

NO. 94203-0

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN DOE, et al.,

Respondents,

v.

DEPARTMENT OF CORRECTIONS et al.,

Petitioners.

**SUPPLEMENTAL BRIEF OF THE
DEPARTMENT OF CORRECTIONS**

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I. INTRODUCTION

The trial court permanently enjoined the Department of Corrections (Department) from releasing Special Sex Offender Sentencing Alternative (SSOSA) evaluations that are used by courts to make sentencing decisions. Yet, these evaluations are forensic evaluations that are shared with the court, the prosecutor, and the Department as part of the sentencing process, and they are routinely filed in public court files. These SSOSA evaluations are not health care information under the Uniform Health Care Information Act (UHCIA), RCW 70.02, because they do not directly relate to a patient's health care.

The plain language of the UHCIA, the traditional distinction that Washington courts and medical providers have drawn between forensic and other evaluations, and the fact that the legislature has expressly provided UHCIA coverage for forensic documents when it wanted to, all weigh in favor of reversal in this case. In addition, concluding that SSOSA evaluations are confidential health care information would impact current practices and require SSOSA evaluations to remain confidential during court proceedings. Reading the UHCIA as broadly as Plaintiffs suggest would also call into question the filing and discussion in open court of any issue that relates to a person's health or medical status. Instead, this Court should apply the well-recognized and long-standing distinction between

records created for a forensic purpose and records created for a treatment purpose. Because the Court of Appeals erred in failing to recognize and apply this distinction, this Court should reverse and remand to the trial court to vacate the permanent injunction. Even if this Court believes some information in SSOSA evaluations is exempt, it should vacate the current injunction and remand to the trial court with clear guidance about the nature of such exempt information.

II. STATEMENT OF THE CASE

A SSOSA evaluation is created as part of a criminal proceeding. RCW 9.94A.670(3). The evaluation is shared with the trial court, the prosecution, and the Department for the purposes of determining whether an alternative sentence is appropriate. CP 156-57, CP 509-10. The Department receives SSOSA evaluations in order to prepare presentence investigations for offenders and to recommend either for or against a SSOSA. CP 509-10. The prosecuting or defense attorney provide the SSOSA evaluations to the assigned Department Community Corrections Officer (CCO) without a signed release. CP 509.

In 2014, Donna Zink submitted a public records request to the Department for all SSOSA evaluations since 1990. CP 192, 195-197. The Department intended to review each evaluation to determine whether the evaluations contained exempt information, such as the names of child

victims under RCW 42.56.240(5). CP 192-193. Prior to the release of the evaluations, a class of Level I sex offenders filed this action to enjoin the release of SSOSA evaluations of Level I sex offenders. CP 1. Concluding that SSOSA evaluations were exempt in their entirety, the trial court permanently enjoined the Department from releasing any portion of the SSOSA evaluations of Level I sex offenders to Zink. CP 734-38.

The Department and Zink appealed. The Court of Appeals affirmed. *John Does G. v. Department of Corrections*, 197 Wn. App. 609, 391 P.3d 496 (2017). The Court of Appeals concluded that SSOSA evaluations are exempt from public disclosure under the UHCIA because the evaluations contain health care information. *Id.* at 624. Although SSOSA evaluations are created as part of the criminal process, the Court of Appeals concluded that SSOSA evaluations were nonetheless protected from disclosure by the UHCIA because “SSOSA evaluations include a ‘service[] or procedure provided by a health care provider’ to ‘diagnose...a patient’s...mental condition.’” *John Doe G.*, 197 Wn. App. at 623. Although the Court of Appeals recognized that there might be non-exempt information in SSOSA evaluations, it declined to address that

issue because the parties had framed the issue as an all-or-nothing proposition. *Id.*¹

The Department and Zink filed separate petitions for review. This Court granted review on two issues. The Department now submits this brief on the issue of whether unredacted SSOSA evaluations are exempt from disclosure because they contain health care information.²

III. ISSUE PRESENTED

A criminal defendant undergoes a SSOSA evaluation to determine whether he or she is entitled to a sentencing alternative. This evaluation is shared with the Department, the court, and the prosecutor; is discussed in open court; and is filed in the public court file. Is this evaluation exempt from disclosure under the Public Records Act (PRA) as confidential health care information?

IV. STANDARD OF REVIEW

A party seeking to prevent disclosure of documents under the PRA must prove the requested records falls within the scope of an exemption or an “other statute.” *Doe ex rel. Roe v. Wash. State Patrol*, 185 Wn.2d 363, 370, 374 P.3d 64 (2016). A court’s review of an injunction issued under

¹ After the Court of Appeals decision in this case, Division II of the Court of Appeals issued a similar published decision in *John Doe P, et al., v. Thurston Cnty.*, --- Wn. App. ---, --- P.3d ---, 2017 WL 2645043 (June 20, 2017).

² The Court has also granted review on Does’ use of pseudonyms. The Department takes no position on this second issue.

RCW 42.56.540 is *de novo*. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407, 259 P.3d 190 (2011). When the record consists only of affidavits, memoranda, and other documentary evidence, the court stands in the same position as the trial court. *Koenig v. Thurston Cnty.*, 175 Wn.2d 837, 842, 287 P.3d 523 (2012).

V. ARGUMENT

The PRA's purpose is to foster governmental transparency and accountability. *Doe ex rel. Roe*, 185 Wn.2d at 371. The PRA requires state and local government agencies to provide public records upon request unless the records fall within a specific PRA or "other statute" exemption. RCW 42.56.070; *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013). When only a portion of a record is exempt, an agency must redact the exempt information instead of withholding it in its entirety if the redactions would render the remainder of the record nonexempt. *Resident Action Council*, 177 Wn.2d at 432-433.

The PRA incorporates the confidentiality provisions of the UHCIA, Chapter 70.02. RCW 42.56.360(2); *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005). The UHCIA governs the disclosure of health care information and information related to mental health services, and it contains separate provisions for both types of information. RCW 70.02.020; 70.02.230. However, the provision

related to mental health records defines such information as a type of health care information. RCW 70.02.010(21); *John Doe G.*, 197 Wn. App. at 620 n.30; Does' Answer to Petitions for Review (Does' Answer), at 16 (recognizing that such records must be "health care information" to be covered under RCW 70.02.010(21)). As such, if SSOSA evaluations are not health care information, they are not protected as mental health records; if the SSOSA evaluations are health care information, they are covered under 70.02.020(1). Therefore, the key question is whether SSOSA evaluations are health care information.

A. The UHCIA Does Not Apply to SSOSA Evaluations Because They Are Created to Aid a Trial Court in a Sentencing Determination, Not to Provide Health Care

In interpreting a statute, courts look first to the plain meaning of the statute, which is determined not only by looking at the statutory language but also by examining the context of the statute, including related statutes and other provisions of the same act. *Fisher Broad.-Seattle TV LLC v. City of Seattle*, 180 Wn.2d 515, 527, 326 P.3d 688 (2014). When the statute's meaning is plain on its face, then courts give full effect to the plain meaning. *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 720-21, 328 P.3d 905 (2014).

1. The UHCIA’s plain language requires protected information to be directly related to health care; SSOSA evaluations are not

For information in a record to be health care information, the information must be readily associated with a “patient” and “directly relate[d]” to that patient’s health care. RCW 70.02.010(16); *see also Prison Legal News, Inc.* 154 Wn.2d at 645. A patient is defined as “an individual who receives or has received health care.” RCW 70.02.010(31). Health care is defined in the relevant part as “any care, service, or procedure provided by a health care provider: (a) To diagnose, treat, or maintain a patient’s physical or mental condition....” RCW 70.02.010(14). Based on this statutory language, the UHCIA contains two significant limitations that exclude SSOSA evaluations from the UHCIA.

First, the care, service, or procedure must be provided *to* diagnose, treat, or maintain a patient’s physical or mental condition. RCW 70.02.010(14)(a). As the Court of Appeals recognized below, the word “to” in this definition is “used as a function word to indicate purpose, intention, tendency, result, or end.” *Webster’s Third New International Dictionary* 2401 (2002); *John Doe G.*, 197 Wn. App. at 622 n.38; *see also Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 368, 112 P.3d 522 (2005) (concluding that UHCIA did not apply because purpose of drug test was not health care or medical treatment). Because the legislature

used the word “to” in this definition, a SSOSA evaluation is protected health care information only if its purpose is to diagnose, treat, or maintain a patient’s physical or mental condition.

The UHCIA further limits “health care information” by requiring that the information “directly relate” to the patient’s health care. RCW 70.02.010(16). Directly means “purposefully or decidedly and straight to the mark” or “in a straightforward manner without hesitation, circumlocution, or equivocation.” *Webster’s Third New International Dictionary* 641 (2002). The use of the phrase “directly relate” requires not just any relationship between the information in question and health care, but a close and straightforward relationship.

In light of these two limitations, a SSOSA evaluation is not protected health care information. The purpose of a SSOSA evaluation is forensic, i.e., to provide information to assist the judge in making a sentencing determination. *Koenig*, 175 Wn.2d at 848 (citing RCW 9.94A.670(4)-(5)). While the SSOSA statute (RCW 9.94A.670(3)) uses the phrase “amenable to treatment,” this does not mean that the evaluation is for the purpose of determining the individual’s mental condition. Amenability to treatment is a legal determination, not a medical one. *See State v. Oliva*, 117 Wn. App. 773, 780, 73 P.3d 1016 (2003). Like any forensic evaluation, a SSOSA evaluation is not conducted to provide

treatment in a confidential setting; it is conducted for the express purpose of publishing the results to the court. *Cf. State v. Bankes*, 114 Wn. App. 280, 287, 57 P.3d 284 (2002) (concluding that the trial court did not err in ordering the production of a SSOSA evaluation to the court over defendant’s objection).

Conceding that one of the purposes of a SSOSA evaluation is to aid a court in sentencing, Does argue that SSOSA evaluations have multiple purposes and that one of these purposes is to diagnose an offender and propose a plan of health care. Does’ Answer, at 18. Under Does’ theory this showing is sufficient because the use of the word “to” simply means one of many purposes. Does’ Answer, at 8. But the UHCIA uses both “to” and “directly relate[d],” and these words focuses the inquiry on information that has a close relationship to a health care purpose.³ The fact that SSOSA evaluations could possibly serve some kind of medical purpose eventually—if the person receives a SSOSA and if the treatment provider decides that the original evaluation is useful—does not constitute a direct relationship between the information and health care. An evaluation created for purposes of aiding a court in sentencing serves primarily a forensic purpose and is not directly related to health care. This

³ To use an example analogous to Does’ example, if a person said that they went *directly* to a restaurant to meet a friend, you would not assume that the person stopped along the way at various places prior to going to the restaurant.

is especially true where, as here, the statute contemplates that the evaluator will not serve as a treatment provider. RCW 9.94A.670(13).

Does also claim that the immediate purpose of a SSOSA evaluation is health care, i.e. a determination that a person is amenable to treatment. Does' Answer, at 19. However, as discussed above, a person's amenability to treatment is a legal question in this context, not a medical one. A SSOSA evaluation does not take place because an individual has voluntarily sought treatment for some kind of illness. Instead, an individual facing a criminal prosecution and prison time undergoes a SSOSA evaluation with the hope of getting a more favorable sentence. *See* RCW 9.94A.670. Put another way, an individual can go to a sex offender treatment provider for treatment without going through the criminal process but an individual will not undergo a SSOSA evaluation unless he or she has committed a sex offense and is in the criminal justice system. *See* RCW 9.94A.670.

Finally, Does argue that SSOSA evaluations contain medical, mental health, substance abuse, and sexual history. Does' Answer, at p. 6. However, this statement focuses solely on the information that is contained in the evaluations and ignores the purpose of the evaluation. SSOSA evaluations are not covered by the UHCIA because they are forensic in nature and are not directly related to health care as a result. It is

the fact that SSOSA evaluations are not directly related to health care that excludes them from the UHCIA. Without being directly related to a health care purpose, SSOSA evaluations are not covered by the UHCIA regardless of the content of such evaluations.⁴

2. The UHCIA does not override the traditional distinction between forensic evaluations and medical evaluations

Courts have long recognized a distinction between a forensic evaluation used for purposes of a trial proceeding and a medical evaluation in which a person is seeking medical care and treatment. *See State v. Sullivan*, 60 Wn.2d 214, 223, 373 P.2d 474 (1962) (distinguishing forensic evaluations for purposes of the doctor-patient privilege); *Hertog v. City of Seattle*, 88 Wn. App. 41, 48, 943 P.2d 1153 (1997) (similar); *see also Poole v. S. Dade Nursing & Rehab. Ctr.*, 139 So.3d 436, 441-42 (Fla. Ct. App. 2014) (concluding forensic evaluations are not covered under Florida's right to privacy law because physician was not consulted for purposes of treatment); *Johnson v. Weil*, 946 N.E.2d 329, 338-40 (Ill. 2011) (similar); *In re Jones*, 790 N.E.2d 321, 327 (Ohio 2003)

⁴ In their Answer, Does suggest a couple of theories about the interplay between the UHCIA and the PRA, including that records covered by the UHCIA are exempt from disclosure in the hands of any health care provider regardless of how the provider acquired those records. Does' Answer, at 7-11. However, under any theory, the SSOSA evaluations are not protected by the UHCIA if they are not health care information. Because SSOSA evaluations are not health care information the Court does not need to decide any broader issue about the relationship between the PRA and the UHCIA.

(distinguishing between forensic evaluations and court-ordered treatment). As this Court observed over fifty years ago when discussing why communications during a forensic examination are not covered by the doctor-patient privilege, a forensic evaluation is conducted “not for the purpose of treatment, but for the publication of results.” *Sullivan*, 60 Wn.2d at 223-24.

This distinction is also recognized by the medical community itself. As an article by Dr. Wheeler—one of the providers who submitted a declaration in support of Does—explained, “some [sex offender specialists] will have a *therapeutic* role with sex offenders, while other [sex offender specialists] will have a *forensic* role.” 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 6 (2006) (emphasis in original). For providers who are performing a forensic role, the focus is “to help inform decision-making in an adversarial context” and “to help a third-party decision-maker by addressing relevant ‘psycho-legal’ issues.” *Id.* at 7. The purpose of forensic evaluations is “to provide clinically relevant data to a third party, who must make an important decision about the offender.” *Id.* “Though a therapist may use the forensic evaluation to

help guide treatment planning, *this is not the purpose the evaluation.*” *Id.* (emphasis added).

The UHCIA’s definition of health care information must be construed in light of this long-standing distinction between forensic evaluations and traditional health care. Nothing in the UHCIA’s definition of health care suggests that the legislature intended to expand the definition of the health care to cover forensic evaluations. In fact, other portions of the UHCIA strongly suggest that the legislature recognized that forensic evaluations would not be covered under the UHCIA unless specifically identified. *See, e.g.*, RCW 70.02.010(21); *see also* discussion *infra* Section V.A.3.

Attempting to ignore the long-standing distinction between forensic evaluations and medical evaluations, Does argue that providers take the same approach to SSOSA evaluations as evaluations of anyone who seeks treatment for a mental disorder that impairs their ability to control sexual behavior. Does’ Answer, at 6. But the legislature drew a distinction in the SSOSA process between a treating provider and the evaluator. RCW 9.94A.670(13) (creating presumption that evaluator will not be the treating provider). Furthermore, this statement ignores the fact that SSOSA evaluations are created for the very purpose of sharing the information with third parties, including the prosecutor and the court.

A distinction between forensic evaluations and medical evaluations is supported by the UHCIA's statutory language and makes logical sense. Like all forensic evaluations, a SSOSA evaluation is not intended to be confidential but is intended to be shared with the Court, the prosecutor, and the Department. Because SSOSA evaluations are forensic documents intended to aid the judge at sentencing, SSOSA evaluations are not confidential health care information.

3. The Court of Appeals interpretation would render multiple other statutory provisions superfluous

Courts must avoid interpretations that would render a portion of a statute meaningless. *Doe ex rel. Roe*, 185 Wn.2d at 381-82. There are a number of specific statutory provisions that expressly provide confidentiality for some forensic documents used in judicial proceedings. *See, e.g.*, RCW 10.77.210; RCW 70.24.024(5) (making confidential records related to hearings involving orders for STD examinations); RCW 70.24.034(5) (similar). For example, the legislature has placed specific limits on the sharing of records and reports of examinations for individuals who are involuntarily committed under RCW 10.77. *See* RCW 10.77.210 (allowing these evaluations to be shared only upon request with specific individuals). If Does' broad definition of health care information were

correct, these records would already be covered under the UHCIA's general provisions and these other provisions would be superfluous.

Similarly, the UHCIA itself identifies certain court-related records that are protected by the UHCIA's confidentiality provisions. Specifically, the UHCIA's definition of "information and records related to mental health services" includes "documents of legal proceedings under chapter 71.05, 71.34, or 10.77 RCW." RCW 70.02.010(21). If such documents were already protected under the UHCIA's general definition of "health care information," the legislature would not have specifically designated them as protected elsewhere in the UHCIA.

Furthermore, these provisions demonstrate that the legislature knows how to craft a confidentiality provision that governs records created for judicial proceedings. The legislature has not done so for SSOSA evaluations despite identifying documents of other legal proceedings in the UHCIA. RCW 70.02.010(21). Even after this Court's decision in *Koenig v. Thurston County*, 175 Wn.2d 837, 287 P.3d 523 (2012), raised the possibility that SSOSA evaluations could be released in response to a public records request, the legislature has never moved to exempt SSOSAs or include SSOSAs in the UHCIA, despite amending RCW 70.02.010(21) and other provisions of the UHCIA multiple times after *Koenig*. Simply

put, if the legislature had wanted to specifically exempt SSOSA evaluations, it could have done so. It has not.

4. Treating documents that are shared with third parties and filed publically in court as confidential health care information would have broad consequences for open courts and transparency in the legal process

Interpreting the UHCIA as broadly as Plaintiffs suggest would extend the definition of “health care information” to cover documents that are routinely filed in public court files and considered in open courts. Courts routinely file unredacted SSOSA evaluations in the public court files. *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); [State v. Scott, Pierce County Cause No. 05-1-01454-9](#); [State v. Manning, Pierce County Cause No. 09-1-05685-6](#). SSOSA evaluations are discussed in appellate opinions and in newspaper articles. *See, e.g.*, *State v. Miller*, 180 Wn. App. 413, 425, 325 P.3d 230 (2014) (discussing the details of a SSOSA evaluation); SK child molester gets jail time, Port Orchard Independent, *available at* <http://www.portorchardindependent.com/news/19831879.html#> (similar). Concluding that SSOSA evaluations are confidential health care information would threaten these current practices.

If SSOSAs are confidential health care information, courts would have to decide whether to seal every evaluation or close the courtroom any time that a SSOSA evaluation is discussed. Such a result would raise serious questions under Article 1, Section 10 of the Washington Constitution.⁵ This Court has struck down statutory provisions that presumptively closed judicial proceedings in other contexts. *See, e.g., In re Det. of D.F.F.*, 172 Wn.2d 37, 47, 256 P.3d 357 (2011). There is no indication that the UHCIA was intended to close the SSOSA process from public view.

Additionally, if SSOSA evaluations are covered under the UHCIA's definition of health care despite their forensic nature, public agencies will be left to wrestle with the potential consequences in other legal contexts. A broad definition of "health care information" could impact records and proceedings in a host of other contexts from tort cases to worker's compensation cases. For example, if an agency obtains a forensic evaluation from a public court file, does the agency need to treat such information as confidential or withhold such records in response to a public records request? Because the UHCIA covers both information and

⁵ Article I, Section 10 states that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. art. 1, section 10. This Court has said "[o]penness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity." *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

records, do superior court proceedings need to be closed when any forensic evaluation or diagnosis is discussed? The legislature could not have intended to shroud these forensic documents and public proceedings with secrecy. This Court should not interpret the UHCIA so broadly as to eliminate transparency in administrative and court proceedings.

B. Even if This Court Concludes the UHCIA Applies to Unredacted SSOSA Evaluations, The Court of Appeals Erroneously Determined That the Release of the Entire Evaluations Could Be Enjoined Upon Such a Showing

Even if this Court concludes that SSOSA evaluations might contain some information that is exempt from disclosure, the trial court's injunction should be vacated with direction to address redaction on remand. This Court has long recognized that an agency must redact a record if redaction can make the record non-exempt. *See, e.g., Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 903, 346 P.3d 737 (2015). The Court of Appeals, however, affirmed the issuance of an injunction that prevented the release of the entire SSOSA evaluation even though it concluded that only "some" information in SSOSA evaluations directly relates to the individuals' health care. *John Doe G.*, 197 Wn. App. at 623.

In reaching this conclusion, the Court of Appeals expressly declined to decide whether there is some information in a SSOSA that is not exempt. *John Doe G.*, 197 Wn. App. at 623. This portion of the

decision ignores the burden of proof to justify withholding in this case. Does argued that the entire evaluations were exempt from disclosure as health care information. CP 271, 291. As the party seeking to prevent disclosure, Does had the burden to show that records could be withheld in their entirety as they requested. *Doe ex rel. Roe*, 185 Wn.2d at 370. If they have failed to make such a showing, the appropriate remedy is to remand to the trial court with sufficient guidance to allow the trial court to address the issue anew.

Moreover, the trial court and the parties in this case would benefit from guidance as to the extent and nature of any exempt information contained in SSOSA evaluations. Absent such guidance, courts and agencies will have to wrestle with confusion and uncertainty with regard to the appropriate extent of redactions moving forward.⁶ In this third party injunction action against the Department, the Department's goal is clarity, but the Court of Appeals decision leaves open many questions. For example, is the Department obligated to release the records if they are simply deidentified? *See Prison Legal News, Inc.*, 154 Wn.2d at 645. This question depends upon what the PRA and the UHCIA require as a matter of law, and resolving the extent of redactions would serve both the general public, who make public records requests, and agencies who will be

⁶ The permanent injunction applied to the SSOSA evaluations of Level I sex offenders; Zink's request also sought evaluations of Level II and Level III sex offenders.

required to respond to such requests. *See, e.g., Resident Action Council*, 177 Wn.2d at 431 (recognizing the importance of clarity in the PRA).

In conclusion, if this Court believes that information in SSOSA evaluations can be redacted to make such documents releasable under the UHCIA, the Court should reverse and remand to the trial court with guidance as to what information must be redacted to render the evaluations releasable under the UHCIA.

VI. CONCLUSION

SSOSA evaluations are forensic evaluations conducted to aid a court in a sentencing determination; they are not health care information under the UHCIA. 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 injunction.

RESPECTFULLY SUBMITTED this 21st day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the **SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF CORRECTIONS** with the Clerk of the Court using the electronic filing system and I hereby certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

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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 21st day of July, 2017, at Olympia, WA.

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