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SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE, et al.,

Appellants,

v.

DEPARTMENT OF CORRECTIONS et al.,

Respondent.

**DEPARTMENT OF CORRECTIONS' ANSWER TO AMICUS
BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS**

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I. INTRODUCTION

An individual undergoes a Special Sex Offender Sentencing Alternative (SSOSA) evaluation as part of the criminal process with the hope that such an evaluation will result in a reduced sentence. The evaluation is shared with the court and third parties so that they can take a position about whether such a sentence is appropriate. Because this forensic evaluation was not created for the purpose of medical treatment, but for the very purpose of being shared with third parties and the court, it is not confidential health care information protected by the Uniform Health Care Information Act (UHCIA).

The UHCIA protects health care information regardless of whether it is written or spoken. Does have argued that SSOSA evaluations are confidential under the UHCIA even after such evaluations are shared with third parties to use in a sentencing determination. This Court should consider the potentially broad consequences of Does' proposed interpretation. Does have not identified any reason that adopting their logic will not impact the treatment of such documents by trial courts. Because the UHCIA protects written and spoken health care information, if this Court holds information in SSOSA evaluations is protected health care information, then courts will inevitably have to wrestle with whether

SSOSA evaluations can be filed in the public court file and discussed in open court.

Finally, to the extent that Amicus rely upon various policy arguments to support its position, those arguments are best directed to the legislature, which is best situated to evaluate the policy considerations surrounding the creation of a statutory exemption.

II. RESPONSE TO ARGUMENTS OF AMICUS

A. **A SSOSA Evaluation's Primary Purpose Is Forensic Because the Evaluation Is Created and Used for Determining Whether a Sentencing Alternative Would Be Appropriate**

The key question in this case is whether a SSOSA evaluation is directly related to a care, service, or procedure that diagnoses, treats, or maintains an individual's physical or mental condition. The use of the term "directly related" requires a straightforward connection between the document and a health care purpose. *See Webster's Third New International Dictionary* 641 (2002) (defining "directly" as "purposefully or decidedly and straight to the mark" or "in a straightforward manner without hesitation, circumlocution, or equivocation."). Because a direct connection is required, courts should look to the immediate or primary purpose of the document and whether the primary purpose is health care related. *See Webster's Third New International Dictionary* 1800 (2002)

(defining “primary” as “functioning or transmitted without intermediary: DIRECT.” (capitalization in original)).

Here, the direct and primary purpose of a SSOSA evaluation is to aid the Court in making a sentencing determination. Like other forensic evaluations, the evaluation is created not for the purposes of medical treatment but to be shared with third parties to assist in making a legal determination. *See State v. Sullivan*, 60 Wn.2d 214, 223, 373 P.2d 474 (1962) (discussing distinction between forensic documents and documents created for treatment); *see also* Christmas Covell & Jennifer Wheeler, *Revisiting the ‘Irreconcilable Conflict Between Therapeutic and Forensic Roles’*: *Implications for Sex Offender Specialists*, 26(3) Am. Psychology Law Society News 7 (2006) (same). Because SSOSA evaluations are created for a forensic purpose, they are not protected health care information under the UHCIA.

Amicus does not rely upon or otherwise discuss any of the UHCIA’s statutory language. Instead, its primary argument is that a SSOSA evaluation is protected because the Legislature created the SSOSA system “with a treatment purpose in mind.” Amicus Brief, at 7. However, this argument is based on a flawed approach to statutory interpretation. Amicus then rely on such an approach to erroneously conclude that the immediate purpose of SSOSA evaluations is treatment

despite the fact that, at the point that a SSOSA evaluation is created, any potential treatment is speculative and contingent upon a number of future events.

First, Amicus's argument is based on a flawed theory of statutory interpretation because it asks the Court to examine only what legislators and the Sex Offender Treatment Policy Board—through published research papers and reports—think is the purpose of SSOSA. Amicus Brief, at 8-10. In a case of statutory interpretation, such as this one, the thoughts in the minds of individual legislators and policymakers are irrelevant. *See, e.g., Watson v. City of Seattle*, --- Wn.2d ---, --- P.3d ---, 2017 WL 3428951 (2017); *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 238, 88 P.3d 375 (2004) (“The interpretation of a statute by an individual legislator does not show legislative intent.”). Instead, the Court looks to the language of the relevant provisions to determine statutory intent. *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-11, 43 P.3d 4 (2002). To the extent that Amicus ask the Court to render a decision based on the analysis of the thoughts of certain legislators or the Sex Offender Policy Board, this Court should reject that invitation.

The bulk of the Amicus's argument is devoted to arguing that a sentence rendered under SSOSA is primarily intended to provide a

treatment option or that the SSOSA system has a treatment purpose. Amicus Brief at 7-8. This argument is based on a faulty premise. The relevant question before the Court is whether the SSOSA evaluation itself—created prior to the imposition of a SSOSA sentence—is directly related to a health care purpose. The focus is on the purpose of the document itself, not on the SSOSA system as a whole. *Cf. Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 882, 357 P.3d 45 (2015) (focusing on the specific records in question when applying the definition of “public record”); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 183-84, 142 P.3d 162 (2006) (indicating that the proper inquiry for determining whether a Public Records Act (PRA) exemption applies is the four corners of the document).

When the inquiry is properly focused on the specific records at issue in this case, the immediate or primary purpose of these evaluations is to aid a court in making a sentencing determination, not for treatment. *See Koenig v. Thurston Cnty.*, 175 Wn.2d 837, 849, 287 P.3d 523 (2012) (noting that a SSOSA evaluation “principally provides a basis for the court to impose sentencing alternatives”). An individual cannot receive a SSOSA sentence without having gone through the criminal process and having admitted to the commission of a crime. *See RCW 9.94A.670(2)(a)* (requiring that an individual “voluntarily and affirmatively admit he or she

committed all of the elements of the crime to which the offender is pleading guilty” and excluding offenders who enter an *Alford* plea from a SSOSA sentence). A sentencing court considers a SSOSA evaluation along with a range of other items identified in the SSOSA statute, such as the wishes of the victim, plus other relevant factors that are not specifically identified in RCW 9.94A.670. *See* RCW 9.94A.670(4) (discussing factors for court to consider); *see State v. Frazier*, 84 Wn. App. 752, 753-54, 930 P.2d 345 (1997) (holding court is not limited to consideration of factors identified in SSOSA statute). Without the prospect of a criminal sentencing, a SSOSA evaluation does not exist.

The SSOSA evaluation itself is created to aid a court in making a legal determination about an individual’s amenability to treatment. *State v. Oliva*, 117 Wn. App. 773, 780, 73 P.3d 1016 (2003). Additionally, although it is true that an individual who actually receives a SSOSA will be mandated to go through treatment, RCW 9.94A.670(5)(c), at the point that the SSOSA evaluation is created, the individual being evaluated is not guaranteed a SSOSA sentence. The ultimate decision about whether or not such a sentence is appropriate is up to the sentencing court’s discretion. RCW 9.94A.670; *see also State v. Onefrey*, 119 Wn.2d 572, 575, 835 P.2d 213 (1992). Some individuals who undergo the evaluation will receive such a sentence; others will not. Indeed, the trial court in this case

recognized as much when it split the class into individuals who receive a SSOSA and individuals who do not. CP 263-66. In other words, the evaluations in question are guaranteed to be considered by the trial court, the prosecuting attorney, and the Department of Corrections for the purpose of making a sentence determination. In contrast, there is only a possibility that an individual receiving a SSOSA evaluation has the potential that the evaluation could be used by a provider if a SSOSA sentence is given and if the treating provider determines that the SSOSA evaluation is useful. Because the immediate and direct purpose of the evaluation is forensic rather than treatment, the SSOSA evaluations are not health care information.

Implicit in Amicus's argument is that a document is protected under the UHCIA if the document could possibly serve a treatment purpose in the future. Such a showing is insufficient under the UHCIA's definition of health care information. The UHCIA specifically requires that the information is "directly related" to a care, service, or procedure provided to diagnose, treat, or maintain an individual's mental or physical condition. RCW 70.02.010(14)(a), (16). By requiring such a direct relationship, the Legislature required the immediate or primary purpose to be for health care. Does' interpretation would alter the statute so that the

UHCIA protects records that could possibly be related to a treatment or diagnostic purpose, even if that treatment is contingent upon other facts.

Finally, Amicus argue that the SSOSA evaluation must include a diagnosis, treatment plan, and prediction of risk. Amicus Brief, at 7. The mere fact that a document contains a diagnosis or a treatment plan does not mean that it has been created for a treatment purpose. In fact, many forensic evaluations contain diagnoses, but courts have never considered such diagnoses as confidential health care information under the UHCIA. *See, e.g., In re Detention of Berry*, 160 Wn. App. 374, 379-81, 248 P.3d 592 (2011) (discussing detailed expert testimony about a sexually violent predator); *In re Detention of Kistenmacher*, 134 Wn. App. 72, 82, 138 P.3d 648 (2006) (similar); *In re Waggy*, 111 Wn. App. 511, 514, 45 P.3d 1103 (2002) (discussing details of SSOSA evaluation). Additionally, Amicus ignores that the evaluator who creates this “treatment plan” is presumptively not the provider that is going to be providing the actual treatment and if a SSOSA is entered, the treating provider is not bound by the proposed treatment plan at all. RCW 9.94A.670(13); WAC 246-930-320(5). Finally, this argument ignores that this “treatment plan” is unlike any traditional medical treatment plan. Instead, it includes things like “recommendations for specific behavior prohibitions, requirements and restrictions on living conditions, lifestyle requirements, and monitoring by

family members and other that are necessary to the treatment process and community safety.” WAC 246-930-320(2)(g)(iii). Therefore, the fact that a SSOSA evaluation contains a “diagnosis” or “treatment plan” does not make such evaluations confidential health care information.

This Court has historically distinguished between evaluations conducted for a forensic and a treatment purpose. *See State v. Sullivan*, 60 Wn.2d 214, 223, 373 P.2d 474 (1962); *see also* Department’s Supplemental Brief, at 11-12. The UHCIA’s requirement that protected health care information must be directly related to a specific medical purpose does not override this traditional distinction. Amicus’s various arguments ignore the statutory language and ask the Court to focus on the wrong inquiry. Amicus’s argument that SSOSA evaluations are primarily created for a treatment purpose ignores the circumstances in which such evaluations are conducted. Instead, as this Court recognized in *Koenig*, SSOSA evaluations are principally designed to aid a court in a sentencing decision. *Koenig*, 175 Wn.2d at 849. Thus, such evaluations are not covered by the UHCIA.

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B. The Department Is Not Asking the Court to Conflate the Analysis for Sealing Court Records with the Standards for PRA Exemptions But Is Addressing the Broad Implications of Adopting Does' Interpretation of the UHCIA

Despite Amicus's argument to the contrary, this Court should consider the broad consequences of the holding that Does and Amicus seek. Does and Amicus have argued that SSOSA evaluations are covered by the UHCIA. Does' Supplemental Brief, at pp. 7-10. As such, unless an UHCIA exception applies, SSOSA evaluations and the information contained in them must be treated as confidential under all circumstances based on Does' and Amicus's reasoning. The Department has raised concerns about the implications that such a broad interpretation could have upon current practices and treatment of SSOSA evaluations and other forensic records. SSOSA evaluations are routinely filed in the public court file in criminal cases and are discussed in open court. *See, e.g.*, Spokane County Superior Court Local General Rule 0.31 (ordering SSOSA evaluations to be placed in the public court file after consideration by the court). If this Court were to adopt Does' and Amicus's reasoning, trial courts would almost certainly assume that they should not be revealing confidential documents or information in open court.

In response, Amicus suggest that the Department is conflating the requirements of General Rule 15 and *Seattle Times v. Ishikawa*, 97 Wn.2d

30, 640 P.2d 716 (1982), with the requirements of the PRA. If this Court accepts Does' argument and affirms the injunction in its entirety, lower courts will be bound to follow such a holding. And if SSOSA evaluations are covered by the UHCIA in such a manner, the lower courts will have to sort out what this means for the filing, consideration, and discussion of such evaluations in open court. The safest route for such courts would be to presumptively seal the evaluations, but such a presumption would have constitutional implications. *See, e.g., In re Det. of D.F.F.*, 172 Wn.2d 37, 47, 256 P.3d 357 (2011). To suggest that such a result is not a possibility is to ignore the very argument that Does have advanced in this litigation.

Although it is true that the analysis of the sealing of a court record and a PRA exemption are distinct inquiries, this Court has never held that they are completely independent. General Rule 15(c)(2)(A) permits the sealing or redaction of a document if the sealing or redaction is permitted by statute. This Court has not held that the application of a confidentiality statute like the UHCIA has no bearing on a court's determination of whether confidential information can be publically disclosed in court proceedings. Indeed, the UHCIA applies to information and documents, in whatever form, and if such information is confidential under the UHCIA, there does not appear to be any applicable exemption that would allow such information to be publically discussed in court. Such a rule could

provide a basis for a court to conclude that documents exempt under the PRA should also be sealed from the court file. Therefore, Amicus's suggestion that the confidentiality of these records will have no impact on how courts will treat these documents—and possibly other forensic documents—is simply incorrect.

Amicus support its argument by relying upon *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012), and *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 246 P.3d 768 (2011). Neither case stands for the proposition that Amicus asserts. First, as Amicus points out, the parties in *Koenig* stipulated that the sealing of the document was not binding on Mr. Koenig and did not restrict the documents' disclosure under the PRA. *Koenig*, 175 Wn.2d at 841-42. Given the fact that the parties stipulated to this, the issue of whether the sealing order actually restricted disclosure of the documents was not before the Court, was not discussed in any of the Court's analysis, and the *Koenig* decision does not shed any light on the relationship between the PRA and sealed court records. *Id.* at 842-47. As such, it does not support Amicus's arguments.

Yakima Herald-Republic also does not stand for the proposition that the existence of a statutory scheme that makes certain records confidential cannot impact a court's analysis under GR 15 or *Ishikawa*. In *Yakima Herald-Republic*, a newspaper sought to unseal copies of billing

invoices from the court file. 170 Wn.2d at 783-84. After those efforts were unsuccessful, the paper submitted a public records request to the County for the records. *Id.* at 785. In 2007, the legislature had passed a specific provision indicating that attorney invoices should not be withheld in their entirety in response to public records requests. RCW 42.56.904. The county took the position that the requested records had been sealed and could only be obtained through the court process; that the records were not public records because they were court records; and that the prosecuting attorney's office did not have the requested records. *Id.* at 786.

On appeal, this Court rejected the argument that the records requested from the county were court records not subject to the PRA when the records were in the hands of the county.¹ *Id.* at 804-06. The Court also rejected the superior court's determination that the sealing orders affected the PRA issue because the orders sealing the documents did not appear to expressly apply to outside agencies and RCW 42.56.904 specifically required the county to produce invoices in its possession. *Id.* at 805-06. Based on this conclusion, it did not appear that the requested records were covered by any exemption. However, the Court ultimately remanded to the trial court for further analysis about the applicability of any exemption and to determine if the records were accompanied by any applicable protective

¹ The Court had previously concluded that court records held by courts were not subject to the PRA in *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).

orders. *Id.* at 808-09. Although the Court in *Yakima-Herald Republic* analyzed the issues separately, the Court did not state that the inquiries had no impact on one another. The Court's conclusions in that factually unique case do not stand for the proposition that the sealing analysis and the PRA can never impact each other.

Finally, to the extent that Amicus imply that the Department has not properly raised this issue or the issue is not before the Court, Amicus is wrong. The Department has raised concerns about the potential impact of a conclusion that these records in public court files are protected health care information at every stage of this case. CP 183-84 (arguing in response to preliminary injunction that documents are found in court files); CP 501-02 (pointing out that evaluations are found in public court files); DOC's Opening Brief in Division I, at pp. 15-16 (similar). Contrary to Amicus's assertions, these issues and arguments were timely raised by the Department.

C. The Policy Issues Raised by Amicus Are Best Directed to the Legislature, Which Can Evaluate the Policy Implications of a Statutory Exemption for SSOSA Evaluations

Under the PRA, exemptions are construed narrowly because the legislature has made it clear that courts should not create exemptions where there are none. *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 371-72, 374 P.3d 63 (2016). Although there may be many valid

policy arguments for the creation of an exemption for any specific documents, persuasive policy arguments do not provide a basis for a court to create an exemption where none exists. Policy arguments are best directed to the legislature, which has the power to create such exemptions. *Id.* at 378 n.3. For similar reasons, courts have rejected any idea that agencies themselves can define the scope of exemptions. *See, e.g., Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 129, 580 P.2d 246 (1978).

Amicus devote a significant portion of its Brief to a discussion of the policy behind the SSOSA process and studies about the effectiveness of SSOSAs. *See, e.g.,* Amicus Brief, at 4 (discussing Washington State Institute for Public Policy study about SSOSA trends); at 7-8 (citing to legislative history and studies to argue that SSOSA were created with a treatment purpose in mind). The policy concerns raised by Amicus may be valid but there also may be equally compelling reason that the legislature would want to allow the release of the evaluations. *See* Zink's Petition for Review, at 19 (arguing that the public cannot scrutinize sentencing decisions or the SSOSA program without access to SSOSA evaluations). Throughout this litigation, the Department has consistently refrained from taking a position on these policy arguments. *See, e.g.,* CP 13-14 (arguing in response to the motion for summary judgment that the policy arguments are best left to the legislature). The Department must release the

evaluations without a clear-cut exemption barring their release. In the absence of an exemption, neither the Department nor a court can use such policy arguments as a basis for an exemption. The fact that the legislature has opted to not pass such a clear exemption, even after this Court's decision in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012), may signal that the legislature does not share Amicus's view of these policy arguments. Because policy arguments do not provide a basis for withholding documents under the PRA, the Court should decline Amicus's invitation to consider such arguments.

III. CONCLUSION

SSOSA evaluations are not directly related to a health care purpose. Instead, they are forensic evaluations conducted to aid a court in a sentencing determination. The various arguments raised by Amicus do not establish that SSOSA evaluations are created for the purpose of treatment, and the policy issues raised by Amicus are best directed to the legislature. Because the Court of Appeals erred in concluding that SSOSA evaluations are exempt in their entirety under the UHCIA, this Court should reverse and remand for the trial court to vacate the permanent

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injunction that required the withholding of SSOSA evaluations in their entirety.

RESPECTFULLY SUBMITTED this 11th day of September, 2017.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 11th day of September, 2017, at Olympia, WA.

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Case name – Doe et al., v. DOC et al.

WSSC Cause No. 94203-0

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