No. 71039-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PLANNED PARENTHOOD OF THE GREAT NORTHWEST, FEMINIST WOMEN'S HEALTH CENTERS d/b/a CEDAR RIVER CLINICS, AURORA MEDICAL SERVICES, SEATTLE MEDICAL AND WELLNESS CLINIC, ALL WOMEN'S HEALTH NORTH, PLANNED PARENTHOOD MOUNT BAKER, Respondents,

v.

JONATHAN BLOEDOW, Appellant,

and

STATE OF WASHINGTON - DEPARTMENT OF HEALTH, Defendant.

BRIEF OF APPELLANT JONATHAN BLOEDOW

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I. Introduction

The State of Washington's Public Records Act is a "strongly worded mandate for broad disclosure of public records," *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); it "shall be liberally construed and its exemptions narrowly construed." RCW 42.56.030. It requires state agencies to produce all public records in response to a relevant request unless the entire record falls within a category of exemption. RCW 42.56.070(1); see also Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 250, 884 P.2d 592 (1994).

Defendant Jonathan Bloedow ("Bloedow"), a member of the media, submitted six separate Public Records Act (RCW 42.56) requests to the State of Washington Department of Health ("DOH") for demographic data relating to induced abortions in the State of Washington. In response, DOH proposed to provide Bloedow with redacted reports, but first, as permitted by the Public Records Act, RCW 42.56.540, notified the Plaintiff abortion clinics, which responded by filing this lawsuit to prevent the disclosure of the data.

The Public Records Act requires agencies and other state officials to "act[] in good faith in attempting to comply with [its] provisions." RCW 42.56.060. By all appearances, DOH has done so. Bloedow urges

this Court to afford deference to DOH's wealth of experience and established procedures and standards in weighing the Public Records Act factors, and reverse the Superior Court's grant of summary judgment and permanent injunction.

II. Assignments of Error

A. Assignments of Error

1. **Assignment of Error 1**: Order Granting Summary Judgment and Permanent Injunction, September 12, 2013

The trial court erred in granting Plaintiffs' Motion for Summary Judgment and Permanent Injunction, concluding that the Public Records Act responses in question are fully exempt from the disclosure requirements of the Public Records Act due to identification of specific abortion facilities based on WAC 246-490-110.

2. **Assignment of Error 2**: Order Granting Summary Judgment and Permanent Injunction, September 12, 2013

The trial court erred in granting Plaintiffs' Motion for Summary Judgment and Permanent Injunction, concluding that information in the proposed Public Records Act responses would be additionally exempt from the disclosure requirements of the Public Records Act due to their "identifying" or being "readily associated with" certain abortion patients,

based on the Washington Health Care Information Act as interpreted according to the provisions of the federal Health Insurance Portability and Accountability Act.

B. Issues Pertaining to Assignment of Error

1. **Issue 1**: DOH, in response to Public Records Act requests from Bloedow, a member of the media, proposes to release spreadsheets containing dates of procedure, age, city and county of residence, race/ethnicity, number of prior abortions, number of prior births, complications if any, and gestational age of the baby, with identification numbers to associate each column of data with the next. Is it entirely precluded from doing so due to their alleged de facto identification of specific abortion facilities because of the nature of the requests, based on WAC 246-490-110 (a limited pledge of confidentiality stating that the State of Washington's collected abortion data "shall not be disclosed publicly . . . in such a manner as to identify any facility")? (Assignment of Error 1)
2. **Issue 2**: Is DOH additionally precluded from disclosing portions of the proposed responses due to their allegedly "identifying" or being "readily associated with" certain abortion patients, based on the Washington Health Care Information Act as interpreted

according to the provisions of the federal Health Insurance Portability and Accountability Act? (Assignment of Error 2)

III. Statement of the Case

As of 2011, there were 45 abortion facilities[1] in the State of Washington. See Guttmacher Institute, State Facts About Abortion: Washington.[2] Pursuant to WAC 246-490-100; RCW 43.70.050, Washington these facilities are required to submit data relating to abortions to DOH. The data, compiled by each facility in a monthly report, consists of the "age of the patient, geographic location of patient's residence, patient's previous pregnancy history, the duration of the pregnancy, the method of abortion, any complications such as perforations, infections and incomplete evacuations, the name of physician or physicians performing or participating in the abortion and such other relevant information as may be required by the secretary." WAC 246-490-100. Facilities also send DOH the location of the facility where the abortion was performed, patient identification number, date of service, race, and whether she is of Hispanic origin. See CP 29 (citing Declaration of Tammy Ragsdale).

[1] This includes hospitals, clinics, and private physicians' offices that perform abortions.
[2] Available at http://www.guttmacher.org/pubs/sfaa/washington.html.

DOH never receives the patient's name. DOH uses this data in various ways, and aggregates it in published reports available on the DOH website.[3] Current DOH data no longer includes Table 24 (Abortions in

[3] These reports include:

- Table 1: Pregnancy Outcomes of Residents by Woman's Age
- Table 2: Age-Specific Rates and Abortion Ratios of Residents
- Table 3: Induced Abortions of Residents by Selected Indicators
- Table 4: Induced Abortions of Residents by Woman's Age and Weeks of Gestation
- Table 5: Previous Live Births of Women Having Abortions by Age Washington State Residents
- Table 6: Previous Induced Abortions of Women Having Abortions by Age Washington State Residents
- Table 7: Induced Abortions by Woman's Age and Place of Occurrence or Residence
- Table 8: Induced Abortions Occurring Within Washington State by Selected [sic]
- Table 9: Induced Abortions Occurring Within State by Type of Procedure and Weeks of Gestation
- Table 10: Induced Abortions with Complications Occurring Within State by Type of Procedure and Weeks of Gestation
- Table 11: Induced Abortions with Secondary Management Occurring Within State by Type of Procedure and Weeks of Gestation
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- Table 15: Birth and Abortion Indicators by County of Residence
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- Table 20: Induced Abortions by Woman's Age and County of Residence
- Table 21: Age-Specific Abortion Rates by County of Residence
- Table 22: Percentage of Pregnancies Terminated by Abortion by Woman's Age and County of Residence
- Table 23: Abortion Ratio by Woman's Age and County of Residence
- Table 24: Abortions in Second Trimester or Later by Woman's Age and County of Residence
- Table 25: Fetal Deaths by Woman's Age and County of Residence
- Table 26: Female Population by Age and County of Residence

Second Trimester or Later by Woman's Age and County of Residence), which is vital to a clear understanding of the state of abortion in Washington, but has added data on Out of State Residents by Washington State County of Occurrence (new Table 24), Induced Abortion of Washington State Residents by Place of Occurrence (new Table 24a), and Abortions Occurring in Washington and Abortions of Washington Residents, 2000-2012.[4] New Table 24a in itself demonstrates the flexibility afforded DOH in publishing or releasing redacted abortion data, as it cross-references county of residence with county of abortion occurrence.

Yet this data, while all extremely useful, does not allow for analytical cross-referencing that would enable researchers like Bloedow to examine trends and correlations more deeply. Without the ability to follow each individual record through each of the categories above in one master chart, the value of the data is limited.

Of course, all data collected by DOH is subject to state and federal confidentiality and ethical guidelines, pursuant to RCW 43.70.050. Thus, specific patient names are not a part of the published DOH data, and

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See Amended Declaration of Christine Charbonneau. Sub. No. 36.

[4] *See* Washington State Department of Health, Induced Abortion/Pregnancy Tables by Topic, available at http://www.doh.wa.gov/DataandStatisticalReports/VitalStatisticsData/AbortionPregnancyData/AbortionPregnancyTablesbyTopic.aspx.

would not be subject to an unredacted open records request. However, county of residence is and has been part of the published DOH data.

Defendant/Appellant Jonathan Bloedow ("Bloedow") is a researcher, journalist, and blogger who exercises his First Amendment rights by periodically publishing articles reporting on issues of concern to the health and safety of women and calling for transparency and accountability by abortion providers.

Between November 2012 and May 2013, Bloedow submitted Public Records Act requests to DOH concerning its abortion data to obtain information of legitimate interest and concern to the public. These included requests for a data extract of reports of induced terminations of pregnancy that occurred during the preceding 12-month period at Planned Parenthood in Everett Washington, CP 56, 84, Ex. D; Planned Parenthood in Kenmore, CP 56, 93, Ex. F; Cedar River Clinics in Renton, CP 56, 94, Ex. G; and Aurora Health Services, CP 56, 88, Ex. E, as of Bloedow's request dated November 13, 2012; at Seattle Medical and Wellness Clinic, CP 56, 77, Ex. B, and All Women's Health North, CP 56, 81, Ex. C; and during the preceding 36-month period at Bellingham Planned Parenthood, CP 56, 75, Ex. A, as of Bloedow's request dated May 20, 2013.

Bloedow does not seek to identify any abortion patients; he did not request and did not want to receive data identifying individual abortion

patients. None of the records requested by Bloedow contain specific patient identifiers, e.g., names, addresses, phone numbers, drivers license numbers, or social security numbers; he understood that any identifying information would be redacted prior to release, pursuant to, e.g., RCW 42.56.230 (protecting social security numbers, contact information, and financial information); RCW 42.56.350 (protecting social security numbers, residential address, and residential telephone number of healthcare providers); RCW 43.70.050 (attesting to the applicability of state and federal confidentiality laws and ethical guidelines to DOH data). His requests were submitted in the pursuit of analyzable epidemiological metadata, not individual patient charts.

Therefore, acting in good faith based on the understanding that because the requested records were an anonymous epidemiological demographic survey of a large portion of women, they are public records, DOH prepared the records for release to Bloedow in accordance with state and federal confidentiality and ethical guidelines and congruent with the information already released in the reports published on its website. DOH compiled a spreadsheet with data related to dates of procedure, age, city and county of residence, race/ethnicity, number of prior abortions, number of prior births, complications if any, and gestational age of the baby, with identification numbers to associate each column of data with the next. No

patient names, addresses, phone numbers, or identifying numbers would be provided. Then, as permitted by RCW 42.56.540, DOH notified Plaintiffs of its proposed release, which was received on or about March 29, 2013. Sub. Nos. 9, 12, 36, 38. DOH nonetheless assured Bloedow that the requested records relating to Planned Parenthood in Everett Washington, Planned Parenthood in Kenmore, Cedar River Clinics in Renton, Aurora Health Services, Seattle Medical and Wellness Clinic, and All Women's Health North would be provided to him on or by April 1, 2013. CP 14, ¶¶ 16-20. As to his request relating to Bellingham Planned Parenthood, Bloedow was told that DOH could not provide any responsive records at that time, pending resolution of the instant lawsuit. CP 15, ¶ 21. This would have served the purpose of the data request and allow for an examination of trends and correlations in the State of Washington abortion data.

On April 23, 2013, Plaintiffs Planned Parenthood of the Great Northwest, Feminist Women's Health Centers d/b/a Cedar River Clinics, and Aurora Medical Services (together with since-added Plaintiff parties, "Plaintiffs") filed this action via their original Complaint for Declaratory and Injunctive Relief Under RCW 42.56.540 (Public Records Act) ("Original Complaint") against DOH in King County Superior Court. Sub No. 1. The Original Complaint claimed that the proposed responses should

be enjoined from disclosure because they identified specific abortion facilities and patients.

On April 25, 2013, Plaintiffs filed their First Amended Complaint ("FAC"), Sub. No. 5,[5] adding Seattle Medical and Wellness Clinic and All Women's Health North as plaintiffs, and Bloedow as a defendant. On April 26, 2013, Plaintiffs filed their Motion for Temporary Restraining Order, Sub. No. 13, and Commissioner Nancy Bradburn-Johnson entered the order ex parte, Sub. No. 7; the parties then stipulated, Sub. No. 18, to continue the TRO until the lower court could hear arguments on Plaintiffs' Motion for Preliminary Injunction, Sub. No. 13, originally set for May 10, 2013.

On June 10, 2013, Plaintiffs filed their Second Amended Complaint ("SAC"), CP 2, adding Mount Baker Planned Parenthood as a plaintiff; reducing inflammatory, defamatory, and irrelevant language directed at Defendant Bloedow (see, e.g., FAC, Introduction and ¶¶ 18-23)[6]; and omitting information relating to Bloedow's legitimate journalism (see, e.g., FAC, ¶¶ 21-23). On June 14, 2013, CP 73, and June 20, 2013,

[5] Select Superior Court docket entries, noted herein as "Sub. No.," are not currently included in the clerk's papers, but are the subject of a supplemental designation of clerk's papers filed on the same date as this brief, other than those already transcribed in the RP. At the Court's discretion, Bloedow can file an amended brief with the CP numbers once the papers are prepared.

[6] This mooted Bloedow's May 17, 2013, Motion to Strike Pursuant to Civil Rule 12, Sub. No. 26, as noted in Bloedow's June 14, 2013 Answer to Second Amended Complaint. CP 11.

CP 21, Bloedow and DOH filed their respective Answer to Second Amended Complaint.

On June 28, 2013, Plaintiffs filed their Motion for Summary Judgment and Permanent Injunction. CP 25. Bloedow, CP 56, and DOH, CP 48, separately responded on July 15, 2013, and Bloedow filed his Cross-Motion for Summary Judgment. CP 59-60. Plaintiffs filed their Reply in Support of Motion for Summary Judgment and Permanent Injunction on July 22, 2013. CP 98.

During the Motion for Summary Judgment briefing and subsequent to email correspondence between Jason M. Howell, Assistant Attorney General, and Bailiff for the Hon. Dean S. Lum, King County Superior Court, on July 2, 2013,[7] Howell submitted the proposed DOH release to Judge Lum for *in camera* review via CD inclusion with a July 15, 2013, letter.[8]

On July 26, 2013, the court heard oral argument on Plaintiffs' motion, RP July 26, 2013/Sub. No. 48, following which the court asked DOH to submit the proposed release, both (a) in its original form, and (b) separately without date of procedure or patient's city and county of residence, for *in camera* review. RP July 26, 2013/Sub. No. 48. This was submitted via CD inclusion with an August 7, 2013, letter from Lilia

[7] Sub. No. unavailable; noted in July 15, 2013, letter.
[8] Sub. No. unavailable.

Lopez, Assistant Attorney General for the State of Washington.[9] On August 26, 2013, the court held a telephone status conference/hearing[10] relating to the first CD consisting of the submission of unredacted ((a), *supra*) records for *in camera* review not being received or being misplaced, and requesting a replacement. Sub. No. 53.

On September 4, 2013, via telephone conference, the court announced its decision to grant summary judgment and permanently enjoin release of the records in question, Sub. No. 55A, and on September 12, 2013, Judge Lum signed his Order Granting Summary Judgment and Permanent Injunction. CP 151. On September 18, 2013, Judge Lum's order sealing the proposed responses on CD, Sub. No. 59,[11] was entered. CP 167.

On October 11, 2013, Bloedow filed his Notice of Appeal in the Superior Court, CP 157. On February 25, 2014, Bloedow filed his Motion for Extension of Time to March 10, 2014 in this Court, which was granted on March 5, 2014.

IV. Argument

[9] Sub. No. unavailable.
[10] As noted in the transcript of this hearing, there was another, prior telephone hearing in August that was not recorded but related to the submission of unredacted records to the court for *in camera* review.
[11] The original CDs in question have been transmitted to this Court.

Washington's Public Records Act is a "strongly worded mandate for broad disclosure of public records," *Hearst*, 90 Wn.2d at 127, which "shall be liberally construed and its exemptions narrowly construed." RCW 42.56.030. The Public Records Act requires state agencies to produce all public records in response to a relevant request unless the entire record falls within a category of exemption. RCW 42.56.070(1); see also Progressive Animal Welfare Soc'y, 125 Wn.2d at 250. If the record cannot be produced in its entirety but could be if exempt information were redacted, then the agency must do that and produce the remainder of the record. RCW 42.56.210(1). For a plaintiff to succeed in blocking the release of a proposed response to a Public Records Act request, he must demonstrate that "examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital government function" under RCW 42.56.540, and also that a relevant statutory exemption applies to the challenged records. See, e.g., Morgan v. City of Fed. Way, 166 Wn.2d 747, 756-57, 213 P.3d 596 (2009); Soter v. Cowles Publ'g Co., 162 Wn.2d 716, 757, 174 P.3d 60 (2007); Progressive Animal Welfare Soc'y, 125 Wn.2d at 257. The plaintiff must bear the burden of proof. See, e.g., Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 35, 769 P.2d 283 (1989).

Bloedow does not dispute that this lawsuit is appropriate for summary judgment,[12] but contends that the lower court misconstrued applicable statutory and case law, thus granting summary judgment in favor of the wrong party.

A. Jurisdiction and Standard of Review

The Superior Court of King County had jurisdiction in this matter, and venue in King County was appropriate pursuant to RCW 42.56.540. The Court of Appeals, Division I, has jurisdiction pursuant to Rule of Appellate Procedure 2.2.

A grant of summary judgment is reviewed de novo. See Washington Imaging Services, LLC v. Washington State Dept. of Revenue, 171 Wn.2d 548, 555, 252 P.3d 885 (2011); Spokane Police Guild, 112 Wn.2d at 35.

B. The State of Washington Public Records Act Requires the Disclosure of Public Records Except in Very Narrowly Construed Circumstances.

The State of Washington Public Records Act provides:

[12] Summary judgment is appropriate where, after viewing all the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party, the court determines that there are no genuine issues of material fact, reasonable people could reach only one conclusion, and the moving party is entitled to judgment as a matter of law. See, e.g., Van Noy v. State Farm Mut. Auto Ins. Co., 142 Wn.2d 784, 790, 16 P.3d 574 (2001); Court Rule 56(c).

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. **This chapter shall be liberally construed** and its **exemptions narrowly construed** to promote this public policy and to assure that the public interest will be fully protected.

RCW 42.56.030 (emphasis supplied). Public inspection of records is in the public interest unless there is an applicable exemption to limit inspection; it is a plaintiffs' burden to demonstrate that disclosure of the disputed records is not in the public interest. RCW 42.56.540 ("The examination of any specific public record may be enjoined if . . . such examination would **clearly not be in the public interest[,] and** would substantially and irreparably damage any person . . . .") (emphasis supplied).

Thus, "[e]ach agency . . . shall make available for public inspection and copying **all public records**, unless the record falls within the **specific exemptions** . . . of specific information or records. To the extent required . . . , an agency shall delete identifying details in a manner consistent with this chapter . . . ." RCW 42.56.060 (emphasis supplied).

Whenever possible, an agency must redact a record rather than exempting it entirely from disclosure. "[T]he exemptions of th[e Public Records Act] are inapplicable to the extent that information, the disclosure

of which would violate personal privacy . . . interests, can be deleted . . . ." RCW 42.56.210(1). A party wishing to enjoin production of redacted records bears the burden of proof that an exemption applies. See Spokane Police Guild, 112 Wn.2d at 35. However, as here, "**[n]o exemption may be construed to permit the nondisclosure of statistical information** not descriptive of any readily identifiable person or persons." RCW 42.56.210(1) (emphasis supplied). This is because:

> The legislature finds that public health and safety is promoted when the public has **knowledge that enables them to make informed choices about their health and safety**. Therefore, the legislature declares, as a matter of public policy, that the public has a right to information necessary to protect members of the public from harm caused by **alleged hazards or threats** to the public.

Laws of 2001, ch. 98, § 1 (emphasis supplied). Transparency and the people's right to know merit great deference.

C. No Information Beyond the Records Themselves May Be Considered in Determining Whether They Identify Specific Abortion Facilities and May Thus Be Exempted.

The responses DOH proposes to release should not be enjoined in their entirety due to their alleged de facto identification of specific abortion facilities.

WAC 246-490-110, a limited pledge of confidentiality incorporated into the Public Records Act through RCW 42.56.070(1) in an attempt to induce abortion facilities to comply with the law requiring them to disclose abortion data, states that the State's collected abortion data "shall not be disclosed publicly . . . in such a manner as to identify any facility."[13]

On their face, the contents of the proposed DOH responses would not identify any particular facility. The only aspect of the responses that would do that would be their mere contextual association with the specific facility named in each targeted request, which was done innocently and does not justify the records' exemption from disclosure. See, e.g., Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398, 414, 259 P.3d 190 (2011) (not exempting from disclosure records relating to a police officer who had been exonerated of allegations of sexual misconduct both criminally and administratively); Koenig v. City of Des Moines, 158 Wn.2d 173, 182-83, 142 P.3d 162 (2006) (not exempting redacted records produced in response to a request including the child sexual assault victim's name, which thus de facto confirmed the child was

[13] WAC 246-490-110 additionally does not permit the release of abortion statistics "in such a manner as to identify any individual without their consent," but does not apply here because there is no individually identifying information to which a patient could possibly consent. If even a patient, looking at the chart, cannot be certain that the line of data refers to her, then surely Bloedow cannot be expected to "readily" identify patients with no more "personal" information than appears on the sheet of paper in front of him.

a victim of sexual assault, despite a statute prohibiting disclosure of information revealing the identity of child victims of sexual assault). While in effect the responses may de facto identify facilities, legally, there is nothing in them other than their mere existence as a responsive production to a Public Records Act request, that associates any record in them with a particular facility. DOH could easily release the information as responsive to numbered requests, with no facility name appearing anywhere in connection with the production other than the request itself. And as contrasted with Koenig and Bainbridge Island Police Guild, in which a request targeted a specific minor child victim or maligned an individual, Bloedow submitted his requests relating to individual public businesses.

Association with an individual as a necessary part of the response does not preclude responsiveness; rather, it advances transparency and serves the public interest in administrative efficiency. As articulated in Koenig and cited favorably in Bainbridge Island Police Guild, barring a reversion to total nontransparency, a dedicated requester could obtain the document he seeks sooner or later:

> The dissent cites no statutory language or case law to support the notion we may look beyond the four corners of the records at issue to determine whether they were properly withheld. Nor does it provide any authority to support disclosing records to some requesters but not

> others, depending on how the request is made. Most notably, however, the dissent's approach would do nothing to prevent the disclosure of the records sought by Mr. Koenig. He, or any other member of the public, could simply request these records using the case number or the name of the assailant. Such a request would not be naming a specific individual, and the records would have to be produced after the information . . . was redacted.

Koenig, 158 Wn.2d at 183. The court held that despite the targeted nature of the requests, the records must be produced with the officer's name redacted:

> We recognize that appellants' request under these circumstances may result in others figuring out Officer Cain's identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while Officer Cain's identity is exempt from production . . . , the remainder . . . is nonexempt.

Bainbridge Island, 172 Wn.2d at 418. Citing Koenig, the court held:

> An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity. Even though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production.

Bainbridge Island, 172 Wn.2d at 414.

An agency may not inquire as to a requestor's intent, see, e.g., In re Request of Rosier, 105 Wn.2d 606, 611, 614, 717 P.2d 1353 (1986) ("release of information under . . . public disclosure acts is not conditioned specifically upon the use to which the information will be put . . . [;] an agency generally may not inquire into the purpose for which the information is sought."); see also King County v. Sheehan, 114 Wn. App. 325, 357, 57 P.3d 307 (Wash. App. Div. 1 2002) (even where requesters' "web sites are controversial, incendiary, and offensive to many," the Public Records Act "requires agencies to ignore the identity of the requester, and to focus on the information itself in determining whether it is exempt from disclosure"). Similarly, neither outside knowledge, nor the specific source of the requested records (internal or external), nor the reason for the confidentiality statute may be considered in formulating a response to a public records request. The alternative would be to reward requesters who are believed, regardless of whether it is factually correct, to have less related background knowledge. This is not permitted. While Bloedow happened to frame his requests in parts by facility in an attempt to assist DOH in its response (since each facility submits a separate report), neither the framing of the request nor Bloedow's potential outside knowledge should preclude DOH from responding in full.

Yet even if the instant proposed DOH response is deemed to be associated with particular facilities, the Public Records Act provides for just such a conflict between the factors of transparency and disclosure, and exemption based on provisions not found directly within the Public Records Act: "In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern." RCW 42.56.030 (emphasis supplied). And the Public Records Act, again, provides for broad disclosure and narrow exemptions, with each agency releasing "**all public records**" that do not "fall[] within . . . **specific exemptions**," redacting rather than exempting when an entire record cannot be released, and only deleting identifying details "to the extent required." RCW 42.56.060 (emphasis supplied). And again, as here, "**[n]o exemption may be construed to permit the nondisclosure of statistical information** not descriptive of any readily identifiable person or persons." RCW 42.56.210(1) (emphasis supplied).

D. The Public Records Act Requires the Full Release of Records that Do Not "Readily" Identify an Abortion Patient.

The responses DOH proposes to release should not be further redacted due to their alleged identification of specific abortion patients.

1. *The Proposed Disclosure Does Not Violate the Health Care Information Act Because It Would Not Reveal "Readily" Associable Information.*

The baseline approach to requests for public records under the Public Records Act is full transparency and disclosure: "Each agency . . . **shall** make available for public inspection and copying **all public records**, unless the record falls within the **specific exemptions** . . . of specific information or records. To the extent required . . . , an agency shall delete identifying details in a manner consistent with this chapter . . . ." RCW 42.56.060 (emphasis supplied); see also Yakima Cnty. v. Yakima Herald-Republic, 170 Wn.2d 775, 808, 246 P.3d 768 (2011) (citing Soter, 162 Wn.2d at 757) (exemption requires that a court "find that a specific exemption applies and that disclosure would not be in the public interest and would substantially and irreparably damage a person."). The Public Records Act's exemptions are "precise, specific, and limited." Kitsap Cnty. Prosecuting Attorney's Guild v. Kitsap Cnty., 156 Wn. App. 110, 116-18, 231 P.3d 219 (2010) (not exempting "town of residence" of county employees despite "residential address" exemption in Public Records Act). In order for a disclosure to violate a person's right to privacy, an "entire" record must "reveal[] information about a person," be "'highly offensive,'" and be "'not [a matter] of legitimate concern.'"

Bainbridge Island Police Guild, 172 Wn.2d at 417 n.12 (internal citation omitted). Information such as, for example, county employees' "names, number of years of employment with the County, department assigned to within the County, job title, office phone number, annual pay rate, and **town of residence**" is not exempt:

> There is no question here that the information . . . requested did not fall under one of the [Public Records Act's] precise, specific, and limited exceptions. See Spokane Research & Def. Fund, 155 Wn.2d at 102, 117 P.3d 1117. Indeed, on appeal, the County does not contend that its employees' towns of residence were exempt from disclosure.

Kitsap Cnty. Prosecuting Attorney's Guild, 156 Wn. App. at 114, 119 (emphasis supplied).

The Health Care Information Act specifies that "health care information" "identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care."[14] RCW 70.02.010(7) (incorporated into the Public Records Act via RCW 42.56.360); see also Wright v. Jeckle, 121 Wn. App. 624, 630, 90 P.3d 65 (2004). The Public Records Act incorporates this definition into the exemption.

[14] In contrast, personal information generally is "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general." Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 211, 189 P.3d 139 (2008). This could include, for example, the sexual relations, family quarrels, and humiliating illnesses discussed in the Restatement [(Second) of Torts § 652D. (1977) discussion on "what nature of facts are protected by this right to privacy," cited below in IV.D.3.

Yet records containing health care information are only partially exempt from public inspection. See generally Prison Legal News, Inc., v. Dep't of Corr., 154 Wn.2d 628, 644-45, 115 P.3d 316 (2005) (holding that a blanket exemption for all medical information, redacting "names, treatments, medical conditions, etc." violated the narrow exemption requirements of Public Records Act).

> Further, the broad mandate favoring disclosure under the [PRA] requires the agency demonstrate that each patient's health care information is "readily associated" *with that patient* in order to withhold the health care information under RCW 70.02.010[7]. Where there is a dispute over whether health care information is readily identifiable with a specific patient even when the patient's identity is not disclosed, the trial court can use in camera review should it need to examine unredacted records to make its independent determination.

Id. at 645-46 (internal citation omitted).

RCW 70.02.010(7) uses DNA as an example of health care information. DNA data, along with information such as a patient's name, specific street address, telephone number, or email, would readily be paired with an individual patient and would clearly be personal health care information.

That is not what DOH proposes to disclose. A more apt analogy to the instant proposed disclosure would be a list of demographic data – such as gender, age, and county of residence – relating to patients whose DNA

was tested, in order to track variations and trends. While this data could conceivably be re-paired with the donor individuals, the work involved would be substantial. The series would not be "readily associated with the identity of a patient." Such is the case here.

Similarly, in a case involving a request for public records relating to medical misconduct investigations in Washington prisons, the agency claimed that a requester could

> "cross reference" a list of deceased inmates it has been provided with medical information to determine patient identity. However, [the agency] does not even make a plausible attempt to demonstrate how, with only the names of deceased inmates and the descriptions of medical care provided in records . . . , it could connect the names to the maladies. Presumably a person trying to do this would *already* have to know the malady from which the inmate died. In any case, the additional information needed to have any possibility to connect these dots would not appear to make the identity "readily associated" with the information that directly relates to the patient's health care, as required by the statute.

Prison Legal News, Inc., 154 Wn.2d at 325 n.17.

While conceivably, with great effort, someone could identify a specific woman and her abortion date and location if he were also armed with a wealth of additional information such as a chart of every Washington woman's menstrual cycles, GPS tracking of individual women, women's texted messages, and credit card receipts with pregnancy test purchases, such individual information would by no means

be evident from the proposed contents of the release. And even when redaction is "insufficient to protect the person's identity," Bainbridge Island Police Guild, 172 Wn.2d at 416 (citing Koenig, 158 Wn.2d at 189); see also Kitsap Cnty. Prosecuting Attorney's Guild, 156 Wn. App. at 114, 119 (in which county employees' names, salaries, and towns of residence were released), records may still be released in many circumstances. The legislature, acting in favor of transparency, holds agencies to a strict standard of exempted information that could "readily" be associated with a particular individual. Mere conceivable association does not suffice; "though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks." Bainbridge Island Police Guild, 172 Wn.2d at 414. "An agency should look to the contents of the [requested] document [to be released] and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity." Id. at 414; see also Koenig, 158 Wn.2d at 184.

2. *The Federal Health Insurance Portability and Accountability Act Does Not Apply to DOH.*

DOH is not a covered entity under the Federal Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 110 Stat.

1936 ("HIPAA"),[15] as Plaintiffs have conceded, CP 39; RP July 26, 2013, p. 32, and so HIPAA does not apply to DOH.

HIPAA protects information that is both (a) health-related, and (b) "individually identify[ying]."[16] HIPAA provides for two methods of de-identifying protected health information: expert determination under 45 C.F.R. § 164.514(b)(1), and Safe Harbor under 45 C.F.R. § 164.514(b)(2), which requires the removal of eighteen identifiers of the individual or of relatives, employers, or household members of the individual.[17] Of these

[15] Plaintiffs contended HIPAA applies here under RCW 43.70.050(2), but that applies only to the secretary's use of data: "The secretary's access to and use of all data shall be in accordance with state and federal confidentiality laws and ethical guidelines."

[16] HIPAA defines "protected health information," a subset of "health information" (45 C.F.R. § 160.103), as "individually identifiable health information . . . that is transmitted by electronic media; maintained in electronic media; or transmitted or maintained in any other form or medium." 45 C.F.R. § 160.103. And "individually identifiable health information" is "information that is a subset of health information, including demographic information collected from an individual, and is created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual." *Id.*

[17] (1) Names; (2) all geographic subdivisions smaller than a state, with limited exceptions; (3) all elements of relevant dates except year, with limited exceptions; (4) telephone numbers; (5) fax numbers; (6) email addresses; (7) social security numbers; (8) medical record numbers; (9) health plan beneficiary numbers; (10) account numbers; (11) certificate/license numbers; (12) vehicle identifiers and serial numbers, including license plate numbers; (13) device identifiers and serial numbers; (14) web Universal Resource Locators (URLs); (15) Internet Protocol (IP) addresses; (16) biometric identifiers, including finger and voice prints; (17) full-face photographs and any comparable images; and (18) any other unique identifying number, characteristic, or code, with limited exceptions; as well as absence of actual knowledge by the covered entity that the remaining information could be used alone or in combination with other information to identify the individual. See also U.S. Department of Health and Human Services, Guidance Regarding Methods for De-identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act Privacy Rule,

18 identifiers, most would be considered to directly identify a particular patient or narrow the field so drastically as to have that effect, but two – (2) geographic subdivisions and (3) dates – depending on the breadth or narrowness of the information, could only be used for identification in their narrower sense (i.e., a birth month is less identifying than a birth date, and a town less than an apartment number).

On the other hand, Washington's Health Care Information Act (RCW 42.56.360) exempts "health care information" – information 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(7).

The two standards are different – neither necessarily broader nor narrower – but there is no conflict between the Health Care Information Act and HIPAA because only the Health Care Information Act, not HIPAA, applies to DOH.[18]

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available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/De-identification/guidance.html.

[18] See Freedom Foundation v. Wash. State Dept. of Transp., 168 Wn. App. 278, 296 n.18, 276 P.3d 341 (2012) (in which, unlike here, the federal statute's confidentiality provisions did apply to the information in question) ("Federal preemption of state law may occur in three circumstances: (1) if Congress passes a statute that expressly preempts state law, (2) if Congress preempts state law by occupation of the entire field of regulation, or (3) if the state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.") (citing Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 326-27, 858 P.2d 1054 (1993)); 45 C.F.R. § 160.203 ("A standard, requirement, or implementation specification adopted under this subchapter that is contrary to a provision of State law preempts the provision of State law" unless certain conditions are met, such as where a state privacy law "is more stringent," but setting no baseline for non-conflicting state law).

DOH, in preparing its proposed response to Bloedow's requests, balanced, as it always does, the rigorous transparency demands of the Public Records Act, tempered by the Health Care Information Act. Since the Health Care Information Act uses an entirely distinct standard as compared to HIPAA to prevent the release of improper health care information, some HIPAA Safe Harbor exempt categories of information may appear in DOH's proposed response. This is not in conflict with HIPAA, as the response fully adheres to the Health Care Information Act, which applies, and not HIPAA, which does not. To proceed otherwise would be to violate the Public Records Act and create a chilling effect on public records transparency.

3. *The Public Records Act Requires the Disclosure of Records that Are Not "Highly Offensive" or that Are of "Legitimate Concern to the Public."*

RCW 42.56.050 specifies that a person's "privacy" is violated "**only if** disclosure of information about the person: (1) Would be **highly offensive** to a reasonable person, **and** (2) is not of legitimate **concern to the public**. The provisions of this chapter dealing with the right to privacy in certain public records **do not create any right of privacy** beyond those rights that are specified in this chapter as express exemptions . . . ."

(emphasis supplied); see also Bainbridge Island Police Guild, 172 Wn.2d at 415.

Thus, as an initial matter, RCW 42.56.050 simply defines "invasion of privacy" and creates no exemption.[19] See Amren v City of Kalama, 131 Wn.2d 25, 36 n.9, 929 P.2d 389 (1997) (finding that the legislature's amended RCW 42.56.050 superseded the Supreme Court's interpretation that a general privacy exemption existed within the Public Records Act, as in In re Request of Rosier, 105 Wn.2d at 611).

"'[P]rivacy' as used [here] is intended to have the same meaning as the definition given that word by the Supreme Court in *Hearst*." Laws of 1987, ch. 403, § 1 (internal citation omitted). Hearst "adopt[ed] the Restatement [(Second) of Torts § 652D. (1977)] standard as the controlling one." Hearst, 90 Wn.2d at 136. The Restatement's comment "illustrates what nature of facts are protected by this right to privacy":

> Every individual has some phases of his life and his activities and some facts about himself that he does not

[19] PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS, §14.3(1)(e) creates no presumption to the contrary, merely pointing back to the Health Care Information Act:

> In addition to United States Supreme Court rulings on the subject, case law and statutory provisions in Washington have recognized the right to privacy in records relating to birth control and abortion. *No Washington case has determined whether these cases or statutes provide an exemption from disclosure*. However, because this information involves the provision of health care services, disclosure of this type of information would come under the provisions of the HCIA.

> expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner **highly offensive** to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of **legitimate public interest**.

Hearst, 90 Wn.2d at 136 (quoting Restatement, at 386) (emphasis supplied).

Hearst noted that "certain helpful privacy principles . . . emerge from [federal Freedom of Information Act, 5 U.S.C. § 552, "FOIA"] cases." Id. at 137. For example, "an agency's promise of confidentiality or privacy **is not adequate to establish the nondisclosability** of information; promises cannot override the requirements of the disclosure law." Id. (citing Petkas v. Staats, 163 U.S. App. D.C. 327, 501 F.2d 887 (1974); Robles v. EPA, 484 F.2d 843 (4th Cir. 1973); Pharmaceutical Mfrs. Ass'n v. Weinberger, 411 F. Supp. 576 (D.D.C. 1976)).

Hearst also noted that under FOIA, "the privacy-related exemptions involve a balancing test, weighing the general public interest in access to governmental information against the specific privacy interests asserted." Id. (citing Department of Air Force v. Rose, 425 U.S.

352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976) and cases cited therein; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); U.S. Code Cong. & Admin. News 1966, p. 2418). "This balance is to be **tilted in favor of disclosure**." Id. (citing Ditlow v. Shultz, 517 F.2d 166 (D.C. Cir. 1975); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971)). The use of the "balancing concept under the FOIA is unique to the privacy exemption, as normally no inquiry into the utility of the information is permissible," id. (citing Rural Housing Alliance v. United States Dep't of Agriculture, 498 F.2d 73 (1974)), but it "meshes well with the Restatement's protection against the release of highly offensive materials while safeguarding the public's legitimate interests." Id.

In Hearst, the court reached "only the first step in the balancing process determining whether the release of the materials sought would be highly offensive to a reasonable person." Id. at 138. Because the appellant failed to "demonstrate[] that the[] records f[e]ll within this category[, t]here [wa]s nothing in the materials . . . that reveal[ed] intimate details of anyone's private life in the Restatement sense. Thus, the portions of the folios ordered disclosed fail to violate any right to privacy." Id.

Here, nothing in the records would reveal any intimate details of anyone's private life in the Restatement sense. In the spreadsheet's lines of

data, there are no "dirty details" of sexual activity, family fights, intimate letters, or the like. A spreadsheet is not a romance novel or a Nicholas Sparks movie, and as fraught with gut-wrenching emotion as an abortion may be, the demographic data sought by Bloedow reveals none of it. An individual would be hard-pressed to recognize herself in the lines of data, and a stranger certainly could not be expected to with any reasonable amount of effort. Thus, it could not be "highly offensive" to an individual for nonidentifying demographic data to be released in a set with scores of others.

The demographic records are, however, in the public interest. As the State of Washington legislature determined,

> public health and safety is promoted when the public has **knowledge that enables them to make informed choices about their health and safety**. Therefore, the legislature declares, as a matter of public policy, that the public has a right to information necessary to protect members of the public from harm caused by **alleged hazards or threats** to the public.

Laws of 2001, ch. 98, § 1 (emphasis supplied). A hazard or threat need not be actual to fulfill the requirements of the Public Records Act, and the examination of demographic data to evaluate the existence of a potential public health threat would certainly suffice.

Moreover, the State of Washington's abortion tracking mechanisms are of legitimate public interest. Because government

functioning mechanisms such as "the nature of . . . investigations is a matter of legitimate public concern, disclosure of that information is not a violation of a person's right to privacy . . . [so] does not fall into the category of [exempt] 'personal information.'" Bainbridge Island Police Guild, 172 Wn.2d at 417-18.

"The people insist on remaining informed . . . **[and so the Public Records Act] shall be liberally construed** . . . to assure that the public interest will be fully protected." RCW 42.56.030 (emphasis supplied).

4. The Release of General Demographic Data in No Way Jeopardizes the State of Washington's Guarantee of Reproductive Privacy in the Reproductive Privacy Law.

The Reproductive Privacy Law, RCW 9.02.100, provides no exemption to the Public Records Act, and is wholly inapplicable where there has been no invasion of privacy.

RCW 9.02.100 states, "the sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions."

As in the case of RCW 42.56.050, this creates no exemption, either alone or in conjunction with any provision of the Public Records Act.[20]

[20] See supra n.19.

Moreover, while the Public Records Act exempts records from disclosure when disclosure would result in the invasion of privacy, if there is no invasion of privacy, then the Reproductive Privacy Law does not apply. The instant proposed DOH disclosures do not contain health care information that can be "readily" associated with any particular individual, and contains no "highly offensive" information." Rather, they contain demographic information that falls within the legitimate public interest. Therefore, the Reproductive Privacy Law does not apply.

V. Conclusion

For the reasons stated above, Bloedow urges the reversal of the lower court's grant of summary judgment and permanent injunction in this matter and requests that this Court require production of the records he requested in the format proposed by DOH through the Attorney General.

Respectfully submitted this 21st day of March, 2014.

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CERTIFICATE OF SERVICE

I, Catherine Glenn Foster, hereby certify that on the 21st day of March, 2014, I caused the foregoing corrected BRIEF OF APPELLANT JONATHAN BLOEDOW to be served on the parties to this case by electronic mail service as agreed to by the following parties to this case:

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