No. 84940-4

CHAMBERS, J. (dissenting) – I do not believe the people or the legislature intended that the most sensitive information of victims of a crime, especially a sex crime, should be revealed to newspapers and the public, causing victims to be victimized all over again. But the majority holds that a victim impact statement (VIS) and a special sex offender sentencing alternative (SSOSA) evaluation are not investigative records and therefore have no protection at all under the Public Records Act (PRA), chapter 42.56 RCW. As a result, the information cannot even be redacted to protect a victim from publication of the victim's identity and sordid details of the crime. Because I think this holding goes too far, I respectfully dissent.

The PRA exempts from disclosure investigative records compiled by law enforcement agencies. RCW 42.56.240(1). Such records are exempt if nondisclosure is essential (1) to effective law enforcement or (2) for the protection of any person's privacy. *Id.* A person's privacy is violated by disclosure if the information "(1) [w]ould be highly offensive to a reasonable person" and "(2) is not of legitimate concern to the public." RCW 42.56.050.

a. VIS

Instead of engaging in an analysis of either the effective law enforcement or privacy prongs of the PRA investigative records exception, the majority holds that the VIS and SSOSA evaluation are not investigative records. The majority first attempts to distinguish the VIS. It states that a VIS is not an investigative record

because it does not relate to ferreting out criminal activity and because it is not like a mitigation package. Majority at 6-9. Neither of these arguments holds up to scrutiny.

As the majority points out, we have held that a cross-examination of a defense witness prepared by the prosecution was not an investigative record. *Dawson v. Daly*, 120 Wn.2d 782, 792-93, 845 P.2d 995 (1993), *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). We explained that an investigative record was a record "'compiled as a result of a specific investigation focusing with special intensity upon a particular party.'" *Dawson*, 120 Wn.2d at 792-93 (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)). We further explained that the investigation had to be "'designed to ferret out criminal activity or to shed light on some other allegation of malfeasance.'" *Id.* at 793 (quoting *Columbian Publ'g Co. v. City of Vancouver*, 36 Wn. App. 25, 31, 671 P.2d 280 (1983)). We ultimately held the documents in *Dawson* were not investigative records in part because there was no criminal investigation focusing on the defense witness. *Id.*

Dawson is factually distinct from this case. In *Dawson*, the documents were not investigative because they had no specific connection to the case against the defendant. Rather, the documents were "compiled for use in cross-examining an 'expert' witness (the requesting citizen) who frequently testifies as a defense witness in child sexual abuse cases prosecuted in Snohomish County." *Id.* at 786-

87. They were prepared by the Snohomish County prosecutor's office "for use in challenging his qualifications, in cross-examining him, and in attempting to impeach him when he appears as a defense witness in child sexual abuse prosecutions." *Id.* at 787. One of the requested files, for example, had been used "in preparing for two previous prosecutions." *Id.* The *Dawson* documents thus did not fit the definition because they were not prepared as a result of any particular investigation but as a result of dealing with a particular expert witness over the course of multiple cases. The VIS at issue here, on the other hand, was created as a result of a specific investigation focusing on a particular party. That is how we have defined "investigative record." *Id.* at 792-93.

The majority also distinguishes the VIS from a mitigation package, which our Court of Appeals has held is an investigative record. *Cowles Publ'g Co. v. Pierce County Prosecutor's Office*, 111 Wn. App. 502, 508, 45 P.3d 620 (2002). The majority implies that a prosecutor is required to consider a mitigation package in capital cases before making a decision whether to seek the death penalty. Majority at 7-8. On the contrary, although a prosecutor is required to make an individualized determination, there is no requirement that a prosecutor must consider a mitigation package. *State v. Pirtle*, 127 Wn.2d 628, 642, 904 P.2d 245 (1995). Like the VIS, the evidence in a mitigation package may be considered at the penalty phase, after the prosecutor has made a charging decision. *See id.* at 671 (defendant may introduce mitigating evidence at the special sentencing proceeding). In reality, there is little practical difference for PRA purposes between a mitigation package,

wherein a defendant collects information intended to affect sentencing, and a VIS, which a court "shall consider" during the sentencing phase. RCW 9.94A.500(1). Both are compiled as a result of an investigation of criminal activity focusing on a particular party. *Dawson*, 120 Wn.2d at 792-93. Ultimately both are intended to affect the sentence. I would therefore hold both are investigative records.

Concluding the VIS in this case is an investigative record does not end the inquiry. Investigative records are exempt only if nondisclosure is essential either to effective law enforcement or for the protection of any person's privacy. RCW 42.56.240(1). Disclosure is prohibited under the privacy prong if disclosure of the information would be highly offensive to a reasonable person and the information is not of legitimate concern to the public. RCW 42.56.050. There is no doubt that disclosure to the public of the victim's identifying information and the impact of sex related crime on the victim's personal life would be highly offensive to a reasonable person. The first prong of the privacy test is satisfied under these circumstances.

We have said that to determine the second prong—whether the information is of legitimate concern to the public—courts must weigh the public interest in efficient government against the public interest in disclosure. *Dawson*, 120 Wn.2d at 798-99. This analysis is not always easy. The public interest in disclosure arises because the public has an interest "'in knowing what their public officers are doing in the discharge of public duties.'" *Id.* (quoting *Stone v. Consol. Publ'g Co.*, 404 So. 2d 678, 681 (Ala. 1981)). But the VIS is only tangentially related to what public officers are doing. It is a document created by the victim of a crime that

explains the impact of the crime on the personal life of the victim. It bears so little relationship to the monitoring of government officials by the public that it is difficult to apply the standard we have established. An approach based upon the plain language of the statute suggests that the public does not have a legitimate interest in the continuing effects of a crime on a victim's personal life. *See* RCW 42.56.050.

Some parties in this case have argued the public has a legitimate interest in monitoring how a VIS impacts sentencing. *E.g.*, Br. of Appellant at 22. But even if a VIS contained some information in which the public has a legitimate interest, the PRA provides for redaction of other information that is not of legitimate interest. RCW 42.56.210. Information in the VIS that identifies or enables identification of the victim is plainly exempt and must at the very least be redacted.

b. The SSOSA Evaluation

A similar analysis applies to the SSOSA evaluation. The majority states that a SSOSA evaluation is not an investigative record because it was not prepared in an effort to ferret out criminal activity. Majority at 10. But, again, that is not our definition of an investigative record. An investigative record is one that is created as a result of a specific investigation focusing on a particular party. *Dawson*, 120 Wn.2d at 792-93. It is the investigation, not the record itself, we require to be for the purpose of ferreting out criminal activity. *Id.* at 793. Further, the similarities between a SSOSA evaluation and a mitigation package are even more striking than in the case of a VIS. Both a SSOSA evaluation and a mitigation package are prepared by digging deep into the personal life of the defendant, and both are

presented to the prosecutor and the court for the purpose of affecting the sentence in a manner favorable to the defendant. I would hold that the SSOSA evaluation is also an investigative record.

Like the VIS, serious privacy concerns are implicated by the release of a SSOSA evaluation to the public. These SSOSA evaluations contain, among other things: a detailed sexual history section; mental health history; medical history; drug and alcohol history; a social history section which may contain details of "abuse the individual may have suffered in the past, including physical, sexual, and emotional abuse;" results of a polygraph examination, which may be "extremely detailed" regarding past and current sexual practices; and results of a phallometric test that measures the defendant's arousal response to a variety of pornography. Clerk's Papers at 112 (Decl. of Amy Muth). Making public much of this information would be highly offensive to a reasonable person, and the legitimacy of the public's interest in this information is minimal. *See* RCW 42.56.050.

The problems that arise when we attempt to apply the PRA to ever expanding types of information and documents are well illustrated by the present case. The PRA was a great idea. Unfortunately, too many terms are undefined. This court has followed the legislative command to interpret the PRA liberally and its exceptions narrowly, and the result is that the few protections found in the PRA have been steadily eroded. We have now reached the point where it is not even possible to redact the name of a sex crime victim from material provided to the public. This dissent does not have the force of law. Only the legislature can amend the act and

establish appropriate protections. I urge the legislature to do so.

AUTHOR:
Justice Tom Chambers

WE CONCUR: