RCW Chapter 42.17, were re-codified as the Public Records Act, RCW Chapter 42.56, in 2005. *See* RCW 42.56.001; Laws of 2005, ch. 274.

² “SSOSA” refers to the “Special Sex Offender Sentencing Alternative” authorized by RCW 9.94A.670.

A VIS is a pleading filed by the victim in open court. As such, a VIS is not an “investigative record” for purposes of RCW 42.56.240(1). Even if it were, a VIS is not exempt under that section because a VIS is intended to be disclosed and considered in an open judicial proceeding at which the defendant’s sentence is determined.

The trial court’s ruling on the SSOSA evaluation was based on only the “effective law enforcement” prong of RCW 42.56.240(1). The content of a SSOSA evaluation is clearly not “private” for purposes of the PRA because the public has a legitimate interest in the criminal justice system, including the use of SSOSA sentencing. The trial court’s conclusion that nondisclosure is essential to effective law enforcement was based on the County’s assertion that disclosure of SSOSA evaluations might deter some defendants from seeking a SSOSA sentence. These concerns are clearly exaggerated, and do not establish that nondisclosure is *essential* to effective law enforcement.

Finally, the trial court failed to require the County to provide redacted copies of the VIS and SSOSA evaluation. Even if those records contain some information that might be exempt from disclosure, the PRA clearly requires agencies to redact exempt information rather than withhold entire records. The PRA requirement of redaction is well

established, and the trial court's failure to enforce this aspect of the PRA was error.

II. ASSIGNMENTS OF ERROR

Assignment of Error. The trial court erred in issuing its *Letter Opinion* dated November 15, 2007, in which the court held that the requested records were exempt from public disclosure pursuant to RCW 42.56.240(1). CP 244-250.

Issues Pertaining To Assignments of Error

A. Whether the VIS is an investigative record for purposes of RCW 42.56.240(1).

B. In the alternative, whether the VIS is exempt under either the "effective law enforcement" or "privacy" prong of RCW 42.56.240(1).

C. Whether the SSOSA evaluation is exempt under either prong of RCW 42.56.240(1).

D. Whether the trial court erred in failing to require the County to provide redacted copies of any records that contain exempt information.

III. STATEMENT OF THE CASE

The records at issue in this case relate to a criminal case in the Thurston County Superior Court, *State v. James Lerud*, No. 00-1-00336-0. The County prosecuting attorney filed an *Information* charging Lerud with

voyeurism on March 2, 2000. CP 32. That same day, an Associated Press article appeared in the Seattle Post-Intelligencer in which the victim, Elizabeth Timm, was mentioned by name and gave several quotes to the newspaper. CP 31.

A SSOSA evaluation for Lerud was prepared on or about June 26, 2000. CP 70. Lerud pleaded guilty on July 18, 2000. CP 32-35.

A. Koenig's Request for Records

On August 17, 2000, Koenig submitted a request for public records to the prosecuting attorney. Koenig requested inspection of:

Investigative files associated with Case #00103360
Including witness statements, victim impact statement(s).
Any and all associated documents or affidavits.

CP 38. The same day, a deputy prosecutor instructed an unknown staff person to copy portions of the *Lerud* file for Koenig. The prosecutor's written instructions to the staff person indicated that the file contained, *inter alia*, a VIS and a SSOSA evaluation. CP 58.

Prior to providing any substantive response to Koenig's request, the prosecutor appeared before the superior court in the *Lerud* matter and asked the court to seal portions of the court file in that case. CP 44-50. The court issued an order to seal the VIS and "any medical or psychological reports" in the court file under GR 15. CP 63. The validity of this order, as well as the circumstances under which this order was

obtained, are disputed.³ However, the parties have stipulated that the order is not binding on Koenig and does not restrict the disclosure of the VIS or SSOSA evaluation by the County under the PRA. CP 253.

B. County's Denial of Koenig's Request

On September 11, 2000, the County responded to Koenig's request with a letter enclosing sixty one (61) pages of copies of records. The letter stated that certain requested records were being provided, and that other records were exempt and were being withheld. The letter asserted that some records were exempt under former RCW 42.17.310(1)(d), (e), (i) and (j), and RCW Chapter 10.97. CP 52. The letter also stated that the VIS had been sealed by the court. *Id.* The letter did **not** mention the SSOSA evaluation. *Id.*

On September 18, 2000, Koenig requested clarification and additional compliance with his earlier requests. Koenig objected to the lack of an index, to the fact that the September 11th letter did not specify how certain exemptions applied to certain records, and to the fact that he was unable to determine whether the exemptions had been properly applied. CP 53. Koenig specifically objected to the assertion that the order to seal the *Lerud* court file prevented disclosure of the VIS by the

³ Koenig asserts that the order to seal the *Lerud* file was improperly obtained and was not validly issued by the *Lerud* court. CP 76-80, 84-89, 202-03. The County asserts that the order was proper. CP 197-980.

County. *Id.* Koenig never received a response to this letter until after this case was filed. CP 29.

C. Procedural History

This action was filed on or about September 3, 2004. Koenig's counsel requested copies of all records relating to Koenig's original requests. CP 64. The County provided Koenig's attorney with twenty two (22) pages of records relating to Koenig's original request, including the note from the deputy prosecutor dated August 17, 2000, which indicated that the *Lerud* file included an "SSOSA Eval" for Lerud. CP 58

Koenig's counsel asked the County whether the SSOSA evaluation mentioned in the County's records was exempt under the PRA. CP 68. The County responded that the SSOSA evaluation was exempt under former RCW 42.17.310(1)(d) (privacy) and because the court file had been sealed. CP 70. The County also asserted that a VIS dated March 8, 2000, was exempt under former RCW 42.17.310(1)(d) (privacy and effective law enforcement) and because the court file had been sealed. *Id.*

By stipulation, further proceedings in this matter were stayed until the Supreme Court issued its opinion in *Koenig v. Des Moines*, 158 Wn.2d 173, 142 P.3d 162 (2006). CP 13-18.

The County still has its own copies of the VIS and SSOSA evaluation in addition to the copies in the sealed court file. CP 56.

D. Summary Judgment

Koenig and the County agreed to determine, by motion, whether the VIS and SSOSA evaluation are exempt from public disclosure. CP 74-75. Koenig moved for partial summary judgment, asking the trial court to hold that the VIS and SSOSA evaluation are not exempt, and that if some information in those records were exempt then the County is required to provide redacted copies of the records. CP 74-99. In response, the County asserted that those records are exempt (i) under RCW 42.56.240(1) (former RCW 42.17.310(1)(d)) and/or (ii) because the same records had been sealed in the *Lerud* court file. CP 177-200.

By letter ruling dated November 15, 2007, the trial court denied Koenig's motion for partial summary judgment. The court ruled that the records are exempt under RCW 42.56.240(1). CP 244-250. The court did not address the validity or effect of the order to seal the *Lerud* court file. *Id.* Nor did the court explain why the County was not required to provide redacted copies of the records. *Id.*

E. Stipulation and Order

The parties entered a stipulated order to dispose of the remaining issues in the case. CP 251 et seq. That order provides, *inter alia*, that the order to seal the *Lerud* file is not binding on Koenig and does not restrict

the disclosure of the VIS or SSOSA evaluation by the County under the PRA. CP 253.

This appeal followed.

IV. ARGUMENT

The Public Records Act “is a strongly worded mandate for broad disclosure of public records.” *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1995) (quoting *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978)). The Act’s disclosure provisions must be liberally construed, and its exemptions narrowly construed. *PAWS II*, 125 Wn.2d at 251. Courts are to take into account the Act’s policy “that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3).

An agency bears the burden of proving that refusing to disclose “is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.” RCW 42.56.550(1). When an agency asserts that a requested record is exempt, in whole or in part, the agency must state how a particular exemption applies to a particular record. RCW 42.56.210(3).

This Court's review of both the trial court's ruling on summary judgment and the County's exemption claims is *de novo*. *Smith v. Okanogan County*, 100 Wn. App. 7, 10, 994 P.2d 857 (2000). Nevertheless, the trial court explained its decision in a *Letter Opinion*. CP 244-250. In the argument sections that follow, Koenig addresses the trial court's opinion and explains why the trial court's analysis is incorrect.

A. The VIS is not an investigative record for purposes of RCW 42.56.240(1).

The County asserts that the VIS and SSOSA evaluation are exempt from public disclosure as "investigative records" under RCW 42.56.240(1).⁴ That section provides:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

(1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any persons right to privacy...

RCW 42.56.240(1). This exemption is not applicable to the VIS because that document is not an "investigative record" for purposes of this section.

⁴ The County originally asserted that the VIS and SSOSA evaluation were exempt under former RCW 42.17.310(1)(d). That section was re-codified as RCW 42.56.240(1) effective June 1, 2006. Laws of 2005, ch. 274. The text of the exemption is unchanged.

By definition, records are not “specific investigative records” for purposes of RCW 42.56.240(1) unless they are compiled by an investigative, law enforcement, penology or disciplinary agency. *See Prison Legal News, Inc. v. Dept. of Corrections*, 154 Wn.2d 628, 637, 115 P.3d 316 (2005) (Department of Corrections is a law enforcement or penology agency). Records compiled by such agencies are “specific investigative records” if they are “compiled as a result of a specific investigation focusing with special intensity upon a particular party.” *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993) (quoting *Laborers Int’l Union, Local 374 v. Aberdeen*, 31 Wn. App. 445, 448, 642 P.2d 418, *review denied*, 97 Wn.2d 1024 (1982)). Where records qualify as “specific investigative records,” such records may be exempt under either of two alternative prongs: (i) the nondisclosure of the records is essential to effective law enforcement, or (ii) the disclosure would violate a person’s right to privacy.⁵ *See King County v. Sheehan*, 114 Wn. App. 325, 57 P.3d 307 (2002) (rejecting application of both prongs to the names of police officers).

With respect to the VIS, it is not necessary for the Court to consider either prong of RCW 42.56.240(1) because the VIS was not

⁵ The question of whether the nondisclosure of the VIS is essential to effective law enforcement and/or whether the VIS is “private” for purposes of the PRA is addressed in section (B), *infra*.

compiled by an agency. It was written by the victim herself. Therefore, the VIS is not “specific investigative record” at all.

The County argues that a VIS is an “investigative record” under RCW 42.56.240(1) because the information was received from the victim for sentencing purposes. This argument is based on the erroneous assumption that the purpose of a VIS is to assist prosecutors in making sentencing recommendations. CP 106, 182. On the contrary, the statutory purpose of a VIS is to bypass the prosecuting attorney and present information directly to the sentencing court.

Victims of crime have always had the ability to provide information to prosecutors. Victims may provide such information whether or not they also elect to file a VIS with the Court. Under a 1989 amendment to the Washington Constitution, the victim of a felony crime has the right to attend trial and to make statements at sentencing and any proceedings where the defendant’s release is considered. Wash. Const. art. I, § 35. The victim must give notice to the prosecuting attorney, but these rights are not dependent upon the prosecutor. *Id.*

The “victim impact statement” is also recognized by statute. Under RCW 7.69.030, the victim of a crime has the right:

To submit a victim impact statement or report to the court, with the assistance of the prosecuting attorney if requested, which shall be included in all presentence reports and

permanently included in the files and records accompanying the offender committed to the custody of a state agency or institution...

RCW 7.69.030(13). This statute gives a crime victim an independent right to comment directly on the defendant's crime and sentencing. For example, in *State v. Lindahl*, 114 Wn. App. 1, 56 P.3d 589 (2002), the prosecutor agreed to recommend a standard range sentence as part of a plea agreement. At sentencing, the prosecutor submitted the agreed recommendation but an attorney for the victim's family suggested an exceptional sentence upward, which the trial court imposed. *Lindahl*, 114 Wn. App. at 5-7. The appellate court rejected the defendant's argument that the prosecutor had breached the plea agreement, noting that the agreement did not require the prosecutor to oppose the family's recommendation. *Lindahl*, 114 Wn. App. at 12.

The trial court's conclusion that the VIS is an "investigative record" was based on an incorrect understanding of the purpose of a VIS. The trial court opined that the VIS "was procured by the prosecutor as part of their statutory duty to investigate and make recommendations on sentencing to the court." CP 248. This statement is directly contrary to this Court's decision in *State v. Carreno-Maldonado*, 135 Wn. App. 77, 143 P.3d 343 (2006). In that case, a prosecutor's statements at sentencing breached a plea agreement by undercutting the State's agreed sentencing

recommendation. The prosecutor argued that the statements were permitted by Wash. Const. art. I, § 35 and RCW 7.69.030. “According to the State, because victims have a right to speak at sentencing, when they do not exercise that right, the State has the right to speak on their behalf.”

Carreno-Maldonado, 135 Wn. App. at 85. This Court disagreed:

Article I, section 35 and RCW 7.69.030 give the victims the right to speak or not speak on their own behalf. But they do not provide the State with the right to speak for the victims when they have decided not to speak and have not requested assistance in otherwise communicating with the court such as by presenting a victim impact statement. Here, the victims were present and able to speak or ask for the prosecutor's assistance if they so desired. The record does not show that the victims asked the prosecutor to serve as their proxy, either by speaking on their behalf, reading a victim impact statement they had prepared, or by giving the court specific documents supporting a request for restitution.

Carreno-Maldonado, 135 Wn. App. at 86.

There is a fundamental difference between a ordinary witness statements, which might be obtained by a police officer or prosecuting attorney during an investigation, and the VIS authorized by Wash. Const. art. I, § 35 and RCW 7.69.030. The former are investigative records. *See Cowles Pub. Co. v. Spokane Police Dept.*, 139 Wn.2d 472, 480, 987 P.2d 620 (2000). The latter is not an investigative record for purposes of RCW 42.56.240(1) because a VIS is not a “specific investigative record” that has been “compiled” by an investigative agency.

Both the County and the trial court relied upon this Court's opinion in *Cowles Publishing Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 507-08, 45 P.3d 620 (2002) for the proposition that a VIS is an investigative record. CP 182, CP 248. In that case, a newspaper requested a "mitigation package" submitted by a defendant in an effort to persuade the prosecutor not to seek the death penalty. *Cowles Publishing Co.*, 111 Wn. App. at 505. The newspaper argued, *inter alia*, that the mitigation package was not an investigative record because the prosecutor was not attempting to "ferret out criminal activity." This Court disagreed, holding that the mitigation package was an (i) "investigative record," (ii) "compiled" by law enforcement. *Cowles Publishing Co.*, 111 Wn. App. at 507-08. The mitigation package was an "investigative record" because the prosecutor was required to investigate whether to seek the death penalty. *Id.* The mitigation package was "compiled" by law enforcement because it had been placed in the investigative file even though it was not actually created by law enforcement. *Cowles Publishing Co.*, 111 Wn. App. at 508 (citing *Newman v. King County*, 133 Wn.2d 565, 572, 947 P.2d 712 (1997)).

The analysis in *Cowles Publishing* does not extend to a VIS. The purpose of a mitigation package is to aid a prosecutor's investigation of a death penalty case. Such information is obtained by a prosecutor for

internal use; it is not filed in court or used in sentencing. In contrast, a VIS is essentially a pleading filed in open court by a party whose rights are independent of the prosecutor. Unlike other information provided to prosecutors, a VIS must be presented to the sentencing court and must be included in defendant's permanent record. RCW 7.69.030(13). Such statements are not part of the prosecutor's investigation of the defendant. Such statements are not investigative records for purposes of RCW 42.56.240(1).

Like all PRA exemptions, RCW 42.56.240(1) must be construed narrowly. *PAWS II*, 125 Wn.2d at 251. To hold that a VIS is an investigative record for purposes of RCW 42.56.240(1) removes all meaning from the statutory terms "investigative" and "compiled." If the Court does not give some meaning to the terms "investigative" and "compiled" then a request for discovery filed by the defendant in a criminal case would be an "investigative record."

The trial court also noted that a record may have more than one purpose, and that:

The primary purpose of the victim impact statement is to guarantee that the interests of the victim of a crime are fully and effectively represented at the sentencing hearing. The statement allows for a degree of catharsis by the victim or the victim's representative, permitting him or her to express their recommendation as to a sentence, the impact a crime

had, and their feelings toward the defendant, all in a judicial setting.

CP 248. While this statement is largely true, it does not support the conclusion that a VIS is an investigative record for purposes of RCW 42.17.240(1). The victim who gives such a statement to the trial court is not an investigative or penology agency. Nor is the sentencing proceeding an investigation of the defendant by the prosecutor.

The trial court also cited RCW 9.94A.500 for the proposition that a VIS is part of the presentence report that is prepared by the Department of Corrections. The County did not make this argument, and the trial court's reliance on RCW 9.94A.500 is erroneous. While that statute requires a sentencing court to consider a VIS, it does not follow that a VIS is an investigative record or that such records are "compiled" by the Department of Corrections. The same sentence in RCW 9.94A.500 provides that the sentencing court must consider arguments from defense counsel, but such arguments are not investigative records.

This Court must reject the County's incorrect understanding of the statutory purpose of a VIS. Such statements are intended to give crime victims an independent voice in court. Characterizing such statements as "investigative records" contradicts the language and purpose of the statute, and reduces crime victims to the status of mere witnesses for the

prosecution. The Court must hold that the VIS is not exempt from public disclosure under RCW 42.56.240(1).

B. In the alternative, the VIS is not exempt under either prong of RCW 42.56.240(1).

The County asserts that VIS is exempt from public disclosure under both the “effective law enforcement” and “privacy” prongs of RCW 42.56.240(1). Assuming, *arguendo*, that the VIS is a “specific investigative record” at all, the record is not exempt under either prong of that section. It is not necessary to reach this issue if the Court concludes that the VIS is not a “specific investigative record.” *See* section (A).

Both the County’s argument and the trial court ruling were based on incorrect assumptions about the nature and purpose of a VIS. As explained in the preceding section, a VIS is not a vehicle for providing information to the prosecutor. Nor is a VIS a private interaction between the victim and the sentencing judge. The VIS is a formal statement by the victim in an open, public court.

1. The VIS is not “private” for purposes of RCW 42.56.240(1).

The County’s argument rests on conclusory assertions that a VIS is or should be “private.” CP 184-86. Nothing in Wash. Const. art. I, § 35 or RCW 7.69.030 supports these assertions. There is no reference to privacy or confidentiality in either provision. On the contrary, the statute

states that a VIS *shall* be included in all presentence reports and in the defendant's permanent files. Furthermore, the Washington constitution provides that "Justice in all cases shall be administered openly." Wash. Const. art. I, § 10.

Privacy is specifically and narrowly defined under the PRA. Information is considered private "only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050. Information is not private under this test unless **both** elements are established. For example, in *Koenig*, 158 Wn.2d at 185-87, the parties agreed that the disclosure of sexually explicit details contained in investigative records would be highly offensive to a reasonable person. Nevertheless, such details were not private under the PRA because there is a legitimate public interest in the operation of the criminal justice system. *Koenig*, 158 Wn.2d at 186-87.

The VIS is not exempt under the privacy prong of RCW 42.56.240(1) unless the record satisfies both prongs of the PRA test for privacy. In the trial court, the County relied on various declarations that a VIS "should" be private. CP 184-86. These declarations are irrelevant

because they ignore the two-prong test for privacy under the PRA.⁶ Neither of the statutory elements of privacy exists in this case.

First, the disclosure of the victim impact would not be highly offensive to a reasonable person.⁷ Unlike the content of a police report, the victim has total control over the content of a VIS. The victim is not required to include any information that the victim does not wish to disclose. Furthermore, the victim knows that a VIS will be available to the court and the criminal defendant, and would not include any information that the victim would not want those parties to know.

Because the VIS is intended to be disclosed in open court, it should not contain factual details that would be highly offensive to a reasonable victim. Nevertheless, the County asserts that the victim in this case *believed* her VIS would not be disclosed to the public, and that a VIS “typically contain[s] descriptions of embarrassing, intimate and violent acts.” CP 184. If this is true, the blame lies with prosecutors and victim advocates. Those parties should ensure that victims understand that a VIS under RCW 7.69.030(13) is *not* a confidential document.

⁶ One of the County’s declarations asserts, without citation, that most judges seal victim impact statements. CP 123. The declarant’s factual assertion is unsupported, and his unqualified legal opinion that this is done “correctly” is immaterial.

⁷ Given that the victim spoke to a newspaper reporter about the incident, it is highly unlikely that the particular victim in the *Lerud* case had any concerns about her privacy. CP 31.

The trial court concluded that “information contained in the [VIS] is the type that would not generally be shared with strangers.” CP 249. This statement is erroneous, and relies on circular reasoning. This statement is circular because it accepts as its own premise that a VIS will not be publicly available. The statement is erroneous because crime victims generally do share their experiences with strangers including police officers, lawyers, judges, and jurors. In many cases, including this one, victims end up sharing their experiences with the media. CP 31. These are the unavoidable consequences of an open court system coupled with a free press.

Acknowledging that a VIS is presented in open court, the trial court asserted, without supporting legal authority, that a VIS “is prepared only for, and directed to, the sentencing judge alone.” CP 249. In light of the constitutional requirement of open courts, this statement is simply false. A sentencing judge is not a therapist, and the VIS is not a private communication between the victim and the judge. Nothing in either the Washington constitution or RCW 7.69.030 gives the victim the right to communicate privately with the Court. On the contrary, the constitution states that a victim may make a statement at sentencing “subject to the same rules of procedure which govern the defendant’s rights.” Wash.

Const. art. I, § 35. The defendant does not have the right to make a private plea to the sentencing judge. Neither does the victim.

The trial court also noted that a victim may submit a VIS in writing “thereby avoiding the possible traumatic experience of sharing these personal details in open court.” CP 250. That may be true, but the VIS remains a public document that the sentencing court must consider, and that will become a part of the defendant’s permanent record.

Finally, the trial court compared the VIS with the performance evaluations of public employees that were held to be private in *Dawson*, 120 Wn.2d 782. CP 249. Performance evaluations are easily distinguishable from a VIS. First, unlike a VIS, the person who is the subject of a performance evaluation has no control over its content. Second, performance evaluations are not written for presentation in open court. The Washington constitution does not guarantee that ‘performance evaluations of public employees shall be administered openly.’ If it did, the *Dawson* court would have reached a different result.

Even if the first prong of the privacy test is met, the second prong is not. The content of a VIS is of legitimate interest to the public. The County blandly asserts that “how a sex crime has impacted the victim should not be of legitimate concern to the public.” CP 185. This naïve comment ignores the fact that a VIS is used to sentence a criminal

defendant. The Supreme Court has clearly stated that the public's interest in the criminal justice system is neither illegitimate nor unreasonable. *Koenig*, 158 Wn.2d at 187. This is particularly true of documents that must be filed in court because the public has a constitutional right of access to judicial proceedings in Washington. "Justice in all cases shall be administered openly." Wash. Const. art I, § 10. If a victim chooses to make a statement to the court and the criminal defendant, such a statement is of legitimate interest to the public.

The public's legitimate interest in the criminal justice system extends to the explicit details of crimes that are found in raw investigative records, *Koenig*, 158 Wn.2d at 185-87, even though such details may never be presented in court. Given that the public has a legitimate interest in such details, the public clearly has a legitimate interest in those details that the victim chooses to present in court for the purpose of sentencing the defendant.

It is unclear how the trial court concluded that the second prong of the privacy test was met in this case. The court mentioned the two-prong test, but its comments were only directed to the first prong. CP 249-50.

The trial court noted that *Dawson* allowed a limited balancing of competing public interests in the determination of whether the second prong of the privacy test is met. CP 249. As the *Koenig* court explained,

Interpreting “legitimate” to mean “reasonable,” we have also held that where “the public interest in efficient government could be harmed *significantly more* than the public would be served by disclosure,” the public concern is not legitimate and disclosure is not warranted. (Emphasis in original).

Koenig, 158 Wn.2d at 185 (quoting *Dawson*, 120 Wn.2d at 798).⁸ The trial court in this case did not explain how this analysis might apply to a VIS. The public interest in efficient government will not be harmed, much less significantly harmed, by the disclosure of the VIS because such documents are intended to be disclosed.

Whether the trial court found that the second prong was met, or merely overlooked that prong, the court’s ruling was erroneous. Under *Koenig*, the second prong is not met, and the VIS is not private for purposes of the PRA.

2. Nondisclosure of the VIS is not essential to effective law enforcement.

To withhold the VIS under the “effective law enforcement” prong of RCW 42.56.240(1) the County must make a showing that the disclosure of such statements would compromise law enforcement such that nondisclosure is “essential.” For example, in *Cowles Publishing Co.*,

⁸ Importantly, this limited balancing only applies to the second—legitimate public interest—prong of the privacy test. *Koenig*, 158 Wn.2d at 185. The court is not permitted to balance the individual’s privacy interest against the public’s interest in disclosure. *Id.*

supra, this Court held that a confidential mitigation package was essential to the free flow of information to the prosecuting attorney.

If a mitigation package is available to the public, a defendant's family members may be reluctant to share their personal information and feelings about the defendant. Without this information, the defendant's only input to the prosecutor would be defense counsel's arguments... [T]o be effective, the prosecutor must have access to all information favorable to the defendant in deciding whether to seek the death penalty.

Cowles Publishing Co., 111 Wn. App. at 509-10.

In contrast to a mitigation package that is intended to be confidential, a VIS is intended to be publicly disclosed to various parties. Not only must such a statement be filed in court, it must also be "included in all presentence reports and permanently included in the files and records accompanying the offender..." RCW 7.69.030(13). Nondisclosure of the VIS is not merely unnecessary, it is contrary to the very purpose of the statement.

In *King County, supra*, the County argued that nondisclosure of a list of police officers' names was essential to effective law enforcement. While recognizing the officers' concerns for their safety, the Court of Appeals rejected the County's argument because officers' names were routinely released in court and in other contexts. *King County*, 114 Wn. App. at 337-38. Similarly, the nondisclosure of a VIS is not essential to

effective law enforcement where such records are routinely disclosed to defendants, their counsel and anyone else who is present at sentencing.

It is unclear how the trial court concluded that nondisclosure of the VIS is essential to effective law enforcement. The court stated that a VIS “relates directly to the prosecutor’s recommendation on the imposition of sanctions for illegal conduct.” CP 249. The trial court stopped short of ruling that a VIS is essential to the prosecutor’s recommendation. As explained in section (A), the VIS is entirely separate from the prosecutor’s recommendation.

For its part, the County asserts that a “painfully” truthful VIS is important to the proper administration of justice, that disclosure of a VIS would have a “chilling effect” on the willingness of victims to cooperate with the criminal justice system, that victims would be unwilling to provide a “true and accurate” VIS, and that disclosure of a VIS could hinder criminal investigations or jeopardize victim safety. CP 186-88. These arguments are based the incorrect assumption that the purpose of a VIS is to convey the details of the crime to the prosecutor. The VIS is not a witness interview or a rape evidence kit. The VIS gives the victim a voice in a public courtroom. The victim need not submit a VIS, and has complete control over its content. But RCW 7.69.030(13) does not create

a star chamber in which the victim may address the question of sentencing away from the prying eyes of the public.

The County also resorts to gross exaggeration, asserting that some victims would not participate in the criminal justice system “in any meaningful way” if a VIS were subject to public disclosure. CP 186. While the right of victims to address the court is a favorable development in the criminal justice system, the suggestion that the system cannot function unless victims may submit a *confidential* VIS is absurd. The Washington court system functioned for 100 years without victims having any statutory rights.⁹ The system continues to function in those cases where the victim does not chose to submit a VIS. While some victims might prefer a confidential VIS mechanism, such confidentiality is not essential to effective law enforcement.

For all these reasons, the Court must hold that the VIS is not exempt under either prong of RCW 42.56.240(1).

C. The SSOSA evaluation is not exempt under either prong of RCW 42.56.240(1).

“SSOSA” refers to the “Special Sex Offender Sentencing Alternative” authorized by RCW 9.94A.670. Under that statute, certain

⁹ The victim states that she would not have provided a VIS if she knew that it would be a public document, but she does *not* claim that she would not have cooperated with law enforcement to convict Lerud. CP 126.

persons convicted of sex crimes are eligible for an alternative form of sentence that requires treatment (among other conditions) but provides a reduced period of confinement in jail. In order to impose a SSOSA sentence on an eligible defendant, the court must obtain and review a report, prepared by a certified sex offender treatment provider, that examines the defendant's amenability to treatment and proposes a treatment plan. RCW 9.94A.670(3). The court's decision to impose a SSOSA sentence is based, in large part, on the SSOSA evaluation:

After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section.

RCW 9.94A.670(4).

A SSOSA evaluation is prepared for the court, not the defendant. *State v. Bankes*, 114 Wn. App. 280, 287, 57 P.3d 284 (2002). In *Bankes*, the court ordered a SSOSA evaluation at the defendant's request. After the report was prepared, the defendant did not ask for a SSOSA sentence and the report was retained by defense counsel. On the prosecuting attorney's motion, the court ordered the defense to file the report with the

court. *Bankes*, 114 Wn. App. at 283. At sentencing, the content of the SSOSA evaluation was considered by the court, which imposed an exceptional sentence. *Bankes*, 114 Wn. App. at 283-84. The Court of Appeals reversed, in part, holding that the use of the defendant's unwarned admissions in the SSOSA report violated the defendant's right against self incrimination. *Bankes*, 114 Wn. App. at 288. However, the Court of Appeals upheld the trial court's order to file the SSOSA report, agreeing with the prosecuting attorney that the statute contemplates the disclosure of the report whether or not a SSOSA sentence is requested by the defendant.

[The statute] contemplates that the court will order an evaluation, that the report will be made available to the court, and that the court will use it to determine whether the defendant *and the community* will benefit from the alternative sentencing option.

Our review of the record suggests that the judge ordered the report to assist him in passing upon whether Mr. Bankes was a candidate for SSOSA. RP at 16-17. Bankes was a first time sex offender with no criminal history, and so technically he was eligible for SSOSA. Since former RCW 9.94A.120(8) authorizes the court to order a SSOSA report either on its own motion or on a defense request, we conclude that the statute implicitly authorizes the court to receive a copy of it. (*Italics in original*).

Bankes, 114 Wn. App. at 287.

The County asserts that the *Lerud* SSOSA evaluation is exempt from public disclosure under both the privacy and effective law

enforcement prongs of RCW 42.56.240(1). The trial court addressed only the effective law enforcement prong. CP 247. Koenig assumes, *arguendo*, that a SSOSA evaluation, unlike a VIS, is an “investigative record” for purposes of RCW 42.56.240(1).

1. The SSOSA evaluation is not “private” under RCW 42.56.240(1).

As explained in Section (B), information is considered private “only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. Assuming, *arguendo*, that a reasonable person would consider the disclosure of his SSOSA evaluation to be highly offensive, the second prong of the PRA privacy test is not satisfied because the SSOSA evaluation is of legitimate interest to the public.¹⁰

A SSOSA evaluation is prepared for the sentencing court to determine whether the community will benefit from a SSOSA and/or whether the defendant is too great a risk or a SSOSA would be too lenient. The public has a legitimate interest in the criminal justice system, including the unpleasant details. *Koenig*, 158 Wn.2d at 186-87. If the details of the crime involving the victim are of legitimate interest to the

¹⁰ Because Koenig’s argument assumes that the disclosure of a SSOSA evaluation would be offensive to a reasonable person, CP 96, the County’s arguments and declarations regarding “private” or “personal” information in SSOSA evaluations are irrelevant. The County cannot show a lack of legitimate public interest.

public, there can be no argument that the details of a report that may determine whether the defendant is incarcerated and/or given treatment is of legitimate interest to the public as well.

The fact that the content of a SSOSA evaluation is important to the functioning of the criminal justice system, and therefore not private, is confirmed by the discussion of the content of SSOSA evaluations in appellate opinions.¹¹ The mandatory registration of sex offenders under RCW 9A.44.130 further demonstrates that the public has the right to know about such offenders notwithstanding any concerns for their privacy.

Whether SSOSA sentencing actually works is a matter of public debate. Participants in the SSOSA system assert that it works well. CP 114. Critics suggest that sex offender therapy does not work, and point out that some offenders who received treatment commit new crimes. CP 216-221. Regardless of the outcome of this debate, the public has a legitimate interest in SSOSA cases.

In the trial court the County presented two arguments to establish a lack of legitimate public interest in the SSOSA evaluation. Neither argument has merit, and neither was accepted by the trial court.

¹¹ A list of examples is found at CP 99 in an **Appendix** to Koenig's motion in the trial court. These unpublished opinions are not cited as legal authority on any issue. *See* RAP 10.4. Such opinions are cited to show that the Washington appellate courts do not regard the content of SSOSA evaluations as private.

First, the County asserted that a SSOSA evaluation is intended for “trained professionals” and that the public has no legitimate use for such information. CP 16. There is no requirement in RCW 9.94A.670 that the judges and attorneys who review a SSOSA evaluation have any particular professional qualifications.¹² In addition, the PRA forbids any consideration of the requester or the purpose of the request. RCW 42.56.080. The Court cannot assume that the requester is unqualified to review a SSOSA evaluation.

Second, the County suggested that public access to detailed police reports somehow obviates the need for public access to a SSOSA evaluation. CP 192-93. Police reports do not contain the same information as the SSOSA evaluation; they do not indicate whether a defendant may be treated or is too great a risk to the community. When a defendant pleads guilty in exchange for a SSOSA sentence, the SSOSA evaluation largely determines whether a sex offender receives treatment or goes to jail. The public has a legitimate interest in these decisions.

For all these reasons, the Court must hold that the SSOSA evaluation is not “private” for purposes of RCW 42.56.240(1).

¹² The County’s argument was based on a declaration which asserts, without citation, that a SSOSA evaluation contains a statement that it should not be disclosed to any “lay person(s).” CP 101. The language recited by the declarant therapist does not appear in any Washington statute or regulation. CP 214-15.

2. Nondisclosure of the SSOSA evaluation is not essential to effective law enforcement.

The County argues that disclosure of a SSOSA report would have a “chilling effect” on the use of SSOSA sentencing. CP 194. This argument is based on various declarations that defendants would be less likely to seek a SSOSA sentence out of fear of disclosure or for other reasons. CP 193-96.

The County’s concerns about disclosure are grossly exaggerated. Defendants who proceed to trial can expect to have their crimes discussed in detail in open court. Such defendants are often facing significant jail time if the SSOSA is not granted. Furthermore, the fact that a defendant has been found guilty of a sex offense is a matter of public record, *see* RCW 10.97.050(1), and the defendant must register as a sex offender. CP 137-38. The suggestion that many defendants would decline a SSOSA sentence based solely on concerns about public disclosure of their SSOSA evaluation is both highly dubious and immaterial.

In finding that the SSOSA evaluation is exempt, the trial court addressed the wrong question and applied the wrong standard. The trial court determined that a SSOSA evaluation constitutes “law enforcement” as that term was defined in *Brouillet v. Cowles Publishing Co.*, 114 Wn.2d 788, 795-96, 791 P.2d 526 (1990). CP 247. Koenig never argued

otherwise. The issue is whether *nondisclosure* of a SSOSA evaluation is *essential* to effective law enforcement. The trial court agreed with the County that disclosure of a SSOSA evaluation would “hinder” law enforcement, presumably because some defendants would decline a SSOSA evaluation, but did not explain why nondisclosure was *essential* to effective law enforcement.

The trial court and the County failed to distinguish between the required showing that nondisclosure is *essential* to effective law enforcement and a lesser, insufficient showing that a law enforcement agency would prefer nondisclosure. RCW 42.56.42.56.240(1) is not applicable unless nondisclosure is shown to be *essential*, not merely preferable. For example, *Cowles Publishing Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988), upheld a trial court’s determination that nondisclosure of the names of officers subjected to internal discipline was essential to effective law enforcement. This determination was based on internal disciplinary procedures in which confidentiality was assured. *State Patrol*, 109 Wn.2d at 717, 733.¹³ Similarly, nondisclosure of the identity of confidential sources is essential to effective law enforcement.

¹³ Even so, only a four justice plurality agreed that nondisclosure was essential to effective law enforcement. Two other justices concurred in the result only, concluding that they were constrained by the trial court’s findings of fact. *State Patrol*, 109 Wn.2d at 734.

Tacoma News, Inc., v. Health Department, 55 Wn. App. 515, 523, 778 P.2d 1066 (1989); *see also King County*, 114 Wn. App. at 338 (noting that requester did not ask for names of undercover officers).

There is no similar promise of confidentiality in SSOSA sentencing, which is a public judicial proceeding. Unlike the internal affairs process in *State Patrol*, the defendant is entitled to the full protection of due process, but nothing in RCW 9.94A.670 suggests any privacy or confidentiality for the defendant.

Even if some defendants would decline a SSOSA based on privacy concerns, that does not make nondisclosure *essential* to effective law enforcement. Defendants who decline a SSOSA based on their concerns about privacy will be tried in open court. To conclude that it is *essential* that every defendant be willing to enter a SSOSA sentence, this Court would have to conclude that the regular criminal justice system does not function at all.

Although therapists, defendants and their attorneys might prefer confidentiality in the SSOSA process, such confidentiality is neither essential to effective law enforcement nor compatible with the constitutional requirement of open courts. The PRA admonishes this Court to “take into account the policy of [the PRA] that free and open examination of public records is in the public interest, even though such

examination may cause inconvenience or embarrassment to public officials or others.” RCW 42.56.550(3). The Court must conclude that the SSOSA evaluation is not exempt from public disclosure.

D. The County is required to provide redacted copies of any records that contain exempt information.

Even if some information in the VIS and/or SSOSA evaluation is exempt under RCW 42.56.240(1), the County must provide redacted copies of those records to Koenig. The PRA does not permit agencies to withhold entire records:

(1) Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions of this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. 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).¹⁴ As the Supreme Court has explained, this section prevents agencies from withholding entire records where only portions of records are exempt:

In general, the Public Records Act does not allow withholding of records in their entirety. Instead, agencies must parse individual records and must withhold only those portions which come under a specific exemption. Portions

¹⁴ The limited exceptions to this requirement relate to tax information, and are not applicable to this case.

exempt from public disclosure. The Court of Appeals disagreed, noting that a specific statutory exemption required the redaction of identifying information of the child victim¹⁵, and holding that certain “sexually explicit descriptive information” could be redacted under the privacy prong of former RCW 42.17.310(1)(d). *Koenig v. Des Moines*, 123 Wn. App. 285, 295, 301-02, 95 P.3d 777 (2004). The supreme court reversed, holding that the “sexually explicit descriptive information” was not exempt, and that only the identifying information could be redacted. *Koenig*, 158 Wn.2d at 189. After *Koenig*, any argument that the VIS is exempt in its entirety must fail.

The County relies on *Cowles Publishing Co.*, which held that a mitigation package (information about a murder defendant’s family) was exempt. *Cowles Publishing Co.*, 111 Wn. App. at 511. In light of the supreme court’s more recent decision in *Koenig*, the statement in *Cowles Publishing* that redaction “would leave little to disclose” is of doubtful validity. Even if that holding remains valid with respect to the “mitigation package” at issue in that case, *Cowles* cannot be extended to withhold entire documents that relate to the crime itself.

¹⁵ Former RCW 42.17.31901, now codified at RCW 42.56.240(5), provides for the redaction of certain identifying information for child victims of sexual assault. This statute is not applicable in this case.

The VIS must contain at least some information that is not private under the PRA. For example, the VIS undoubtedly contains, at a minimum, a statement by the victim about the sentence Lerud should have received. It is likely that the VIS also contains a statement as to whether or not the victim supported the imposition of a SSOSA sentence. Such statements, which are considered by the sentencing judge, are of legitimate interest to the public and therefore not private. Because the County did not comply with RCW 42.56.210 Koenig can only speculate about what other information the VIS might contain. The PRA does not allow the County to place this burden upon the requester. The PRA requires the County to explain how particular parts of particular records are exempt. RCW 42.56.210.

2. Exempt information in the SSOSA evaluation, if any, must be redacted.

The County argues that redaction of the SSOSA evaluation “will not cure the privacy and effective law enforcement issues.” CP 196. This argument is based on the County’s erroneous assumption (addressed in Section C) that a SSOSA evaluation is private and/or that nondisclosure of a SSOSA evaluation is essential to effective law enforcement.

There may be some exempt information in the SSOSA evaluation. For example, it may contain information about other victims that might be

redacted under RCW 42.56.240(2) (witnesses) or -.240(5) (child victims). Under *Koenig*, the County would be permitted to redact such information in compliance with RCW 42.56.210.

However, the SSOSA evaluation must contain a large amount of information that is not exempt under RCW 42.56.240(1) and must be disclosed. By statute, the SSOSA evaluation must contain certain information that is clearly not exempt from public disclosure. A SSOSA evaluation must assess the defendant's amenability to treatment and relative risk to the community. RCW 9.94A.670(3). It is absurd to suggest that the public has no legitimate interest in the treatment provider's assessment of these important issues or that nondisclosure of such information is essential to effective law enforcement.

A SSOSA evaluation must also provide a proposed treatment plan which shall include, at a minimum:

- (i) Frequency and type of contact between offender and therapist;
- (ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;
- (iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;
- (iv) Anticipated length of treatment; and
- (v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent

known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

RCW 9.94A.670(3)(b). The County has not explained why these elements of a SSOSA evaluation, which relate directly to the sentencing court's decision to grant or deny a SSOSA sentence, would be exempt from public disclosure. Instead, the County dismissed the possibility of redacting the SSOSA evaluation as "magic." CP 196.

3. The County must explain why specific portions of records must be redacted.

RCW 42.56.210(3) requires the County to explain how specific PRA exemptions would apply to specific portions of the VIS and/or SSOSA evaluation. On remand, if the County asserts that particular portions of the VIS and/or SSOSA evaluation are exempt then the County must produce redacted copies of those records and state why the redacted portions are exempt as required by RCW 42.56.210(3).

E. Koenig is entitled to attorney's fees on appeal pursuant to RCW 42.56.550(4).

The PRA requires an award of attorney's fees to a successful requester on appeal. *Progressive Animal Welfare Soc'y v. UW (PAWS I)*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990); RCW 42.56.550(4). Koenig respectfully requests an award of attorney's fees pursuant to RAP 18.1.

V. CONCLUSION

This case must be remanded to the trial court with instructions to order the County to produce the VIS and SSOSA evaluation and to award Koenig attorney's fees and penalties under RCW 42.56.550(4). On remand, if the County asserts that particular portions of the VIS and/or SSOSA evaluation are exempt then the County must produce redacted copies of those records and state why the redacted portions are exempt as required by RCW 42.56.210(3).¹⁶

Koenig is also entitled to an award of fees on appeal.

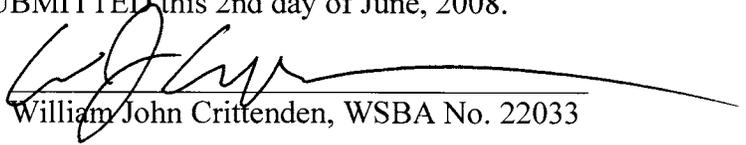
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¹⁶ Koenig reserves the right to in camera review of any redactions pursuant to RCW 42.56.550(3). CP 75.

RESPECTFULLY SUBMITTED this 2nd day of June, 2008.

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I, the undersigned, certify that on the 2nd day of June, 2008, I caused a true and correct copy of this *Brief of Appellant* to be served, by the method(s) indicated below, to the following person(s):

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