74354-6

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No. 94203-0

No. 74354-6-I

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

JOHN DOE G, JOHN DOE I, JOHN DOE J, and JOHN DOE K,
as individuals and on behalf of others similarly situated,

Respondents,

v.

DEPARTMENT OF CORRECTIONS,

Appellant,

and

DONNA ZINK,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

CORRECTED BRIEF OF RESPONDENTS

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INTRODUCTION AND SUMMARY

The Public Records Act (PRA) recognizes the public's interest in government transparency, RCW 42.56.030, and also recognizes that this interest has limits, *see, e.g.*, RCW 42.56.070(1); RCW 42.56.360. This case is about one of those limits. Here, several statutes require the Department of Corrections (DOC) to keep confidential certain sensitive health care information about sex offenders and their victims. As a result, that information is exempt from the PRA.

This case involves evaluations performed by health care professionals under the Special Sex Offender Sentencing Alternative (SSOSA). These SSOSA evaluations determine whether certain first-time sex offenders are amenable to treatment, and thus whether they may receive a SSOSA—a suspended sentence with intensive clinical treatment and supervision. *See* RCW 9.94A.670(2)–(6). To complete the evaluation, the health care professional must examine the offender's psychosexual history and condition, and assess the offender's relative risk factors and amenability to treatment. RCW 9.94A.670(3)(a)–(b); WAC 246-930-230(2)(d)–(f). If the offender is deemed amenable to treatment, the professional must also include a detailed treatment plan. RCW 9.94A.670(3)(b); WAC 246-930-230(2)(g).

Requester Donna Zink, invoking the PRA, has asked DOC to release all SSOSA evaluations in its possession since 1990. The trial court enjoined DOC from this blanket release. It was correct to do so.

SSOSA evaluations are exempt from disclosure under chapter 70.02 RCW, the Uniform Health Care Information Act (UHCIA), because they are identifiable patients' health care information. *See* RCW 42.56.360(2) ("health care information of patients" under chapter 70.02 RCW is exempt from disclosure under PRA). Only licensed health care professionals can perform SSOSA evaluations, and those professionals treat SSOSA evaluations the same way they would treat any other evaluation of a patient seeking mental health treatment for a sexual behavior problem. The document that springs from this clinical evaluation must contain both a comprehensive psychological assessment and a detailed health care treatment plan. If SSOSA evaluations are not protected under chapter 70.02 RCW, it is difficult to imagine what medical information could be exempt from the PRA.

SSOSA evaluations are also exempt from the PRA under another provision in the UHCIA, RCW 70.02.250. *See* RCW 42.56.070(1) ("other statute[s]" may exempt records from disclosure under PRA). RCW 70.02.250 establishes a wide-ranging mandate requiring "all relevant records and reports" to be shared with DOC. RCW 70.02.250(2). Once

shared with DOC, those records and reports must be kept confidential. RCW 70.02.250(5). Because SSOSA evaluations are among those confidential "relevant records and reports," RCW 70.02.250 is an "other statute" that exempts SSOSA evaluations from disclosure under the PRA.

For similar reasons, SSOSA evaluations are exempt from the PRA under RCW 71.05.445. It too requires that "relevant records and reports" be shared with DOC, RCW 71.05.445(2), and then requires DOC to keep those records and reports confidential, RCW 71.05.445(4). SSOSA evaluations are among those "relevant records and reports," so RCW 71.05.445 is an "other statute" that exempts them from disclosure under the PRA. RCW 42.56.070(1).

The trial court was also right to enjoin the release of SSOSA evaluations under RCW 42.56.540, the provision of the PRA authorizing injunctions against disclosure. The court was presented with detailed, unrebutted evidence showing that blanket disclosure of SSOSA evaluations would retraumatize victims, hinder offenders from rehabilitation and reintegration, and undermine the success of the SSOSA system itself. In light of this evidence, the injunction should be affirmed.

Zink raises a number of other issues: whether the trial court should have allowed Plaintiffs to proceed pseudonymously, whether the trial court should have certified a Plaintiff class, and whether the trial court

should have entered a preliminary injunction. That last issue—the propriety of the preliminary injunction—is now moot. Zink's arguments on the other two issues are legally flawed and should be rejected.

STATEMENT OF THE ISSUES

1. Do chapter 70.02 RCW and RCW 71.05.445 exempt SSOSA evaluations from disclosure under the Public Records Act?

2. Did the trial court correctly conclude that SSOSA evaluations contain sensitive personal and medical information, and that their blanket disclosure would not be in the public interest and would substantially injure either a vital government function or Plaintiffs themselves?

3. Did the trial court correctly allow Plaintiffs to proceed in pseudonym?

4. Was the trial court within its discretion to certify a class of Plaintiffs?

5. In this appeal from a permanent injunction, does this Court need to address whether the trial court was right to enter a preliminary injunction?

STATEMENT OF THE CASE

I. The SSOSA system

In enacting the SSOSA system, the Legislature "create[d] a sentencing alternative for certain first time sex offenders." *State v. Pannell*, 173 Wn.2d 222, 227, 267 P.3d 349 (2011). Under this system, eligible offenders who are found amenable to treatment must submit to intensive treatment and supervision. RCW 9.94A.670(5)(b)–(d). In

exchange, the sentencing court may suspend a portion of the offenders' prison time. RCW 9.94A.670(5)(a).

The SSOSA statute lays out exacting standards for SSOSA eligibility, drastically narrowing the number of offenders who are eligible for SSOSAs. RCW 9.94A.670(2), (4). Even among eligible offenders, however, SSOSA sentences are uncommon. In 2005, for example, only 35% of sex offenders that met the threshold eligibility criteria actually received a SSOSA. CP 376, ¶ 16.c. And in fiscal year 2012, only 95 offenders in all of Washington received a SSOSA. CP 376, ¶ 16.e.

Despite—or perhaps because of—their relatively rarity, SSOSA sentences have proven remarkably effective. Sex offenders who complete SSOSA sentences have the lowest recidivism rates for any type of crime, including sex offenses. CP 387, ¶ 7; *see also* CP 442, ¶ 38 ("[R]ecidivism rates for individuals who complete the SSOSA program remain consistently lower than recidivism rates for individuals who do not receive SSOSA[.]").

Beyond the threshold eligibility requirements, the SSOSA system requires that offenders, to receive a SSOSA, undergo an evaluation and be found amenable to treatment. To determine amenability, the trial court orders a detailed SSOSA evaluation. RCW 9.94A.670(3). These evaluations must be performed by certified treatment providers—health

care professionals who have been specifically licensed by the Department of Health to evaluate and treat sex offenders. *See* RCW 9.94A.820(1); RCW 18.155.020.

The SSOSA evaluation's purpose is to assess "the offender's amenability to treatment and relative risk to the community," and to propose a "treatment plan." RCW 9.94A.670(3)(b). To fulfill this purpose, SSOSA evaluations must contain detailed personal information. They must describe, among other things, the offender's crime; sexual history; perceptions of others; risk factors, including the offender's alcohol and drug abuse, sexual patterns, use of pornography, and social environmental influences; personal history, including the offender's relationships, employment, and education; a family history; a history of the offender's violence or criminal behavior; and the offender's mental health functioning. WAC 246-930-320(2)(e). Based on these factors, the SSOSA evaluation must assess the appropriateness of community treatment, summarize the examiner's diagnostic impressions, gauge the offender's risk of reoffending, appraise the offender's willingness for outpatient treatment, and propose a clear and detailed treatment plan. WAC 246-930-320(2)(f), (g).

After receiving the evaluation, the trial court must decide whether to impose a SSOSA. *See* RCW 9.94A.670(4). If the court decides to

impose a SSOSA, the sentence must include certain terms. The sentence, for example, must always include a period of treatment of up to five years. RCW 9.94A.670(5)(c). It must also impose "[s]pecific prohibitions and affirmative conditions" relating to behaviors that may trigger recidivism, such as viewing pornography or using intoxicants. RCW 9.94A.670(5)(d).

II. Plaintiffs filed this action to enjoin release of SSOSA evaluations after Zink demanded evaluations from DOC under Public Records Act (PRA).

In 2014, Donna Zink sent a request to DOC under the PRA, chapter 42.56 RCW. She demanded all SSOSA evaluations "maintained, in the possession of or owned by the Washington State Department of Corrections from January 1, 1990 to the present." CP 116. Not long thereafter, Plaintiffs filed this action to enjoin the mass release of SSOSA evaluations.

Plaintiffs are current or former Level I sex offenders who underwent SSOSA evaluations. CP 418–19, ¶¶ 2–3; CP 424–25, ¶¶ 2–3, 8; CP 429, ¶¶ 3, 5–6; CP 432–33, ¶¶ 2–3. Washington differentiates between offenders who present a high, moderate or low risk for re-offense. CP 400–01, ¶¶ 7–8; *see also State v. Brosius*, 154 Wn. App. 714, 720, 225 P.3d 1049 (2010). Level I offenders are those registered sex offenders that have been assessed to pose the lowest risk to the public. RCW 13.40.217(3), 72.09.345(6); CP 391, ¶ 21.

After filing this action, Plaintiffs sought a temporary restraining order, and then a preliminary injunction, both of which were granted. CP 97–98, 256–61. The trial court also allowed Plaintiffs to proceed in pseudonym and to represent a certified class of compliant Level I offenders who, after January 1, 1990, underwent a SSOSA evaluation. CP 761–62, 773–76. Plaintiffs then amended their complaint with the trial court's leave, alleging that SSOSA evaluations were exempt from disclosure under RCW 71.05.445 and chapter 70.02 RCW. CP 1048–50, ¶¶ 28–39.

Plaintiffs later moved for summary judgment and a permanent injunction under RCW 42.56.540, the provision of the PRA that authorizes injunctions against disclosure. CP 271, 284. Plaintiffs argued that RCW 71.05.445 and chapter 70.02 RCW both prohibited the release of SSOSA evaluations. CP 277–83. After full briefing and argument, the trial court granted Plaintiffs' motion. CP 749–53. This appeal followed.

ARGUMENT

I. The legal framework of PRA exemptions

The PRA allows the public to inspect and copy public records, but also provides a number of exemptions to disclosure. "Some of these exemptions are contained within the PRA itself." *Doe ex rel. Roe v. Wash. State Patrol*, No. 90413-8, 2016 WL 1458206, at *3 (Wash. Apr. 7, 2016).

One of these incorporated exemptions is for "[c]hapter 70.02 RCW," which the PRA says "applies to public inspection and copying of health care information of patients." RCW 42.56.360(2).

The PRA also provides that public records are exempt from production if they fall within any "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1); *see Doe*, 2016 WL 1458206, at *3. A statute qualifies as an "other statute" under the PRA "when the plain language of the statute makes it clear that a record, or portions thereof, is exempt from production." *Doe*, 2016 WL 1458206, at *5. The other statute "does not need to expressly address the PRA, but it must expressly prohibit or exempt the release of records." *Id.* at *3.

II. Chapter 70.02 RCW prohibits DOC from releasing SSOSA evaluations.

SSOSA evaluations are exempt from the PRA under chapter 70.02 because they qualify as exempt "health care information of patients" under chapter 70.02 RCW, and because they are also exempt under RCW 70.02.250.

A. SSOSA evaluations are exempt "health care information of patients" under chapter 70.02 RCW.

The PRA explicitly incorporates certain aspects of the UHCIA, chapter 70.02 RCW. The PRA states that "[c]hapter 70.02 RCW applies to

public inspection and copying of health care information of patients," thus exempting the "health care information of patients" from PRA's disclosure mandate. RCW 42.56.360(2); *see also Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005). SSOSA evaluations qualify as "health care information of patients."

Under chapter 70.02 RCW, "health care information" is defined as "any information, . . . recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care." RCW 70.02.010(16). A SSOSA evaluation fits that definition.

SSOSA evaluations can be performed only by certified health care professionals who have been specifically licensed by the Department of Health to evaluate and treat sex offenders. *See* RCW 9.94A.820(1); RCW 18.155.020. These professionals must "possess an underlying credential as a licensed health care professional," and must "have extensive training in a mental health field, as well as specialty training in the evaluation and treatment of sexual offense behavior." CP 389, ¶ 12.

As the expert testimony in the record demonstrates, a SSOSA evaluation is no different from any other clinical evaluation by a mental health care provider. The Washington Association for the Treatment of Sexual Abusers (WATSA), through its leadership, testified that a SSOSA

evaluation contains the provider's diagnostic impressions; an assessment of psychological, behavioral, and lifestyle factors; and a written treatment plan. CP 387, ¶ 8. And, critically, "the evaluator's "clinical approach" to a SSOSA evaluation "is the same as the clinical approach of an evaluator conducting an intake for a non-criminal justice involved person seeking mental health treatment for a sexual behavior problem." CP 387–88, ¶ 9. Two certified sex offender treatment providers testified that SSOSA evaluations contain the offender's psychological test results, and the offender's medical, mental health, and psychosexual history. CP 410–11, ¶¶ 6–7; CP 416, ¶ 4.b. Both treatment providers testified that they treat SSOSA evaluations as protected health information, which they keep confidential. CP 410, ¶ 6; CP 416, ¶ 4.c.

This testimony is consistent with the statutorily declared purpose of SSOSA evaluations, which is to determine whether offenders are amenable to treatment. RCW 9.94A.670(3). To determine whether an offender is amenable to treatment for a condition—that is to say, amenable to health care—the evaluator must necessarily prepare a medical evaluation of the offender. Such an evaluation is precisely the kind of information that "directly relates to the patient's health care." RCW 70.02.010(16). A SSOSA evaluation's direct relation to medical treatment makes it quite different from an employer-administered drug test, which

does not necessarily bear any relationship to medical treatment. *See Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 368, 112 P.3d 522 (2005) (drug test was condition of employment, and it was "undisputed that [its] purpose . . . was not health care or medical treatment").[1]

An offender undergoing a SSOSA evaluation also qualifies as a "patient." RCW 42.56.360(2) (exempting health care information "of patients"). Chapter 70.02 RCW defines a "patient" as "an individual who receives or has received health care." RCW 70.02.010(31). And "health care," in turn, is defined broadly to include "any care, service, or procedure provided by a health care provider" in order to "diagnose, treat, or maintain a patient's physical or mental condition." RCW 70.02.010(14). Only health care providers may perform SSOSA evaluations. RCW 9.94A.820(1); RCW 18.155.020; *see also* RCW 70.02.010(18) (defining "health care provider"). And in performing a SSOSA evaluation, the health care provider is providing a service that is intended to "diagnose" and "treat" the offender's condition. In determining whether the offender is amenable to treatment, the health care

[1] Case law similarly indicates that SSOSA evaluations are health care information. In *State v. A.G.S.*, the Supreme Court recognized that Special Sex Offender Disposition Alternative ("SSODA") evaluations are "not court documents" but rather "a psychological report that includes a treatment plan." 182 Wn.2d 273, 278, 340 P.3d 830 (2014). Both SSOSA and SSODA evaluations serve a similar purpose and must include similar content. *Compare* RCW 9.94A.670 (SSOSA), *with* RCW 13.40.162 (SSODA).

provider is necessarily diagnosing the offender. *See* RCW 9.94A.670(3) (evaluation is needed to "determine whether the offender is amenable to treatment"); CP 387, ¶ 8 (evaluation "identif[ies] and describe[s] an individual's psychological, behavioral, and lifestyle factors . . . to determine amenability to treatment"). And, in proposing a treatment plan, *see* RCW 9.94A.670(3)(b), the health care provider is helping to treat the offender; an offender cannot be treated without a plan of treatment.

DOC, however, maintains that SSOSA evaluations are not protected "health care information" under chapter 70.02 RCW because they are "mandatory forensic evaluation[s]" designed to help a sentencing court. DOC Br. 13. This argument errs by assuming that a SSOSA evaluation cannot have more than one purpose. That assumption is incorrect because "a SSOSA evaluation serves *many* important functions," not just one. *Koenig v. Thurston Cty.*, 175 Wn.2d 837, 847, 287 P.3d 523 (2012) (emphasis added). Nor does anything in chapter 70.02 RCW indicate that a document cannot contain health care information just because it also relates to sentencing. While DOC is correct that a SSOSA evaluation aids a sentencing court's decision, the court "cannot make this decision without first knowing whether the offender is amenable to treatment." *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995). And, to determine amenability to treatment—i.e., *health care* treatment—

the evaluator must necessarily perform a health care evaluation. That is why the evaluation is performed by a health care professional, RCW 18.155.020, who employs the same clinical approach that an evaluator would use for any patient "seeking mental health treatment for a sexual behavior problem." CP 388, ¶ 9.

A SSOSA evaluation, then, is performed by a health care professional who treats the offender as a patient and employs normal clinical methods to produce an assessment of the offender's condition and formulate a treatment plan. If a SSOSA evaluation is not the "health care information" of a "patient" under chapter 70.02 RCW, it is difficult to see what kind of health care information *could* be exempt from public disclosure.

B. RCW 70.02.250 exempts SSOSA evaluations from the PRA.

Separate and apart from chapter 70.02 RCW's protection of patients' health care information, RCW 70.02.250 acts as an "other statute" prohibiting the disclosure of SSOSA evaluations.[2] RCW 42.56.070(1).

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[2] Plaintiffs have created a flowchart showing how RCW 70.02.250 creates an exemption for SSOSA evaluations. That flowchart, a version of which was also submitted to the trial court, *see* CP 743, is included in the Appendix to this Brief.

1. RCW 70.02.250 exempts SSOSA evaluations from disclosure under the PRA because they qualify as "relevant records and reports."

RCW 70.02.250(2) creates a broad mandate that certain information be disclosed to DOC. It states that "[t]he information to be released to the department of corrections must include all relevant records and reports, as defined by rule, necessary for the department of corrections to carry out its duties." RCW 70.02.250(2).

RCW 70.02.250(5) then requires that this information be kept confidential. It provides that "[t]he information received by the department of corrections under this section"—and, therefore, the information *released to* DOC under this section—"must remain confidential and subject to the limitations on disclosure outlined in chapter 71.34 RCW, except as provided in RCW 72.09.585." RCW 70.02.250(5). By providing that the information released under RCW 70.02.250 "shall remain confidential," this provision prohibits the disclosure of that information under the PRA. *See Cornu-Labat v. Hosp. Dist. No. 2 Grant Cty.*, 177 Wn.2d 221, 238, 298 P.3d 741 (2013) (noting that a statute providing that certain information "shall be confidential" provided "a specific—not implied—PRA exemption"). Moreover, nothing in RCW 72.09.585—the statute to which RCW 70.02.250(5) refers—provides that SSOSA evaluations are excluded from confidentiality. Quite the opposite is true, in

fact. RCW 72.09.585(6) limits the release of mental-health information to the public "to descriptions of the offender's behavior, risk he or she may present to the community, and need for mental health treatment." RCW 72.09.585(6). And it flatly bans DOC from releasing "copies of treatment documents or records" to "the public." *Id.*

Because the statute prohibits the disclosure of "[t]he information received by the department of corrections under this section," RCW 70.02.250(5), the next logical step is to ask whether SSOSA evaluations are included in that information. And the answer to that question, in turn, depends on whether SSOSA evaluations qualify as among "relevant records and reports, as defined by rule," that must be released to DOC under RCW 70.02.250(2). If so, RCW 70.02.250(5) prohibits their disclosure.

The rule that defines "relevant records and reports" is located at WAC 388-865-0610. It provides that "relevant records and reports" include the following:

- An "[o]utpatient intake evaluation," which is defined as "[a]ny initial or intake evaluation or summary done by any mental health practitioner or case manager[,] the purpose of which is to provide an initial clinical assessment in order to guide outpatient service delivery." WAC 388-865-0610(1)(b)(i).

- An "[o]utpatient treatment plan," which is defined as "[a] document designed to guide multidisciplinary outpatient treatment and support." WAC 388-865-0610(1)(b)(v).

- "Records and reports of other relevant treatment and evaluation," which include "[a] formal report, assessment, or evaluation based on psychological tests conducted by a psychologist"; "[a] formal neuropsychological report, assessment, or evaluation based on neuropsychological tests conducted by a psychologist"; an "[e]ducational assessment"; a "[f]unctional assessment"; and a "[r]isk assessment," which is a formal evaluation to determine a patient's risk of violence or criminality. WAC 388-865-0610(1)(d)(i)–(iv), (vii).

A SSOSA evaluation falls under more than one of these headings. First, a SSOSA evaluation qualifies as an *outpatient intake evaluation*, an *educational assessment*, a *functional assessment*, and a *risk assessment*. WAC 388-865-0610(1)(b)(i), (1)(d)(iii), (iv), (vii). After all, two of the overriding purposes of the evaluation are to assess the offender's "relative risk to the community" and "to determine whether the offender is amenable to treatment." RCW 9.94A.670(3), (3)(b); *accord* WAC 246-930-320(2)(f)(iii) (requiring a SSOSA evaluation to include a "specific assessment of relative risk factors"). And the evaluation must—among other things—assess the offender's "offense history," "problems," "deviant behaviors," "social and employment situation," and "[o]ther

evaluation measures." RCW 9.94A.670(3)(a); *accord* WAC 246-930-320(2)(e) (implementing these requirements for SSOSA evaluations).[3]

Second, a SSOSA evaluation is a relevant record and report because it qualifies as an *outpatient treatment plan.* WAC 388-865-0610(1)(b)(v). Another key purpose of a SSOSA evaluation is to propose a "treatment plan." RCW 9.94A.670(3)(b). The regulatory standards governing SSOSA evaluations also require SSOSA evaluations to "[i]nclude a proposed treatment plan which is clear and describes" a number of matters "in detail," including the "length of treatment" and type of treatment needed, and the "specific issues to be addressed in treatment and a description of planned treatment interventions." WAC 246-930-320(2)(g).[4]

So for more than one reason, and in more than one way, SSOSA evaluations qualify as "relevant records and reports, as defined by rule."

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[3] Expert testimony supports these conclusions. WATSA testified that "[o]ne of the purposes of conducting a SSOSA evaluation is to identify and describe an individual's psychological, behavioral, and lifestyle factors associated with risk to re-offend." CP 387, ¶ 8. It added: "The clinical approach of an evaluator completing a SSOSA evaluation is the same as the clinical approach of an evaluator conducting an intake for a non-criminal justice involved person seeking mental health treatment for a sexual behavior problem." CP 387–88, ¶ 9. Note, in addition, that if the SSOSA evaluation is performed by a psychologist, the evaluation also qualifies as a "[p]sychological evaluation" or "[n]europsychological evaluation." WAC 388-865-0610(1)(d)(i)–(ii).

[4] Expert testimony again supports this analysis. As WATSA testified, SSOSA evaluations must include "a written treatment plan which must note the specific issues to be addressed in treatment, planned interventions, recommendations for specific behavioral prohibitions, and proposed methods for verifying compliance." CP 387, ¶ 8; *see also* CP 388, ¶ 11 (discussing the nature of a SSOSA treatment plan).

RCW 70.02.250(2). Hence, SSOSA evaluations are "to be released to the department of corrections" under RCW 70.02.250. *Id.* And because SSOSA evaluations are among "[t]he information received by the department of corrections under this section," those evaluations "shall remain confidential." RCW 70.02.250(5).

According to DOC, however, it is irrelevant that SSOSA evaluations qualify as "relevant records and reports, as defined by rule." RCW 70.02.250(2). DOC says that this portion of the statute—subsection 2—simply "defines the scope of the information that is shared with the Department" under subsection 1. DOC Br. 31. DOC does not provide an argument for this position, which is untenable in any event.

Subsection 1 requires only certain kinds of entities—"mental health service agenc[ies]"—to make specific notifications to DOC. RCW 70.02.250(1). By contrast, Subsection 2 is phrased far more broadly. It speaks of "[t]he information to be released to the department," and does not identify specific persons who must release that information. RCW 70.02.250(2). Rather, it uses the passive voice. Instead of identifying the entity that must disclose, it identifies the kind of document ("relevant records and reports") that must be disclosed. It thus applies to all "relevant

records and reports," *id.*, including SSOSA evaluations, no matter whose hands those records and reports are in.[5]

Moreover, the only *explicit* connection between subsection 1 and subsection 2 makes it clear that subsection 2's scope goes beyond subsection 1's. Subsection 2 makes it clear that the "relevant records and reports" of which it speaks include, but are not limited to, those that are "identified in subsection (1) of this section." *Id.*; *see also Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001) ("includes" is a "term of enlargement," not a "term of limitation").

DOC also argues that the "reference to 'relevant records and reports' is too amorphous" to exempt documents from the PRA. DOC Br. 32. DOC cites no authority to support this argument, and the term "relevant records and reports, as defined by rule," RCW 70.02.250(2), is anything but amorphous, since the relevant rule defines "relevant records and reports" with exactness. And while DOC maintains that agencies may not "define the scope of their own exemptions," DOC Br. 32 n.6, that is not what the Department of Social and Health Services (DSHS) did in

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[5] That is also why RCW 70.02.250 does not apply only to "records that are released by mental health service agencies." DOC Br. 35 (emphasis omitted). While subsection 1 requires mental health service agencies to deliver up certain records to DOC, RCW 70.02.250 as a whole reaches beyond subsection 1. In subsection 2, it provides a wide-ranging disclosure mandate—a mandate that applies not to certain kinds of entities, but rather to certain kinds of documents, no matter whose hands those documents are in.

WAC 388-865-0610.[6] Rather than "regulat[ing] disclosure directly or interpret[ing] the disclosure requirements of the PRA," DSHS "implemented regulations" to define a statutory term outside the PRA, "pursuant to the express enabling provision[]" of RCW 70.02.250(2). *White v. Clark Cty.*, 188 Wn. App. 622, 636, 354 P.3d 38 (2015).

2. RCW 70.02.250 provides an independent exemption from disclosure.

DOC takes the position that RCW 70.02.250 provides no independent exemption from disclosure under the PRA and simply reaffirms confidentiality provisions found elsewhere. In support of this position, DOC makes four unpersuasive arguments.

First, DOC argues that RCW 70.02.250(5) cannot be an independent exemption because it merely provides that certain information is "subject to the limitations on disclosure outlined in chapter 71.34 RCW." *See* DOC Br. 30–31. This argument reads language out of the statute. The statute provides that information "must remain confidential *and* subject to the limitations on disclosure outlined in chapter 71.34 RCW." RCW 70.02.250(5) (emphasis added). It is the first clause of the sentence—"must remain confidential"—that creates the independent

[6] The rule was promulgated by DSHS, not by DOC. For that reason, too, DOC's concern about agencies defining "the scope of their own exemptions," DOC Br. 32 n.6, is misplaced.

exemption under the PRA. Because DOC's reading ignores that clause, that reading should be rejected. *See, e.g.*, *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.").

If DOC is arguing that the verb "remain" in the phrase "must remain confidential" merely reaffirms exemptions created elsewhere, DOC errs. To require a document to "remain confidential" is simply to require that it be treated as confidential. This is clear from the legislature's consistent use of the phrases "shall remain confidential" or "must remain confidential," which appear in other Washington statutes. *See, e.g.*, RCW 43.190.110, 43.33A.025(2), 70.87.310(2), 70.96A.150(1). These phrases do not require a record to have already been confidential. RCW 70.96A.150(1), for example, provides that addiction treatment programs must treat their records as confidential, stating that those records "shall remain confidential." RCW 70.96.150(1). This cannot mean that these records were *already* confidential, since the treatment programs themselves created those records; a document that does not yet exist cannot be confidential. Similarly, RCW 70.87.310(2) provides that the "identity of a whistleblower" who complains to the state or a locality "must remain confidential." This cannot mean that the whistleblower's

identity was *already* confidential, because a "whistleblower" under this statute may have already complained to her employer and thus be known to that employer. *See* RCW 70.87.010(40) (defining "[w]histleblower"). DOC errs by ignoring this consistent legislative use of the term "remain confidential," which does not require prior confidentiality to create an exemption from disclosure.

Second, DOC maintains that when the first subsection of RCW 70.02.250 refers to "information and records related to mental health services," it is "expressly incorporating the general confidentiality provisions of the UHCIA." DOC Br. 32–33. But it is the second subsection of RCW 70.02.250, not the first, on which Plaintiffs rely here, for it is the second subsection that contains the phrase "relevant records and reports." RCW 70.02.250(2). Thus, even if the first subsection merely incorporates the UHCIA, that fact is irrelevant to this case.

Third, DOC relies on the fact that language that is currently in RCW 70.02.250 was once included in RCW 71.05.445. DOC Br. 33. DOC appears to be arguing that because RCW 71.05.445 is not an independent exemption, RCW 70.02.250 cannot be either. DOC's premise is wrong, however. As explained below, RCW 71.05.445 provides an independent exemption to the PRA. *See infra* pp. 29–31.

Fourth, DOC cites another statute, RCW 70.02.230, which requires healthcare providers to keep mental-health records confidential: "[T]he fact of admission to a provider for mental health services and all information and records compiled, obtained, or maintained in the course of providing mental health services . . . at public or private agencies must be confidential." RCW 70.02.230(1). This provision refers to RCW 70.02.250, among other statutes, as an exception to the general rule of confidentiality. *Id.* This reference simply shows that RCW 70.02.250 creates an exception to the general rule that healthcare providers must keep mental health records confidential. *Cf.* DOC Br. 33–34. And no one, including Plaintiffs, doubts that it *does* create such an exception. In its first subsection, it requires "a mental health service agency" to release certain "[i]nformation and records" to DOC. RCW 70.02.250(1). But this information-sharing requirement in RCW 70.02.250(1) does not negate the aspects of RCW 70.02.250 that create an independent exemption for SSOSA evaluations. RCW 70.02.250 *also* requires that all documents shared with DOC under that section be kept confidential. RCW 70.02.250(5). And that section mandates that "all relevant records and reports," including SSOSA evaluations, be shared with DOC, no matter whose hands the evaluations are in. RCW 70.02.250(2).

3. SSOSA evaluations are exempt from disclosure even if RCW 70.02.250 does not provide an independent exemption

Even if DOC were correct, and RCW 70.02.250 merely reaffirmed exemptions granted elsewhere, SSOSA evaluations would still be exempt from disclosure under the PRA. This is true for two reasons: First, the evaluations fall under chapter 70.02 RCW's protections for the "health care information of patients," RCW 42.56.360(2); and second, chapter 70.02 RCW contains another exemption that applies to SSOSA evaluations.

As DOC notes, RCW 70.02.230 provides that "[i]nformation and records related to mental health services are confidential." DOC Br. 16. "Information and records related to mental health services," in turn, are defined as "a type of health care information . . . compiled, obtained, or maintained in the course of providing services by a mental health service agency or mental health professional to persons who are receiving or have received services for mental illness." RCW 70.02.010(21). The professionals who perform SSOSA evaluations certainly qualify as "mental health professional[s]," RCW 70.02.010(27), since only certified sex offender treatment providers may perform SSOSA evaluations. CP 389, ¶ 12. And, as noted above, the mental health professionals conducting SSOSA evaluations for offenders take the same clinical approach as they

would for any person seeking mental health treatment for a sexual behavior problem. CP 387–88, ¶ 9. For this reason too, SSOSA evaluations are independently exempt from disclosure under chapter 70.02 RCW.

DOC notes, however, that RCW 70.02.010(21), which defines "[i]nformation and records related to mental health services," states that certain kinds of legal documents qualify as such—but does not explicitly mention SSOSA evaluations. Hence, argues DOC, SSOSA evaluations are implicitly excluded from the definition under the *expressio unius* canon. DOC Br. 18. That is incorrect. The statute introduces the list of legal documents with the word "includes," indicating that the list is meant to be illustrative, not exclusive. *See, e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (citing cases). For that reason, DOC is not justified in inferring an exclusion from silence.

III. RCW 71.05.445 prohibits DOC from releasing SSOSA evaluations.

A. SSOSA evaluations qualify as "relevant records and reports," therefore RCW 71.05.445 exempts them from disclosure under the PRA.

RCW 71.05.445 is an "other statute" that prohibits the disclosure of SSOSA evaluations.[7] RCW 42.56.070(1). Like RCW 70.02.250, RCW 71.05.445 requires SSOSA evaluations to be disclosed to DOC, and then requires DOC to keep SSOSA evaluations confidential.

The text of RCW 71.05.445 unambiguously prohibits disclosure. It creates a wide-ranging mandate for disclosure to DOC, providing that "[t]he information to be released to the department of corrections shall include all relevant records and reports, as defined by rule, necessary for the department of corrections to carry out its duties." RCW 71.05.445(2). And it provides that these records and reports, because they are "received by the department of corrections under this section," must "remain confidential and subject to the limitations on disclosure outlined in chapter 71.05 RCW, except as provided in RCW 72.09.585."[8] RCW 71.05.445(4). Thus, RCW 71.05.445 makes "all relevant reports and reports, as defined

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[7] Plaintiffs have created a flowchart showing how RCW 71.05.445 creates an exemption for SSOSA evaluations. That flowchart, a version of which was also submitted to the trial court, *see* CP 744, is included in the Appendix to this Brief.

[8] As noted above, RCW 72.09.585 does not authorize disclosure of SSOSA evaluations. *See supra* pp. 15–16.

by rule," exempt from disclosure. And because SSOSA evaluations qualify as "relevant records and reports," *see supra* pp. 16–18, RCW 71.05.445 is an "other statute" prohibiting their disclosure under the PRA.

As it does when discussing RCW 70.02.250, DOC argues that subsection 2 of RCW 71.05.445 simply defines the information that is shared with DOC under subsection 1. DOC Br. 22. For the same reasons that this argument failed for RCW 70.02.250, the argument fails again here. *See supra* pp. 19–20. In fact, this argument is even less persuasive for RCW 71.05.445 than it was for RCW 70.02.250. Subsection 2 of RCW 71.05.445 does not even refer to subsection 1, so DOC is reading into subsection 2 something that is not there. And "courts may not read into [a] statute matters which are not there." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990).[9]

DOC also argues that RCW 71.05.445's exemption applies only to "court-ordered treatment." DOC Br. 35–36. While subsection 1 of RCW 71.05.445 refers to "person[s] receiving court-ordered treatment or treatment ordered by the department of corrections," RCW 71.05.445(1)(b), the section as a whole reaches beyond subsection 1. In

[9] For reasons already given, *see supra* pp. 20–21, DOC errs when it argues that RCW 71.05.445(2)'s exemption for "relevant records and reports" is "too amorphous," DOC Br. 23, or that Plaintiffs' arguments would allow an agency to define the scope of its own exemptions, *id.* at 23 n.4.

subsection 2, the section provides a disclosure mandate that, like the one in RCW 70.02.250, applies to certain kinds of documents: "all relevant records and reports." RCW 71.05.445(2). Subsection 2 does not limit its disclosure mandate to whether the person to which the document relates is receiving court-ordered treatment. *See id.* Because "all relevant records and reports" include SSOSA evaluations, and because the exemption mandate of RCW 71.05.445(4) reaches documents disclosed under subsection 2, RCW 71.05.445 exempts *all* SSOSA evaluations held by DOC.

B. RCW 71.05.445 provides an independent exemption from disclosure.

DOC also argues that RCW 71.05.445 does not provide an independent exemption from disclosure—instead, it merely provides that records that are confidential under chapter 70.02 RCW must remain confidential when in DOC's hands. DOC is incorrect.

DOC first maintains that the language of RCW 71.05.445(4) does not create an independent exemption. DOC relies on the language stating that information released to DOC is "subject to the limitations on disclosure outlined in chapter 71.05 RCW, except as provided in RCW 72.09.585." DOC Br. 22 (citation, emphasis, and internal quotation marks omitted). This reading ignores what RCW 71.05.445(4) actually says,

however. It says that the information "shall remain confidential *and* subject to the limitations on disclosure outlined in chapter 71.05 RCW." RCW 71.05.445(4); *see also supra* pp. 21–22.

In further support of its argument that RCW 71.05.445 does not create an independent exemption, DOC relies heavily on legislative history. As an initial matter, resort to legislative history is inappropriate here because RCW 71.05.445(2) and (4) unambiguously exempt SSOSA evaluations from the PRA. *See, e.g.*, *State v. Mehrabian*, 175 Wn. App. 678, 712–13, 308 P.3d 660 (2013) ("Only if statutory language is ambiguous do we resort to . . . legislative history."). But even if resort to legislative history were permissible, the history does not show what DOC maintains. The history certainly suggests that one of RCW 71.05.445's purposes is to allow more information sharing with DOC. *See* DOC Br. 25. DOC does not explain, however, why that purpose requires an atextual reading of RCW 71.05.445 under which the statute provides no independent exemption from the PRA. If anything, reading RCW 71.05.445 as it is actually written—to provide an independent exemption—*promotes* information sharing, because it allows for the full exchange of sensitive information without the need to worry that it will become public.

DOC also relies on a now-repealed statute. DOC Br. 27. This statute referred to RCW 71.05.445 as an exception to a general rule that care providers keep certain records confidential and not disclose them. *See* Laws of 2005, ch. 504, § 109. This reference, however, merely shows that RCW 71.05.445 allows providers to disclose records to DOC, *see* RCW 71.05.445(1)—something that Plaintiffs do not dispute.

IV. *Koenig* does not control this case.

On appeal, Zink renews her argument that *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012) controls the outcome of this case.[10] But *Koenig* held merely that SSOSA evaluations do not fall under RCW 42.56.240(1)'s "investigative records" exemption from disclosure. *Koenig*, 175 Wn.2d at 849. *Koenig* cannot be read to dispose of every possible exemption to the PRA, including those that *Koenig* does not discuss. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994).

The reach of *Koenig* is confirmed by the Court of Appeals' opinion in that case. There, the Court of Appeals held that Thurston County had

[10] DOC has conceded that *Koenig* "does not control." Tr. 14:5, Nov. 6, 2015.

waived any argument that the UHCIA prohibited disclosure. *Koenig v. Thurston Cty.*, 155 Wn. App. 398, 418, 229 P.3d 910 (2010), *aff'd in part and rev'd in part on other grounds*, 175 Wn.2d 837. It is unsurprising that the Supreme Court did not discuss an argument waived at the Court of Appeals. It is irrelevant, therefore, that Thurston County or amici discussed the UHCIA in their briefs. *Cf.* Zink Br. 39–40.

What is more, Thurston County *itself* disclaimed any reliance on the UHCIA, stating that it was "not arguing that the SSOSA evaluation is exempt under chapter 70.02 RCW." CP 714. For this reason, too, *Koenig* does not speak to the theories argued here.

To argue otherwise, Zink relies on the standard of review in PRA cases, which is de novo. Zink Br. 39. Zink is confusing standards of review with issue preservation. Even when an appellate court reviews a trial court de novo, it will typically not reach arguments that were not presented to the trial court. Thus, for example, the Supreme Court declined to consider a federal preemption issue that was not presented to the trial court, *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002), even though preemption is a question of law reviewed de novo, *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 100, 233 P.3d 861 (2010). *See also, e.g.*, *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (on an appeal from summary judgment—which is

reviewed de novo—declining to reach an argument not argued below). It was in accordance with this rule that the *Koenig* court declined to reach the issues it did not discuss. *Koenig* does not control.

Finally, while Zink does not rely on it, the Supreme Court's recent decision in *Doe ex rel. Roe v. Washington State Patrol*, No. 90413-8, 2016 WL 1458206 (Wash. Apr. 7, 2016), does not control here, either. There, the court held that RCW 4.24.550, a community-notification statute, was not an "other statute" prohibiting release of "sex offender registration information" under the PRA. *Id.* at *1. Here, RCW 4.24.550 is not at issue, and Zink seeks the release not of registration information, but of SSOSA evaluations. If anything, the reasoning of *Doe* bolsters Plaintiffs' position on RCW 70.02.250 and 71.05.445, which both require DOC to keep certain records "confidential." RCW 70.02.250(5); RCW 71.05.445(4). In its reasoning, *Doe* cited favorably the model rules of the PRA, which notes that "an agency cannot provide a record when a statute makes it 'confidential' or otherwise prohibits disclosure." WAC 44-14-06002(1) (quoted in *Doe*, 2016 WL 1458206, at *8).

V. The trial court properly enjoined the Department of Corrections from releasing SSOSA evaluations to Zink.

Plaintiffs sought a permanent injunction against disclosure under RCW 42.56.540. Under that provision of the PRA, a court may issue an

injunction if it finds (1) that the record names or specifically pertains to the party seeking an injunction; (2) that an exemption against disclosure applies; and (3) that "disclosure would not be in the public interest and would substantially and irreparably harm [the complaining] party or a vital government function." *Ameriquest Mortg. Co. v. Office of Att'y Gen.*, 177 Wn.2d 467, 487, 300 P.3d 799 (2013) (citing RCW 42.56.540). The trial court found that Plaintiffs had satisfied all of these requirements. *See* CP 737–38. On appeal, DOC challenges three of the findings that the trial court made in support of the requirement that disclosure would not be in the public interest and would substantially and irreparably harm the party or a vital government function.[11] These findings will be discussed in turn. As will be seen, each finding is supported by particularized—and unrebutted—testimony.

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[11] Zink's assignment of errors and statement of issues challenge some of the findings the trial court made in support of its permanent injunction. *See* Zink Br. 13–14, 16. Because Zink makes no arguments to support these assignments of error, they are not before the Court. "Assignments of error unsupported by citation of authority or legal argument will not be considered by the court." *Riksem v. City of Seattle*, 47 Wn. App. 506, 513, 736 P.2d 275 (1987); *see also, e.g.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 216, 936 P.2d 1163 (1997). This case illustrates the rationale behind this rule. Here, because Zink has not provided any argument to support her assignments, Plaintiffs are unable to determine why she has made those assignments and are at a loss to respond.

A. Detailed, unrebutted testimony supports the trial court's finding that SSOSA evaluations contain significant medical, mental health, or other personal information, along with the evaluator's diagnostic assessment of that information.

The trial court found that SSOSA evaluations "contain significant medical, mental health, and other personal information, along with the evaluator's diagnostic assessment of that information." CP 752, ¶ 21. This subsidiary finding supported the trial court's conclusion that disclosure would "substantially and irreparably harm" Plaintiffs. *Ameriquest*, 177 Wn.2d at 487. DOC challenges the finding, arguing it is supported only by conclusory testimony. DOC is incorrect.

The Plaintiffs submitted testimony of experts—whose expertise no party has challenged as inadmissible under ER 702—explaining why SSOSA evaluations contain "medical, mental health, and other personal information, along with the evaluator's diagnostic assessment of that information." The testimony is unrebutted; no party submitted evidence rebutting the experts' testimony on this point. And the testimony was detailed and particularized, not "conclusory." DOC Br. 37.

Thus, for example, the Plaintiffs submitted testimony from Brad Meryhew, an attorney who is a member of the Sex Offender Policy Board and who has represented hundreds of sex offenders over a distinguished career. CP 371–73. Based on his expertise, he testified that SSOSA

evaluations "include not only an offender's history and details about their crime, but also intimate details about an offender's entire life," such as "past sexual partners, victims and non-victims, and the details of their sexual activities." CP 374, ¶ 11. They "also include the intimate details of an offender's marriage or significant relationships." CP 374, ¶ 12. Plaintiffs submitted similar particularized testimony from WATSA,[12] from Dr. Natalie Novick Brown, a psychologist and certified sex offender treatment provider,[13] from Dr. Mark B. Whitehill, another psychologist and certified sex offender treatment provider,[14] and from Amy Muth, an attorney whose practice focuses on representation of those accused of sex offenses.[15] Several of these experts noted that SSOSA evaluations contain

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[12] WATSA, through its expert leaders, *see* CP 384–86, ¶¶ 2–5, testified that SSOSA evaluations "include a personal history (including a psychosexual history), an assessment of current functioning, a mental health diagnosis (when indicated), and a proposed set of treatment goals. . . . SSOSA evaluations must contain the [evaluator's] written conclusions and recommendations, which shall include a summary of the evaluator's diagnostic impressions, specific assessments of risk factors, willingness of the offender to engage in outpatient treatment, and a written treatment plan . . . ." CP 387, ¶ 8.

[13] Dr. Brown testified that SSOSA evaluations include "intimate and intrusive data (e.g., sexual arousal interests and fantasies, sexual responses to physiological testing), use of pornography, treatment experiences . . . , psychological test results, medical and mental health history, family history, relationship history (including the names of previous sexual partners and details involving the sexual aspects of those relationships), education, employment history, and military history." CP 410, ¶ 6.

[14] Dr. Whitehill testified that SSOSA evaluations "summarize and analyze the offender's psychosexual history. They contain information on the nature of the crime; this often means that the identity of the victim can . . . be identified by context." CP 416, ¶ 4.b.

[15] Muth testified that SSOSA evaluations require the offender to "relay information about initial sexual experiences, past sexual partners, sexual practices, and experiences with deviant arousal." CP 439, ¶ 16. The offender is also "asked questions about past and

sensitive information about more than just the offenders themselves—they also contain sensitive information about the *victims*. *E.g.*, CP 410, ¶ 6; CP 416, ¶ 4.b; CP 440, ¶¶ 18–19.

Plaintiffs themselves corroborated this expert testimony. One Plaintiff testified that his SSOSA evaluation included, for example, his "family history, sibling relationships, any mental health issues . . . , any substance abuse, my other medical history, my sexual relationships and activities for my entire life, and sexual attitudes and preferences." CP 419, ¶ 3. The SSOSA evaluation included the "results of both the polygraph and plethysmograph," the latter of which tracks penile arousal in response to specific stimuli. CP 419, ¶ 3. Another Plaintiff's SSOSA evaluation "includes a lot of personal information about my life and history . . . , like my sexual experiences at that age and my family history." CP 425, ¶ 8. Yet another Plaintiff recalled that, during the SSOSA evaluation, he "had to do a polygraph and they asked me a lot of questions about myself and all the people I'd had sex with and my preferences." CP 429, ¶ 3. And still another Plaintiff confirmed that the evaluation "went through the details of

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current mental health diagnoses and medication and treatment regimens for those diagnoses, as well as experience with and treatment for substance abuse problems. If an individual has previously sought treatment or has a documented mental illness, the evaluator will also requests records from past treatment providers[.]" CP 440, ¶ 20. In addition, the evaluator will often "ask that a client submit to either a sexual history polygraph, a plethysmograph"—which measures penile arousal—"or both, the results of which will also be contained in the SSOSA evaluation[.]" CP 440, ¶ 22.

the offense," but also dealt with his past, including "past sexual relationships," and his "medical history." CP 433, ¶ 3. He and the provider discussed that he "had attempted suicide multiple times and was taking medications for depression and anxiety." CP 433, ¶ 3.

This testimony from both expert and fact witnesses is detailed and nonconclusory. Indeed, it is unrebutted. The trial court did not err by accepting it.

B. Detailed, unrebutted testimony supports the trial court's finding that mass disclosure of SSOSA evaluations would discourage offenders from seeking treatment, prevent offenders from being candid with their evaluators, harm victims, and expose sensitive health care information.

The trial court found that disclosing SSOSA evaluations to Zink "would harm victims, discourage sex offenders from seeking and receiving SSOSA evaluations, discourage those offenders who do receive SSOSA evaluations from being candid with their evaluator, make it more difficult for Level I sex offenders to reintegrate, and disclose sensitive health care information." CP 752–53, ¶ 22. It entered this subsidiary finding to support its larger conclusion that "disclosure would not be in the public interest." *Ameriquest*, 177 Wn.2d at 487. DOC challenges the finding, however, on the ground that it is "pure speculation." DOC Br. 39.

DOC is incorrect. As explained below, Plaintiffs submitted concrete evidence showing that mass disclosure of SSOSA evaluations

would injure the public interest because (1) it would discourage offenders from seeking evaluations, or from being candid with their evaluators; (2) it would disclose extremely sensitive information about readily identifiable victims; and (3) it would disclose sensitive health care information.

1. Disclosure would discourage offenders from seeking evaluations, and from being candid with their evaluators.

The public has an interest in the proper operation of the SSOSA system. *See Koenig*, 175 Wn.2d at 847 ("We do not doubt the value of SSOSA evaluations. Indeed, we have recognized that the legislature developed this sentencing alternative for first time offenders to prevent future crimes and protect society."). The record supports the trial court's finding that mass disclosure of SSOSA evaluations would undermine the SSOSA system by discouraging offenders from undergoing evaluations or from being candid when they do undergo evaluations.

Experts who have represented sex offenders in the SSOSA process testified that "general public disclosure of very intimate, personal details about themselves, their family, and all of their past sexual partners will undoubtedly lead many offenders to refuse to participate in valuation and assessment, and will lead others to offer less than complete information." CP 377, ¶ 21; *accord* CP 441, ¶ 29 ("I am concerned that many of my

clients will refuse to seek SSOSA out of fear that this highly sensitive information could be made available to any person who asks . . . .").

Providers who perform SSOSA evaluations agree with these predictions. Dr. Brown testified that "[b]ecause SSOSA evaluations contain intrusive and very personal information" about both offenders and victims, mass disclosure "would remove [the] incentive" for offenders to disclose that information in SSOSA evaluations. CP 411, ¶ 8. Dr. Whitehill agreed, testifying that the "sensitivity of the SSOSA evaluation leads me to conclude that mass disclosure of SSOSA evaluations would discourage sex offenders from seeking and receiving a SSOSA sentence, and would reduce the candor of those offenders who do seek and undergo a SSOSA evaluation." CP 416, ¶ 4.b. This testimony makes rational predictions by relying on facts the DOC does not dispute and on expertise it does not challenge.

These unrebutted predictions are confirmed by the testimony of Plaintiffs themselves. That testimony suggests that some, if not all, of the Plaintiffs would have been unwilling to undergo SSOSA evaluations if they had not been confidential. Plaintiffs testified that they thought their SSOSA evaluations would be confidential. CP 425, ¶ 8; CP 430, ¶ 11. They also testified that "[i]t would be devastating if anyone got their hands" on the evaluations. CP 430, ¶ 11; *see also* CP 426, ¶ 10.

The testimony on which the trial court relied, then, consisted of expert predictions rationally based on past experience and unrebutted by countervailing testimony. Such testimony is sufficient under this Court's precedent. In *Planned Parenthood of Great Northwest v. Bloedow*, the plaintiff had submitted declarations by providers stating that they relied on a guarantee of confidentiality when they submitted abortion reports to the state. 187 Wn. App. 606, 629, 350 P.3d 660 (2015). The trial court had enjoined the disclosure of those reports, and in affirming, this Court relied on the provider declarations to conclude that disclosure would chill candor: "Disclosure of the records would jeopardize the ability of DOH to obtain information from health care providers . . . ." *Id.* Here, Plaintiffs submitted testimony from attorneys, providers, and offenders suggesting that disclosure of SSOSA reports would have a similar chilling effect on offenders' candor and willingness to engage in the SSOSA process.[16]

DOC protests that SSOSA evaluations have already been available since *Koenig*, and that Plaintiffs submitted no evidence that *Koenig* has had a chilling effect. DOC Br. 39. But *Koenig* featured a targeted PRA request to a county prosecutor's office and a superior court, and it held

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[16] To the extent DOC is arguing that the trial court erred simply because its findings concerned the future, DOC is wrong. Rational predictive judgment is inevitably required in much injunctive relief, and is not the same as speculation. *See Brown v. Plata*, 563 U.S. 493, 535 (2011) (affirming the predictive judgments on which the trial court based its injunctive relief).

merely that SSOSA evaluations in those two places did not qualify as exempt investigative records. *See* 175 Wn.2d at 840–41. The request here is far different. Zink requests the mass disclosure of *all* SSOSA evaluations from a *statewide* source, the Department of Corrections. And she evidently plans to centralize these evaluations in one location. *See* CP 290 (citing CP 445–46, ¶¶ 4–5; CP 484).

There is a dispositive factual and legal difference between targeted requests to a local source, such as the request in *Koenig*, and the mass statewide disclosure that Zink seeks here. As one Plaintiff puts it:

> [T]here's a big difference between the court records and a request for all SSOSA evaluations. In a court record, a person needs to be looking for information about me, but if DOC could give my SSOSA out to anyone, it would be available to someone who is just casually looking or targeting sex offenders specifically to harm them.

CP 426, ¶ 10.

The U.S. Supreme Court has also recognized that mass disclosure and centralization causes far more harm than the possibility that individual records may be available in many different locations. In *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), reporters asked the FBI, under the federal Freedom of Information Act, to release the criminal records of a certain family. The question for the Court was whether that release would be an "unwarranted invasion of

personal privacy," 5 U.S.C. § 552(b)(7)(C), even though the criminal records were already available in "courthouse files, county archives, and local police stations throughout the country." *Reporters Comm.*, 489 U.S. at 764. The Court held that release of the records would indeed invade the family's personal privacy, because "there is a vast difference between records that might be found after a diligent search" in many different locations, and "a computerized summary located in a single clearinghouse of information." *Id.*; *see also id.* at 770 (noting that "a centralized computer file pose[s] a threat to privacy" (quotation marks and citation omitted)). Similarly here, there is a vast difference between the effects of a decision—like *Koenig*—that allows for targeted or local disclosure, and the request that Zink has made here, which, if granted, would allow for mass, statewide disclosure, and then the centralization of the disclosed records online.

2. Disclosure would retraumatize victims.

The public has an interest in not retraumatizing the victims of sex offenses by exposing them to the public. *See, e.g.*, *State v. Kalakosky*, 121 Wn.2d 525, 547, 852 P.2d 1064 (1993) (noting that sexual assault victims need privacy in order to successfully recover, and observing that "[o]f recent years, legislatures and courts have attempted to provide rape victims some privacy rights"). The record supports the trial court's finding

that mass disclosure of SSOSA evaluations would retraumatize a substantial number of victims.

SSOSA evaluations contain sensitive information about not just the offenders themselves, but also their victims. *See supra* pp. 35–37. The victim's identity will often be obvious from a SSOSA evaluation; disclosure of the SSOSA evaluation will thus disclose their identity and retraumatize them.[17] DOC does not deny these facts, and certainly submitted no evidence to rebut them. Instead, it simply says that it will redact "the names of child victims." DOC Br. 39. This is insufficient reassurance. Redacting child victims' names will still allow readers to infer their identity from context. For example, one Plaintiff testified that "[i]t would be obvious from the SSOSA evaluation who my victim was": his sister. CP 426, ¶ 9. And, in any event, DOC's reassurance does not apply to non-child victims.

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[17] CP 374, ¶ 11 (SSOSA evaluation "identif[ies] . . . victims and non-victims"); CP 378, ¶ 24 ("The disclosure of a relative perpetrator for example almost inevitably leads to the person they victimized being disclosed as the victim."); CP 411, ¶ 8 (noting that disclosure would identify victims and "could serve to perpetuate their sexual victimization"); CP 426, ¶ 9 ("It would be obvious from the SSOSA evaluation who my victim was. Then all this would come up for her as well. She also thought we could move beyond the past."); CP 441, ¶ 31 (disclosure would publicize "the sexual activity of individuals other than the client," including "the victim of the sex offense charged"); CP 442, ¶ 34 ("In many instances where there is an existing relationship between the victim and the perpetrator, people who review these evaluations can often determine the identity of the victim by context.").

3. Disclosure would expose sensitive health care information.

The public has an interest in preserving the confidentiality of sensitive health care information. *See Planned Parenthood*, 187 Wn. App. at 628. For the reasons Plaintiffs have given above, *see supra* pp. 9–14, mass disclosure of SSOSA evaluations would release that kind of information.

C. Detailed, undisputed testimony supports the trial court's finding that mass disclosure of SSOSA evaluations would undermine the SSOSA system and discourage reintegration.

The trial court found that disclosing SSOSA evaluations to Zink "would substantially injure public safety by undermining the SSOSA system and discouraging reintegration of Level I sex offenders." CP 753, ¶ 23. The court entered this finding to support its conclusion that "disclosure would not be in the public interest" and would "substantially and irreparably harm . . . a vital government function." *Ameriquest*, 177 Wn.2d at 487. DOC challenges this finding, too, as "pure speculation" that is "not based on any concrete, specific evidence." DOC Br. 39.

DOC is again wrong. The trial court based its finding on the testimony of expert witnesses and Plaintiffs who drew rational predictions

from experience.[18] Under *Planned Parenthood*, that kind of testimony is sufficient to uphold the trial court's finding. *See supra* p. 41.

D. The Doe *decision does not affect the trial court's injunction.*

Earlier this year, the Supreme Court held that the State Patrol was required to release sex offender registration records under the PRA, and that RCW 4.24.550 was not an "other statute," RCW 42.56.070(1), prohibiting their release. *Doe ex rel. Roe v. Wash. State Patrol*, No. 90413-8, 2016 WL 1458206 (Wash. Apr. 7, 2016). These records did not include SSOSA evaluations, and instead consisted of principally of a copy of the State Patrol's sex offender database. *See id.* at *1–2.

This decision does not affect the trial court's decision to enjoin the blanket release of SSOSA evaluations. While *Doe* allows the public to learn class members' identity as current or former registered offenders, it does not give the public access to SSOSA evaluations themselves, which are far more sensitive than the mere fact of registration. Those evaluations

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[18] On the undermining of the SSOSA system, see *supra* pp. 39–40. On reintegration of offenders, see, for example, CP 378, ¶ 25 ("Individuals who appear on public web sites are subject to significant barriers to housing, employment, and reintegration into the community. This has been borne out in social science research and in my experience working with hundreds of registered sex offenders."); CP 404, ¶¶ 15–16 (expert testimony that the overly broad identification of sex offenders leads "make[s] it more difficult for individuals to successfully reintegrate," and "may actually contribute to factors that may lead to increased technical violations and new offenses"); CP 411, ¶ 9 (noting that disclosure "would expose Level 1 offenders to additional harassment and discrimination," which is "destabilizing psychologically" and "slows and sometimes stalls the behavior change process"); CP 426, ¶ 10 (if the Plaintiff's SSOSA evaluation were released, "I would have no future to look forward to").

contain extremely personal information about offenders, their victims, and their families that cannot be gleaned from registration itself. *Doe* thus leaves unaffected the findings that DOC challenges here: that SSOSA evaluations contain extraordinarily sensitive personal and medical information about both the offender and others; that blanket disclosure of evaluations would discourage offenders from undergoing SSOSA evaluations or being candid in them; that disclosure would retraumatize victims; that disclosure of such sensitive information would hinder reintegration of offenders into the community; and that all these things would undermine the successful SSOSA system, thereby making the public less safe.

VI. The trial court properly allowed Plaintiffs to proceed pseudonymously.

Without sealing court filings from public access, the trial court allowed Plaintiffs to proceed in pseudonym. CP 761–62. Zink challenges this decision as an improper order to seal. Plaintiffs' response to Zink's arguments proceeds in two steps. Plaintiffs first explain why the trial court's decision does not amount to an order to seal. Plaintiffs next show

that the court's decision should be affirmed under well-established principles governing pseudonymity.[19]

A. By allowing Plaintiffs to proceed pseudonymously, the trial court was not sealing documents.

GR 15 defines what it means to seal a document. "To seal," the rule says, "means to protect from examination by the public and unauthorized court personnel." GR 15(b)(4). An order to redact "shall be treated as . . . [an] order to seal," and to redact means to protect "a portion or portions of a specified court record" from "examination by the public and unauthorized court personnel." GR 15(b)(4), (5).

Under GR 15, then, a court filing is sealed or redacted when the filing, or portions of it, are available to the court, but not available to the public. Here, though, everything available to the trial court was also available to the public.

Washington precedents on sealing also suggest that pseudonymous litigation does not amount to sealing. In adopting a presumption against sealing, for example, our Supreme Court relied on the public's "right of access to court proceedings" under the Washington Constitution. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). "[T]o

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[19] Appellate courts review for an abuse of discretion orders granting leave to proceed anonymously. *See Does I Thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1069 (9th Cir. 2000).

maintain public confidence in the fairness and honesty of the judicial branch," the public has a right "to access open courts where they may freely observe the administration of civil and criminal justice." *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 542, 114 P.3d 1182 (2005) (citation omitted). As the Supreme Court, quoting a trial court, has observed, the public presumptively has access to "[e]verything that passes before this Court." *Id.*

Here, allowing Plaintiffs to proceed pseudonymously did not abridge the public's right to access anything that passed before the trial court. It did not deprive the public of any information that the trial court possessed or prevent the public from scrutinizing the trial court's decisions.

Plaintiffs' names, therefore, resemble the "information surfacing during pretrial discovery that does not otherwise come before the court." *Rufer*, 154 Wn.2d at 541. Because that information "does not become part of the court's decision making process," the public rights that apply to court filings "do[] not speak to its disclosure." *Dreiling v. Jain*, 151 Wn.2d 900, 910, 93 P.3d 861 (2004). Thus, "there is not yet a *public* right of access with respect to these materials," and only "good cause" need be shown before those materials may be restricted. *Rufer*, 154 Wn.2d at 541

(citation and internal quotation marks omitted). And here, as explained below, Plaintiffs showed good cause for pseudonymity.[20]

B. The court acted within its discretion when it allowed Plaintiffs to proceed pseudonymously.

While CR 10(a)(1) provides that complaints "shall include the names of all the parties," it is silent about whether parties may use *false* names. Our Supreme Court, however, has said in passing that "a plaintiff may proceed under a pseudonym to protect a privacy interest." *N. Am. Council on Adoptable Children v. Dep't of Soc. & Health Servs.*, 108 Wn.2d 433, 440, 739 P.2d 677 (1987). The federal courts, whose Federal Rule of Civil Procedure 10(a) is materially identical in relevant part to CR 10(a)(1), have come to the same conclusion. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (citing cases); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (same). These federal courts have identified many factors that may be considered when a court exercises its discretion to permit proceeding in pseudonym—cautioning always, though, that any list is "non-exhaustive"

[20] Zink recently asked the Supreme Court to rule that the same rules governing orders to seal also governed orders allowing litigants to proceed pseudonymously. The Supreme Court did not reach this issue and declined to express an opinion on it. *Doe ex rel. Roe v. Wash. State Patrol*, No. 90413-8, 2016 WL 1458206, at *10 & n.6 (Wash. Apr. 7, 2016).

and that courts should take into account other factors relevant to the particular case at hand. *Sealed Plaintiff*, 537 F.3d at 189–90.[21]

The trial court recognized that only pseudonymity could give Plaintiffs meaningful access to injunctive relief. It stated that "[f]orcing Plaintiffs to disclose their identities to bring this action would eviscerate their ability to seek relief." CP 762, ¶ 2. In so finding, the trial court did not abuse its discretion.

Courts agree that use of pseudonyms is appropriate when "the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." *See M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998) (citation omitted). Here, as the trial court noted, the very harm that Plaintiffs sought to prevent in bringing this action would have been realized if the trial court had forced Plaintiffs to publicly disclose their identities. *See Doe v. Harris*, 640 F.3d 972, 973 n.1 (9th Cir. 2011) (allowing Plaintiff "to continue to proceed under a pseudonym because drawing public attention to his status as a sex offender is precisely the consequence he seeks to avoid by bringing this suit"); *Roe v. Ingraham*, 364 F. Supp. 536, 541 & n.7 (S.D.N.Y. 1973) (permitting plaintiffs to proceed in pseudonym in challenging the constitutionality of a statute

[21] Because no appellate case law in Washington speaks to when and how parties may proceed in pseudonym, Plaintiffs rely here on persuasive federal authorities.

requiring disclosure of their identities as individuals prescribed narcotic drugs). It would also have undermined the PRA itself, which permits challenges to the release of records by individuals named in the records. *See* RCW 42.56.540. Indeed, forcing Plaintiffs to disclose their identities to access the only relief available—court protection of exempt records—would have raised serious due process concerns. *Cf. Bodie v. Connecticut*, 401 U.S. 371, 376–77 (1971) (recognizing a due process right of access to the courts when judicial review is necessary to resolve a dispute).

The trial court determined that disclosing Plaintiffs' identities would cause them permanent harm and that the Plaintiffs faced "a significant risk of physical, mental, economic, and emotional harm if their identities are disclosed." CP 762, ¶ 3. This determination was correct.

Like the trial court here, other courts have allowed anonymity for plaintiffs "when identification creates a risk of retaliatory physical or mental harm" and "when anonymity is necessary to preserve privacy in a matter of sensitive and highly personal nature." *Does I Thru XXIII*, 214 F.3d at 1068 (citations and internal quotation marks omitted). Courts have permitted the use of pseudonym by individuals who receive mental health treatment when the case would necessarily reveal their illness or treatment. *See, e,g.*, *Doe v. Colautti*, 592 F.2d 704, 705 (3d Cir. 1979) (pseudonym used by plaintiff challenging state benefits for hospitalization

in private mental institutions); *Doe v. Hartford Life & Accident Ins. Co.*, 237 F.R.D. 545, 549–50 (D.N.J. 2006) (collecting and discussing cases). Additionally, courts have allowed parties to proceed in pseudonym "when nondisclosure of the party's identity is necessary to protect a person from harassment, injury, ridicule or personal embarrassment." *Does I Thru XXIII*, 214 F.3d at 1067–68 (citation, alteration, and internal quotation marks omitted).

Those factors are present here. Plaintiffs and experts familiar with the treatment of sexual offenders attested that, if Plaintiffs were publicly identified as registered sex offenders, they would face physical and verbal abuse, harassment, economic loss, and psychological harm. *See, e.g.*, CP 378–79, 404, 411, 416, 429, 434. Experts in the treatment of sexual offenders also attested that broad-based dissemination of mental health treatment records will undermine the efficacy of the treatment process. *See* CP 411–12, 416. The trial court did not abuse its discretion by agreeing with this testimony.

The trial court also recognized that the public has a reduced interest in the Plaintiffs' names. And, in finding that the public's interest in these proceedings would not be meaningfully compromised, the trial court determined that "[t]he names of individual Plaintiffs have little bearing on the public's interest in the dispute or its resolution." CP 762, ¶

4. In so reasoning, the trial court did not abuse its discretion: "[W]here a lawsuit is brought solely against the government and seeks to raise an abstract question of law that affects many similarly situated individuals, the identities of the particular parties bringing the suit may be largely irrelevant to the public concern with the nature of the process." *See Doe v. Del Rio*, 241 F.R.D. 154, 158 (S.D.N.Y. 2006). The primary questions in this case are legal questions of statutory interpretation that affect hundreds, if not thousands, of people that are similarly situated to the Plaintiffs. Plaintiffs represent a certified class of those people. Under these circumstances, the precise names of the named Plaintiffs have little bearing on the public's interest in this case.

The trial court also did not abuse its discretion when it found that DOC and Zink would not be prejudiced by allowing Plaintiffs to proceed in pseudonym. CP 762, ¶ 5. Neither DOC nor Zink challenged the Plaintiffs' credibility, for example. Nor does Zink challenge Plaintiffs' membership in the certified class. *See* Zink Br. 30.

Next, the trial court was within its discretion to find that Plaintiffs' privacy interests in proceeding pseudonymously outweighed the public's interest in their identity. CP 762, ¶ 6. The public's access to the case was not limited apart from being unable to determine the identities of Plaintiffs. And, as noted above, the Plaintiffs' identities are largely

irrelevant. *See supra* pp. 53–54. Thus, the public's minimal interest in learning Plaintiffs' names is outweighed by Plaintiffs' interest in meaningful access to judicial review and in avoiding harm to themselves and their loved ones.

Finally, the trial court found that there was "no reasonably viable alternatives to redress" the concerns that Plaintiffs sought to address by proceeding in pseudonym. CP 762, ¶ 7. The trial court's finding on this point was not an abuse of discretion, particularly since Zink has suggested no alternative that could protect Plaintiffs' interests.

VII. The trial court acted well within its discretion by certifying a class.

The trial court certified a Plaintiff class defined as all level I sex offenders "who are either compliant with the conditions of registration or have been relieved of the duty to register, and who underwent an evaluation to determine if they were eligible for a [SSOSA] after January 1, 1990." CP 773. Zink challenges this class certification. She does not argue that the trial court misapplied CR 23. Rather, she argues that the PRA forecloses class actions altogether. According to Zink, each "person who is named in the record or to whom the record specifically pertains," RCW 42.56.540, must be joined as a party. This argument should be

rejected. It conflicts with the civil rules and binding precedent interpreting those rules, and it also misunderstands the nature of class actions.

Because Zink does not deny that CR 23 itself allows class certification in this case, the trial court's certification decision should be affirmed. After all, "[c]lass certification is governed by CR 23." *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264, 278, 267 P.3d 998 (2011). And civil rules like CR 23 "govern all civil proceedings" except when they are "inconsistent with rules or statutes applicable to special proceedings." CR 81(a). The PRA, however, is not one of those "statutes applicable to special proceedings." As the Supreme Court has held, the PRA does "not create a special proceeding subject to special rules," so "the normal civil rules are appropriate for prosecuting a PRA claim." *Neighborhood Alliance of Spokane Cty. v. Cty. of Spokane*, 172 Wn.2d 702, 716, 261 P.3d 119 (2011). Hence, CR 23 controls here, and under it certification was appropriate.

More fundamentally, Zink's argument misunderstands the representative nature of class actions. In a class action, representative plaintiffs stand in for all the other members of the class. Those members are then treated as parties to the litigation. *See Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979) (class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named

parties only," and holding that a class action could be maintained even under a statute that referred merely to an "individual"). That is why a class-action judgment binds all unexcluded members of the class. CR 23(c)(3). And that is why moving for class-action certification on appeal "amounts, in effect, to a request for a substitution of parties." *DeFunis v. Odegaard*, 84 Wn.2d 617, 623, 529 P.2d 438 (1974).

The representative nature of class actions also means that even a statute phrased in individual terms will allow for a class action. So, for example, even though the Consumer Protection Act authorizes money damages and injunctive relief only to those who "bring a civil action," RCW 19.86.090, the Court of Appeals has held that this provision applies not only to the named plaintiffs, but "to the represented class members" too. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 346, 54 P.3d 665 (2002). Even though those class members did not bring the action at first, they are deemed to be present as parties through the class-action mechanism.

For the same reason, the PRA does not forbid class actions. Through CR 23, class representatives stand in for all other class members "named in [a] record or to whom [a] record specifically pertains." RCW 42.56.540. If the class representatives' "motion and affidavit[s]" supply proof that records name or specifically pertain to both the class

representatives and the other members of the class, *id.*, then a classwide injunction under RCW 42.56.540 is perfectly acceptable. Because Plaintiffs supplied precisely that proof here, the trial court's class certification and classwide injunction was proper.

VIII. Because Zink's challenge to the preliminary injunction is now moot, this Court need not address it.

Zink challenges the trial court's preliminary injunction, arguing that the court used the wrong legal standard. The trial court, she maintains, erroneously applied the general legal standard that governs preliminary injunctions,[22] rather than the special rules that govern injunctions under the PRA. Zink Br. 4. Zink's challenge to the preliminary injunction is moot, however—and, in any event, this appeal does not present the legal question that Zink wants this Court to decide.

When the trial court entered a permanent injunction, it applied the standard articulated in RCW 42.56.540, the provision that Zink believes governs *all* injunctions under the PRA. *See* CP 781–83, ¶¶ 17, 22, 23, 24, 25. Entry of that permanent injunction thus rendered moot "[t]he propriety of the temporary order[]." *Ferry Cty. Title & Escrow Co. v. Fogle's Garage, Inc.*, 4 Wn. App. 874, 881, 484 P.2d 458 (1971); *see also, e.g.*, 43A C.J.S. *Injunctions* § 14 (noting that a grant of a preliminary injunction

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[22] *See, e.g.*, *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000).

generally becomes moot after the trial court enters a permanent injunction). Zink notes that the Court of Appeals, in other cases, have determined that "once the permanent injunction is issued, . . . the [propriety of a] preliminary injunction is moot." Zink Br. 6. She fails to explain why the Court should not reach the same conclusion here.

CONCLUSION

The trial court's summary judgment, permanent injunction, class certification, and order allowing Plaintiffs to proceed in pseudonym should all be affirmed.

RESPECTFULLY SUBMITTED this 1st day of August, 2016.

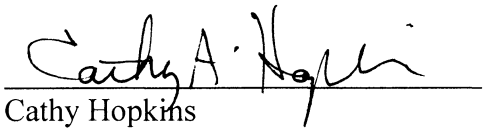
KELLER ROHRBACK L.L.P.

By _____

Benjamin Gould, WSBA #44093
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on August 1, 2016, I caused a true and correct copy of this document, along with its Appendix, to be served on Donna and Jeff Zink (dzink@centurytel.net) and Timothy John Feulner (TimF1@atg.wa.gov; cherriek@atg.wa.gov; correader@atg.wa.gov) via email, pursuant to RAP 18.5(a) and CR 5(b)(7).



Cathy Hopkins
Seattle, Washington
August 1, 2016

APPENDIX

RCW 70.02.250 CREATES AN EXEMPTION TO THE PUBLIC RECORDS ACT

Step One: Does RCW 70.02.250 create an exemption for specified records?

Yes. RCW 70.02.250(5) provides that "[t]he information received by the department of corrections under this section shall remain confidential."

Step Two: What is the "information received ... under" RCW 70.02.250?

RCW 70.02.250 provides that "[t]he information to be released to the department of corrections must include **all relevant records and reports, as defined by rule."** RCW 70.02.250(2).

Step Three: What are "relevant records and reports, as defined by rule"?

Relevant records and reports include "**outpatient intake evaluations,**" "**outpatient treatment plans,**" and "**records and reports of other relevant treatment and evaluation.**" WAC 388-865-0610.

Step Four: Do SSOSA evaluations count as "relevant records and reports"?

Yes. *See, e.g.*, RCW 9.94A.670(3); CP 383–92, 408–12.

RCW 71.05.445 CREATES AN EXEMPTION TO THE PUBLIC RECORDS ACT

Step One: Does RCW 71.05.445 create an exemption for specified records?

Yes. RCW 71.05.445(4) provides that "[t]he information received by the department of corrections under this section shall remain confidential."

Step Two: What is the "information received ... under" RCW 71.05.445?

RCW 71.05.445 provides that "[t]he information to be released to the department of corrections" includes **"all relevant records and reports, as defined by rule."** RCW 71.05.445(2).

Step Three: What are "relevant records and reports, as defined by rule"?

Relevant records and reports include "**outpatient intake evaluations**," "**outpatient treatment plans**," and "**records and reports of other relevant treatment and evaluation**." WAC 388-865-0610.

Step Four: Do SSOSA evaluations count as "relevant records and reports"?

Yes. *See, e.g.*, RCW 9.94A.670(3); CP 383–92, 408–12.