



CASE REPORT

PUBLIC RECORDS ACT- INVESTIGATIVE RECORDS EXEMPTION. Victim impact statements are exempt from disclosure under the Public Records Act under the investigative record exemption. Special Sex Offender Sentencing Alternative evaluations are not exempt, but subject to redaction of victim-identifying information. *Koenig v. Thurston County*, No. 37446-3, ____ Wn. App. ____ (April 6, 2010).

I. Facts. After James Lerud pleaded guilty to eight counts of voyeurism, Mr. Koenig submitted a public records request to the Thurston County prosecuting attorney and the Superior Court clerk's office for all investigative files in the case, including witness statements, victim impact statements, and any associated documents or affidavits. The trial court ordered that the victim impact statement and Lerud's medical and psychological reports be sealed from public disclosure. The prosecuting attorney's office then mailed copies of the case documents to Mr. Koenig, withholding the victim impact statement and Lerud's Special Sex Offender Sentencing (SSOSA) evaluation based upon the court's order.

II. Applicable Law and Analysis. RCW 42.56.240(1) provides that specific investigative records compiled by law enforcement are exempt from disclosure where nondisclosure is essential to effective law enforcement or for the protection of any person's right to privacy. A "victim impact statement" is a crime victim's written statement given to the court and the prosecutor prior to sentencing the defendant.¹ The court held that the victim impact statement was exempt in its entirety from disclosure under the investigative record exemption because nondisclosure was essential to effective law enforcement.² In its analysis, the court first found that a victim impact statement is an "investigative record" because one part of the prosecutor's investigation focuses on the appropriate penalty or sentence to be recommended to the court. Next, the court found that nondisclosure was essential to effective law enforcement because disclosure would chill victim participation and cooperation with prosecution and reporting of crime, and cited statutes indicating a legislative intent to treat victims of crime with courtesy and sensitivity at all stages of the criminal justice process. The court also found that redacting the victim's name was not a sufficient cure because, even without the victim's name, the potential disclosure of even a redacted statement could cause victims to censor their statements or refuse to provide them at all.

¹ The right to make a statement at sentencing is guaranteed by the Washington Constitution and RCW 7.69.030(13).

² Although the trial court sealed the records, the trial court's order was not at issue because access to court files rests solely within the trial court's discretion. Accordingly, the Public Records Act did not apply to Mr. Koenig's request to the trial court, and his request to the prosecutor had to be analyzed separately under the PRA. *Nast v. Michels*, 107 Wn.2d 300, 303, 730 P.2d 54 (1986).

With respect to SSOSA evaluations, the court held that the investigative record exemption did not apply, but victim-identifying information must be redacted prior to disclosure, as authorized under RCW 42.56.240(1). SSOSA evaluations are psychological examination reports which determine whether sex offenders are amenable to treatment, and therefore, qualify for a reduced sentence. The evaluation contains the offender's version of the facts, the official version of the facts, the offender's entire sexual history, including any history of abuse, the offender's social and employment situation, and other highly personal information. Despite a strong dissenting opinion that disclosure would violate the offender's right to privacy and multiple affidavits from prosecutors and defense attorneys alike stating that release of the evaluation would hinder plea negotiation and reduce offender participation in the treatment program, the majority disagreed. The court held that concerns about a defendant's willingness to engage in the SSOSA process must be balanced against the public's right to full access to sex offender information. The court concluded that the legislature had already addressed the appropriate balance, citing statutes regarding sex offender registration, which allow parents to better prepare and educate their children regarding the release of sex offenders into the community.

III. Conclusion. This case provides another application of the investigative record exemption and stresses the importance of withholding investigative records only where essential for effective law enforcement or to protect a person's right to privacy. In determining whether nondisclosure is essential for effective law enforcement, the court will rely on affidavits from law enforcement personnel and will also look to the legislature for guidance. Despite the fact that Thurston County had a strong argument in favor of withholding the SSOSA evaluation, penalties for withholding the SSOSA evaluation were mandatory. However, given the recent *Yousoufian* case regarding public records penalties, reasonableness of the explanation for noncompliance should be considered a mitigating factor when the court assesses penalties. If you have any questions regarding the Public Records Act, please contact your city attorney.