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NO: 66428-~~1~~

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

King County Clerk,

Plaintiff/Appellant,

v.

Ignacio Encarnación and N. Karla Farras,

Defendant/Respondent.

BRIEF OF RESPONDENTS ENCARNACIÓN & FARRAS

RECEIVED
COURT OF APPEALS
DIVISION ONE

APR - 1 2011

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 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
I. Introduction	1
II. Statement of the Case	4
III. Statement of Issues Presented	8
IV. Argument & Authority	9
A. Judicial transparency is intended to enable public oversight and foster public confidence in the court system	10
B. The public’s access to court records must sometimes yield to other constitutional interests, including privacy	12
1. Development of Washington’s record-sealing jurisprudence with respect to privacy rights cases.....	13
2. GR 15, <i>State v. Waldon</i> and the GR 15/ <i>Ishikawa</i> test.....	16
C. SCOMIS redaction under the GR15/ <i>Ishikawa</i> test.....	17
D. The Superior Court properly applied GR15/ <i>Ishikawa</i> test.....	21
1. The unlawful detainer case record posed a serious and imminent threat to the Respondents’ privacy as related to rental housing access.....	21
2. The superior court conducted an open hearing and allowed objections from any person present.....	24
3. The superior court sought the least restrictive effective means to protect the Respondents’ privacy interest.....	25
4. The superior court correctly ruled that the Respondents’ privacy interests outweighed the public interest in access to the case record by a SCOMIS name search.....	29
5. The redaction order is temporary and narrow in scope.....	36

TABLE OF CONTENTS

	<u>Page</u>
E. Redaction is not tantamount to destruction of records.....	37
1. The Clerk can redact party names from SCOMIS consistent with GR 15(c).....	37
2. Redaction of party names from SCOMIS does not render the case file inaccessible even temporarily.....	38
F. Allowing the redaction of party names from SCOMIS is essential to enabling courts to protect privacy.....	40
1. Courts need the power to redact their own databases in order to protect individuals' privacy rights.....	40
2. Precluding courts from redacting the contents of their own databases would cause due process violations	42
3. Precluding the redaction of court indices, such as SCOMIS, would be contrary to public policy.....	44
VI. Conclusion.....	49

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Constitutions, Statutes, & Regulations – Washington</i>	
RCW 2.56.....	18
RCW 2.68.....	18
RCW 19.182.040(1)(b).....	37
RCW 19.182.060(2).....	27, 48
RCW 19.182.090(5)(a).....	28
RCW 19.182.090(6).....	29
RCW 59.18.030(2).....	5
RCW 59.18.580.....	22
RCW 59.18.580(1).....	20
Wash. St. Const., Art. I, § 7.....	12, 15, 40
Wash. St. Const., Art. I, § 10.....	11, 32
 <i>Court Rules</i>	
GR 15.....	8, 16- 18, 20- 21, 25, 40, 42, 46, 48
GR 15(a).....	20, 38
GR 15(b).....	16
GR 15(b)(2).....	20
GR 15(b)(3).....	37
GR 15(c).....	9, 16, 21, 37, 43

TABLE OF AUTHORITIES

	<u>Page</u>
GR 15(c)(1).....	24-25
GR 15(c)(2).....	16-17, 25
GR 15(c)(2)(F).....	22
GR 15(c)(4).....	20
GR 15(c)(5).....	37-38
GR 15(c)(5)(B).....	38
GR 15(c)(5)(D).....	38
GR 15(c)(6).....	37-38
GR 15(f).....	37, 40
GR 31(c)(3).....	19
GR 31(c)(4).....	20
GR 31(g).....	39-40
GR 31(g)(1).....	28
JISCR 1.....	18
JISCR 13.....	17
JISCR 15.....	41, 45
JISCR 15(b).....	18
King County LCR 7(b)(4)(A).....	24
King County LGR 15(c).....	7

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Judicial Decisions</i>	
<i>Allied Newspapers v. Eikenberry</i> , 121 Wn.2d 205; 848 P.2d 1258 (1993).....	11, 15, 32, 41, 48
<i>Armstrong v. Manzo</i> , 380 U.S. 545; 85 S.Ct. 1187 (1965).....	43
<i>Bellevue John Does I – II v. Bellevue School Dist.</i> , 164 Wn.2d 199; 189 P.3d 139 (2008).....	30, 34
<i>City of Tacoma v. Tacoma News, Inc.</i> , 65 Wn. App. 140; 827 P.2d 1094 (1994).....	34
<i>Cohen v. Everett City Council</i> , 85 Wn.2d 385; 535 P.2d 801 (1975).....	32
<i>Does I thru XXIII v. Advanced Textile Corp.</i> , 214 F.3d 1058 (9 th Cir. 2000).....	31
<i>Dreiling v. Jain</i> , 151 Wn.2d 900; 93 P.3d 861 (2004).....	11-12, 30, 32, 42
<i>Federated Publications, Inc. v. Kurtz</i> , 94 Wn.2d 51; 615 P.2d 440 (1980).....	10, 12- 15, 46
<i>Foisy v. Wyman</i> , 83 Wn.2d 22; 515 P.2d 160 (1973).....	33
<i>Humphries v. County of Los Angeles</i> , 554 F.3d 1170 (9 th Cir. 2009).....	43-44
<i>In re Dependency of D.M.</i> , 136 Wn. App. 387; 149 P.3d 433 (2006).....	31
<i>In re Oliver</i> , 333 U.S. 257; 68 S.Ct. 499 (1948).....	10
<i>Indigo Real Estate Services v. Rousey</i> , 151 Wn. App. 941; 215 P.3d 977 (2009).....	8-9, 17,

TABLE OF AUTHORITIES

	<u>Page</u>
	19-22, 27-29, 33, 40- 41, 43, 49
<i>Los Angeles County v. Humphries</i> , ___ U.S. ___; 131 S.Ct. 447 (2010)	44
<i>Mathews v. Eldridge</i> , 424 U.S. 319; 96 S.Ct. 893 (1976).....	43
<i>Paul v. Davis</i> , 424 U.S. 693, 96 S.Ct. 1155 (1976).....	42
<i>Port of Longview v. Intern’l Materials, Ltd.</i> , 96 Wn. App. 431; 979 P.2d 917 (1999).....	33
<i>Richmond Newspaper, Inc. v. Virginia</i> , 488 U.S. 555; 100 S.Ct. 2814 (1980).....	10
<i>Rufer v. Abbot Laboratories</i> , 154 Wn.2d 530; 114 P.3d 1182 (2005).....	30-32, 42
<i>State v. A.N.J.</i> , 168 Wn.2d 91; 225 P.3d 956 (2010).....	31
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30; 640 P.2d 716 (1982).....	8-9, 12, 14-17, 20-21, 23-26, 29, 36, 40, 42, 46, 48- 49
<i>Shoemaker v. Shaug</i> , 5 Wn. App. 700; 490 P.2d 439 (1971).....	33
<i>State vs. McEnry</i> , 124 Wn. App. 918, 103 P.3d 857 (2004).....	22-23

TABLE OF AUTHORITIES

	<u>Page</u>
<i>State v. Noel</i> , 101 Wn. App. 623; 5 P.3d 747 (2000).....	12, 41
<i>State v. Waldon</i> , 148 Wn. App. 952; 202 P.3d 325 (2009).....	16-17, 21
<i>T.S. v. Boy Scouts of America</i> , 157 Wn.2d 416; 138 P.3d 1053 (2006).....	31
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433, 91 S.Ct. 507 (1971).....	42
<i>Other Authorities</i>	
Beccaria, Cesare, <i>On Crimes & Punishment</i> (1974).....	11
Dept. of Health, Education & Welfare, <i>Records, Computers and the Rights of Citizens</i> (July 1973).....	47-49
Dunn, Eric and Marina Grabchuk, “Background Checks and Social Effects: Contemporary Tenant-Screening Problems in Washington State”, 9 Seattle J. for Soc. Just. 319 (2011).....	19, 45
Kleystauber, Rudy, “Tenant Screening Thirty Years Late: A Statutory Proposal to Protect Public Records, 116 Yale L.J. 1344 (2007).....	34-35
National Research Council of the National Academies, <i>Engaging Privacy and Information Technology in a Digital Age</i> (2007).....	35, 47
Solove, Daniel J., <i>The Digital Person: Technology and Privacy in the Information Age</i> (2004).....	1, 3, 35-36, 41, 45- 46
Testimony of John Bell to Wash. House Jud.Comm. (June 8, 2010)	19, 28

I. Introduction

In 2004, electronic information privacy expert Professor Daniel Solove warned of new threats besieging consumers from the widespread digitization and instant accessibility of personal data through internet databases. See Solove, Daniel J., *The Digital Person: Technology and Privacy in the Information Age* (2004). Contrasting a classic Orwellian image of an omnipresent authority gathering and using data for malignant purposes against that of an inscrutable bureaucracy producing similarly toxic results through mere indifference, Professor Solove wrote:

“The privacy problem created by the use of databases stems from an often careless and unconcerned bureaucratic process—one that has little judgment or accountability—and is driven by ends other than the protection of people’s dignity. We are not just heading toward a world of Big Brother or one composed of Little Brothers, but also toward a more mindless process—of bureaucratic indifference, arbitrary errors, and dehumanization—a world that is beginning to resemble Kafka’s vision in *The Trial*.”

Solove at 55.

At the heart of this problem, Professor Solove explained, is that “information in databases often fails to capture the texture of our lives. Rather than provide a nuanced portrait of our personalities, compilations of data capture the brute facts of what we do without the reasons.” *Id.* at 49. Using the contents of digital databases to assess a person’s character or reputation often leads to impoverished judgments that harm both the

decision-makers and the affected individuals, such as by limiting their access to employment, credit, or—as pertinent to this case—housing.

Neither Ignacio Encarnación nor his wife, N. Karla Farias, had ever heard of Professor Solove when they applied to rent an apartment at “The Court Yard” in Burien, Washington, in November 2009. But when The Court Yard’s property manager called them shortly thereafter to say that their application had been denied, Mr. Encarnación and Ms. Farias learned first-hand the dangers of such impoverished judgments.

The reason for rejection, the property manager explained, was that Mr. Encarnación and Ms. Farias had an “eviction record.” But neither Mr. Encarnación nor Ms. Farias had ever been evicted—that is, they had never been ordered to leave, or physically expelled from, rental premises by judicial process. A prior landlord had filed an eviction lawsuit against them, however, and the record of that lawsuit was maintained in an electronic database freely available to the public over the internet. This was the “eviction record” to which The Court Yard’s manager referred.

Mr. Encarnación protested the denial of their rental application. It was true that he and Ms. Farias had been sued for eviction, he said, but they had a meritorious defense. Far from being evicted, they had settled the matter on favorable terms. The suit had been dismissed. The record of the eviction action was misleading—or as Professor Solove might have

expressed it, the “eviction record” gave a distorted impression of Mr. Encarnación and Ms. Farias that did not capture the “texture” of their suitability for the tenancy. See Solove at 49.

This did not matter to The Court Yard. It was company policy, the property manager said, not to accept any tenant against whom an eviction suit had been filed. Though they had always been good tenants in the past, Mr. Encarnación and Ms. Farias were forced to look elsewhere for rental housing—and as they would soon learn, The Court Yard was not the only apartment building that had become inaccessible to them once their names appeared as unlawful detainer defendants in the superior court records.

On the contrary, The Court Yard’s policy—of automatically declining applicants with unlawful detainer records—is typical of many Washington housing providers. Even landlords that do not exclude all such applicants categorically still tend to downgrade those with eviction records, rejecting them more readily if other adverse information appears (such as delinquent consumer debts or minor criminal offenses). As with The Court Yard, the facts, circumstances, or outcomes of an applicant’s past eviction lawsuit are seldom taken into account. That a quality tenant may be misidentified as “unsuitable” through this process (i.e., a “false negative”) is accepted, presumably as a trade-off for assuring that fewer “false positives” (i.e., unsuitable tenants misidentified as suitable) occur.

With the unlawful detainer case record substantially diminishing their rental housing opportunities, Mr. Encarnación and Ms. Farias filed a motion in the superior court to redact their names from the index housing providers and tenant-screening firms use to discover whether rental applicants have been sued for eviction. The superior court, after weighing their individual privacy rights against the public's interest in access to the court record, ordered the redaction.

The King County Clerk, who opposed Mr. Encarnación's and Ms. Farias' motion below, now appeals from the order for redaction. But the redaction order was narrowly-tailored, well-supported by the facts and law, and imperative under the interests of justice. It should be affirmed.

II. Statement of the Case

On or about December 31, 2007, Ignacio Encarnación and Norma Karla Farias leased an apartment on 152nd Street in Burien, Washington, for themselves and their three children. CP at 38, 46. After an initial six-month lease term expired, Mr. Encarnación and Ms. Farias entered into two subsequent lease renewals, most recently renewing for a one-year term beginning in July 2009. CP at 39, 46-50. Throughout their time of occupancy, Mr. Encarnación and Ms. Farias consistently paid their rent, complied with the rules of their tenancy, and did not have any problems

with the landlord or neighbors. CP at 43, 94.

On or about August 1, 2009, the apartment building was sold to new owners, Aaron Hundtofte and Kent Alexander. CP at 39, 52. Shortly after acquiring the property, the new owners asked Mr. Encarnación and Ms. Farias to enter in a new, month-to-month lease agreement. CP at 39-40, 54-66. Mr. Encarnación and Ms. Farias did not agree to the month-to-month lease proposal. CP at 40. As they would later learn, Mr. Hundtofte and Mr. Alexander planned to make substantial renovations, which would not be possible with tenants occupying the premises. CP at 41-42.

A dispute then arose between Mr. Encarnación and Ms. Farias, who believed they were entitled to occupy the premises through the end of their one-year lease term, and Mr. Hundtofte and Mr. Alexander, who did not wish to honor that lease. CP at 40-41, 68-78, 93. On or about August 4, 2009, Mr. Hundtofte and Mr. Alexander served Mr. Encarnación and Ms. Farias with the first of multiple notices purporting to terminate their tenancy as of September 1, 2009. CP at 40-41, 68-78, 93.

Under state law, the notices Mr. Hundtofte and Mr. Alexander served Mr. Encarnación and Ms. Farias would have been effective to terminate a month-to-month tenancy, but not a tenancy for a specified time. See RCW 59.18.030(2). Asserting their unexpired one-year lease term, Mr. Encarnación and Ms. Farias chose to remain beyond September

1 and challenge the termination of their tenancy. CP at 93-94. Mr. Hundtofte and Mr. Alexander stopped accepting Mr. Encarnación's and Ms. Farias' rent, and filed this unlawful detainer action on September 10, 2009. CP at 40-41, 94.

Following a course of negotiations, the parties entered into a Stipulation and Agreed Order on November 12, 2009, that resolved the case. CP at 41-42, 90-94. The agreement, which essentially functioned as a "buy out" of their remaining term, entitled Mr. Encarnación and Ms. Farias to retain the September, October, and November rent money and obligated Mr. Hundtofte and Mr. Alexander to provide them a favorable reference, in return for which Mr. Encarnación and Ms. Farias agreed to leave the apartment by December 1, 2009. CP at 90-92.

Mr. Encarnación and Ms. Farias began searching for housing immediately after the agreement, and promptly applied to a vacant unit at The Court Yard in Burien. CP at 42, 94-95. They submitted rental applications and paid \$80 for background checks, but were rejected based on the record of this unlawful detainer action. CP at 42, 95. The property manager at The Court Yard declined their request to reconsider the application based on the benign circumstances and favorable outcome of the case, or the positive reference from Mr. Hundtofte and Mr. Alexander. CP at 42, 95.

Fortuitously, Mr. Encarnación and Ms. Farias were later able to locate a place to live temporarily through a friend-of-a-friend. CP at 42-43, 95. But that property was located in Pierce County, far from their jobs and children's schools, and was facing a bank foreclosure. CP at 95. Expecting they would need to relocate again soon, Mr. Encarnación and Ms. Farias sought in the mean time to address the eviction record that severely limited their rental prospects within King County. On April 28, 2010, they filed a motion to redact their names from the electronic indices that landlords and tenant-screening services use to detect eviction filings, including the Superior Court Management Information System (SCOMIS) case record. CP at 1-12, 19-37, 97-111.

The motion was heard on September 28 and November 3, 2010,¹

¹ The procedural history of this action is actually significantly more complex, but as much of that history is irrelevant to the present appeal, Respondents will summarize the most relevant portions in this footnote. The Respondents' motion to redact was originally heard by a commissioner in the superior court's ex parte department and granted on May 26, 2010. CP at 126-132. However, the Clerk declined to execute that May 26, 2010, order. CP at 284-285, 299-302. At that time, the Respondents discovered that, per a King County the original motion should have been brought before the Chief Civil Judge, rather than the ex parte department. See KCLGR 15(c). Therefore, the Respondents filed a motion before the Chief Civil Judge, entitled "Motion to Affirm Commissioner's Order Requiring Clerk's Office to Redact Record," seeking an order either declaring the May 26 order to be valid and enforceable, or setting a de novo hearing on the underlying motion to redact. CP at 133-140. However, this motion was denied on June 23, 2010. CP at 303-304. Since the grounds for denial were not specified, it was unclear whether the June 23, 2010, order left the May 26 order intact—and, accordingly, whether the Respondents needed to appeal or seek to enforce the May 26 order through a petition for mandamus. CP at 303-304, 361-362, 370-371. Therefore, the Respondents filed a timely appeal, but obtained an order from the Court of Appeals Commissioner granting the superior court "full authority to hear and decide any motions brought by the appellants regarding the redaction of court records or any requests for mandamus." CP at 361-362.

and granted in a written order (by Judge James D. Cayce) on November 18, 2010. CP at 648-649, 727-733; RP 9/28/10; RP 11/3/10. Only the King County Clerk (hereafter “the Clerk”) opposed the motion. CP at 294-302, 624-631. Though the Clerk was not a party, the superior court allowed the Clerk to submit evidence and written briefing and participate in oral arguments, and duly considered the Clerk’s arguments before granting the motion. CP at 731; RP 9/28/10 at 2-8; RP 11/3/10 at 3-10. It is now the Clerk who appeals from the superior court’s November 18, 2010, order granting the motion to redact. CP at 734.

III. Statement of Issues Presented

1. Does the temporary replacement of a party’s full name with his or her initials in the SCOMIS system constitute the “destruction” of a court record? *Answer: No.*

2. Should *Indigo Real Estate Services v. Rousey*, which holds that, subject to the GR 15/*Ishikawa* test, a superior court may redact party names from SCOMIS when necessary to protect an individual privacy interest, be overruled? *Answer: No.*

The Respondents filed a petition for a writ of mandate, but this was denied on the basis that the June 23, 2010, order had vacated the May 26, 2010, redaction order. CP at 364-371. The Respondents then filed a motion (with the Chief Civil Judge of the superior court) to vacate that portion of the June 23, 2010, order which denied a de novo hearing on the underlying motion to redact. CP at 309-314. That motion was reassigned to Judge James D. Cayce, who granted the motion to vacate and heard the motion for redaction on

IV. Argument & Authority

The superior court properly ordered Mr. Encarnación's and Ms. Farias' full names to be redacted from the SCOMIS index until November 17, 2016. CP at 732. Washington Courts have the inherent power to seal or redact their own records when necessary to protect constitutionally-protected rights, such as the right to personal privacy (protected by the Washington State Constitution), so long as the party seeking redaction fulfills the governing legal test arising under GR 15(c) and *Seattle Times v. Ishikawa*. As this Court recently held in *Indigo Real Estate v. Rousey*, this power extends to information stored in a court's electronic databases, such as the Superior Court Management Information System (SCOMIS").

The superior court followed the governing GR 15(c)/ *Ishikawa* legal standard, and entered a narrowly-tailored redaction order that is limited in scope and duration. This Court should affirm that order, and should reject the King County Clerk's challenge to *Indigo Real Estate*. Temporarily redacting a party's name from SCOMIS or other electronic database does not entail "destruction" of records, and courts need control over their own databases to ensure those systems do not unreasonably invade individuals' privacy or pose threats to personal safety.

A. Judicial transparency is intended to enable public oversight and foster public confidence in the court system.

As Justice Hugo Black wrote for a majority of the U.S. Supreme Court in 1948, “[t]he traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*.” *In re Oliver*, 333 U.S. 257, 268-69; 68 S.Ct. 499 (1948). In line with this tradition, few concepts have drawn such universal praise from courts and legal scholars as judicial transparency. Openness “has long been recognized as an indispensable attribute of an Anglo-American trial,” the Supreme Court observed in 1980, “[b]oth Hale in the 17th century and Blackstone in the 18th saw the importance of openness to [assure] proceedings were conducted fairly to all concerned[.]” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569; 100 S.Ct. 2814 (1980) (public access “discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”); see also *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 66; 615 P.2d 440 (1980) (“The guarantee of open judicial proceedings has been a fundamental part of Anglo-American jurisprudence since the common law.”) (Utter, C.J., dissenting).

granted the motion in a written order on November 18, 2010. CP at 727-733.

No state has more fully embraced this healthy distrust of secret tribunals than Washington, which made a firm commitment to open courts in its state constitution. See Wash. St. Const., Art. I, § 10 (“Justice in all cases shall be administered openly, and without unnecessary delay.”). Washington’s courts have zealously enforced this provision, protecting the public’s right of access in similarly effusive terms. See *Allied Newspapers v. Eikenberry*, 121 Wn.2d 205, 211; 848 P.2d 1258 (1993) (“Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.”); see *Dreiling v. Jain*, 151 Wn.2d 900, 908; 93 P.3d 861 (2004) (“Let the verdicts and proofs of guilt be made public, so that opinion, which is, perhaps, the sole cement of society, may serve to restrain power and passions; so that the people may say, we are not slaves, and we are protected”), quoting Beccaria, Cesare, *On Crimes & Punishments* (1764).

Accordingly, a strong presumption of openness attaches to both civil and criminal court proceedings in Washington. See *Dreiling* at 909; see *Allied Newspapers* at 211. This presumption extends not only to live hearings but also to records of proceedings, and other materials submitted to a court through the course of litigation. See *Dreiling* at 909-10. The rationale for making access to court records presumptively open is the

same as that regarding live proceedings. See *Dreiling* at 908-09 (“access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process.”).

B. The public’s access to court records must sometimes yield to other constitutional interests, including privacy.

Strong as Washington’s commitment to the open administration of justice is, public access to judicial proceedings and court documents is not absolute. See *Kurtz*, 94 Wn.2d at 60. Unrestricted public access to court information sometimes conflicts with other constitutionally-protected interests, such as a criminal defendant’s right to a fair trial, or a person’s right to privacy. See *Kurtz* at 60; see *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36; 640 P.2d 716 (1982); see also Wash. St. Const., Art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). When such conflicts arise, limits on public access to court hearings or records may be necessary to reconcile the competing concerns. See *Ishikawa* at 36; see also *Kurtz* at 60. Courts must balance these interests, and thus have discretion to close hearings or seal court records when appropriate. See *Kurtz* at 62; see *Ishikawa* at 36-37; see also *State v. Noel*, 101 Wn. App. 623, 628-29; 5 P.3d 747 (2000) (courts have the inherent power to seal records).

1. Development of Washington’s record-sealing jurisprudence with respect to privacy rights cases.

The modern legal scheme governing the closure of court hearings and sealing of records in Washington originates with the (Washington) Supreme Court’s 1980 decision in *Federated Publications v. Kurtz*, which concerned a court’s closure, on the joint motion of the parties, of a pre-trial suppression hearing in a murder trial. See *Kurtz* at 53. A local newspaper, which had run several articles about the case, sued to gain access to the suppression hearing records and to enjoin future such closures. See *Id.* at 54.

In deciding *Kurtz*, the Supreme Court established a five-step analysis for courts to follow in deciding whether to close or seal a hearing to protect a criminal defendant’s fair trial. See *Id.* at 62-63. First, an accused needs to “make some showing of likelihood of jeopardy to his constitutional rights from an open proceeding.” *Id.* at 62. “Anyone present when the closure motion is made must be given an opportunity to object,” but to overcome prima facie grounds for closure, an “objector must demonstrate that there are available practical alternatives to closure which would protect defendant's rights.” *Id.* at 62-63. The court then “must weigh the competing interests of the defendant and the public.” *Id.* at 64. If the court decides on this balance that the hearing or record should be

sealed, it must do so by an order “no broader in its application or duration than necessary to serve its purpose.” *Id.* at 65.

Less than one year after *Kurtz*, the prosecutor and the defendant in another King County murder trial brought a joint motion to close the courtroom during argument of a pre-trial motion to dismiss. See *Ishikawa*, 97 Wn.2d at 32. The prosecutor notified two local newspapers of the motion, and they appeared to contest the closure. *Id.* at 33. The court permitted the newspapers to object and suggest alternatives, but allowed the defendant to present her reasons for seeking closure at an *in camera* hearing. See *Id.* at 39. “As a result, [the] newspapers had no idea why the parties requested secrecy.” *Id.* at 39. This Supreme Court held this was error: the newspapers were entitled to know the reasons for seeking closure, as those reasons related not only to potential practical alternatives, but also the baseline legal standard for closure. See *Id.* at 39-40.

Kurtz had held that only a “likelihood of jeopardy” need be shown for a court to close proceedings when the fairness of a criminal trial is threatened. See *Kurtz* at 62. But the *Ishikawa* court held that “a higher threshold will be required before court proceedings will be closed” to protect other interests, such as privacy. *Ishikawa* at 37. Specifically: “If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a serious and imminent threat to some other

important interest must be shown.” *Id.* at 37. Adding this higher standard to the remaining four parts from the *Kurtz* analysis, the resulting *Ishikawa* opinion announced the new standard governing the closure of hearings or court records for any reason other than protecting a criminal defendant’s right to a fair trial(such as privacy). See *Ishikawa* at 37-38.

The Supreme Court definitively extended *Ishikawa* to privacy-based restrictions on public access to court records in *Allied Newspapers v. Eikenberry*, 121 Wn.2d at 211. *Allied Newspapers* was a constitutional challenge that a group of media companies brought against a statute that “require[d] courts to ensure that information identifying child victims of sexual assault is not disclosed to the public or press during the course of judicial proceedings or in any court records.” *Id.* at 207. The Supreme Court had no difficulty finding the statute served compelling objectives, including “to ensure the child’s privacy as guaranteed under Const. Art. 1, Sec 7,” or that those objectives “may be sufficient to warrant court closure.” *Allied Newspapers* at 211. Nonetheless, the Supreme Court ruled, the statute was unconstitutional because it did “not allow trial courts to comply with the *Ishikawa* guidelines.” *Id.* at 212. This was because the statute, rather than allow (or direct) courts to conduct the case-specific balancing test set forth in (*Kurtz* and) *Ishikawa*, impermissibly provided for automatic closure in all cases subject to the statute. *Id.* at 212.

2. GR 15, *State v. Waldon* and the GR 15/*Ishikawa* test

Ishikawa remains the seminal authority for determining whether, and to what extent, a court may seal a hearing or a court record to protect personal privacy. See *State v. Waldon*, 148 Wn. App. 952, 967; 202 P.3d 325 (2009). But in 1989, Washington adopted a court rule, GR 15, which now complements *Ishikawa* by supplying practical guidance for parties filing and courts deciding on motions to seal. See GR 15(c). The rule set forth notice requirements, defined key terms (such as “seal,” “redact,” and “court record”), and established procedures for court staff to carry out sealing and redaction orders. GR 15(b-c). GR 15 also listed important factors that courts may consider in deciding whether to limit public access to a record. See GR 15(c)(2); see also *Waldon* at 966.

Extensive revisions to GR 15 in 2006, which attempted to fully codify the procedural and substantive rules for sealing, redacting, and even destroying court records, suggested to some that a party could secure an order to seal by meeting the factors specified in GR 15 alone. See *Waldon* at 962. However, this Court reviewed those revisions in *State v. Waldon*, and “conclude[d] that revised GR 15, standing alone, does not meet the constitutional benchmark established by *Ishikawa*.” *Waldon* at 962 (GR 15 “does not create a presumption that the movant can satisfy the compelling interest standard merely by showing that one or more of these

concerns are present in her case.”). Instead, the *Waldon* court held, “GR 15 and *Ishikawa* must be read together when ruling on a motion to seal or redact court records.” *Waldon* at 967.

Under the hybrid, GR 15/*Ishikawa* analysis announced in *Waldon*, a court should follow the procedural steps set forth in GR 15 on a motion to seal court records. See *Waldon* at 966-67. In determining whether a party has an adequate privacy interest to warrant sealing a record, or whether that interest outweighs the public’s interest (in access to that record), a court should also take into account the substantive factors articulated in the rule. See *Waldon* at 966; see GR 15(c)(2). However, a court may seal a record only if *Ishikawa*’s more rigorous requirements are satisfied. See *Waldon* at 965 (“The constitutional standard for restricting access to court proceedings and records is articulated in *Ishikawa* and its progeny.”).

C. SCOMIS redaction under the GR 15/*Ishikawa* test.

The Superior Court Management Information System (SCOMIS) is an electronic database (or “court record system”²) that Washington’s 39 superior courts use to manage their dockets and case records.³ See *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 947; 215 P.3d 977

² The term “court record systems” is used throughout the Judicial Information System Committee Rules to refer collectively to all the separate databases serving Washington’s trial and appellate courts, including local systems not part of the statewide Judicial Information System. See JISCR 13.

(2009). SCOMIS is “operated by the Administrator for the Courts under the direction of the Judicial Information System Committee and with the approval of the Supreme Court pursuant to RCW 2.56.” See JISCR 1; see also RCW 2.68 et seq.

Whenever a new civil action is filed in any superior court, the clerk enters certain information, including the parties’ names, case number, and “case type,” into SCOMIS. See CP 105-111. Once entered, information cannot be altered or removed from SCOMIS except by court order. See GR 15, JISCR 15(b). Access to SCOMIS is free, and available throughout the world via internet. CP at 105-111. Though users must acknowledge a set of disclaimers (e.g., the courts do not guarantee that information in SCOMIS is complete, accurate, or up-to-date) before proceeding to the search screen, SCOMIS does not require users to establish an account or register with the site before using the service. See CP at 113.

Anyone—including a prospective landlord or tenant-screening company—can discover whether an eviction case has been filed against a person by running a SCOMIS name search in any counties where that person has lived. See 105-111. If so, SCOMIS will display the person’s name as a “defendant,” a case type of “unlawful detainer,” and the cause

³ <http://www.courts.wa.gov/jis/?fa=jis.display&theFile=caseManagementSystems>, last visited Apr. 11, 2011.

number for each such action. See CP at 105. Rental housing providers and consumer reporting agencies are aware of SCOMIS and commonly use it for this purpose.⁴ CP at 19-37. Some screeners run queries directly from the courts' website at the time of an application, while others receive periodic "bulk distributions," whereby they may download all or selected portions of the entire SCOMIS database. See GR 31(c)(3); see Testimony of John Bell (Admin. Office of the Courts) to Wash. House Judiciary Comm., June 8, 2010, at 0:09:31⁵ (hereafter "Bell Testimony").

In 2009, this Court held in *Indigo Real Estate v. Rousey* that SCOMIS may be redacted in the same manner as other court files and records. See *Indigo Real Estate Services v. Rousey*, 151 Wn. App. at 947. *Indigo Real Estate* involved a tenant who was sued for unlawful detainer after experiencing a domestic violence incident. See *Id.* at 944-45. The suit, being contrary to the Victim Protection Act,⁶ was quickly dismissed, and the tenant filed a motion to redact her name from SCOMIS to prevent the case record from impairing her future rental prospects. See *Indigo* at

⁴ See also Dunn, Eric and Marina Grabchuk, "Background Checks and Social Effects: Contemporary Tenant-Screening Problems in Washington State," 9 Seattle J. for Soc. Just. 319, 326-327 (2011).

⁵ Full testimony available on-line at: <http://www.tvw.org/media/mediaplayer.cfm?evid=2010060031B&TYPE=V&CFID=2314362&CFTOKEN=c76111f662eb78d6-4136E6A1-3048-349E-4EAF7D290A0F36E8&bhcp=1>; relevant remarks begin at 0:09:31.

945. The superior court denied her motion, “finding no basis under the law or GR 15 to seal the file.” *Indigo* at 945.

On appeal, this Court held first that information stored in SCOMIS is a type of “court record,” the expansive definition of which includes:

“(i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions [or] information in a case management system created or prepared by the court that is related to a judicial proceeding.”

GR 31(c)(4); see *Indigo* at 947 (“SCOMIS meets both prongs of the definition of court record for purposes of GR 15”); see also GR 15(b)(2).

Since the contents of SCOMIS are “court records,” the *Indigo Real Estate* court continued, the inherent authority to seal or redact records extends to SCOMIS data the same as any other type of record. See *Indigo* at 947; see, accord, GR 15(a) (“This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.”). Thus, the superior court did have authority to redact SCOMIS and should have considered the tenant’s motion under the GR 15/*Ishikawa* test. See *Indigo* at 949; see also GR 15(a). “In sum, GR 15 authorizes courts to redact information in SCOMIS, and GR 15 and the *Ishikawa* factors

⁶ See RCW 59.18.580(1) (“A landlord may not terminate a tenancy ... based on the

together provide the legal standard for evaluating [a] motion to redact her name from the SCOMIS index.” *Indigo* at 949-50.

D. The Superior Court properly applied GR 15/*Ishikawa*.

There is no question that the superior court applied the GR 15/*Ishikawa* standard in this case. CP at 729-732; RP 11/3/10 at 5-8. An order to redact court records is reviewed for abuse of discretion when the superior court applies the correct legal standard. See *Indigo* at 946. The redaction order was not abuse of discretion, and should be affirmed.

1. The unlawful detainer case record posed a serious and imminent threat to the Respondents’ privacy as related to rental housing access.

Under the first GR15/*Ishikawa* step, a person who seeks an order to seal must demonstrate a “sufficient privacy or safety concern[] that may be weighed against the public interest.” *Waldon* at 966, quoting GR 15(c)(2). Mr. Encarnación and Ms. Farias identified privacy, as it relates to their ability to secure housing. CP at 4-6, 42-43, 95, 728-732. To complete that first step, the court next needed to determine whether the court record in question poses a “serious and imminent threat” to that interest, i.e., Mr. Encarnación’s and Ms. Farias’s housing opportunities. See *Ishikawa* at 37; see also *Waldon* at 966.

As this Court also held in *Indigo Real Estate*, protecting a person’s

tenant’s or applicant’s or a household member’s status as a victim of domestic violence,

future rental housing opportunities is a type of privacy interest that can, on a case-specific basis, be sufficiently compelling to justify sealing a court record. See *Indigo* at 953; see also *State v. McEnry*, 124 Wn. App. 918, 103 P.3d 857 (2004); see also GR 15(c)(2)(F) (order to seal may be entered where “[a]nother identified compelling circumstance exists that requires the sealing or redaction.”). The *Indigo Real Estate* court—to continue the discussion from above—did not rule that protecting the future rental prospects of a domestic violence survivor always (i.e., as a matter of law) supplies a compelling basis for sealing the record of an eviction suit filed in violation of RCW 59.18.580. See *Indigo* at 952. But that court did hold that protecting such a tenant’s housing prospects could be “compelling enough to override the presumption of openness” in some circumstances, and remanded to the superior court for a case-specific determination of whether an order to seal was appropriate. See *Id.* at 953.

The only other Washington case to examine this issue, *State v. McEnry* (Division Two), is consistent with *Indigo Real Estate*. See *McEnry*, 124 Wn. App. at 921-22. In *McEnry*, a man with two vacated convictions moved to seal the case files to protect his employment. *Id.* at 921. The superior court granted the motion, even though he had worked for the same company for over 20 years and had no expectation of a new sexual assault, or stalking[.]”).

criminal record search or other background check being run on him. See *Id.* at 922. The Court of Appeals reversed, finding public access to the file did, under these circumstances, pose a “‘serious and imminent’ threat” to the defendant’s employment. *Id.* at 926, quoting *Ishikawa* at 37.

Before ending its inquiry, the *McEnry* court noted that an order to seal might have been appropriate if public access had impaired the defendant’s housing opportunities. See *Id.* at 926. But, the defendant in *McEnry* had already “conceded that potential loss of housing based on his court records was ‘not an issue’ because he owns his home.” *Id.* at 926. Whether *McEnry* would have been decided differently had the defendant been a renter, rather than a homeowner, cannot be known. But the *McEnry* dicta strongly suggests that, as in *Indigo Real Estate*, a tenant who depends on the rental market and whose housing prospects are diminished by a court record may have cause to seal it. See *Indigo* at 953; see *McEnry* at 926. In those cases, superior courts must “exercise discretion to decide whether the interests asserted by [such tenants] are compelling enough to override the presumption of openness.” *Indigo* at 953.

That is precisely what happened in this case. Mr. Encarnación and Ms. Farias established that they are not homeowners, and thus depend on the rental market to meet their housing needs. CP at 730. They showed that they did not have satisfactory, or even stable, housing at the time of

their motion, and thus anticipated having to apply for new housing again in the near future. CP at 38-44, 93-95. They demonstrated how a recent rental application had been rejected specifically because of the unlawful detainer case record, thus proving that the redaction was needed to address a serious, imminent, and ongoing impairment to their housing prospects. See *Ishikawa* at 36; CP at 42-43, 95, 728. Evidence of residential leasing practices, showing that Washington housing providers commonly reject or downgrade applicants with unlawful detainer records on an automatic or categorically basis, proved the Respondents' experience at The Court Yard was not unusual or unlikely to reoccur. CP at 19-37.

2. The superior court conducted an open hearing and allowed objections from any person present.

The second *Ishikawa* factor requires the court to hold an open hearing and permit any person present to object (to the sealing). *Ishikawa* at 38. "Reasonable notice of a hearing to seal must be given to all parties in the case." GR 15(c)(1). Here, Mr. Encarnación and Ms. Farias applied for the redaction order by motion, as contemplated by GR 15(c)(1), and gave at least six court days' notice to all parties (i.e., Mr. Hundtofte and Mr. Alexander) at the time of filing.⁷ See KCLCR 7(b)(4)(A) (six court days' notice presumptively reasonable in King County); CP at 117-120.

Once the Clerk announced her objections, the Respondents provided notice of the proceedings to the Clerk as well (though not required to do so by GR 15). See GR 15(c)(1); CP at 725-726. The superior court heard the motion at an open proceeding and allowed non-parties (i.e., the Clerk) to object. RP at 9/28/10 at 2; see also RP 11/3/10. The court granted the motion in a detailed written order with findings of fact and conclusions of law. See *Ishikawa* at 38; see also GR 15(c)(2); CP at 727-733.

3. The superior court sought the least restrictive effective means to protect the Respondents' privacy interest.

The third *Ishikawa* step is to determine whether sealing the record “would be both the least restrictive means available and effective in protecting the interests threatened.” *Ishikawa* at 38. The superior court did so—indeed, this appears to have been among its chief concerns. In the September 28, 2010, hearing, the superior court urged the Clerk to “work together” with Respondents to come up with a way of sealing, redacting, or otherwise altering the case record to protect their housing opportunities while infringing the least on public access. RP 9/28/10 at 4-7.

The Respondents and Clerk did meet to explore such possibilities, but no resolution was achieved. CP at 648-651, 657. At the next hearing, the superior court again urged the Clerk to assist in discerning the least

⁷ In a civil case, GR 15(c)(1) actually provides only that “The King County Clerk was not a party, and thus never became entitled to notice under GR 15(c)(1). However, the

restrictive effective, means for protecting Respondents' rental prospects:

“I want them to have this record redacted or sealed. I told you that before, whichever is easiest for the Clerk's Office. I don't want to do something that is impossible technology-wise or that you think is contrary to law if there is another way that we can go about doing it.”

RP 11/3/10 at 7. Since the only basis for objection the Clerk presented was that redacting SCOMIS would impermissibly restrict public access to the file, there can be no doubt the superior court, by the phrase “contrary to law,” meant a form of sealing or redaction broader than necessary to protect the Respondents' privacy. RP 11/3/70 at 7. This perfectly reflects consideration of the third *Ishikawa* factor. See *Ishikawa* at 38.

Eventually, the Clerk did not accede to any alternative that would entailed the removal, replacement, or alteration of the Respondents' names from the SCOMIS index, leaving the superior court no choice but to order the redaction over the Clerk's objections. RP at 8; CP at 727-733. This ruling too was well-grounded in both evidentiary and legal support. Mr. Encarnación and Ms. Farias had admitted extensive evidence to show that prospective housing providers and tenant-screening firms were likely to discover their unlawful detainer case record by searching court databases, such as SCOMIS. CP at 19-37, 97-99. This evidence supported the superior court's conclusion that redacting their names from SCOMIS

Clerk may have become entitled to notice

would be effective in protecting their privacy, i.e., by making housing providers less likely to learn of the eviction lawsuit. CP at 731.

The *Indigo Real Estate* court had openly questioned whether an order to seal an unlawful detainer defendant's name from SCOMIS after the name had already been entered would be effective, since a tenant-screener might conceivably obtain defendants' names early on and retain them in a place outside SCOMIS. See *Indigo Real Estate* at 953. In answer to this, Mr. Encarnación and Ms. Farias presented evidence that many housing providers and screening services obtain records of eviction filings directly from court databases, and run the searches at the time of a rental application. CP at 19-26, 29-37, 97-99. This supported the superior court's conclusion that redacting the Respondents' names from SCOMIS would "materially benefit them with respect to their ability to secure rental housing," even if it was not necessarily a foolproof solution. CP at 731.

Also, the Fair Credit Reporting Act requires "consumer reporting agencies," such as tenant-screeners, to "follow reasonable procedures to assure maximum possible accuracy of the information concerning [an] individual about whom [its] report relates." RCW 19.182.060(2). This probably means that a background check provider who downloads the contents of public records databases must update that data at reasonable intervals. In fact, the Administrative Office of the Courts requires persons

who download SCOMIS information to periodically refresh their data as a term of the dissemination contract. See Bell Testimony at 0:05:50 – 0:06:36, 0:16:07 – 0:17:56; see GR 31(g)(1). In other words, a tenant-screener that keeps unlawful detainer defendant names in its own database might still have a record of Mr. Encarnación’s and Ms. Farias’ eviction suit even after the redaction of SCOMIS, but that record would disappear from the private database the next time its contents are refreshed.

Furthermore, redacting Mr. Encarnación’s and Ms. Farias’ names from SCOMIS could prevent a consumer reporting agency from verifying that they were sued for unlawful detainer, thus entitling them to have the eviction case record deleted from a tenant-screening report. See RCW 19.182.090(5)(a) (“If, after a reinvestigation ... information is found to be inaccurate or cannot be verified, the consumer reporting agency shall promptly delete the information from the consumer's file.”).

The *Indigo Real Estate* court had raised a second question: whether a court can adequately protect an unlawful detainer defendant’s housing opportunities by ordering the insertion of additional explanatory details into SCOMIS, rather than taking the defendants’ names out. See *Indigo* at 953. In this case, ample evidence demonstrated that such lesser measures would not be effective. CP at 728-732. As Mr. Encarnación’s and Ms. Farias’ recent first-hand experience at The Court Yard had shown, as well

as their other evidence bearing on residential tenant-selection practices in Washington, explanations or details about the facts, circumstances or dispositions of unlawful detainer cases are seldom considered in rental decisions. CP at 19-24, 27-28, 42, 95, 727-733. Adding more details to SCOMIS—whether about the claims, defenses, or outcomes of the suits, or even FCRA-style⁸ explanatory statements—would not, even if feasible,⁹ protect the Respondents’ housing opportunities against such reflexive decision-making practices. CP at 732.

4. The superior court correctly ruled that the Respondents’ privacy interests outweighed the public interest in access to the case record by a SCOMIS name search.

Under the fourth *Ishikawa* factor, a court should seal a record if the individual privacy interest outweighs the public’s need for access. See *Ishikawa* at 38. The superior court properly weighed Mr. Encarnación’s and Ms. Farias’ privacy interests against the public value of access to their names via SCOMIS. CP at 730-732. Against the compelling need the Respondents had shown for obtaining the redaction (to secure adequate

⁸ See *Indigo Real Estate* at 953 (“Amicus Washington Coalition for Open Government has suggested that a tenant could insert an explanation into the SCOMIS case record analogous to that which an individual can insert into a credit history.”); see also, e.g., RCW 19.182.090(6) (allowing a consumer to “file a brief statement setting forth the nature of the dispute” with a consumer reporting agency).

⁹ Even if including additional explanatory information could have been a less-restrictive alternative to sealing the record, neither the Clerk nor any other person presented evidence suggesting this was possible. See *Indigo Real Estate* at 953 (“Representatives of the superior court clerk and JIS each may wish to provide the court with information

housing), the court found very little public value in access to that specific record. CP at 730-731. This conclusion chiefly relied on two related reasons. The Respondents' names were not material to any public purpose for which the court records might be accessed. CP at 730-731. And while the case record diminished Mr. Encarnación's and Ms. Farias' housing prospects, it did so without any corresponding benefit to housing providers. CP at 730 ("public access to the SCOMIS record will "not assist landlords in detecting or screening out irresponsible tenants").

Courts have traditionally sealed materials "unrelated, or only tangentially related, to the underlying cause of action" much more readily than records central to the case. See *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 542; 114 P.3d 1182 (2005) ("[I]f a record is truly irrelevant to the merits of the case ... in applying *Ishikawa* it would likely find that sealing is warranted."); see *Dreiling*, 151 Wn.2d at 908. The names of the parties to a particular dispute are seldom relevant to the merits of a case, or to assessing a tribunal's administration of justice. See, e.g., *Bellevue John Does 1-11 v. Bellevue School Dist.*, 164 Wn.2d 199, 220-21; 189 P.3d 139 (2008) (names of accused teachers not helpful to public in evaluating school district investigations of teacher misconduct). Courts regularly substitute initials for full names in family law and juvenile cases,

concerning the feasibility of this alternative and the capacity of SCOMIS to

and this does not prevent observers from understanding or evaluating their rulings. See, e.g., *State v. A.N.J.*, 168 Wn.2d 91, 96; 225 P.3d 956 (2010) (juvenile defendant's name replaced by initials in court records); see also *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 431-32; 138 P.3d 1053 (2006) (replacing names of alleged child abuse victims and perpetrators with "identifying numbers or codes" was not abuse of discretion). Other courts protect privacy by allowing parties and witnesses to proceed under pseudonyms. See, e.g., *In re Dependency of D.M.*, 136 Wn. App. 387, 389; 149 P.3d 433 (2006) (initials and aliases used to conceal names of participants in dependency proceeding); see also *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

Mr. Encarnación's and Ms. Farias' names were not relevant to any disputed issue, and substituting their initials in SCOMIS has effect on the public's ability to evaluate the administration of justice. The names are "unrelated, or only tangentially related, to the underlying cause of action," and the public had little interest in them. See *Rufer* at 548.

Probably the only members of the public who would be interested in knowing the names of unlawful detainer defendants, or of associating this case with Mr. Encarnación or Ms. Farias, are residential landlords and tenant-screeners. CP at 19-37. But, the private economic ends for which

accommodate it.").

such users seek court records has nothing to do with overseeing judicial or other democratic institutions. Tenant-screeners are entitled to access court records the same as anyone else, but their right is derived from, and no greater than, the public's interest generally. See *Cohen v. Everett City Council*, 85 Wn.2d 385, 386-87, 535 P.2d 801 (1975). And while the public has great interest in access to records relevant to the administration of justice, the public has “very little, if any, interest” in records that are not. See *Rufer* at 542 (“article I, section 10 is not relevant to documents that do not become part of the court's decision making process”).

As discussed above, enabling the public to observe and evaluate the administration of justice is the fundamental rationale for open court records in the first place. See *Dreiling*, 151 Wn.2d at 908-09; see *Allied Newspapers* 121 Wn.2d at 211. Background checkers may access court records because they might use them for public purposes—not because they do use them for private purposes. Article I, § 10 was not adopted to facilitate private consumer reports. Even if it had been, the superior court explicitly found in this case that “public access to the SCOMIS record will not assist landlords in detecting or screening out irresponsible tenants.” CP at 730.

The use of unlawful detainer records in rental decisions revolves around the assumption that a person's performance in past tenancies

tends to predict that person's performance in a potential future tenancy. The validity of this assumption is far from unassailable, since reasons leading to a prior eviction (such as a lost job, medical problem, divorce, or other income disruption, troublesome co-tenant, etc.) may no longer exist, and even a tenant previously evicted for genuinely anti-social or irresponsible behavior may have reformed. But, even assuming this approach to tenant-selection is sound, the use of unlawful detainer filings as a proxy for unfavorable rental history is not sound—not all eviction suits are well-founded. See, e.g., *Indigo Real Estate*, 151 Wn.App. at 945 (eviction suit to remove tenant pressured into surrendering her tenancy based on domestic violence); see *Shoemaker v. Shaug*, 5 Wn. App. 700; 490 P.2d 439 (1971) (lessor unreasonably withheld consent for tenant to assign lease, then sued to evict tenant for unauthorized assignment); see *Foisy v. Wyman*, 83 Wn.2d 22, 32; 515 P.2d 160 (1973) (recognizing, in unlawful detainer action, that uninhabitability of premises may discharge tenant's duty to pay rent); see *Port of Longview v. Intern'l Materials, Ltd.*, 96 Wn. App. 431, 442; 979 P.2d 917 (1999) (barring, on First Amendment grounds, government landlord from bringing eviction suit in retaliation for tenant's critical public remarks).

Put another way, the mere filing of an unlawful detainer does not establish that the person (against whom the suit was filed) violated a term

of the prior tenancy or committed any wrongful act. A judgment or other substantive adverse ruling might, but merely learning through SCOMIS that a case was filed says nothing of the claims, merits, or circumstances of the action. CP at 105-111. Relying on a dismissed suit, or other case in which the plaintiff's allegations were not substantiated, is particularly dubious. See, e.g., *Bellevue John Does 1-11*, 164 Wn.2d at 221 (“When an allegation is unsubstantiated, the [accused’s] identity is not a matter of legitimate public concern.”); see also *City of Tacoma v. Tacoma News, Inc.*, 65 Wn. App. 140, 150; 827 P.2d 1094 (1994) (same).

Nonetheless, as The Court Yard’s practices demonstrate, many housing providers are satisfied to treat any unlawful detainer action as proof of adverse performance in a past tenancy, and do not distinguish between actions that were well-grounded and those that were not. CP at 23-28, 42, 95. Some landlords may follow such policies because detailed and trustworthy information about prior eviction suits can be difficult, expensive, or time-consuming to obtain—whereas, thanks to databases like SCOMIS, merely finding out whether a person was sued for unlawful detainer is free, instant, and easy. CP at 19-35. Other housing providers may have other, more cynical reasons for categorically excluding unlawful detainer defendants. See, e.g. Kleystauber, Rudy, “Tenant Screening Thirty Years Late: A Statutory Proposal to Protect Public Records, 116

Yale L.J. 1344, 1363 (2007) (discussing how some landlords blacklist “activist” tenants who have asserted legal rights against prior landlords).

Whatever their motives, such landlords, in effect, choose more “false negatives” (i.e., rental applicants wrongly found unsuitable) as a trade-off for either a decrease in the cost of data collection or a decline in “false positives (i.e., applicants wrongly assessed as suitable).” As the National Academy of Sciences explains:

For a given database and given analytical approach, false positives and false negatives are in some sense complimentary. . . . For example, it is easy to identify all individuals who are bad credit risks—just deny everyone credit. This approach catches all of the bad credit risks—but also results in a huge number of false negatives.

National Research Council of the National Academies, *Engaging Privacy and Information Technology in a Digital Age*, § 1.5.2 at 44 (2007).

As the superior court correctly perceived, Mr. Encarnación and Ms. Farias are “false negatives.” Nothing in the record of this action should make a reasonable person less likely to accept them as tenants. See CP at 730. Yet keeping their full names in SCOMIS would likely result in their being rejected by housing providers unwilling to look beyond mere case filings. CP at 727-733. “This reality leads to unease, vulnerability, and powerlessness—a deepening sense that one is at the mercy of others, or, perhaps even more alarming, at the mercy of a bureaucratic process

that is arbitrary, irresponsible, opaque, and indifferent to people's dignity and welfare." Solove at 149.

The public certainly has no interest in having court databases contain false or misleading personal data, and facilitating impoverished decision-making of the kind Professor Solove warned about counteracts, rather than promotes, the public interest. The superior court was right to find, under the fourth *Ishikawa* factor, that Mr. Encarnación's and Ms. Farias' interest in not being denied housing as "false negatives" was the paramount concern. See *Ishikawa* at 37; CP at 730-731.

5. The redaction order is temporary and narrow in scope.

The final *Ishikawa* factor requires an order to seal records be "no broader in its application or duration than necessary to serve its purpose." *Ishikawa* at 39. Here, the superior court tailored relief as narrowly as possible to protect Mr. Encarnación's and Ms. Farias's privacy; only their names are redacted, with even their first and last initials preserved. CP at 732. The order applies only to court databases; it leaves all the pleadings, exhibits, orders, and other materials fully intact. CP at 732.

The superior court also used appropriate discretion to limit the duration of the order, setting it to expire on November 12, 2016. CP at 732. On that date, Mr. Encarnación's and Ms. Farias' need for redaction should materially lessen, as the Fair Credit Reporting Act will prohibit

consumer reporting agencies (such as tenant-screening companies) from reporting this eviction suit. See RCW 19.182.040(1)(b); CP at 732.

E. Redaction is not tantamount to destruction of records

Redacting party names from SCOMIS does not, as the Clerk argues, amount to destruction of records. To “destroy” a court record “means to obliterate a court record or file in such a way as to make it permanently irretrievable.” GR 15(b)(3). Removing the Respondents’ names from SCOMIS has not made the names permanently irretrievable. See GR 15(b)(3). By its own terms, the redaction order—being set to expire on November 17, 2016—is temporary, not permanent. CP at 732.

Mr. Encarnacion’s and Ms. Farias’ names still appear intact on all the documents in the court file even now. CP at 731-732. When the order expires, the Clerk can easily retrieve and restore the names to SCOMIS, using any of numerous alternatives. See GR 15(f). For instance, the Clerk could retrieve the names from any pleading or order. Alternatively, the Clerk could keep the full names in a secure location outside the case file, such as on a separate list or spreadsheet. See GR 15(f) (authorizing the storage of sealed records outside case files). Either method would be consistent with the procedures for redacting records. See GR 15(c)(5-6).

1. The Clerk can redact party names from SCOMIS consistent with GR 15(c).

GR 15 specifies the procedures for carrying out an order to redact court records. See GR 15(c)(5-6). The first step is that “the original court record shall be replaced in the public court file by the redacted copy.” GR 15(c)(6). Once original records are removed from a public court file, the clerk may either “seal them, and return them to the file under seal or store separately.” GR 15(c)(5)(B). If stored in the public file, then “[b]efore a court file is made available for examination, the clerk shall prevent access to the sealed court records.” GR 15(c)(5)(D).

These procedures apply equally to, and are easily transferable to, electronically-stored court records like SCOMIS entries. See GR 15(a) (“This rule applies to all court records, regardless of the physical form ... method of recording ... or the method of storage[.]). Here, the original record to be removed from the public file was the text appearing in the SCOMIS “Name” fields under King County case number 09-2-33205-3. CP at 105-111, 732. The “redacted copy” the Respondents supplied was the alternative text, consisting only of their initials (“I.E. and “N.K.F.”). CP at 1, 732. That the Clerk replaced the original record with the “redacted” copy by altering the text in an electronic field, rather than swapping two sheets of paper, is immaterial. See GR 15(a).

2. Redaction of party names from SCOMIS does not render the case file inaccessible even temporarily.

The Clerk also overstates the degree to which the order limits public access to the case file at present. It is true that, so long as Mr. Encarnación's and Ms. Farias' names remain redacted from SCOMIS, a person cannot discover the action by running SCOMIS name query. That is, after all, the purpose of the redaction. But this does not mean the case is totally inaccessible. A member of the public can still discover the case by searching SCOMIS under the plaintiffs' names, the case number, or even the defendants' initials. Or, rather than use SCOMIS at all, a person could access the case file through a bulk distribution. See GR 31(g).

The Clerk argues that, “[a]s a practical matter, the public does not search court records by case number, they conduct searches using the parties' names.” Br. of App. at 10. Yet the evidence in the record proves only that tenant-screening firms and other background-checkers rely on name searches, not that the general public uses the same search methods. SCOMIS is neither the only method by which the records of this case may be accessed, nor is it the method a person genuinely seeking to observe or evaluate the administration of justice would use.

For instance, a person researching how the court has performed in eviction cases would probably not know the case number or party names from any specific unlawful detainer action—instead, such a person would likely request and obtain the records through a “bulk distribution,” such as

a batch of all unlawful detainer cases filed within a specified time period. See GR 31(g) (authorizing the bulk distribution of court records through dissemination contracts). Likewise, a person evaluating a particular judge might request a batch of case files assigned to that judge. See *Id.* Nothing would prevent the court from including the file from this action in any such bulk distribution. See GR 31(f-g).

F. Allowing the redaction of party names from SCOMIS is essential to enabling courts to protect privacy.

Ultimately, the Clerk recognizes her position is irreconcilable with *Indigo Real Estate v. Rousey*, and urges the Court to “clarify” that opinion to prohibit the redaction of party names from court databases. Br. of App. at 14. Of course, such a “clarification” would amount to overruling one of *Indigo Real Estate’s* central holdings: that party names can be redacted from SCOMIS if the GR 15/*Ishikawa* test is fulfilled. See *Indigo* at 949. The Court should reject this challenge to *Indigo Real Estate*.

1. Courts need the power to redact their own databases in order to protect individuals’ privacy rights.

Like judicial openness, personal privacy is also a constitutionally-protected interest in Washington. See Wash. St. Const., Art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is why “[a]ccess to court records is not absolute and shall be consistent with reasonable expectations of personal

privacy.” *Allied Newspapers* at 211; see also JISCR 15 (“It is declared to be the policy of the courts to facilitate public access to court records, provided such disclosures in no way present an unreasonable invasion of personal privacy and will not be unduly burdensome to the ongoing business of the courts.”). That is also why courts have the inherent power and duty to seal their records when public access will unreasonably violate a person’s privacy. See *Indigo* at 953 (error to deny motion for redaction without engaging in GR 15/*Ishikawa* analysis); see also *State v. Noel*, 101 Wn. App. at 628-29 (error not to consider whether order to seal based on court’s inherent power was appropriate, even where criminal defendant failed to establish statutory grounds for “expungement”).

The Clerk argues that the court’s inherent power to seal or redact its own records does not reach information in court databases. See Br. of App. at 10. But, as the underlying facts of this case demonstrate perfectly, information in court databases can inflict significant privacy-related harms, just as other types of court records may. “Privacy involves the power to refuse to be treated with bureaucratic indifference when one complains about errors or when one wants certain data expunged.” See Solove at 51. Without control over the contents of its own databases, a court would be powerless to balance the public’s interest in open records against threats to personal privacy—this would be an untenable result, for

striking such a balance is a constitutional imperative. See *Ishikawa* at 36.

Under the Clerk's position, information could not be redacted from court databases even if authorized by statute. See Br. of App. at 12 ("even when records are destroyed, the order to destroy and the written findings supporting the order must be publicly accessible."). This would make the contents of court databases truly indelible—permanent records beyond the reach of both the courts and legislature. Yet nothing in GR 15 or other authority bestows such invulnerability upon court databases. In fact, the opposite is true: docket management databases, like SCOMIS, are at some remove from the administration of justice and thus warrant less—not more—transparency than core judicial records like pleadings, exhibits, transcripts, and court orders. See *Dreiling* at 609; see *Rufer* at 548.

2. Precluding courts from redacting the contents of their own databases would cause due process violations.

State action that injures a person's reputation may trigger due process requirements if the person is deprived of property (or liberty) as a result. See *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."); see also *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976) (reputational harm alone is insufficient; state action must also

cause deprivation of liberty or property interest). Such due process rights probably pertain to SCOMIS under this doctrine, because every time a Washington court publishes a defendant's name on its publicly-available list of unlawful detainer suits, that court record diminishes that person's rental housing opportunities. CP at 727-733.

In other words, a person who is (or who is about to be) listed in a court database as an unlawful detainer defendant probably has the right to notice and an opportunity to dispute that record in some type of hearing. See *Mathews v. Eldridge*, 424 U.S. 319, 333; 96 S.Ct. 893 (1976) (“some form of hearing is required before an individual is finally deprived of a property interest”). Washington provides for this through GR 15(c). See *Indigo* at 949. But if the courts could not redact information from their databases, a person injured by a SCOMIS record or other court database would have no meaningful opportunity to be heard. See *Mathews* at 333 (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552; 85 S.Ct. 1187 (1965).

In fact, a person injured by a SCOMIS record—particularly one containing inaccurate or misleading information—could potentially even hold the court system liable for that injury if no procedure was available to correct or remove the damaging contents. In *Humphries v. County of Los*

Angeles, for instance, parents who were improperly listed in a state index of child abuse suspects were able to sue the agency that maintained it. See *Humphries v. County of Los Angeles*, 554 F.3d 1170, 1188 (9th Cir. 2009), *partially reversed on other grounds by* 131 S.Ct. 447 (2010). Key to the parents' claim was that the agency did not have adequate procedures for challenging their inclusion in the database. See *Humphries*, 554 F.3d at 1200 (“In sum, we are not persuaded that California has provided a sufficient process for ensuring that persons . . . do not suffer the stigma of being labeled child abusers plus the loss of significant state benefits[.]”). The Clerk’s position, which would place court databases beyond the limits of sealing or redaction orders, could expose Washington’s court system to similar claims and potential liability to persons injured by errors or other problematic information appearing in court databases.

3. Precluding the redaction of court indices, such as SCOMIS, would be contrary to public policy.

The use of SCOMIS as a tenant-screening mechanism dramatically shifts the cost-benefit analysis a residential tenant must make when served with an eviction notice or unlawful detainer suit. A tenant who anticipates an unjust eviction suit must choose whether to remain in the premises and defend, but at the cost of incurring a case record—or vacate the premises anyway, avoiding the creation of an eviction record but also forfeiting his

or her tenancy. A tenant who considers the damage to her future housing prospects a worse injury than the loss of one particular tenancy¹⁰ is thus incentivized to give up her home, despite her meritorious legal position.

This dynamic threatens the basic integrity of the forum. It is difficult to imagine a policy more “unduly burdensome to the ongoing business of the courts” than one which undermines the administration of justice. See JISCR 15. A court in which a tenant “loses” (by acquiring an eviction record) simply by showing up—even if he “wins” (by defeating the unlawful detainer claim), does exactly that. Precluding successful defendants from having their names redacted their names from SCOMIS (when necessary to avoid being unjustly blacklisted from the rental market), would chill tenants from ever setting foot in that court, no matter how strong their cases might be.

Housing providers may not purposefully exploit SCOMIS for the purpose of tilting the system against residential tenants. But as Professor Solove explains, this happens nonetheless when those who compile and disseminate personal data are indifferent to personal privacy:

The problem with databases and the practices currently associated with them is that they disempower people. They make people vulnerable by stripping them of control over

¹⁰ See Dunn and Grabchuk at 336 (“Tenants who have meritorious defenses and compelling evidence often decide that preserving a particular tenancy is not worth the damage that an unlawful detainer record will inflict upon their future rental prospects—especially when that damage is not ameliorated by a favorable outcome in the case.”).

their personal information. There is no diabolical motive or secret plan for domination; rather, there is a web of thoughtless decisions made by low-level bureaucrats, standardized policies, rigid routines, and a way of relating to individuals and their information that often becomes indifferent to their welfare.

Solove at 41. The most important function of any judicial system is to interpret the laws and adjudicate cases. The courts should not surrender control over its own databases, which in the modern technological age is increasingly essential to protect the integrity of core judicial functions from the byproducts of private data mining.

If anything, the erosion of basic due process in eviction cases that results from the appropriation of court records systems by commercial background checkers suggests, like for criminal defendants whose fair trial rights are threatened by pre-trial publicity, that the GR 15/*Ishikawa* test may demand too much of an unlawful detainer defendant who seeks to redact his or her name from SCOMIS. See, accord, *Kurtz*, 94 Wn.2d at 61 (“substantial though not clearly demonstrable risk of impairment of the right to an impartial jury” is “intolerable” in a criminal case). Only the most zealous proponent of open records, blind to the competing concerns of modern data privacy, would suggest making SCOMIS completely impervious to redaction under any standard.

Precluding the redaction of court databases would also conflict

with mainstream best practices governing the collection, storage, and dissemination of digital information. In the U.S., the “gold standard for privacy protection”¹¹ concerning digital information systems is the Code of Fair Information Practices (CFIP), which the U.S. Department of Health, Education, and Welfare published at the dawn of the computer age. See Dept. of Health, Education & Welfare, *Records, Computers and the Rights of Citizens* (July 1973)¹² (hereafter “HEW”). Directed to those amassing personal information in nouveau electronic “databanks,” the CFIP called on “[a]ny organization creating, maintaining, using, or disseminating records of identifiable personal data [to] assure the reliability of the data for their intended use and must take precautions to prevent misuses of the data.” *Id.* at §3.

“Repurposing”—that is, allowing personal information to be used for a different purpose than that for which it was collected—is disfavored under the CFIP, except where the new use is for the person’s benefit, with the person’s consent, or where “some paramount societal interest can be clearly demonstrated.” *Id.* at §3. The CFIP urges entities maintaining databanks to provide mechanisms for individuals to contest repurposing. *Id.* at §3 (“There must be a way for an individual to prevent information

¹¹ See National Academies, §. 1.5.4 at p. 48 (2007).

about him obtained for one purpose from being used or made available for other purposes without his consent.”).

Courts enter information into SCOMIS to organize and manage their dockets,¹³ not to create de facto credit reports. See generally JISCR 1. This does not stop tenant-screeners or other consumer reporting agencies from using SCOMIS for background checks. CP at 19-37. This is true even though SCOMIS is neither regulated by the credit reporting laws nor maintained under auspices of “maximum possible accuracy”—the standard applicable to credit reports, and even though the courts do not guarantee the accuracy, completeness, or timeliness of the information in SCOMIS. See RCW 19.182.060(2); CP at 113. In effect, tenant-screeners repurpose SCOMIS data, and that repurposing takes place to the detriment of unlawful detainer defendants and without their consent.

Ordinarily, allowing open access to court records is probably a “paramount societal interest” that justifies uncontrolled repurposing. See *Allied Newspapers* at 211. But that is not so where a court, having applied the GR 15/*Ishikawa* test, has specifically found that an individual’s privacy interest outweighs the public’s interest in access to a record. See

¹² Full text available on-line at:
<http://aspe.hhs.gov/datacncl/1973privacy/tocprefacemembers.htm>.

¹³ See <http://www.courts.wa.gov/jis/?fa=jis.display&theFile=caseManagementSystems>, last visited Apr. 12, 2011.

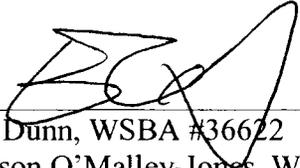
Indigo at 949; see *Ishikawa* at 38. Such an individual, the CFIP provides, must have a way to prevent the data the court collected about him (i.e., his name) for the purpose of managing its docket from being used for other purposes (such as tenant-screening). See HEW, §3. Allowing courts to redact their databases is thus consistent with best practices on repurposing.

VI. Conclusion

For the foregoing reasons, the superior court should be affirmed.

RESPECTFULLY SUBMITTED this 19 day of April, 2011.

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

KING COUNTY CLERK,

NO. 66428-1-I

Plaintiff/Appellant,

CERTIFICATE OF SERVICE

vs.

**IGNACIO ENCARNACIÓN
AND N. KARLA FARRAS,**

Defendants/Respondent.

I certify that on the 21st day of April, 2011, I caused a true and correct copy of the Brief Of Respondents Encarnación & Farras to be served on the following, via ABC Legal Services, Inc.:

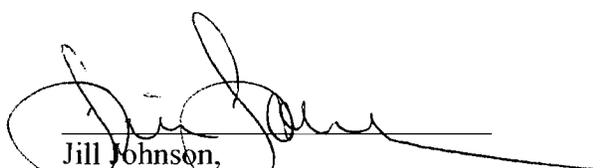
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