

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG
Respondent / Cross-Petitioner,

v.

THURSTON COUNTY
Petitioner / Cross-Respondent.

SUPPLEMENTAL BRIEF OF
RESPONDENT / CROSS-PETITIONER

WILLIAM JOHN CRITTENDEN
Attorney for Petitioner

William John Crittenden
Attorney at Law
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972
wjcrittenden@comcast.net

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I. INTRODUCTION

This brief supplements the arguments in Koenig's *Brief of Appellant, Reply Brief of Appellant, and Answer and Cross-Petition for Review*. RAP 13.7. This brief addresses the proper standard of review in PRA cases and responds to the arguments in the *County's Reply to Respondent Koenig's Answer to Pet. for Rev.* (hereafter "*County's Reply*") regarding the victim impact statement (VIS), the redaction requirement, and the unlawful, improperly-obtained order to seal the *Lerud* court file.

II. STANDARD OF REVIEW

Relying on the self-serving opinions of individuals who oppose public disclosure, the County repeatedly asserts that it has presented "evidence" as to why the VIS and SSOSA should be exempt, and that Koenig has failed to rebut this "evidence." *County's Reply* at 1, 2, 3, 10, 16, 18, 19. The County carelessly assumes that the application of the PRA to two whole classes of public records presents only questions of fact. The County might have a point, if the County's declarations dealt with matters of pure fact *and* if this were not a PRA case.

The application of law to facts is a mixed question of law and fact, for which an appellate court's review is *de novo*. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002). Furthermore, in PRA cases this Court's review is *de novo*.

Yakima v. Yakima Herald-Republic, ___ Wn.2d ___, ___ P.3d ___, ¶ 33 (Jan. 13, 2011). “When the record before the trial court consists entirely of ‘documentary evidence, affidavits and memoranda of law,’ this court ... reviews the trial court’s decision de novo.” *Id.* (quoting *Morgan v. City of Federal Way*, 166 Wn.2d 747, 753, 213 P.3d 596 (2009)). The only exception is where a court makes findings of fact based on live testimony. *Zink v. City of Mesa*, 140 Wn. App. 328, 336, 166 P.3d 738 (2007).

The County’s declarations are merely the biased opinions of lay persons on the legal question of how RCW 42.56.240(1) should be interpreted and applied to an entire class of public records. Because this Court’s review is *de novo*, this Court is free to discount or reject those opinions. This lack of deference is demonstrated in *King County v. Sheehan*, 114 Wn. App. 325, 339-341, 57 P.3d 307 (2002), and in the Court of Appeals’ ruling on the SSOSA evaluations in this case. *Koenig v. Thurston County*, 155 Wn. App. 398, 413-15, 229 P.3d 910 (2010).

Furthermore, the County’s conclusory declarations ignore the legal standards for exemptions and redaction under the PRA, and violate the well-established requirements that the PRA must be liberally construed to allow disclosure and its exemptions must be narrowly construed. *Progressive Animal Welfare Society v. UW (PAWS II)*, 125 Wn.2d 243, 251, 884 P.2d 592 (1994); RCW 42.56.030. The County’s declarations

presuppose an incorrect understanding of the legal function of a VIS, and advance hyperbolic allegations that the SSOSA system will fail if subjected to any public disclosure.

Both the County's *Petition* and the *County's Reply* ignore the applicable standard of review. Instead, the County makes the ludicrous claim that Koenig has described the County's witnesses as "perjurers." *County's Reply* at 1. Koenig has never accused the County's witnesses of perjury. Such an accusation would erroneously imply that the issues in this case are factual. Koenig has merely pointed out the obvious bias of the County's witnesses and the defects in their opinions about the PRA. The PRA requires no deference to the opinions of the parties at whom the PRA is aimed. *PAWS II*, 125 Wn.2d at 252, 270 n.17.

III. SUPPLEMENTAL ARGUMENT

A. The victim impact statement (VIS) is not exempt under either prong of RCW 42.56.240(1).

1. The VIS is not an "investigative record."

The argument on pages 2-5 of the *County's Reply* repeats the County's arguments in the Court of Appeals.¹ *See Resp. Br.* at 6-8. Koenig has already addressed these arguments in his *Cross-Petition*, and

¹ The last two sentences on page 4 of the *County's Reply*, continuing onto page 5, are copied without citation from the Court of Appeals' opinion. *See Koenig v. Thurston County*, 155 Wn. App. 398, 406, 229 P.3d 910 (2010).

has already explained why the analysis in *Cowles Pub'g Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 45 P.3d 620 (2002), does not extend to a VIS. *Cross Petition* at 5-9.

Conceding that a VIS is written by the victim and filed in court, the County focuses on the irrelevant question of how the prosecutor obtained a copy of the VIS in this particular case. The County asserts that the “only evidence” is that the prosecutor sends the victim a form, receives the VIS from the victim, files the VIS in court, and keeps a copy. *County's Reply* at 2-3. Koenig does not challenge this “evidence” because it is irrelevant to the legal question of whether a VIS is an investigative record compiled by a law enforcement agency for purposes of RCW 42.56.240(1). No case holds that such a pleading, received by the prosecutor from another party, is an investigative record. The County cannot convert a VIS into an investigative record by acting as the secretary for the victim.

The County also argues that it used the VIS in making a sentencing recommendation. *County's Reply* at 3-4. This Court must distinguish between the manner in which the prosecutor obtains (or “compiles”) a VIS and the irrelevant question of how the prosecutor “uses” a VIS. The prosecutor’s *use* of the VIS is irrelevant. The question of whether a VIS is an investigative record depends upon how and why the VIS was obtained or “compiled” by the prosecutor. RCW 42.56.240(1) (exemption for

“specific investigative records **compiled** by investigative, law enforcement, and penology agencies” where nondisclosure is essential to effective law enforcement or protection of privacy). In *Cowles Publishing Co.*, 111 Wn. App. at 507-08, the prosecutor compiled the mitigation package as part of the prosecutor’s investigation into the death penalty. A prosecutor also *uses* case law, statutes, sentencing guidelines, and defense materials making a sentencing recommendation, but these materials are not investigative records. The victim is not a law enforcement agency. The VIS is not an investigative record because it was not compiled as the *result* of the prosecutor’s investigation of the defendant.

The VIS is not a tool by which the prosecutor investigates the defendant. The prosecutor cannot compel the victim to provide a VIS nor can it prevent the filing of a VIS with which the prosecutor disagrees. The purpose of a VIS is to give the victim an independent voice. Characterizing a VIS as the *result* of an investigation by the prosecutor is contrary to the fundamental purpose of a VIS. The Court must recognize a fundamental distinction between a witness statement and a VIS. The former is an investigative record. The latter is not.

The County objects that “the VIS is not a pleading filed by a party in the criminal case.” *County’s Reply* at 3. But the County continues to ignore the cases that establish that a VIS is essentially a pleading filed by

the victim. *See State v. Lindahl*, 114 Wn. App. 1, 12, 56 P.3d 589 (2002) (prosecutor did not breach plea agreement by failing to oppose family's higher sentence recommendation); *State v. Carreno-Maldonado*, 135 Wn. App. 77, 143 P.3d 343 (2006) (Wash. Const. art. I, § 35 and RCW 7.69.030 do not allow the prosecutor to speak on behalf of the victim). These cases confirm that a VIS gives a crime victim an independent right to address the sentencing court. A VIS is presented to and considered by the sentencing court, and a VIS must be in writing (because it must be filed). RCW 7.69.030. Consequently, a VIS is essentially a pleading filed by the victim. As the dissent noted, the purpose of a VIS "is to assist the court, not the prosecutor's office, and it in no way assists the investigative arm of the police." 155 Wn. App. at 422 (Bridgewater, J., dissenting).

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

The argument on pages 10-15 of the *County's Reply* repeats the County's arguments in the Court of Appeals. *See Resp. Br.* at 15-20. Koenig has already addressed these arguments in his *Cross-Petition* at 9-14. 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 purpose of the VIS.

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. *County’s Reply* at 10-14; CP 186-88. The County argues that “[a] prosecutor needs the VIS to make informed sentencing recommendations.” *County’s Reply* at 14. These arguments are based the incorrect assumption that the purpose of a VIS is to convey the details of the crime to the prosecutor.²

The County can make a sentencing recommendation based on ordinary witness interviews. As shown by *Lindahl* and *Carreno-Maldonado*, which the County continues to ignore, the VIS gives a crime victim an independent right to address the sentencing court. As a matter of law, the VIS is not a sentencing tool for the prosecutor. By repeatedly mischaracterizing the VIS and its legal significance, the County—not Koenig—is failing to respect the rights of victims.

² In one of the County’s many declarations 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.

Furthermore, there is no legal basis for the prosecutor's assertion that a VIS needs to be "painfully" truthful or detailed. The VIS is not a witness interview, rape evidence kit, or any other sort of evidence. 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 sentencing court away from the prying eyes of the public.

The County argues that RCW 7.69.030(13) creates a "right" to present an "accurate" VIS, and that disclosure violates "right." *County's Reply* at 15.³ Nothing in RCW 7.69.030(13) creates a right to present a VIS that is exempt from disclosure under the PRA. RCW 7.69.030(13) is not a statute "which exempts or prohibits disclosure of specific information or records" for purposes of the PRA. RCW 42.56.070(1). The Court cannot imply a PRA exemption from Chapter 7.69 where no exemption is expressly provided. Only specific exemptions in other statutes are incorporated into the PRA. *PAWS II*, 125 Wn.2d at 262.

The County also argues that disclosure of a VIS "does not protect the victim from psychological harm caused by having personal details disclosed" and would thereby violate RCW 7.69.030(4). *County's Reply*

³ The County did not make this argument in the trial court and should not be permitted to present such an argument for the first time on appeal. RAP 2.5(a).

at 15. The County misleadingly paraphrases the statute, which provides that victims have the right “to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts ...” RCW 7.69.030(4). This statute does not guarantee protection from the “psychological harm” that is inevitable in an open court system. Taken to its illogical extreme, the County interprets this statute to create a criminal justice system in which concern for the victim trumps all requirements for open courts, due process, and the rights of the defendant and the public. The County insists that a detailed, fully-confidential VIS is somehow *essential* to effective law enforcement. But the County cannot explain how the criminal justice system functioned for 100 years without victims having any right to present a VIS or how it continues to function in cases where the victim does not submit a VIS.

3. The VIS is not exempt under the privacy prong.

The argument on pages 5-10 of the *County’s Reply* repeats the County’s arguments in the Court of Appeals. *See Resp. Br.* at 9-15. Koenig has addressed these arguments in his *Cross-Petition* at 14-16.

The County relies on various declarations that a VIS should be private. *County’s Reply* at 5-8; CP 184-86.⁴ The opinions expressed in

⁴ The victim in the *Lerud* case asserted that she believed the VIS would remain private. CP 125-26. Given that the victim spoke to a newspaper reporter about the incident, it is unlikely that she had any concerns about her privacy. CP 31.

these declarations are not only biased but irrelevant because they ignore the two-prong test for privacy under the PRA. Information is private for purposes of RCW 42.56.240(1) only if its disclosure “(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.” RCW 42.56.050. Neither element of privacy exists in this case.

The County suggests that Koenig’s position is “ludicrous,” and that it is imperative to allow a victim to communicate intimate details to the sentencing court. *County’s Reply* at 9. But the VIS is not a private communication between the victim and the court. 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 Washington constitution states that a victim may make a statement at sentencing “*subject to the same rules of procedure which govern the defendant’s rights.*” (Emphasis added). Wash. Const. art. I, § 35. The defendant does not have the right to make a private sentencing argument to the sentencing judge. Neither does the victim. Koenig’s “solution” may not be ideal from the victim’s viewpoint, but it is required by the PRA and the guarantee of open courts. The County’s position is no more than a policy argument against clear legislative choices that have already been made.

The County’s arguments regarding the second prong of the privacy test — legitimate public interest — are disposed of by *Koenig v. Des*

Moines, 158 Wn.2d 173, 142 P.3d 162 (2006). This Court held that the public's interest in criminal justice was not outweighed by the harm of disclosing the sexually explicit details of a crime involving a minor. *Koenig*, 158 Wn.2d at 187. The public interest is even greater, and the potential harm even less, where details, if any, are selected for presentation in open court by the victim herself.

Attempting to distinguish *Koenig*, the County argues that public access to police reports and other records somehow obviates any legitimate public interest in the "personal impact" of the crime on the victim. *County's Reply* at 9-10. Police reports do not contain the same information as a VIS, and are not a substitute for access to the VIS. Once again, the County simply ignores the essential fact that a VIS is used to sentence a criminal defendant in open court.

Even if a VIS contains information that meets the first prong of the privacy test, a VIS is not private because the public has a legitimate interest in the VIS. *Koenig* has explained that the VIS likely contains other important information, such as the victim's statements about Lerud's sentence and/or whether he should have received a SSOSA sentence. *Cross-Petition* at 16, *App. Br.* at 38; *Reply Br.* 23. The County ignores *Koenig's* point because the County cannot explain why such information would be private under the two-prong test in RCW 42.56.050.

The County asserts that Koenig seeks to “discredit” the persons who provided declarations in support of the County, and suggests that Koenig should have initiated an “evidentiary hearing” if he wished to challenge the opinions of these persons. *County’s Reply* at 10. As explained in section II (above), the County erroneously assumes that the application of the PRA to an entire class of records — victim impact statements — is a question of fact. The County’s declarations are merely biased opinions on a question of law. Koenig does not need to “discredit” these opinions because this Court’s review is *de novo*. As in *Sheehan, supra*, the Court is free to scrutinize, discount, and/or reject the opinions presented in those declarations if they are not persuasive.

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

Apart from erroneously requiring certain redactions from the SSOSA evaluation, the Court of Appeals correctly rejected the County’s argument that a SSOSA evaluation is exempt under RCW 42.56.240(1). *Koenig*, 155 Wn. App. at 412-17. The County’s *Petition* is devoid of legal analysis, and relies on the biased opinions of attorneys and therapists who seek to avoid public scrutiny of the SSOSA system. *Petition* at 7-17. Koenig has already adequately addressed the County’s erroneous arguments regarding the SSOSA evaluation. *Cross-Petition* at 19-20;

Answer to Amici Curiae at 1-8; *App. Br.* at 26-25; *Reply Br.* at 15-22.

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

The argument on pages 16-19 of the *County's Reply* repeats the County's arguments in the Court of Appeals. *See Resp. Br.* at 21-25. Koenig has addressed these arguments in his *Cross-Petition* at 16-19.

Numerous decisions of this Court confirm that agencies may not withhold entire documents but must redact any exempt information and then disclose the rest of the document. *See PAWS II*, 125 at 261; *Prison Legal News v. Dep't. of Corr.*, 154 Wn.2d 628, 646-47, 115 P.3d 316 (2005); *Des Moines*, 158 Wn.2d at 183-87; *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 206, 189 P.3d 139 (2008). The County continues to ignore the applicable law, and it relies on policy arguments to justify its refusal to provide redacted records as the PRA unambiguously requires. *County's Reply* at 16-19.

The only case cited by the County on the redaction issue is *Cowles Pub'g*, 111 Wn. App. at 510-11. *County's Reply* at 19. As Koenig has explained, the *Cowles Pub'g* opinion is erroneous and should be overruled on the issue of redaction. *Answer to Brief of Amicus Curiae* at 2.

1. Exempt information in the VIS, if any, must be redacted.

In addition to following its own erroneous redaction analysis in

Cowles Pub'g, the Court of Appeals (i) failed to consider what non-exempt information the VIS might contain, and (ii) erroneously suggested redaction of identifying information that is not exempt from disclosure. *See Cross-Petition* at 16-17. The County ignores these errors.

Koenig has explained, *three times*, that the VIS undoubtedly contains some non-exempt information, such as the victim's statements about the sentence Lerud should have received and/or whether he should have received a SSOSA sentence. *Cross-Petition* at 16; *App. Br.* at 38; CP 208. The County has ignored this issue, but this Court cannot ignore the redaction requirement. On remand, the County must either produce the VIS or provide a redacted VIS in compliance with RCW 42.56.210(3).

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

The County's *Petition* at 19-20 repeats its arguments about how redaction will not adequately address the privacy concerns of sex offenders, and cites *Cowles Pub'g, supra*, for the proposition that redaction would leave nothing of public interest to disclose. But, as Koenig has repeatedly explained, a SSOSA evaluation must contain a large amount of non-exempt information, including an assessment of the defendant's amenability to treatment and a proposed treatment plan, including monitoring plans, and crime-related prohibitions. RCW

9.94A.670(3)(b); *App. Br.* 39-40. The County has never 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 under either prong of RCW 42.56.240(1).

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

On remand, if the County asserts that particular portions of the VIS and/or SSOSA evaluation are exempt then the County must produce redacted records and state why redacted portions are exempt as required by RCW 42.56.210(3). The County does not argue otherwise.

D. The County's arguments regarding the order to seal the *Lerud* court file are meritless.

The County has stipulated that the order to seal the *Lerud* court file is not binding on Koenig and does not restrict disclosure of either the VIS or SSOSA evaluation by the prosecutor under the PRA. CP 253; *Koenig*, 155 Wn. App. at 402. Nonetheless, the County argues that the order to seal the file is "uncontested evidence" that nondisclosure is essential to effective law enforcement. *County's Reply* at 15-16. This argument is contrary to the parties' stipulation. The County cannot evade the stipulation by re-characterizing the order as "evidence" on an issue of fact. Lest this Court give any weight to the order to seal the *Lerud* court file, the Court should understand why the County was willing to stipulate that the

order was not binding. The details of how the prosecutor obtained the order are set forth in Koenig's motion for summary judgment. CP 75-81.

Koenig made separate requests for the *Lerud* records from the prosecutor and the court clerk. CP 37, 59. The prosecutor's response gave no indication that the prosecutor had noted a motion to seal the *Lerud* file. CP 38. The hearing notice for the prosecutor's motion was not served on Koenig, and the notice did not mention Koenig or his request for records from the prosecutor. CP 28, 62. A few days later, a letter from the clerk informed Koenig that the prosecutor had noted a motion to seal the **court** file. The letter did not mention Koenig's PRA request to the prosecutor or give any indication that the motion to seal the court file would affect Koenig's PRA request for records held by the **prosecutor**. CP 39. Koenig did not attend the hearing on the motion to seal the court file because he had no reason to believe that a motion to seal the court file in the *Lerud* case would affect his PRA request to the prosecutor. CP 28.

At the hearing, the prosecutor told the court that the County had received a request "through the Clerk's office" to examine the court file, and asked the court to seal the VIS. The prosecutor never mentioned the SSOSA evaluation. The prosecutor did not tell the court that Koenig had also requested the *Lerud* records from the prosecutor under the PRA. Consequently, the court had no idea that the prosecutor was seeking a

court order to prevent disclosure of records by the prosecutor under the PRA. The court granted the motion, and the prosecutor agreed to draft an order under GR 15. CP 46-50. The order presented by the prosecutor purported to seal “any privileged medical or psychological reports of the defendant” even though the court had not granted such relief. CP 63. Once the prosecutor obtained the order, the prosecutor used that order to withhold the VIS and SSOSA evaluation from Koenig. CP 52. The prosecutor did not even mention that the SSOSA evaluation existed. *Id.*

The prosecutor’s conduct was clearly unethical. RPC 3.3(f) provides that “[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.” In *Disciplinary of Ferguson*, ___ Wn.2d ___, ___ P.3d ___ (February 3, 2011), this Court upheld a determination that an attorney had violated former RPC 3.3(f) by making false representations about her efforts to provide notice to the adverse party, as well as by failing to disclose relevant facts. Similarly, the prosecutor in this case failed to inform the court that Koenig had made a separate PRA request for records from the prosecutor or that the County intended to rely on the GR 15 order to withhold records from Koenig under the PRA.

Koenig’s motion for summary judgment detailed the prosecutor’s

conduct in obtaining the order to seal the *Lerud* court file, and explained why the order was not binding. CP 74-99. Nevertheless, the County argued that the order prevented the prosecutor from producing records under PRA. CP 177-200. The trial court mentioned the order to seal the *Lerud* court file in its decision, but the court did not accept the County's arguments regarding the effectiveness of that order. CP 244-250. At that point the County *stipulated* that the order is not binding on Koenig and does not restrict disclosure of records under the PRA. CP 253.

Even if the County had not entered into the stipulation, the unlawful order obtained by the prosecutor would have no impact on Koenig's request for records from the prosecutor under the PRA. First, the order was issued *ex parte* and without any notice to Koenig that it would affect his pending PRA request. CP 28, 38-39, 62, 87-88. Unless Koenig had been made a party to the *Lerud* proceeding no valid order to enjoin the disclosure of records could have been issued. *Burt v. Dept. of Corrections*, 168 Wn.2d 828, 836-37, 231 P.3d 191 (2010).

Second, documents filed in court are presumptively open to the public unless compelling reasons to seal a document are found under the standards set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). Where a trial court fails to conduct the analysis required by *Ishikawa*, an order to seal a court record is invalid and must be vacated.

Seattle Times v. Serko, __ Wn.2d __, 243 P.3d 919, 928-29 (2010). The transcript from the prosecutor's motion to seal the *Lerud* court file clearly shows that the trial court did not conduct the required *Ishikawa* analysis. CP 44-50. The resulting order (CP 153) is void.

Third, the *Lerud* court did not authorize the prosecutor to withhold any records from Koenig. The prosecutor never told the court that a PRA request had been made to the prosecutor. CP 44-50. The court did not apply the PRA or issue an injunction under RCW 42.56.540. The resulting order to seal the court file had no legal effect on Koenig's request for records from the prosecutor. *Yakima County*, ¶ 86.

There is no basis for the County's opinion that "many" judges seal a VIS, and there is no reason to assume that files are sealed correctly. Almost 30 years after *Ishikawa* was decided, trial courts continue to improperly seal records. *See Seattle Times v. Serko*, 243 P.3d at 929. In 2006, an investigation by the Seattle Times revealed that many courts have sealed records without applying the correct legal standards. *See Reply Brief*, Appendix.⁵ The only fact that the County's "uncontested evidence" establishes is that the *Lerud* file was improperly sealed in this case.

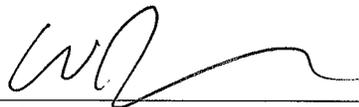
⁵ Available online at http://seattletimes.nwsource.com/cgi-bin/PrintStory.pl?document_id=2003595519&zsection (last visited February 1, 2011).

Finally, Koenig has explained that there is a critical difference between court files and the same documents in the possession of an agency. *Reply Br.* at 15; CP 203. Court files are available to the public unless they are sealed, but records held by an agency can be redacted prior to disclosure under the PRA. The County ignores this distinction.

IV. CONCLUSION

This Court should reverse the Court of Appeals' determination that the VIS is exempt from disclosure under RCW 42.56.240(1) and affirm the determination that the SSOSA evaluation is not exempt. This case should be remanded to the trial court with instructions to order the County to produce the VIS and SSOSA evaluation, for *in camera* review under RCW 42.56.550(3), if needed, and to award Koenig fees and penalties under RCW 42.56.550(4). On remand, if the County asserts that 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). Koenig also requests an award of attorney's fees in this Court pursuant to RAP 18.1(b), RCW42.56.550(4), and *Progressive Animal Welfare Soc'y v. UW (PAWS I)*, 114 Wn.2d 677, 690, 790 P.2d 604 (1990).

RESPECTFULLY SUBMITTED this 4th day of February, 2011.



William John Crittenden, WSBA No. 22033

WILLIAM JOHN CRITTENDEN
Attorney at Law
300 East Pine Street
Seattle, Washington 98122
(206) 361-5972
wjcrittenden@comcast.net

Attorney for Respondent / Cross-Petitioner David Koenig

Certificate of Service

I, the undersigned, certify that on the 4th day of February, 2011, I caused a true and correct copy of this *Supplemental Brief of Respondent / Cross-Petitioner* to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) and First Class Mail to:

Jeffrey Fancher
Thurston County Prosecutor
2424 Evergreen Park Dr SW Ste 102
Olympia WA 98502-6024
fanchej@co.thurston.wa.us

Michael C Kahrs
Attorney At Law
5215 Ballard Ave NW Ste 2
Seattle WA 98107-4838
mkahrs@kahrsfirm.com

Amy Muth
Law Office of Amy Muth, PLLC
1111 3rd Ave, Ste 2220
Seattle WA 98101-3213
amy@amymuthlaw.com



William John Crittenden, WSBA No. 22033