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COURT OF APPEALS  
DIVISION II

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

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DAVID KOENIG,  
Appellant,

v.

THURSTON COUNTY AND THE THURSTON COUNTY  
PROSECUTING ATTORNEY,  
Respondent

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**THURSTON COUNTY'S RESPONSE**

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## **I. STATEMENT OF THE CASE**

Appellant, David Koenig (Koenig), is appealing a decision of the Thurston County Superior Court denying his partial motion for summary judgment that alleged violations of the Public Records Act (“PRA”), ch. 42.56 RCW (formerly ch. 42.17 RCW). The Thurston County Prosecuting Attorney’s Office (“PAO”) withheld the two records at issue in this case after determining both documents were exempt from disclosure under the PRA. The two records at issue are a victim impact statement (“VIS”) from a victim of a sex crime and the psychological evaluation of the criminal defendant created to determine eligibility of the defendant’s participation in a Special Sex Offender Sentencing Alternative (“SSOSA”) authorized by RCW 9.94A.670. Both documents were obtained by the County for sentencing purposes. The evidence presented to the trial court shows nondisclosure of these two private, sensitive documents is necessary for the protection of privacy and is essential for effective law enforcement. The County asks this Court to carefully review the declarations in support of the County’s position which are in the record and cited to throughout this brief. The evidence overwhelmingly shows the private nature of the documents Koenig is attempting to obtain and why the documents are exempt from public disclosure.

## II. FACTS

During the pendency of a criminal case against James D. Lerud (Thurston Superior Court Cause No. 00-1-00336-0), who was charged with Voyeurism, the Thurston County Prosecuting Attorney's Office received a public records request from Appellant, David Koenig ("Koenig"). CP 132, CP 142. In his August 17, 2000 public records request, Koenig asked for "Investigative files associated with case #00103360 Including witness statements, Victim Impact Statement(s) Any and all associated documents or affidavits". CP 142. In an August 29, 2000 letter, Thurston County Deputy Prosecuting Attorney Jon Tunheim requested Koenig to call the Prosecuting Attorney's office in order to set up a time to inspect the available records. CP 143. The August 29, 2000 response was mailed eight working days following receipt of the request. The timeliness of this response is not before this Court.

On August 21, 2000, the Thurston County Clerk's Office received a public records request from Koenig dated August 17, 2000 also relating to the Lerud criminal matter. CP 144. On August 31, 2000, Betty Gould, Thurston County Clerk, responded by letter stating that superior court files are not governed by the PRA, but explained that the files are available for viewing and copying. CP 145. Ms. Gould also explained that a motion to

seal had been noted for September 8, 2000 by the PAO. CP 145. This appeal does not include a cause of action regarding the Thurston County Clerk's involvement in responding to Koenig's request to the Clerk's Office nor whether the VIS and the SSOSA evaluation were properly sealed in the related criminal matter.

On September 6, 2000, the PAO received a letter dated September 4, 2000 from Koenig in which he asked that copies of the records be mailed to him. CP 146-148. His letter also identified specific documents that he wanted to review regarding the criminal case against Mr. Lerud which he was requesting. CP 146-147. Mr. Tunheim responded with copies of documents and a letter dated September 11, 2000. CP 149. The copies did not include the Victim Impact Statement nor the SSOSA Evaluation as the PAO believed the two sensitive documents were exempt from disclosure. CP 105-106.

In a September 18, 2000 letter, Koenig challenged the sufficiency of Mr. Tunheim's response regarding the claimed PRA exemptions. CP 150-151. For the first time, Koenig raised the issue of the motion to seal. Prior to this letter, Koenig had not contacted the PAO regarding the motion, although the County Clerk's August 31, 2000 letter had specifically stated the hearing date and had provided him with legally sufficient notice of the motion to seal. CP 129, CP 145. At this point in

time, the SSOSA evaluation and the victim impact statement had already been sealed by the Thurston County Superior Court judge. CP 107, CP 153.

On September 3, 2004, Koenig filed his Complaint For Public Disclosure in Thurston County Superior Court. CP 6-12. Rather than utilize the show cause process provided in RCW 42.56.550(1) where the County would be afforded an evidentiary hearing, Koenig opted to bring a motion for “partial” summary judgment on the limited issues of whether the SSOSA evaluation and victim impact statement are exempt from public disclosure.<sup>1</sup> CP 74-75. Following oral argument, the trial court properly denied Koenig’s motion for summary judgment. CP 251-261. The court held that both the SOSSA evaluation and the victim impact statement are exempt from public disclosure pursuant to RCW 42.56.240. CP253.

For purposes of this appeal, the County and Koenig have agreed to narrow the issues to only the non-disclosure of two documents: the Victim Impact Statement and the SSOSA Evaluation of Mr. Lerud. CP 253-254.

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<sup>1</sup> Thurston County is aware of *Spokane Research v. City of Spokane*, 155 Wn.2d 89, 106, 117 P.3d 1117 (2005), wherein the Washington State Supreme Court held summary judgment is a proper method to prosecute PRA claims.

### III. ARGUMENT

#### A. Argument Summary And Standard Of Review.

The PRA does not require the disclosure of the victim impact statement nor the SOSSA evaluation as both documents are investigative records compiled by the Thurston County Prosecuting Attorney's Office, the non disclosure of which is essential to effective law enforcement and for the protection of a person's right to privacy. While the County has presented a multitude of evidence from professionals who work with crime victims and the SOSSA program, Koenig has failed to provide any competent evidence supporting his claims. The decision of the trial court must be upheld as a matter of law.

In reviewing a PRA request, "the appellate court stands in the same position as the trial court where the record consist only of affidavits, memoranda of law, and other documentary evidence." *PAWS v. UW*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Judicial review of the agency's decision to withhold the records is de novo. RCW 42.56.550(3).

#### B. The Victim Impact Statement (VIS) Is Exempt From Public Disclosure.

RCW 42.56.240 provides in relevant part:

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...the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy;

RCW 42.56.240(1). The County maintains that withholding the VIS is essential to protect the victim's right to privacy and is essential to effective law enforcement.

1. The VIS is an investigative record compiled by the Thurston County Prosecuting Attorney's Office to assist in sentencing decisions.

Koenig dedicates a considerable number of pages in his brief trying to convince this Court that the VIS is not an investigative record compiled by the Thurston County Prosecuting Attorney's Office. The simple fact is the Thurston County Prosecuting Attorney's Office obtains the information from the victim so that the Prosecutor's Office can use the information for sentencing purposes.

Koenig ignores the evidence in the record when he argues the VIS was not compiled by the Prosecuting Attorney's Office. *See* Brief of Appellant, Pg. 10-11. The only evidence presented in this case is that the PAO sends out the form to the victim, and then provides the original to the court and a copy to the deputy prosecuting attorney handling the case for sentencing purposes. CP 105, CP 278. Koenig would like this Court to ignore how Thurston County utilizes a VIS in investigating an appropriate

sentencing recommendation. Koenig has failed to point to anything in the record that controverts the County's position.

Kim H. Carroll, Victim Advocate for the Thurston County Prosecuting Attorney's Office, states:

As part of my job responsibilities as a victim advocate, I send out the Prosecutor's Office victim impact statement form to victims of crime. This is done for sentencing purposes. I provide the original to the court and a copy to the deputy prosecuting attorney handling the criminal matter.

CP 278.

John Tunheim, Thurston County Deputy Prosecuting Attorney, states:

The victim impact statement is a document provided to us by the victim of the crime. This document is a form that is completed by crime victims and gives them the opportunity to provide this office with information about the impact that the crime has had on the victim.

CP 105.

This evidence in the record shows VISs are obtained by the Thurston County Prosecuting Attorney's Office to assist in the sentencing recommendation. A prosecuting attorney's office uses a victim's statement about impacts of a crime when investigating the appropriate penalty. Instead of looking at how the Thurston County Prosecuting

Attorney's Office uses VISs, Koenig focuses on how a court may use the statements. *See* Brief of Appellant pg. 11-13. That a judge may disagree with a prosecuting attorney's office on a sentencing recommendation does not convert the county's investigative record into something else.

Furthermore, that the information may be read by a judge during a sentencing hearing does not eliminate the fact that the deputy prosecuting attorney uses the information contained in the VIS prior to the hearing to make sentencing decisions. Finally, just because information may be arranged by a third party before the PAO obtains it does not affect its status as an investigative record compiled by the PAO.

Similar arguments failed in *Cowles Publ'g v. Prosecutor's Office*, 111 Wn. App. 502, 507-08, 45 P.3d 620 (2002). In that case, the court held that documents obtained by a *prosecuting attorney's office* while investigating an appropriate penalty met the test of investigative records. *Id.* at 507-508.

But a prosecutor's office does investigate the accused and the alleged facts of the crime while preparing for trial. And one part of a prosecutor's investigation focuses on the question of an appropriate penalty.

*Id.* at 508.

Koenig attempts, but fails, to distinguish *Cowles*. Koenig infers that a document filed with the court can no longer be considered an investigative

record. If that were true, police reports filed with a court would suddenly no longer be deemed investigative records. In the case before this Court, the Prosecuting Attorney's Office was investigating the impact of the criminal defendant's actions. Clearly, the information obtained by the deputy prosecuting attorney for sentencing purposes is an investigative record.

2. The VIS is an extremely private document that must not be disclosed to protect the victim's right to privacy.

Unlike a police report, a VIS is voluntarily provided by an individual who is not part of a law enforcement agency. The statement is extremely private and personal to the victim. This was made evident by the Declaration of Elizabeth Timm Andersen (CP 125-127), Declaration of David L. Johnson (CP 121-124), Declaration of Kim H. Carroll (CP 277-279), Declaration of Jon Tunheim (CP 104-108) and Declaration of Catherine A. Carroll (CP 116-120). The following are excerpts from the many declarations provided by Thurston County.

Elizabeth Timm Andersen, the victim of voyeurism in the related criminal matter, states:

I wish to make it very clear that I do not want copies of my Victim Impact Statement to be given to every member of the public who decides to ask for a copy. This statement is personal and private. I believed it would remain private, and I trusted the Prosecuting Attorney's office not to give out copies to whomever asked for it. The crime itself was

one of invasion of privacy, thus it makes this demand for my impact statement that much more disturbing... I did not ask to be a victim of a crime, and I don't want to believe that by being a victim of a criminal act that I've been stripped of my right to privacy.

CP 125-126.

Catherine A. Carroll, legal director at the Washington Coalition of Sexual Assault Program since 2002, states:

I believe the privacy protections afforded survivors of sexual violence are fundamental to healing from being sexually victimized and must be respected... Having worked with more than a thousand victims, I have experienced the devastating and humiliating impact of these crimes upon victims... I believe that because society at large generally still adheres to negative stereotypes about women, that women continue to be blamed for their own sexual victimization, regardless of their actions... I further believe that as a result of victim blaming, most victims of sexual violence are very concerned about their privacy... I believe that the inherently offensive and intrusive characteristics of sexual violence that a victim experiences, and then is brave enough to share with the court, is private information provided to benefit the court in its decision making process regarding sentencing of the defendant.

CP 117.

David L. Johnson, Executive Director of the Washington Coalition of Crime Victim Advocates, states:

People do not become a victim of crime voluntarily, and it is our firm belief that they should not sacrifice their individual privacy simply by virtue of becoming a victim of crime and then cooperating with law enforcement and the criminal justice system. Guaranteeing victims some sense of privacy is absolutely essential in enlisting their

cooperation with the system; cooperation which in turn serves the public good...In addition, Victim Impact Statements are a very crucial part of the sentencing process, and a right guaranteed to crime victims by Washington statute (RCW 7.69.030(13) and the Washington State Constitution (Const. art. I, § 35). In an attempt to protect the privacy of the victims, most judges correctly and compassionately seal those Victim Impact Statements after the sentencing. Releasing those sealed records to just any member of the public would be a great disservice to crime victims, would tend to dissuade them from cooperating with law enforcement and the criminal justice system, and could put the victim's safety at risk. We argue that the system should protect crime victims, and not expose them to further danger and/or public humiliation...A Victim Impact Statement may contain historical information about past abuse and experiences that the victim may not have divulged previously.

CP 123.

Kim H. Carroll, Victim Advocate for the Thurston County

Prosecuting Attorney's Office, states:

Victims have a statutory right to give a statement to the court at the time of sentencing (RCW 7.69). Often times, victims prepare and provide these statements to the State prior to completion of investigations and adjudication. Victim Impact Statements typically contain descriptions of embarrassing, intimate and violent acts. A victim should have the expectation of privacy. They have been violated enough by the act of the offender, but to know their raw emotions and most painful experiences as described in their own words could be released to the public upon a simple request, could lead the victim to decide not to make an impact statement.

CP 277-278.

John Tunheim, Thurston County Deputy Prosecuting Attorney,

states:

I decided not to provide Mr. Koenig a copy of the victim impact statement because of the private nature of this document. In sexually based offenses, victims are often put in a position of describing events and circumstances that they feel are degrading and humiliating...For many years, this office has taken a "victim centered" approach to prosecution. As part of that philosophy, I believe that a victim's privacy must be closely guarded and only compromised when necessary in the interests of justice...Furthermore, the legislature (RCW 7.69.010) has mandated that prosecuting attorneys vigorously protect the rights of crime victims which include the right to be treated with dignity, respect, courtesy and sensitivity.

CP 105-106.

RCW 42.56.050 provides the statutory standard to determine when a person's right to privacy would be violated from a disclosure under the Public Records Act.

A person's "right to privacy," ...is invaded or violated 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. The above excerpts make it clear that the test is met when it comes to a VIS. First, disclosing how a sex related crime has personally impacted your life would be highly offensive to any reasonable person that was a victim of such a crime. This is supported by the excerpts of professionals that work with crime victims.

Koenig's solution is to limit a VIS to facts that are not offensive to the victim.

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...

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...

*See* Brief of Appellant, Pg. 19. Koenig's suggestions are ludicrous.

Koenig recognizes that disclosing details of impacts to victims of sex crimes will be highly offensive to a reasonable person, but therefore concludes these details should be left out of the VIS. This conclusion is wrong. The fact is that VISs *do* contain information that is highly offensive to a reasonable person. It is imperative these intimate details of the impact a crime has on a victim are presented to the court for sentencing.

Second, how a sex crime has impacted the victim is not of legitimate concern to the public. As explained by the excerpts above, this information is extremely private. The County understands that in this day and age where many "prominent" figures' personal lives are in tabloids and on TV, Koenig may believe he should have a right to the private details of a sex crime victim's life through a personal statement prepared for the court and obtained by the PAO. Hopefully, the "need" for open

government will not be used in this way. This private information should remain such and not be disclosed pursuant to the exemption protecting a person's right to privacy under RCW 42.56.240(1).

The Supreme Court in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 185, 142 P.3d 162 (2006), has analyzed the "privacy" exemption in the context of a request made to obtain sexually explicit material in police reports about a minor. The Supreme Court provides helpful analysis on what information is not of legitimate concern to the public.

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.

*Id.* at 185. Clearly a statement written by a victim of a sex crime is much different than a police report written by a public peace officer. The public interest in efficient government would be harmed significantly more than the public would be served if the VIS is disclosed. Law enforcement's need for VISs containing the *full and true* impacts to the victim significantly outweighs the public's right to see what a crime victim has put in a very personal statement. With all of the records available to the public (police reports, witness statements, court file, etc.), it is not of reasonable/legitimate concern to the public to see the *personal* impact as provided by a victim in her own words in the VIS.

Finally, Koenig's veiled attempt to discredit the experienced professionals that provided declarations supporting the County must be disregarded. All of the County's declarations regarding the VIS came from professionals with many years of experience working with crime victims. Koenig failed to provide one piece of evidence refuting the County's experienced witnesses regarding VISs. Koenig's attack on the credibility of the County's experienced witnesses is baseless and unsupported. Instead of initiating an evidentiary hearing, Koenig opted for a motion for summary judgment in which he failed to provide any credible evidence rebutting the County's experienced witnesses. Koenig failed to provide any evidence from professionals that work with victims of crime. Instead, Koenig filed a declaration of another attorney that has worked on PRA cases. CP 212. Koenig has not provided any evidence that challenges the veracity and accuracy of the County's evidence.

3. The VIS should not be disclosed as nondisclosure is essential to effective law enforcement.

Obtaining a "painfully" truthful VIS is important for the proper administration of justice as it is needed for sentencing decisions and recommendations. CP 104-108. The following excerpts show the chilling effect disclosure of the VIS will have on effective law enforcement.

Elizabeth Timm Andersen, the victim of voyeurism in the related criminal matter, states:

I would not have provided a Victim Impact Statement if I had been told that the statement would be a public document to be given to any and all who asked for it.

CP 126.

Catherine A. Carroll, legal director at the Washington Coalition of Sexual Assault Program since 2002, states:

I further believe that if Victim Impact Statements were subject to public disclosure many victims of sexually violent crimes would not participate in the criminal justice system in any meaningful way.

CP 117.

David L. Johnson, Executive Director of the Washington Coalition of Crime Victim Advocates, states:

Guaranteeing victims some sense of privacy is absolutely essential in enlisting their cooperation with the system; cooperation which in turn serves the public good... Releasing those sealed records to just any member of the public would be a great disservice to crime victims, would tend to dissuade them from cooperating with law enforcement and the criminal justice system, and could put the victim's safety at risk... The criminal justice system would have a difficult time discovering the true impact to victims if victims knew that the written statement would be disclosed to anyone who made a public record request to the prosecutor's office... A crime victim would be hesitant to provide in writing a statement relating to how a crime has truly impacted his or her life if s/he knew that a member of the public could obtain the document from the prosecutor....

CP 123-124.

Kim H. Carroll, Victim Advocate for the Thurston County

Prosecuting Attorney's Office, states:

They have been violated enough by the act of the offender, but to know their raw emotions and most painful experiences as described in their own words could be released to the public upon a simple request, could lead the victim to decide not to make an impact statement. Such a result could seriously hinder investigations, prosecutions and hope of recovery...In my opinion, redacting certain information from the Victim Impact Statement would not rectify the problem, but would still make the victim vulnerable. A crime victim would be hesitant to provide in writing a statement relating to how a crime has truly impacted his or her life if s/he knew that a member of the public could obtain the document from the prosecutor, notwithstanding the fact that some information may be redacted. Gaining the trust and cooperation of a crime victim to assist the prosecution of a case is not always easy. Asking a crime victim to provide a Victim Impact Statement and letting them know it would be available to anyone that asks for it would create a situation where crime victims would not be willing to provide intimate details of the true impact to their lives. With the knowledge that a redaction of information could always be overturned by a court, I couldn't legitimately tell a crime victim what information would truly remain private. This has a tremendous negative impact on effective law enforcement.

CP 277-278.

John Tunheim, Thurston County Deputy Prosecuting Attorney,

states:

For many years, this office has taken a "victim centered" approach to prosecution. As part of that philosophy, I believe that a victim's privacy must be closely guarded and

only compromised when necessary in the interests of justice. To do otherwise, in my view, creates a chilling effect on the willingness of victims to report crime, provide information and cooperate with the prosecution. Therefore, the protection of victim privacy is critical to the effectiveness of law enforcement and the criminal justice system. Furthermore, the legislature (RCW 7.69.010) has mandated that prosecuting attorneys vigorously protect the rights of crime victims which include the right to be treated with dignity, respect, courtesy and sensitivity. If I have knowledge that anything a victim may provide will be handed over to the public through a public disclosure request, this office will inform the victim of that possibility. It is my opinion that if a victim knows this, he or she will be unwilling to provide a true and accurate impact statement.... Letting them know we need a very personal statement and that it could be obtained by anyone who requests it will have a chilling effect on law enforcement by not being able to obtain accurate victim impact statements... The victim impact statement and the sexual deviancy evaluation are unique and not similar to other documents such as police reports. Instead, the two documents are “voluntary” documents needed for sentencing. In both instances, they contain very private information that is necessary for effective law enforcement. Also, it is unlikely that accurate documents will be provided to a prosecuting attorney if the documents can be disclosed to anyone that asks for them.

CP 105-108.

As the excerpts from professionals that deal with victims on a daily basis show, disclosing VISs to anyone who makes a request will have a chilling effect on the victim’s willingness to participate in this essential law enforcement process. In fact, the victim herself stated, unequivocally, that she would *not* have provided a VIS if she had known the statement

would be considered a public document and given to anyone who asked for it. CP 126. Proper sentencing is *essential* to effective law enforcement. As the sworn statements provide, the VIS would not be accurate if the victim knew anyone could obtain a copy of the document. A prosecutor needs the VIS to make informed sentencing recommendations. Clearly, the VIS must not be disclosed.

Koenig's own arguments support an exemption of the VIS for purposes of maintaining effective law enforcement. Koenig argues:

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...

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...

*See* Brief of Appellant, Pg. 19. What Koenig is stating is that victims should not disclose the true impacts of the crime. In other words, Koenig recognizes that impacts can be very private and argues that such impacts should be kept out of the hands of the PAO and the judge unless the victim is willing to allow the public to review it. This line of reasoning is outrageous and must be disregarded as it flies in the face of the purpose of ch. 7.69 RCW.

In recognition of the severe and detrimental impact of crime on victims, survivors of victims, and witnesses of

crime and the civic and moral duty of victims, survivors of victims, and witnesses of crimes to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, and in further recognition of the continuing importance of such citizen cooperation to state and local law enforcement efforts and the general effectiveness and well-being of the criminal justice system of this state, the legislature declares its intent, in this chapter, to grant to the victims of crime and the survivors of such victims a significant role in the criminal justice system. The legislature further intends to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity; and that the rights extended in this chapter to victims, survivors of victims, and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants.

RCW 7.69.010. Koenig's position, that a victim's true impacts should not be provided in the VIS if the impacts are too personal, does not honor or protect the victim as required under RCW 7.69.010; and does not protect the victim's right to present an accurate VIS under RCW 7.69.030(13)<sup>2</sup>. Obtaining a truthful VIS is important in assisting the PAO in making effective law enforcement decisions. Even Koenig recognizes that a victim will not include sensitive details in a VIS if the victim knew they would be disclosed to the public. *See* Brief of Appellant, pg. 19. This alone supports withholding the VIS for purposes of ensuring effective law enforcement.

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<sup>2</sup> On the other hand, allowing the public to view a VIS does not protect the victim from the psychological harm caused by having personal details disclosed. RCW 7.69.030(4).

Finally, Koenig continues his common theme that the VIS is available to the judge and is in the court file and, therefore, protecting it does not advance effective law enforcement. This leaves out several uncontested facts that are in the record. First, the VIS was sealed in this matter. CP 153. Second, many VISs are sealed. CP 123. In this case, the VIS was not available to just anyone through the court. While the parties have stipulated that the court's sealing of the records does not create an exemption for the PAO (CP 253), it does provide factual evidence that the VIS was not available to be viewed in the court file and that the judge found it sensitive enough to seal. All of the uncontested evidence establishes that nondisclosure of the VIS is essential to effective law enforcement and, therefore, is exempt under RCW 42.56.240(1).

4. Redaction of information contained in the VIS will not cure the privacy and effective law enforcement issues.

Koenig's assertion that one can just take what a victim of a sex crime has written in her own words and decide what is private and personal is not rational. First, one must consider that the Prosecuting Attorney's Office has to gain the victim's trust to obtain the statement. Then the Prosecuting Attorney's Office will inform the victim that any member of the public can obtain a copy of the VIS, but not to worry because it will attempt to redact what is private in nature (which may be

looked at by a judge and over-turned or a settlement reached by the parties). While some words may not seem private to one person, a victim may feel those same words are extremely personal. It must be remembered that the VIS is provided in the victim's own words for the court to consider.<sup>3</sup> Furthermore, this is a unique, voluntary document being produced by a person that has been victimized. The following excerpts from the victim and professionals that work with victims make it clear that redaction for this unique document will not work.

Elizabeth Timm Andersen, the victim of voyeurism in the related criminal matter, states:

I understand that sometimes the identifying information will be redacted from documents before they are given to members of the public. I vigorously object to a copy of my statement being redacted and given to Mr. Koenig. I never intended for my personal and private thoughts to be made a public statement whether or not my name is attached to them. If my statement is determined to be part of the "public domain" and given out upon request, I will be victimized once again.

CP 126.

David L. Johnson, Executive Director of the Washington Coalition of Crime Victim Advocates, states:

In my opinion, having a crime victim's name removed from the Victim Impact Statement would not rectify the

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<sup>3</sup> This begs the question of whether a VIS is truly a "public record" under RCW 42.56.010(2). However, it must be noted that the County did concede this point during oral argument on Koenig's limited motion for partial summary judgment.

problem. A crime victim would be hesitant to provide in writing a statement relating to how a crime has truly impacted his or her life if s/he knew that a member of the public could obtain the document from the prosecutor, not withstanding the fact that his or her name has been redacted.

CP 123-124.

Kim H. Carroll, Victim Advocate for the Thurston County

Prosecuting Attorney's Office, states:

In my opinion, redacting certain information from the Victim Impact Statement would not rectify the problem, but would still make the victim vulnerable. A crime victim would be hesitant to provide in writing a statement relating to how a crime has truly impacted his or her life if s/he knew that a member of the public could obtain the document from the prosecutor, not withstanding the fact that some information may be redacted. Gaining the trust and cooperation of a crime victim to assist the prosecution of a case is not always easy. Asking a crime victim to provide a Victim Impact Statement and letting them know it would be available to anyone that asks for it would create a situation where crime victims would not be willing to provide intimate details of the true impact to their lives. With the knowledge that a redaction of information could always be overturned by a court, I couldn't legitimately tell a crime victim what information would truly remain private. This has a tremendous negative impact on effective law enforcement.

CP 278.

John Tunheim, Thurston County Deputy Prosecuting Attorney,

states:

I don't believe it would make a difference if some of the information, including the victim's name, is redacted. It is

extremely difficult to establish trust with a victim. Letting them know we need a very personal statement and that it could be obtained by anyone who requests it will have a chilling effect on law enforcement by not being able to obtain accurate victim impact statements.

CP 106.

It should be clear from the above excerpts that redaction is not the answer. When the County attempts to obtain a voluntary, very private document, telling a victim, “if someone makes a request, the document will have to be given out...but some of the information will be redacted, which may be overruled by a judge,” does not provide a sense of security for a victim of a crime. From the evidence in the declarations, the County will lose this effective sentencing tool if the VIS is disclosed, notwithstanding redaction. Additionally, redaction will not protect the victim’s right to privacy. The legislature (RCW 7.69.010) has mandated that prosecuting attorneys and judges vigorously protect the rights of crime victims which include the right to be treated with dignity, respect, courtesy and sensitivity. CP 106; RCW 7.69.010(1). Thurston County, the victim, and those that work with victims believe one way of doing this is allowing the victim to be truthful when providing a VIS, a right provided under RCW 7.69.030(13). It must be remembered that prosecutors and judges must honor and protect a victim’s right to provide

an accurate VIS. RCW 7.69.010. As the evidence provides, redaction is not consistent with the legislature's directive.

Finally, as a VIS contains private information, redacting would leave nothing of public interest to disclose. Rejecting the same argument made by Koenig in this case, the Court in *Cowles* stated:

Cowles argues that the trial court should have considered disclosing the mitigation package subject to deleting any information that would have violated privacy interests, as suggested in RCW 42.17.260(1). But Yates' 91-page mitigation package consists almost exclusively of information and photos about his family. Deleting these materials from the mitigation package would leave little to disclose.

*Cowles Publ'g* at 510-11. Clearly, the same is true in this case and redaction should not be seen as an option.

C. Psychiatric Evaluations Are Exempt From Public Disclosure.

1. The Sexual Deviancy Evaluation for the defendant is an extremely private document that must not be disclosed to protect the defendant's right to privacy.

A Sexual Deviancy Evaluation is provided to the PAO to assist the PAO in determining if the defendant should be considered for a Special Sex Offender Sentencing Alternative (SSOSA). CP 106-107. This evaluation is prepared by a private health care provider and presented to the PAO by the defense attorney. CP 106-107, CP 100-103, CP 110-111. The report is a health care record that contains very private health care

information. CP 110-115, CP 100-103, CP 106-108. There can be no question that nondisclosure of this report is necessary in protecting the right to privacy of an individual undergoing the evaluation (as well as any other individual mentioned in the evaluation) under RCW 42.56.240(1), as defined by RCW 42.56.050:

A person's "right to privacy," ...is invaded or violated 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.

Disclosure of the Sexual Deviancy Evaluation would be highly offensive to a reasonable person and is not of legitimate concern to the public. The information contained in the report about the individual being evaluated is intended for use only by qualified professionals. CP 101-102. Not only is there private information about the criminal defendant, there is also private information about the victim and others that the defendant was involved with. CP 101-103, CP 111-113. Based upon the only evidence in the record, there can be no question that material contained in the SSOSA evaluation is highly offensive to a reasonable person.

As for the second prong of RCW 42.56.050, the public does not have a legitimate interest in obtaining a medical report that is created only for trained professionals to analyze. The judge that sealed the SSOSA

evaluation, the treatment provider, the deputy prosecutor involved in the case, and the Washington Association of Criminal Defense Lawyers all agree that the sexual deviancy evaluation is extremely private and should not be provided to the public through a public disclosure request. CP 100-103, CP 104-108, CP 109-115.

The Supreme Court in *Koenig v. City of Des Moines*, 158 Wn.2d 173, 185, 142 P.3d 162 (2006), provides helpful analysis on what information is not of legitimate concern to the public.

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.

*Id.* at 185. In this case the SSOSA report would harm the government interest *significantly more* than the public would be served by obtaining a document that is meant for professionals. CP 100-103, CP 109-115.

Following *Koenig v. City of Des Moines*, the public now can obtain a copy of a police report with all the sexually explicit information that they want about a victim. With this information already at their fingertips through the police report, the public interest isn’t going to be served by also reading a sexual-psychological report regarding a person charged with a sex crime. Also, as will be described below, the defendants will not meaningfully participate in the SSOSA evaluation if the report is available

to the public. This is *significantly more* harmful to the public interest in efficient government than service to the public by disclosure.

Finally, the legislature has also made it clear that a SSOSA report is not of legitimate concern to the public.<sup>4</sup> The SSOSA evaluation in question was provided by Robert Macy, a Fully Certified Offender Treatment Provider, who has been a sex offender treatment therapist since 1974. CP 100. Pursuant to RCW 70.02.005(4):

The legislature finds that:

...

(4) Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

Disclosure of the SSOSA by the PAO to Koenig without the patient's authorization is not allowed under RCW 70.02.050. If the legislature thought that health care information like a SSOSA report was of legitimate public concern once in the hands of the PAO, it would have provided an exception. This supports the County's position that the SSOSA report is only intended for professionals and is not of legitimate concern to the

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<sup>4</sup> In promulgating rules relating to the release of information to the public regarding sex offenders under RCW 4.24.550, the legislature did not include the SSOSA report in the information that was to be provided to the public. Verbatim Report of Proceedings (VRP) at 28-29 (October 12, 2007).

public. Koenig's only evidence regarding SSOSA evaluations comes from an attorney with experience in public records cases that has no evident experience with SSOSA other than reading a newspaper article in preparing a declaration for this case. CP 212-234.

2. The SSOSA evaluation should not be disclosed as nondisclosure is essential to effective law enforcement.

The SSOSA evaluation is an extremely important tool for the criminal justice system. As was pointed out by Amy Muth, on behalf of the Washington Association of Criminal Defense Lawyers:

According to a 2005 study conducted by the Washington State Institute for Public Policy, the SSOSA program has a remarkably high success rate...The study, titled "Sex Offender Sentencing in Washington State: Recidivism Rates," authored by Robert Barnoski, found that recidivism rates for individuals who complete the SSOSA program remain consistently lower than recidivism rates for individuals who do not receive SSOSA...16.9% of sex offenders sentenced to prison terms and 14.5% of offenders sentenced to jail terms were convicted of a new felony within five years of being released, whereas only 4.7% of sex offenders who received a SSOSA were convicted of a new felony...In addition, 3.2% of prison-term sex offenders and 3.2% of jail-term sex offenders were convicted of a new sex offense in that same timeframe, while only 1.4% of SSOSA recipients were convicted of a new sex offense...The SSOSA program thus has a substantial benefit to both individuals who complete it and to the public in protecting the community from future criminal offenses...Should this court determine that the SSOSA psychosexual evaluations are subject to public disclosure, it will have a chilling effect on a sentencing program that has proven benefits for the individual pursuing the sentence and for the community.

CP 114. The following excerpts show the chilling affect disclosure of the SSOSA report will have on effective law enforcement.

Robert Macy, a sex offender treatment therapist since 1974, states:

In conducting an appropriate and useful evaluation it is essential that information is garnered regarding all aspects of the life of the person being evaluated. In that a sexual offense includes another person, examining the relationships of the offender is essential. To put victims of sexual offense in harms way by disclosing information about them to the public would significantly reduce the likelihood of such victims reporting sexual assault. This would, therefore, enable further assaults. It would also cause harm for those innocents noted in the evaluation... It would be counterproductive to community safety for the SSOSA evaluations to become open to the public. It would make my job extremely difficult if not impossible to do. It is difficult to elicit and encourage the disclosure of sensitive information. It is essential the client undergoing a SSOSA evaluation be encouraged to be fully disclosing of vital sensitive information. Public disclosure would enable withholding and reduces the likelihood of discovery of additional victims and cause the victimization of innocent persons noted in the evaluation as well as the client.

CP 101-103.

Amy I. Muth, on behalf of the Washington Association of Criminal

Defense Lawyers, states:

In my practice, when I recommend SSOSA to a client, I advise my client to obtain a psychosexual evaluation and permit me to share it with the prosecutor so that we can persuade the prosecutor to join in our request for a SSOSA...I also tell clients who wish to plead guilty to a non-SSOSA eligible sex offense to seek a psychosexual evaluation so that we can use it for negotiations

purposes...In fact, it is the practice of the King County Prosecuting Attorney's Office to request psychosexual evaluations prior to extending a plea offer for a sex offense charge so that they can make an appropriate sentencing recommendation...The evaluation is thus used both at sentencing and as part of the plea negotiations process...From my experience, my clients who have obtained these evaluations are extremely fearful that the evaluations could be made available to anyone who seeks them...They are worried that employers, ex-family members, or the public could obtain this information and use it as a basis to terminate employment, improperly use it in civil litigation, or simply for harassment purposes...Should this information be made public, I am concerned that many of my clients will refuse to seek SSOSA out of fear that this highly sensitive information could be made available to family members, employers, and local community members, who will use it to retaliate or harass my clients...It will also inhibit the candor necessary for the evaluator to accurately assess the diagnosis of the individual seeking the evaluation and fashion an appropriate treatment plan...

CP 110-113.

Jon Tunheim, a Thurston County Deputy Prosecuting Attorney for the past 17 years, states:

These reports are generally provided to me in an effort to reach a settlement in the case. Requiring disclosure of these reports, in my view, would substantially hinder the plea negotiation process. In fact, one would question if it would be malpractice for a defense attorney to provide a copy of the report to the state knowing that it is subject to public disclosure. Yet providing a copy of the report to the state is the only way for the defendant to request a recommendation from the state for the SSOSA option. At the time, I considered the report to be very private and work product. Upon further review of the public disclosure law, it is obvious that such a report must remain

confidential for the additional reason of effective law enforcement. If a defendant understands that such a report could be handed over to anyone, there is a good chance the Prosecuting Attorney's Office would never be able to obtain the necessary SSOSA material. SSOSA provides a means to rehabilitate sex offenders. Losing this tool has a negative impact on effective law enforcement.

CP 106-107.

The County will lose an effective tool if SSOSA evaluations are disclosed. As stated by Amy Muth, the SSOSA program is an effective tool for law enforcement purposes. CP 114. The legislature, through RCW 42.56.240(1), provided an exemption for a document that will have a negative impact on effective law enforcement. Koenig failed to provide any evidence to rebut the County's declarants. All of the evidence in the record supports a finding that a SSOSA evaluation is the type of document protected by the exemption and should not be disclosed to Koenig.

3. Redaction of information contained in the SSOSA evaluation will not cure the privacy and effective law enforcement issues.

In order to get around the exemptions, Koenig argues redaction will solve the problem. Clearly, Koenig hasn't genuinely considered the circumstances surrounding the SSOSA evaluation. A criminal defendant being prosecuted for a sex crime will not be willing to go through the evaluation process if he thinks there is a chance a stranger, like Koenig, or someone he knows could read his psychological evaluation. Telling the

defendant that the prosecutor who is prosecuting him will redact information that s/he thinks is private will not make it okay. According to both the defense attorneys and the PAO, redaction will not somehow, magically, make it work as Koenig would like this Court to believe.

Amy I. Muth, on behalf of the Washington Association of Criminal Defense Lawyers, states:

It would be impossible to effectively redact a psychosexual evaluation so that the personal information is not made available for public dissemination, as it would require virtually all of the sections described above to be redacted.

CP 113.

Jon Tunheim, a Thurston County Deputy Prosecuting Attorney for the past 17 years, states:

Telling a defendant that the Prosecuting Attorney's Office will redact private information prior to handing out the report will not solve the problem as many defendants will not be willing to leave the redaction decision up to a prosecuting attorney whom is trying to convict them.

CP 107.

The only evidence in the record show that redaction of a SSOSA report is not workable.

Furthermore, redaction is not permissible under RCW 70.02.005 with regard to health record information. Also, as with the VIS, redacting a SSOSA evaluation would leave nothing of public interest to disclose.

Rejecting the same argument made by Koenig in this case, the Court in

*Cowles* stated:

Cowles argues that the trial court should have considered disclosing the mitigation package subject to deleting any information that would have violated privacy interests, as suggested in RCW 42.17.260(1). But Yates' 91-page mitigation package consists almost exclusively of information and photos about his family. Deleting these materials from the mitigation package would leave little to disclose.

*Cowles Publ'g* at 510-11. Clearly, the same is true in this case and redaction should not be seen as an option. Nondisclosure of the SSOSA evaluation is necessary for effective law enforcement and to protect the privacy of the individual seeking the evaluation.

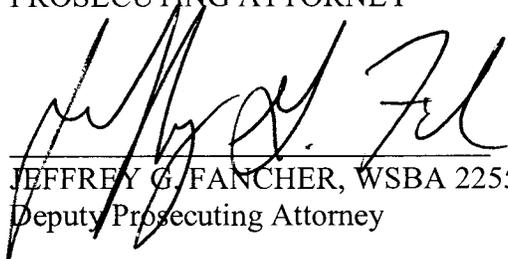
#### **IV. CONCLUSION**

It is unusual to have a large criminal defense attorney association, a victim of a sex crime, victim rights advocates, a sex offender treatment provider and a Deputy Prosecuting Attorney all aligned on the same side of an issue. This fact alone makes it clear that the documents involved in this case are unique and deserve protection from public disclosure. A Thurston County Superior Court judge already found the documents need protection and had the documents sealed. There is a reason no case authority exists dealing specifically with a VIS and a SSOSA evaluation requested through a public record request. Common sense would require

such documents be protected. The two documents must not be disclosed to protect privacy rights and because nondisclosure is essential to effective law enforcement. Koenig already has the police reports that give him the details of the sex crime. Disclosing two private documents that were created by third parties and voluntarily provided to the PAO with the belief that they would be held in confidence is not in the public interest. As stated above, the fact that society seems to thrive on sensationalizing intimate, private details of the lives of other individuals, does not make disclosure in the public interest for purposes of the public disclosure act. Thurston County prays this Court find that the County properly withheld the VIS and the SSOSA evaluation.

DATED this 30 day of June, 2008.

EDWARD G. HOLM  
PROSECUTING ATTORNEY



JEFFREY G. FANCHER, WSBA 22550  
Deputy Prosecuting Attorney

A copy of this document was properly addressed and mailed, postage prepaid, to the following individual(s) on June 30, 2008:

William John Crittenden, Attorney at Law  
927 North Northlake Way, Ste. 301  
Seattle, WA 98103  
*Attorney for Appellant*

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: 6-30-08

Signature: Linda L. Olsen

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