No. 84940-4

J.M. JOHNSON, J. (dissenting)—Our legislature has recognized that effective law enforcement and individual privacy rights outweigh the public's interest in the disclosure of certain information. Accordingly, the Public Records Act (PRA)[1] expressly exempts "investigative records," the disclosure of which would impair these interests. RCW 42.56.240(1). Contrary to the plain language of this statute and our decisional law interpreting its scope, the majority holds two highly sensitive records that were compiled by a prosecutor—a victim impact statement (VIS) and a special sex offender sentencing alternative (SSOSA) evaluation—must be publicly disclosed.

Protection of the VIS is also required by Amendment 84 to the Washington Constitution, which was adopted just to protect victims and ensure their participation in the criminal process.

[1] Ch. 42.56 RCW.

The majority claims both these documents were not "created" as part of an "investigation." Majority at 12. This disregards David Koenig's express characterization of these records as "investigative files" in his written public records request. The majority's analysis also demonstrates a fundamental misunderstanding of the elements that make records "investigative" by focusing on the reason for the records' *creation* rather than the purpose for which they were *compiled*.

Continuing this erroneous analysis, the majority puts forth a shortsighted definition of an "investigation." Under the majority's reasoning, a criminal investigation terminates when the defendant has been convicted and does not include sentencing proceedings. Yet, a criminal prosecution is not finalized until the entry of a judgment and sentence. I dissent because our law embraces a more comprehensive view of a criminal investigation and encompasses the determination of a proper sentence. I would therefore hold that the PRA exemptions contained in RCW 42.56.240(1) extend to documents held by the prosecutor for the purpose of evaluating an appropriate penalty, such as the VIS and SSOSA evaluation at issue here. This dissent would protect the private crime statement of victims as our law

(and constitution) intends, preserving the balance of rights suggested by Amendment 84.

Analysis

I. The SSOSA Evaluation and the VIS Are "Specific Investigative Records" Because They Were Compiled as Part of the Prosecutor's Charging Decisions or Investigation into an Appropriate Sentence

I agree with Justice Chambers in dissent that both the VIS and the SSOSA evaluation are investigative records. I write separately on this topic to emphasize additional errors I perceive in the majority's reasoning.

A. *The SSOSA Evaluation*

First of all, Koenig did not even dispute that the SSOSA evaluation is an investigative record. In fact, his initial PRA request asked for "*Investigative files* associated with Case #00103360." Clerk's Papers (CP) at 37 (emphasis added). Koenig's trial briefing indicated an "agree[ment] that the SSOSA psychological evaluation is an 'investigative record.'" CP at 257. In his appellate brief, Koenig stated he "[a]ssume[d], *arguendo*" that the SSOSA evaluation is investigative and did not make any argument to the contrary. Br. of Appellant at 29. The Court of Appeals agreed with Koenig that the SSOSA evaluation is investigative. *Koenig v. Thurston County*, 155

Wn. App. 398, 412-13, 299 P.3d 910 (2010) ("Koenig assumes that a SSOSA evaluation is an investigative record compiled by law enforcement . . . . We agree."). Koenig did not assign error to this conclusion nor did he raise the issue in his answer and cross petition for review.

Under RAP 13.7(b), this court will not consider issues not raised in the petition for review or the answer: "If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in . . . the petition for review and the answer." *See also Wood v. Postelthwaite*, 82 Wn.2d 387, 388-89, 510 P.2d 1109 (1973). We also decline to address issues that are not adequately briefed by the parties. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (This court "will not review issues for which inadequate argument has been briefed or only passing treatment has been made."). Because Koenig conceded that the SSOSA evaluation is an investigative record, Thurston County did not have reason or opportunity to brief the issue. Nor did the court request additional briefing on the matter. *See* RAP 12.1(b). Nevertheless, the majority concludes the SSOSA evaluation is not exempt from disclosure by answering a question that

was not properly presented to the court.

If the issue were appropriately before us, we must conclude the SSOSA evaluation is an investigative record. I agree with Justice Chambers that, for PRA purposes, there is little difference between the SSOSA evaluation at issue here and the sentencing mitigation package in *Cowles Publishing Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 508, 45 P.3d 620 (2002). Both were compiled by the prosecutor's office to use in its investigation into an appropriate sentence for incorporation into a final judgment and sentence.

B. *The VIS*

Amendment 84 enshrined the rights of victims in the Washington State Constitution. Article I, section 35 declares, "Effective law enforcement depends on cooperation from victims of crime" and demands that victims of crime be treated with "due dignity and respect." Wash. Const. art. I, § 35. To implement this constitutional objective, RCW 7.69.030(13) provides victims the right to prepare a VIS, with assistance from the prosecutor's office if requested. Courts are required to consider the victim's statement at sentencing. *See* RCW 9.94A.500(1) ("The court shall consider . . . any

victim impact statement."). The VIS typically reveals personal details showing the extent of harm caused by the defendant and the crime's effect on the victim. In this case, the record shows the Thurston County Prosecutor's Office routinely requested a VIS from victims for its own sentencing investigations. CP at 278.

The majority rejects any similarities between the sentencing mitigation package in *Pierce County Prosecutor's Office* and the VIS in this case. Admittedly, both were submitted to the prosecutor for the same reason. In the majority's words, in *Pierce County Prosecutor's Office* "[t]he prosecutor relied on the mitigation package to investigate the defendant's background and family *as part of a larger investigation into an appropriate penalty*." Majority at 7 (emphasis added). Inexplicably, the majority can discern the investigative nature of determining an appropriate penalty in the context of a capital case but not in a sexual assault case. It appears to reach this conclusion based on rigid adherence to a timeline under which only pretrial activities can be "investigative." *See id*. According to the majority, because the decision to seek the death penalty is a "charging decision" made before trial, files related thereto are investigative. Majority at 8. Records related to

any lesser penalty are apparently not "investigative" because they may be considered postconviction. This distinction is nonsensical; the VIS and the mitigation package are compiled and used by the prosecutor for the very same purpose—to investigate an appropriate penalty. The VIS undoubtedly may also affect the charging of a crime and whether to accept a guilty plea to a lesser crime. I join Justice Chambers' opinion that both the VIS and the SSOSA evaluation must be viewed as investigative records. *See* dissent (Chambers, J.) at 4.

C. *The Appropriate Inquiry Is the Reason the Records were Compiled, Not How They Are Ultimately Used*

The majority concludes, "when applying the investigatory records exemption, a court must find that an investigative entity is compiling *and using* the relevant record to perform an investigative function." Majority at 12 (emphasis added). This statement illustrates the confusion leading the majority to its conclusion. "Specific investigative records" are not defined as such based on their *use*. Rather, a record is deemed investigatory solely based on the purpose for which it is compiled. *See Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (defining "specific investigative records" as those "'*compiled as a result of a specific investigation* focusing with

special intensity upon a particular party'" (emphasis added) (quoting *Laborers Int'l Union of N. Am., Local No. 374 v. City of Aberdeen*, 31 Wn. App. 445, 448, 642 P.2d 418 (1982)), *abrogated on other grounds by Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 257-58, 884 P.2d 592 (1994)). If a record is compiled as part of a specific investigation, it is considered a "specific investigative record" regardless of how it is later used.[2]

Furthermore, a document created for one purpose may be compiled for a different, investigatory purpose. *Newman v. King County*, 133 Wn.2d 565, 572-73, 947 P.2d 712 (1997). The majority fails to distinguish the reasons SSOSA evaluations and VISs are created in the abstract from the reasons they were compiled by the prosecutor's office in this case. True, a VIS can be a mode of catharsis for the victim, giving the victim a voice in the sentencing process. A SSOSA evaluation informs the sentencing court

[2] The majority cites only *Pierce County Prosecutor's Office* for the proposition an investigative record must be relied upon as "part of an investigation that the prosecutor conducts." Majority at 9 (citing *Pierce County Prosecutor's Office*, 111 Wn. App. at 508). Yet, the cited case contains no language suggesting an investigative record must be used or relied upon to be investigative. Instead, it declares the same standard set forth in *Dawson v. Daly:* an investigative record is one "'compiled as a result of a specific investigation focusing with special intensity upon a particular party.'" *Pierce County Prosecutor's Office*, 111 Wn. App. at 507 (internal quotation marks omitted) (quoting *Dawson*, 120 Wn.2d at 792-93).

whether a defendant is eligible for treatment and reduced jail time as part of the SSOSA program. *See* RCW 9.94A.670(4), (5). Yet, despite some noninvestigatory functions of the VIS and SSOSA evaluation, the copies of the VIS and SSOSA evaluation *compiled by the prosecutor's office* were investigatory in purpose: They were sought out and collected as part of the prosecutor's sentencing investigation. When the focus is properly shifted to the motivation for compiling the documents, the SSOSA evaluation and VIS cannot be seen as anything other than investigatory.

II. Nondisclosure Is "Essential to Effective Law Enforcement or For the Protection of Any Person's Right to Privacy"

A. *Redaction of Victim Identifying Information from the VIS Is Essential Because Disclosure Would Have a Chilling Effect on Victim Cooperation with Law Enforcement*

Justice Chambers' dissent concludes disclosure of an unredacted VIS would violate victims' privacy rights.[3] I agree, but submit that we need not reach the privacy prong of RCW 42.56.240(1) because nondisclosure of unredacted VISs must be held "essential to effective law enforcement."

The legislature has not specifically defined the parameters of the "essential to law enforcement" exception. When interpreting a statute, our

[3] The privacy rights of third parties, such as prior victims of the same defendant, may also be implicated.

aim is to give effect to the intent of the legislature, beginning with the statute's plain language. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). The plain language of RCW 42.56.240(1) does not convey that the exemption only applies if law enforcement would cease to function were the documents in question disclosed. If this were the standard, the provision would simply exempt records, the nondisclosure of which is "essential to law enforcement." Instead, the exemption asks whether nondisclosure is "essential to *effective* law enforcement." RCW 42.56.240(1) (emphasis added). In other words, it matters whether the *effectiveness* of law enforcement would be compromised by disclosure.

Effective law enforcement is thwarted without victim cooperation. The people amended our constitution, in part, to make this clear. Article I, section 35 of the Washington State Constitution now provides, "Effective law enforcement *depends* on cooperation from victims of crime." (Emphasis added.) In *Brouillet v. Cowles Publishing Co.*, this court defined "law enforcement" to include the "imposition of sanctions for illegal conduct" or the "imposition of a fine or prison term." 114 Wn.2d 788, 795-96, 791 P.2d

526 (1990) (quoting in part Black's Law Dictionary 474 (5th ed. 1979)). Simply put, law enforcement includes sentencing, and a criminal case is not final until the entry of a judgment and sentence. Effective sentencing requires information regarding the severity of the crime, including its effect on the victim. *See* RCW 9.94A.010(1), .500(1). VISs are a key source of this information and thus must be painfully accurate and truthful to assist in the sentencing process. VISs may also affect the charging and plea process, as previously noted.

To ascertain whether a record is essential to law enforcement, a court must consider affidavits submitted by those with knowledge of and responsibility for an investigation. *Newman*, 133 Wn.2d at 573. The county submitted a number of sworn statements attesting that VISs would not be complete and accurate or available at all if they were publically accessible. These sworn statements were not controverted. Elizabeth Timm Andersen, the author of the VIS that Koenig sought in this case, unequivocally stated:

> I would *not* have provided a Victim Impact Statement if I had been told that the statement would be a public document to be given to any and all who asked for it.

CP at 126. Catherine A. Carroll, legal director at the Washington Coalition

of Sexual Assault Programs, stated:

> [I]f Victim Impact Statements were subject to public disclosure many victims of sexually violent crimes would not participate in the criminal justice system in any meaningful way.

CP at 117. According to David L. Johnson, executive director of the Washington Coalition of Crime Victim Advocates:

> Guaranteeing victims some sense of privacy is absolutely essential in enlisting their cooperation with the system . . . Victim Impact Statements are a very crucial part of the sentencing process.

CP at 123. Jon Tunheim, Thurston County prosecuting attorney, declared:

> For many years, this office has taken a "victim centered" approach to prosecution. As part of that philosophy, I believe that a victim's privacy must be closely guarded and only compromised when necessary in the interests of justice. To do otherwise, in my view, creates a chilling effect on the willingness of victims to report crime, provide information and cooperate with the prosecution. Therefore, the protection of victim privacy is critical to the effectiveness of law enforcement and the criminal justice system. Furthermore, the legislature (RCW 7.69.010) has mandated that prosecuting attorneys vigorously protect the rights of crime victims which include the right to be treated with dignity, respect, courtesy and sensitivity. If I have knowledge that anything a victim may provide will be handed over to the public through a public disclosure request, this office will inform the victim of that possibility. It is my opinion that if a victim knows this, he or she will be unwilling to provide a true and accurate impact statement.

CP at 105-06. Kim H. Carroll, victim advocate for the Thurston County

Prosecuting Attorney's Office, presented a similar view:

> A victim should have the expectation of privacy. They have been violated enough by the act of the offender, but to know their raw emotions and most painful experiences as described in their own words could be released to the public upon a simple request, could lead the victim to decide not to make an impact statement. Such a result could seriously hinder investigations, prosecutions, and hope of recovery. . . . Asking a crime victim to provide a Victim Impact Statement and letting them know it would be available to anyone that asks for it would create a situation where crime victims would not be willing to provide intimate details of the true impact to their lives. . . . This has a tremendous negative impact on effective law enforcement.

CP at 277-78.

As these declarations establish, VISs would not be painfully accurate and some would not be available for sentencing purposes if available to the public at large. Effective law enforcement demands that these important sentencing tools be obtainable and that victims be encouraged to engage in the criminal justice system. *See Cowles Publ'g Co. v. State Patrol*, 109 Wn.2d 712, 736, 748 P.2d 597 (1988) (holding the names of officers under investigation were exempt as "essential to law enforcement" because disclosure would have a chilling effect on reporting of misconduct); *Tacoma News, Inc. v. Tacoma-Pierce County Health Dep't*, 55 Wn. App. 515, 522, 778 P.2d 1066 (1989) ("Disclosing the identities of sources will discourage

potential sources from providing important information in the future, and will therefore frustrate the investigative process.").

Koenig submitted no evidence to counter the county's declarations regarding the role of VISs in sentencing. Instead, he argues nondisclosure of VISs is not essential because a victim has discretion over what to include in her statement—if the victim does not want certain information released, she can leave it out (even if it is relevant and important). This argument ignores the important role of a candid VIS in sentencing. Even more importantly, requiring victims to censor their statements to eliminate the most chilling—and likely the most important—details would not show them the "due dignity and respect" required by our constitution. Wash. Const. art. I, § 35; *see also* RCW 7.69.010 (declaring the legislature's intent that crime victims be treated with "dignity, respect, courtesy, and sensitivity" and that victim's rights are "honored and protected by law enforcement agencies, prosecutors, and judges").

Koenig also contends the confidentiality of a VIS is not essential because the victim may ultimately make a statement in open court. However, the VIS may contain additional details not shared in court and may be the

only vehicle through which the victim will candidly explain the crime's impact. Koenig's "open courts" argument also ignores the distinction between court records—to which the public has a common law right of access—and records compiled by the prosecutor's office for an investigatory purpose—which are exempt from disclosure under the PRA. *See Nast v. Michels*, 107 Wn.2d 300, 303, 730 P.2d 54 (1986).

The county argues complete nondisclosure of the VIS is required. Koenig counters, even if the VIS contains some exempt information, the public must have access to a redacted version. RCW 42.56.210(1) provides that PRA exemptions "are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought."

In *Koenig v. City of Des Moines*, a case involving records of child sexual abuse, we held only the victim identifying information could be redacted. 158 Wn.2d 173, 189, 142 P.3d 162 (2006). The remainder of the records, including "sexually explicit details," was subject to disclosure. *Id.* We explained:

> [E]ven if such records do contain sexually explicit information potentially deterring victims and their families from cooperating with law enforcement, that effect is negated by the fact these

> details cannot be connected to a specific victim.

Id. at 187. Release of redacted records was required even though a victim's identity could conceivably be established through other sources:

> The fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public's interest in information regarding the operation of the criminal justice system illegitimate or unreasonable.

Id.; *see also Tacoma News*, 55 Wn. App. at 524 ("So long as the identities of complainants and witnesses are not revealed, disclosure of the facts alone will not have a 'chilling effect' on the investigation and enforcement process.").

It may be that disclosure of a carefully redacted VIS would not always thwart effective law enforcement. The chilling effect of expected public disclosure will remain, only slightly ameliorated, by removing identifying details. *See Koenig v. City of Des Moines*, 158 Wn.2d at 187. Therefore, in some cases, while redaction of victim identifying information from VISs may help ensure the victim participation that is essential to law enforcement, some portions could be disclosed. Clearly, however, the majority opinion—by requiring disclosure of a complete and unredacted VIS—will impermissibly deter the victim contribution to law enforcement that our constitution deems

essential.

B. *Redaction of Health Care Information and Information Identifying Third Parties from the SSOSA Evaluation Is Essential to Protect Privacy Rights*

Whether nondisclosure of a SSOSA evaluation is essential to effective law enforcement leaves more room for dispute. As Koenig and the Court of Appeals recognized, defendants have considerable incentives to participate in the SSOSA program, including the possibility of receiving a significantly reduced jail term. *Koenig v. Thurston County*, 155 Wn. App at 415-16; RCW 9.94A.670(5). These incentives could outweigh any chilling effect that would result from disclosure. Moreover, the success of the SSOSA program is still a matter of debate. But, because disclosure of a SSOSA evaluation implicates the privacy rights of other parties and contains private information regarding sexual or personal matters, I join Justice Chambers' conclusion that portions of the SSOSA evaluation are exempt under the privacy prong of RCW 42.56.240(1). Dissent (Chambers, J.) at 6.

This conclusion is bolstered by the fact a SSOSA evaluation contains private "health care information" in which the public has no legitimate interest. RCW 70.02.010(7) ("'Health care information' means any

information . . . that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care.").[4] In enacting the Uniform Health Care Information Act, chapter 70.02 RCW, in 1991, the legislature found that "[h]ealth care information is personal and sensitive information that if improperly used or released may do *significant harm to a patient's interests in privacy*, health care, or other interests." RCW 70.02.005(1) (emphasis added). Even if health care information is held by a public agency (such as a prosecutor's office), the patient does not lose his or her privacy interest in the medical information therein. RCW 70.02.005(4) ("It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.").

To qualify as health care information, a record must contain two elements—patient identity and information about the patient's health care. *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 645, 115 P.3d

[4] The Court of Appeals declined to address whether information contained in a SSOSA evaluation is "health care information," stating the record on appeal was not sufficiently developed. The court seems to have misinterpreted the county's argument. The county does not assert that the SSOSA evaluation is independently exempt from disclosure under the Uniform Health Care Information Act, chapter 70.02 RCW. Instead, the provisions of the act bolster the county's position that the SSOSA evaluation contains private information in which the public has no legitimate interest.

316 (2005). The SSOSA evaluation meets these criteria. Obviously, a SSOSA evaluation is linked to a specific patient—the sex offender. Others may also be discussed—including children. The SSOSA evaluation record also relates to the patient's health care, defined as "any care, service, or procedure provided by a health care provider . . . [t]o diagnose, treat, or maintain a patient's physical or mental condition." RCW 70.02.010(5)(a). The SSOSA evaluation is conducted by a certified sex offender treatment provider to diagnose the offender's mental and physical condition and propose a treatment plan. *See* CP at 100-03.

There is no dispute that disclosure of information in a SSOSA evaluation would be highly offensive to a reasonable person. The critical question is whether the public has a legitimate interest in the details of a SSOSA evaluation. Public interest in a given piece of information is not legitimate "where 'the public interest in efficient government could be harmed *significantly more* than the public would be served by disclosure.'" *Koenig v. City of Des Moines*, 158 Wn.2d at 185 (quoting *Dawson*, 120 Wn.2d at 798).

In order for a SSOSA evaluation to be accurate, the patient must feel

free to reveal highly personal information to a treatment provider. The sex offender treatment provider who conducted the SSOSA evaluation in this case avowed:

> It would be counterproductive to community safety for the SSOSA evaluations to become open to the public. It would make my job extremely difficult if not impossible to do. It is difficult to elicit and encourage the disclosure of sensitive information. It is essential the client undergoing a SSOSA evaluation be encouraged to be fully disclosing of vital sensitive information. Public disclosure would enable withholding and reduces the likelihood of discovery of additional victims and cause the victimization of innocent persons noted in the evaluation as well as the client.

CP at 103. The SSOSA program, the effective treatment of sex offenders, and the public interest in preserving the confidentiality of medical records would be significantly undermined by the threat of disclosure. These harms render any public interest in health care information contained in a SSOSA evaluation unreasonable. *See Dawson*, 120 Wn.2d at 799 ("[I]n light of the potential harm disclosure could cause, we hold that *legitimate* public *concern* is lacking in this case. . . . [D]isclosure could cause even greater harm to the public by making supervisors reluctant to give candid evaluations.").

A SSOSA evaluation may also identify the sex offender's current and past sexual partners, prior victims, and family members. CP at 101. The

public has no legitimate interest in information identifying these third parties. *See Pierce County Prosecutor's Office*, 111 Wn. App. at 510 ("[T]he family's privacy interests outweigh any public interest in the basis for the prosecutor's decision."). Furthermore, as discussed above in the context of VISs, disclosure of victim identities would have an intolerable chilling effect on victim cooperation with law enforcement. *See also* Daniel M. Murdock, Comment, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 Ala. L. Rev. 1177, 1177 (2007) (Rape is underreported largely because victims fear the public disclosure of their identities.). Thus, information in the SSOSA evaluation that reveals the identities of innocent third parties is not subject to disclosure.

The county argues nondisclosure of the entire SSOSA record is required because redaction of the exempt information would leave "little to disclose," citing *Pierce County Prosecutor's Office*, 111 Wn. App. at 511. As addressed above, the PRA demands that exempt information be redacted if possible. While exempt information may make up the majority of the SSOSA report, any other information is subject to disclosure. The public has a legitimate interest in the ultimate disposition of a SSOSA evaluation but not

in the defendant's specific, detailed health care information or the identities of third parties. I would therefore hold the county may redact these particulars from the SSOSA evaluation to protect defendants' and third parties' privacy rights.

Conclusion

The PRA ensures agency accountability by demanding that the public be able to bear witness to the inner workings of government through public access to most records. This policy is not furthered by public disclosure of highly private information regarding nongovernment actors, especially victims of crime specifically protected by our constitution. By failing to appreciate this distinction, the majority orders disclosure of extremely sensitive information, including the identities of victims and specifics of their victimization. This is especially important for victims of violence and sexual abuse who are brave enough to assist law enforcement. Through purported adherence to the PRA's directive that exemptions be "narrowly construed," the majority nearly reads the investigative records exemptions out of existence. Ironically, the majority also disregards Koenig's express characterization of these documents he requested as "investigative records."

The majority's decision will discourage victims of crime from participating in law enforcement and compel government agencies to commit gross privacy violations. The PRA does not require this result, but since it is the result reached by the majority, it is up to the legislature to make the investigative records exemptions to the PRA even clearer. I dissent.

AUTHOR:

Justice James M. Johnson

WE CONCUR:

Justice Charles K. Wiggins