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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAVID KOENIG,
Respondent/Cross-Petitioner,

v.

THURSTON COUNTY,

Petitioner/Cross-Respondent.

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**BRIEF OF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON**

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ORIGINAL

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I. IDENTITY AND INTEREST OF AMICUS

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation and defense of constitutional and civil liberties. It supports the right of any member of the public to promote government transparency and accountability through public records requests, and believes that those who exercise their right to access should not be limited by prohibitive costs. The ACLU is also a leading proponent of informational privacy, including the privacy rights of victims and defendants in the criminal court system. Where competing public interests are implicated, the public’s interest in disclosure must be balanced with other legitimate public interests served by nondisclosure.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case illustrates the tension between the public’s right to access court and prosecutor’s office records and the need for confidentiality of certain documents submitted in connection with criminal court proceedings to protect the privacy rights of victims, defendants and other involved individuals. The documents in dispute here are Victim Impact Statements (“VIS”) and Special Sex Offender Sentencing Alternative (“SSOSA”) evaluations, both containing disclosures to the court used in the sentencing phase of some sex offense cases.

Amicus asks the Court to conclude that nondisclosure of VIS and SSOSA evaluations in cases involving sex crimes, where such records have been sealed in court records, is required under the privacy prong of the investigative records exemption of the Public Records Act (“PRA”). In this case, David Koenig (“Koenig”) made a PRA request to the Prosecuting Attorney’s office for the sex offender’s file, but the VIS and SSOSA evaluation in that file were sealed in the court record.

This case involves competing interests under the PRA. The public has a legitimate interest in accountability and oversight of prosecutors, criminal sentencing decisions, the efficacy of the sexual offender programs and open access to court files. However, any public interest in the disclosure of intimate details of sexual activity and sensitive medical information contained in *sealed* criminal court records is outweighed by other vital public interests. Therefore, the overall public interest in disclosure of the documents at issue cannot be viewed as legitimate, and the documents should be entirely exempt from disclosure under the privacy prong of the investigative record exemption of the PRA.¹

¹ *Amicus* does not offer argument on whether the VIS and SSOSA are “investigative records” under the PRA. *Amicus* also does not address whether the documents at issue are exempt under the “essential to law enforcement” prong of the investigative records exemption.

III. ISSUES PRESENTED

Where a PRA request is made to the Prosecuting Attorney for a VIS and SSOSA evaluation that is submitted in sentencing of a sex crime and is sealed in the court record, is nondisclosure of those documents required under the privacy prong of the investigative records exemption of the Public Records Act, RCW 42.56.240(1)?

IV. STATEMENT OF THE CASE

The key facts from the parties' briefs and the Court of Appeals' decision are summarized below.

A. Victim Impact Statements and SSOSA Evaluations Contain Extremely Sensitive Private Information Related to the Sentencing Phase of Some Sex Offense Cases.

Victims of sex crimes and sex offenders may provide information relevant to the issues before the court in the sentencing phase of sex crimes, but it is often private and sexually explicit information which no reasonable person would wish to have publicly disclosed. Crime victims have a statutory right to submit a victim impact statement ("VIS"). RCW 7.69.030(13). This VIS may include the financial, medical, social and psychological impact of the offense on the victim – items which can range from the sex life of the victim with other people or prior abuse to humiliating victimization at the time of the offense. RCW 7.69.020(4); *see also* Thurston County's Reply to Respondent Koenig's Answer to

Petition for Review, p. 7 (Kim H. Carroll declaration describing VIS at CP 277-278). In this case, victim advocate groups provided declarations describing the harm that would be inflicted on victims if VIS's were publicly disclosed. *See* Thurston County's Reply to Respondent Koenig's Answer to Petition for Review, pp. 6-7 (Catherine A. Carroll declaration at CP 117, David L. Johnson declaration at CP 123 and Kim H. Carroll declaration at CP 277-278).

Equally sensitive information is contained in the SSOSA evaluation. Recognizing the role of treatment for convicted sex offenders in protecting community safety, the Washington legislature established a Special Sex Offender Sentencing Alternative ("SSOSA") program where a convicted sex offender may be eligible for treatment as part of his or her sentencing. RCW 9.94A.670. The SSOSA program is limited to sex offenders with no prior conviction for a sex offense and sex offenses that did not result in substantial bodily harm to the victim. *See* RCW 9.94A.670(2) (listing requirements). If the court finds that the offender is eligible for the SSOSA, the court, on its own motion or the state or the offender's motion, may order an examination to determine whether the offender is amenable to treatment. *See* RCW 9.94A.670(3).

Generally, SSOSA evaluations cover the following topics:
"Client's Version of the Incident; Victim's Version of the Incident; and

Client's Medical, Mental Health, Employment, Educational, Developmental, Relationship/Marital, Substance Abuse, and Sexual Histories." See *Koenig v. Thurston County*, 155 Wn.App. 398, 426-427, 229 P.3d 910 (2010), *review granted*, 170 Wn.2d 1020, 245 P.3d 774 (2011); RCW 9.94A.670(3)(a); *see also* Thurston County's Petition for Review, pp. 13-17 (declarations describing SSOSA evaluations). They can also include physical exams such as a plethysmograph that measures sexual arousal. *Koenig*, 155 Wn.App. at 426-427. The plethysmograph is a test that "measures sexual arousal by means of an electronic recording device attached to the penis of the person being tested. The recording device monitors the subject's responses to the viewing of slides of naked women and children of various ages involved in various types of sexual activity." *In re Marriage of Parker*, 91 Wn.App. 219, 222, 957 P.2d 256 (1998).² A SSOSA evaluation may contain private sexual information about the sex offender's current and past sexual partners, suicidal thoughts, fantasies during masturbation, use of pornography, past victims

² Another case describes the plethysmograph in more detail: "The individual is placed in a room and a mercury strain gauge is placed around the penis so that the circumference of the penis can be measured. And this mercury strain gauge is capable of measuring slight increases in circumference, many times before they are noticeable to the man himself. The individual is then presented with sequential stimulus materials, auditory and visual, encouraging him to think about and look at materials indicative of sexual activity with different ages of people, different genders, and different sexual activities." *State v. Spencer*, 119 N.C.App. 662, 459 S.E.2d 812, 814-815 (1995).

or information about the offender's childhood and family, including having previously been the victim of sexual or other abuse. *See* WAC 246-930-320. The SSOSA examinations and treatments must be provided by certified sex offender treatment providers who are health care professionals regulated by the Department of Health. RCW 9.94A.670(13); RCW 18.155.020; WAC 246-930-020. The record contains declarations describing why public disclosure of these evaluations would deter people from using the SSOSA process, undermining the public interest in effective treatment of sex offenders. *See* Thurston County's Petition for Review, pp. 7-11 (Robert Macy declaration at CP 100-103 and Amy Muth declaration at CP 110-112).

B. The PRA Request to the Prosecuting Attorney's Office for James Lerud's Criminal Court Records Included the Victim's Impact Statement and Lerud's SSOSA Evaluation.

James Lerud pleaded guilty to eight counts of voyeurism. While the criminal case was pending, David Koenig made a PRA request to the Thurston County Prosecuting Attorney's Office (the "Prosecuting Attorney") for public records in the Lerud file. Koenig asked to inspect the investigative files in the case, including witness statements, victim impact statements, and any associated documents or affidavits. Lerud received a Special Sex Offender Sentencing Alternative disposition, and the Prosecuting Attorney's file also included Lerud's SSOSA evaluation.

Koenig sent a similar PRA request to the Thurston County Superior Court clerk's office. The clerk's office allowed Koenig to review documents except for the VIS and SSOSA evaluation, which were the subject of the Prosecuting Attorney's pending motion to seal certain documents. After the trial court granted the motion to seal,³ the Prosecuting Attorney mailed copies of the case documents to Koenig, withholding the VIS and SSOSA reports based on the court's sealing order.

Koenig then filed a PRA complaint against Thurston County and the Prosecuting Attorney, seeking the same SSOSA evaluation and VIS from the Lerud case he had sought before. The trial court ruled that the records were exempt from disclosure under the investigative record exemption of the PRA and denied Koenig's motion. The parties stipulated that the order to seal was not binding on Koenig and that it did not restrict the Prosecuting Attorney's disclosure of the documents under the PRA.

After Koenig appealed, in a plurality decision with three opinions, the Court of Appeals ruled that the VIS was exempt from disclosure under the "effective law enforcement" prong of the investigative record exemption and did not decide whether it was exempt under the privacy prong of the exemption. *Koenig*, 155 Wn.App. at 411. The majority

³ The parties dispute whether the motion to seal was properly granted. *Amicus* takes no position on that matter, but assumes for the purpose of argument that the order was properly issued.

found, on the other hand, that the SSOSA evaluation was not exempt under the “effective law enforcement” prong, and that it could be redacted to protect everyone but the sex offender’s privacy under the privacy prong.⁴ *Koenig*, 155 Wn.App. at 418-419. This Court granted review.

V. ARGUMENTS OF AMICUS CURIAE

A. **The PRA Recognizes that Both the Public’s Right to Access Government Agency Records and Victims’ and Defendants’ Privacy Rights in the Criminal Court System are Important Public Interests.**

The Public Records Act, Chapter 42.56 RCW, is a broad mandate for the disclosure of documents held by government agencies with limited exceptions. However, the PRA does not override or limit the personal privacy interests of individuals simply because the government possesses their private information. When the people of Washington state enacted the PRA through initiative, they declared that disclosure under the PRA be “mindful of the right of individuals to privacy and of the desirability of efficient administration of government.” RCW 42.17.010 (11).

⁴ Judge Penoyar held that the PRA requires SSOSA evaluations to be redacted to exclude information identifying the victim of the charged crime, other victims named in the evaluation, and, where appropriate, the victims’ family members, friends, innocent bystanders and any other non-expert or non-law enforcement witness. *Koenig*, 155 Wn.App. at 418.

This Court has recognized competing policy interests in the PRA with regard to criminal matters and endorsed a “workable formula” to resolve the conflict:

Achieving an informed citizenry is a goal sometimes counterpoised against other important societal aims. ***Indeed, as the act recognizes, society’s interest in an open government can conflict with its interest in protecting personal privacy rights and with the public need for preserving the confidentiality of criminal investigatory matters, among other concerns.*** Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure.

Spokane Police Guild v. Washington State Liquor Control Board, 112 Wn.2d 30, 33-34, 769 P.2d 283 (1989) (emphasis added).

The PRA contains an exemption for investigative public records. The investigative records exemption, RCW 42.56.240, states: “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.”

B. Exempting a Court-Sealed VIS and SSOSA Evaluation from Public Disclosure in Sex Crime Cases Is Necessary to Protect Privacy.

Investigative records, such as the VIS and SSOSA evaluation at issue here, are exempt from disclosure when essential “for the protection of any person’s right to privacy.” RCW 42.56.240(1). The PRA further explains that disclosing information violates a person’s right to privacy “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. Both conditions must be met.

1. Public Disclosure of Sealed VIS’s Related to Sex Crimes and SSOSA Evaluations Would be Highly Offensive to a Reasonable Person.

Disclosure of the types of information contained in sealed VIS and SSOSA evaluations in sex crime cases would be highly offensive to a reasonable person. Koenig concedes this with respect to the SSOSA evaluation, but blames prosecutors and victim advocates for the fact that a VIS does, in fact, typically contain such details. Brief of Appellant, pp. 19, 29. Exemptions in the PRA, of course, do not depend on what a party believes *should* be in the document at issue, but instead on the actual contents. When considering the actual contents of the VIS and SSOSA evaluation in this case, the trial judge deemed them worthy of sealing, recognizing that sealing was justified by a compelling privacy concern.

Amicus has not seen the documents at issue here. We are also unable to give this Court examples of other VIS or SSOSA evaluations. Both prosecutors and defense attorneys have been unwilling to share examples, even when associated with a case unknown to *Amicus* and with identities fully redacted. It is clear from the response to our requests that all involved believe the information is highly sensitive and goes far beyond information otherwise disclosed to the public under sex offender notification laws. *Amicus* respectfully urges the Court to examine the actual documents in this case to better understand their nature.

In defining “privacy” for purposes of the PRA, Washington courts borrow from the common law tort of invasion of privacy. *Bellevue John Does 1-11 v. Bellevue School Dist.* #405, 164 Wn.2d 199, 212, 189 P.3d 139 (2008), *citing Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 135-36, 580 P.2d 246 (1978). This Court has repeatedly illustrated the types of information covered: “Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man’s life in his home, and some of his past history that he would rather forget.” *Id.* at 213 (quoting *Hearst* and Restatement (Second) of Torts, § 652D cmt. b); *see also Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 706, 24 P.3d 390 (2001), *rev’d on other grounds* 536 U.S. 273 (2002) (finding

personal relationships, sexual habits, and physical anatomy to be protected by privacy tort).

While consensual sexual relations typically fall within this definition, disclosure of details about sex crimes are even more invasive of privacy. Not only do they involve sexual matters, but they are exactly the kind of “unpleasant or disgraceful or humiliating” matters and “past history that [s]he would rather forget” that the *Hearst* Court was referring to. Both the VIS and SSOSA evaluation are likely to include humiliating and degrading details of sexual victimization, and have the potential to also include items of physical and mental health history, prior history of sexual abuse, and undisclosed sexual orientation.

The reality is that sex crimes are perceived differently by both victims and society at large, resulting in compelling considerations relevant to whether details about them in the VIS and SSOSA evaluation should be publicly disclosed. There continues to be significant stigma associated with sexual victimization. *See, e.g.*, Rape Abuse & Incest National Network, *Confidentiality Laws*, at <http://www.rainn.org/public-policy/sexual-assault-issues/confidentiality-laws> (describing the reason confidentiality of a victim’s statements to a sexual assault counselor is essential); RCW 5.60.060(7) (sexual assault advocate privilege in Washington); Center for Sex Offender Management, *The Role of the*

Victim and Victim Advocate in Managing Sex Offenders, at www.csom.org/train/victim/2/slides/section2-slides.ppt (discussing sexual assault victim fears about disclosure which cause delayed or non-reporting of the offense). Rape is heavily underreported, with only about an estimated one-third of rapes reported to police. *See* Daniel M. Murdock, Comment, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177, 1177 (2007). The predominant reason for this underreporting is that victims fear public disclosure about it. *Id.*

The extremely sensitive nature of the information in VIS's and SSOSA evaluations is reflected in how sex crimes are handled in society. There are numerous rape crisis centers and even a national sexual assault hotline, supported by both public and private money, because disclosure of information about sex crimes adds to the trauma of the sexual assault itself and requires especially sensitive handling. There are special rules of evidence to protect the privacy of sexual assault victims, specifically protecting them from having to disclose information about their past sex life. *See* RCW 9A.44.020 (Washington's rape shield statute). And perhaps most significantly, there is even widespread agreement among news organizations that the identities of sexual assault victims should not be reported in order to protect their privacy. *See, e.g.*, Associated Press,

The Associated Press Statement of News Values and Principles, at <http://www.ap.org/newsvalues/index.html>. All of this is based on the recognition that sex crimes involve an intimate matter, the disclosure of which impinges on people's privacy. It simply cannot be credibly asserted that disclosure of details of sex crimes and the impact those crimes have on victims is not highly offensive to a reasonable person.

In the present case, the Prosecuting Attorney moved to seal both the victim's impact statement and the sex offender's SSOSA evaluation as confidential and privileged health information. The victim of the sex offense relied on the Prosecuting Attorney's assurances that her VIS would remain confidential. *See Koenig*, 155 Wn.App. at 407. She would not have provided a VIS if she had been told that the statement would become a public document. *Id.* James Lerud's SSOSA evaluation also contained privileged medical and psychological reports. *Id.* at 401-402. The SSOSA evaluation likely contained private information of the victim and others who might be mentioned in the evaluation. *See id.* at 426-427; WAC 246-930-320. Finding compelling privacy concerns, the trial court sealed both these records. Disclosure of information under these circumstances—sealed documents containing private sexual information related to a sex crime—would be highly offensive to a reasonable person.

2. Public Disclosure of Court-Sealed VIS's in Sex Crime Cases and Court-Sealed SSOSA Evaluations Does Not Serve a Legitimate Public Concern.

Not all interests of the public are “legitimate,” and even public interests that are reasonable in the abstract may become illegitimate when the societal cost of fulfilling those interests is considered. In assessing the “legitimate concern” factor, the public interest in disclosure must be balanced against the public interest in the efficient administration of government. *Koenig v. Des Moines*, 158 Wn.2d 173, 185, 142 P.3d 162 (2006). 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. *Id.*

VIS and SSOSA evaluations are used by the trial court at the sentencing phase of trial to determine the sex offender's sentence and eligibility for the SSOSA program. Other documents and the court hearing itself are public. Although the public has a legitimate interest to access most court records in criminal cases to oversee government activities such as the trial court's sentencing decisions, the effectiveness of prosecutors, and the usefulness of the statutory SSOSA program, other important public interests demand that court-sealed VIS and SSOSA evaluations remain exempt from public disclosure.

a. Public Disclosure of the VIS Would Harm the Public Interest in the Efficient Participation of Victims in Sentencing Decisions.

Washington recognizes a strong public interest in victim participation in the sentencing process, with the submission of a VIS guaranteed both by statute, RCW 7.69.030(13), and by the Washington Constitution, Article 1, Section 35. As demonstrated by the multiple declarations submitted to the trial court in this case, that public interest would be undermined by public disclosure of a VIS containing sensitive and intimate details. Many victims—including the victim in this case—would be unwilling to participate in the sentencing process if it cost a permanent loss of privacy in that matter.

Koenig asserts that a VIS is intended to be used in open court, and therefore there is no privacy right associated with it. Brief of Appellant at 19-21. But this ignores the difference between a one-time appearance in court and a permanent public record. The written VIS lasts forever. If it is released to the public, the victim's trauma may be repeated multiple times in the future—with no beneficial result of seeing justice done. This is an unacceptable trade-off for many victims of sex crimes, and the compelling public interest in an effective justice system will be harmed.

Not every victim will be adversely affected by disclosure of his or her VIS, of course—not even every victim of a sex crime. Some will not

mind the loss of privacy, and will even see publicity of details as a way of reclaiming the power taken from them by the perpetrators. Others will simply not include intimate details in their statements, finding it sufficient to relate only general facts. One very strong indicator of whether a particular VIS is indeed sensitive, and whether its disclosure will have negative effects on future exercise of victim rights, is whether the judge—after evaluating public and private interests—determines that sealing the VIS is justified, as was done here.

b. Public Disclosure of SSOSA Evaluations Would Harm the Public Interest in an Efficient and Effective SSOSA Program.

The Legislature established the SSOSA program over twenty years ago, recognizing the strong public interest in treatment of amenable sex offenders in order to reduce recidivism. As demonstrated by the multiple declarations submitted to the trial court in this case, the program has been remarkably effective in protecting public safety—and would be undermined by public disclosure of SSOSA evaluations. It must be remembered that these evaluations are often produced *prior* to conviction, as part of plea negotiations, and that they contain intimate details of the alleged offender's life—not just details of the alleged offense, but sensitive details of psychosexuality, mental health, and past abuse. If alleged offenders know that their innermost secrets will be released to the

public, many will choose not to participate. Even more harmful to public safety, public disclosure discourages candor in the information given to the evaluator, which undermines effective treatment. *See* CP at 103 (expert confirming this detrimental effect)⁵; *Smith v. Orthopedics Intern., Ltd., P.S.*, 170 Wn.2d 659, 667, 244 P.3d 939 (2010) (one of recognized purposes of treatment professional confidentiality is to “surround patient-physician communications with a ‘cloak of confidentiality’ to promote proper treatment by facilitating full disclosure of information”). Given the more important interests at stake, whatever public interest there is in the evaluation details is not “legitimate,” as recognized by the court in its sealing order.

c. Public Disclosure of the VIS and SSOSA Evaluation Would Harm the Public Interest in Sealing Court Records.

The decision to seal court records is not made lightly. Trial courts may only seal records “if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the

⁵ The therapist stated public disclosure of the evaluation 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.”

court record.” GR 15(c)(2). The trial court must also consider the five-part analysis set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) to ensure that the restriction of court records meets constitutional requirements. Here, Koenig could not obtain the VIS and SSOSA evaluation from the Thurston County Superior Court clerk because those records were sealed, presumably in accordance with those requirements. To allow the PRA to circumvent a court sealing order would harm the public interest in efficient government operations.

First, there is simply the redundant effort involved in evaluating privacy interests, first by the sealing court, and then again by an agency and court dealing with a PRA request. There is a strong public interest in the judicial efficiency resulting from consideration of the privacy interest only once. And, of course, there is also a great deal of waste in the associated efforts of parties, attorneys, and other interested persons who all must contest the same issue in multiple fora.

Second, and perhaps more significantly, there is the risk of inconsistent determinations among the several fora. When two incompatible—and binding—determinations of privacy are made, it reduces respect for the judiciary. More subtly, it demonstrates that privacy is a second-class right. Since a requester need only prevail in a single forum in order to obtain a document, the lesson quickly becomes

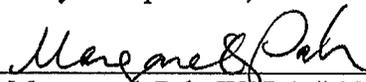
that a privacy-protective decision is merely a nuisance; all that one needs to do is bring the same question before a second (or third, or fourth) body until a contrary decision is reached. The correct procedure to deal with improper sealing is a motion to unseal under GR 15(e) or a motion to vacate the order—not a collateral attack in a PRA action.

There is therefore no *legitimate* public concern in the contents of sealed records justifying disclosure. Here, the public interest in efficient government would be harmed significantly more than the public would be served by disclosure of sealed records.

VI. CONCLUSION

Amicus respectfully submits that nondisclosure of court-sealed VIS and SSOSA evaluations in cases involving sex crimes is required under the privacy prong of the investigative records exemption.

Respectfully submitted this 6th day of September, 2011.

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