

# SEX OFFENDER POLICY BOARD

Analysis on Relationship Between Chapter 42.56 RCW and RCW  
4.24.550

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## Introduction

In 2015, the legislature passed SSB 5154 Sec. 16, which tasked the Sex Offender Policy Board (SOPB) with reviewing the public disclosure of information compiled and maintained for sex offender and kidnapping offender registries. Because this information is currently held by public agencies, it necessarily requires an analysis of the relationship between chapter 42.56 RCW and RCW 4.24.550.

This paper accomplishes several tasks: it identifies certain offender information held by agencies that is either considered “public” or is specifically addressed by RCW 4.24.550; it briefly reviews the legal principles governing public disclosure of offender information, including Chapter 42.56 RCW and RCW 4.24.550, and it presents some of the legal arguments from *Doe v. Washington State Patrol*<sup>1</sup>, currently pending in the Washington State Supreme Court, which involves the Public Records Act as it applies to sex offender information held by specific public agencies. Finally, it contextualizes the Board’s legislative assignment within this legal and policy framework.

## Sex and Kidnapping Offender Registration Information Held by “Public Agencies”

There are various forms of sex offender information, which reside in multiple locations. This information is required by different statutes, most notably RCW 9A.44.130, which pertains to registration of sex offenders and kidnapping offenders.

An offender who is required to register pursuant to RCW 9A.44.130 must, in some format, provide to the county sheriff: name, any aliases used, accurate residential residence or if lacking a fixed residence, where he or she plans to stay, date and place of birth, place of employment, crime for which he or she has been convicted, date and place of conviction, social security number, photograph, and fingerprints.<sup>2</sup> The registrant must also provide the sheriff with an accurate accounting of where he or she stayed during the week during if he or she lacks a fixed residence.<sup>3</sup> If a person subject to registration requirements applies to change his or her name pursuant to RCW 4.24.130, he or she must provide the sheriff with a copy of the application.<sup>4</sup>

The county sheriff is required to send this registration information, photographs, fingerprints, risk level notification, and any change of address to the Washington State Patrol (WSP).<sup>5</sup> The WSP is required to maintain a central registry of sex offenders and kidnapping offenders who are required to register pursuant to RCW 9A.44.130.<sup>6</sup> WSP acts as a repository for the sex offender registration forms submitted by the county sheriffs for retention and enters

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<sup>1</sup> Laws of 2015, ch. 261 § 16.

<sup>2</sup> RCW 9A.44.130(2)(a).

<sup>3</sup> RCW 9A.44.130(5)(b).

<sup>4</sup> RCW 9A.44.130(6).

<sup>5</sup> RCW 43.43.540(1).

<sup>6</sup> RCW 43.43.540(2).

the registration data from these “source documents” into the database.<sup>7</sup> These documents also include the offender’s current risk level classification; it is unknown whether the WSP maintains any documents in support of the classification decision such as the completed classification tool or records related to discretionary leveling decisions. WSP asserts that the State Patrol Database only includes the offender’s name, residential address, date of birth, crime for which he or she was convicted, date of conviction, and county of registry.<sup>8</sup> The amount of information available to law enforcement is not simply what is shown on the website, it includes all related information and documentation maintained by law enforcement and it is unclear what is encompassed in the “source documents” referenced by WSP.

In addition to this legislative mandate, RCW 4.24.550 requires the Washington Association of Sheriffs and Police Chiefs (WASPC) to, subject to funding, maintain a statewide registered kidnapping and sex offender web site that is available to the public.<sup>9</sup> The website is required to post information regarding: all Level II and Level III offenders, Level I offenders who are out of registration compliance, and all kidnapping offenders.<sup>10</sup> Although WASPC stresses that they are not generally a state agency subject to the Public Records Act, they agree that pursuant to specific legislative mandate, they maintain a defined public database with the information in the database constituting a public record.<sup>11</sup>

Although law enforcement agencies are primarily responsible for maintaining registration information, many other public agencies are responsible for initial risk classification and notifications. Other agencies that may maintain sex offender registration information include, but are not limited to, the Department of Social and Health Services, the Juvenile Rehabilitation Administration, the Department of Corrections, the Special Commitment Center, as well as other agencies that may provide services to offenders, which require the use of sex offender information. As governmental entities, these agencies are subject to the provisions of the Public Records Act.

## **Washington’s Public Records Act (Chap. 42.56 RCW)**

The Public Records Act began as “The Public Disclosure Act” in 1972 when voters adopted Initiative 276, which required documents that were maintained by city, county, and state government, and all special purpose districts, to be made available to the public. In 2006, the statutes were recodified from Ch. 42.17 RCW to Ch. 42.56 RCW and are now referred to as the Public Records Act (PRA). Construction of the chapter shall be as follows:

...This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to insure the

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<sup>7</sup> Brief of Appellant Washington State Patrol at 1, John Doe A, et al v. Washington State Patrol et al, No. 90413-8.

<sup>8</sup> Washington State Patrol’s Answer to Amicus Brief at 1-2, John Doe A, et al v. Washington State Patrol et al, No. 90413-8.

<sup>9</sup> RCW 4.24.550(5)(a).

<sup>10</sup> *Id.*

<sup>11</sup> Brief in Response Washington Association of Sheriffs & Police Chiefs (“WASPC”) at 8, John Doe A, et al v. Washington State Patrol et al, No. 90413-8.

public interest will be fully protected. 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. Primary exemptions to the statute are found in RCW 42.56.230-42.56.480. RCW 42.56.070(1) provides, in part,

Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of \*subsection(6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records.

Washington state courts continue to liberally construe Chap. 42.56 RCW, having decided several cases that reinforce the broad application of disclosure of records and limit the exemptions. In *Cowles Publishing Co. v. Spokane*,<sup>12</sup> the court held that the “investigative records” exception to the PDA does not provide a categorical exemption from disclosure to police investigative records where the suspect is arrested and referred to the prosecutor. The court has also found that documents related to an investigation of allegations made against school employees did not fall within the investigative records exemption of the PRA<sup>13</sup> and the identifying details of a port employee who was under an investigation was unlawfully redacted from the investigative report.<sup>14</sup> The court in *Koenig v. Thurston County*<sup>15</sup> held that certain documents held by the prosecutor’s office, specifically Special Sex Offender Sentencing Alternative (SSOSA) evaluations and victim impact statements are not exempt from disclosure under the investigative records exemption under the PRA.

By contrast, the Supreme Court has ruled that a juvenile’s Special Sex Offender Disposition Alternative (SSODA) evaluation did not belong in the official juvenile court file and was therefore not subject to disclosure.<sup>16</sup> This case did not address any issues directly related to the Public Records Act; however, the court based its opinion on an examination of RCW 13.50.050(3), which requires that all records of a juvenile offender must be kept confidential unless they are a part of the official court file or meet another statutory exemption. This spirit of open disclosure contained in the Public Records Act is not always compatible with the need for certain information to be confidential. For this reason, the PRA provides that the disclosure of information may be limited by “other statutes.”<sup>17</sup>

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<sup>12</sup> 139 Wn.2d 472 (1999),

<sup>13</sup> *Predisik v. Spokane School District No. 81*, 182 Wn.2d 896 (2015).

<sup>14</sup> *West v. Port of Olympia*, 183 Wn. App. 306 (2014).

<sup>15</sup> 175 Wn.2d 837 (2012).

<sup>16</sup> *State v. A.G.S.*, 182 Wn.2d 275 (2014).

<sup>17</sup> See RCW 2.64.111, RCW 2.64.11, RCW 5.60.060, RCW 5.60.070, RCW 7.68.140, RCW 9A.82.170, RCW 10.77.210, among others.

## **Release of Offender Information to the Public under RCW 4.24.550**

RCW 4.24.550, pertaining to the release of information regarding sex and kidnapping offenders, authorizes public agencies to release offender information under certain circumstances. The statute does not specifically prohibit disclosure of offender information and in fact asserts that information under the section should not be considered confidential except otherwise provided for by law.<sup>18</sup> However, it also sets forth narrowly tailored criteria for the release of offender information based on who is releasing it and what information is to be released. The plain language of RCW 4.24.550, as well as case law, suggests that it was intended to provide disclosure guidelines to those who create, receive and maintain sex and kidnapping registration information.

### **Web site disclosure of sex and kidnapping offender information**

The criteria to disclose information on the publicly accessible web site maintained by WASPC is statutorily defined by RCW 4.24.550(5)(a). It requires information related to level III, level II, level I non-compliant offenders, and kidnapping offenders who are required to register pursuant to RCW 9A.44.130 to be available to the public via the web site. The published information includes name, relevant criminal convictions, address by hundred block, physical description and photo.

### **Public agency disclosure of sex and kidnapping offender information**

Pursuant to RCW 4.24.550(1): public agencies are authorized to release information to the public regarding sex and kidnapping offenders only when the agency determines that disclosure is relevant and necessary to protect the public and counteract the danger created by the particular offender in addition to the information which is released via the web site. The plain language of this provision indicates that a public agency is authorized to release information, other than what is available on the web site, only after this individualized assessment is made.

RCW 4.24.550(2) further limits the extent of the public disclosure of the “relevant and necessary” information, providing that such disclosure shall be rationally related to risk level, locations where the offender resides or is regularly found, and the needs of affected community members to enhance safety.

### **Local law enforcement disclosure of offender information**

The extent of disclosure of offender information made by local law enforcement, aside from the information available via the public web site, is predicated on the agencies’ consideration of risk level of the offender. The statute provides guidelines for dissemination of information based on risk level and other considerations.<sup>19</sup> The county sheriff with whom a level III offender is registered is required to publish a legal notice, advertising or a news release that conforms to the guidelines specified in RCW 4.24.5501.

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<sup>18</sup> RCW 4.24.550(9).

<sup>19</sup> RCW 4.24.550(3).

## Judicial Interpretation of RCW 4.24.550

In *State v. Ward*,<sup>20</sup> the court extensively discussed the limited public disclosure provisions related to sex offender information. The court was asked to review whether retroactively applying the Community Protection Act to felony sex offenses was an ex post facto violation.<sup>21</sup> The court concluded that retroactive application of the statute did not violate either the appellants' equal protection or due process rights under the federal and state constitutions.

A review of the court's analysis in this decision indicates that they considered the statutory framework to be one of "limited disclosure".<sup>22</sup> Their holding concluded:

"We hold, however, that because the Legislature had limited the disclosure of registration to the public, the statutory registration scheme does not impose additional punishment on registrants."

In the decision, the court analyzes the detailed process laid out in RCW 4.24.500, which involves individualized determinations for release of data. To illustrate the importance of an individualized determination, the court uses the example of releasing a social security number of an offender, which may be unnecessary in many cases, but critical where a potential employer must discover the offender's identity and criminal background.<sup>23</sup> The court also discusses determinations of disclosure based on geography as an example of how limited disclosure furthers the Legislature's primary goal of protecting the public while not rising to the level of being an affirmative disability or restraint to the offender.<sup>24</sup> The court's contemplation of these individualized determinations of disclosure in *Ward*, and its reliance on them for the holding in the case, suggests that disclosure of such information has been limited by the legislature the court's active contemplation of limiting disclosure under RCW 4.24.550.<sup>25</sup>

## Legal Issues and Arguments Presented in *Doe v. Washington State Patrol et al*

Another case that addresses the disclosure of offender information, *Doe v. Washington State Patrol et al*,<sup>26</sup> is pending before the Washington State Supreme Court. Although it would be inappropriate to speculate as to the outcome of a pending case, the case requires discussion, as the legislature has required the Board to make findings and recommendations based on the current state of the law.

The factual basis of *Doe* is a public records request, directed to WSP and WASPC, for electronic copies of sex offender registration forms for level I sex offenders whose last names

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<sup>20</sup> 123 Wn.2d 488 (1994).

<sup>21</sup> *Id.* at 495.

<sup>22</sup> *Id.* at 499.

<sup>23</sup> *Id.* at 503.

<sup>24</sup> *Id.* at 500.

<sup>25</sup> A discussion of *State v. Ward*, appears in both the Appellant and Amicus Briefs submitted in *John Doe A, et al v. Washington State Patrol et al*, No. 90413-8.

<sup>26</sup> No 90413-8.

begin with “A” and sex offender registration “files” for offenders whose last names begin with “B”.<sup>27</sup> The requestor later changed her request, asking for a copy of WSP’s database.<sup>28</sup> WSP and WASPC were willing to release the information, as they have routinely released downloads of the database in response to public response requests.<sup>29</sup> After being informed of the pending requests, the subjects of the records filed a request for certification as a class and moved for a blanket, permanent injunction against the release. The injunction was granted by the Superior Court, and is the basis for the appeal.

WSP argues that the requested information is subject to disclosure under the PRA and that the more narrow release provisions contained in RCW 4.24.550 do not apply. Of relevance to this question is whether RCW 4.24.550 is considered an “other” statute under the Public Records Act. The PRA provides that the operation of “other statutes” can prevent release of information otherwise available through the PRA.<sup>30</sup> WSP and WASPC both assert that RCW 4.24.550 should not be considered an “other statute,” which would prevent disclosure of the requested information.<sup>31</sup>

The WSP specifically argues that the affirmative community notification provisions outlined in RCW 4.24.550 do not alleviate its duty to provide public records under Chap. 42.56 RCW. WSP also argues that if the legislature intended to prohibit disclosure, it would have affirmatively prohibited public disclosure as it did for gang databases and the felony firearms database.<sup>32</sup> WSP also asserts that RCW 4.24.550 is an immunity statute for community notification, not an exemption to the Public Records Act.<sup>33</sup>

Alternatively, the Washington Association of Criminal Defense Lawyers (WACDL) argued in its amicus brief that RCW 4.24.550 is an “other statute,” such that an agency must follow the standards it sets forth before releasing offender information.<sup>34</sup> WACDL also argues that if RCW 4.24.550 is not the authority regarding the release of sex and kidnapping offender registration information but rather the PRA, the practical effect would contravene the policy underlying the Community Notification Act.<sup>35</sup> Allowing release of all registration records allows any person to distribute and disseminate the information freely and makes superfluous the narrowly tailored criteria for release.

Whereas the pending case of *Doe* focuses on the case information related to level I offenders and database information maintained by WSP, it is unclear in other instances which

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<sup>27</sup> Brief for The Washington Association of Criminal Defense Lawyers as Amici Curiae Supporting Plaintiffs/Respondents at 2, *John Doe A, et al v. Washington State Patrol et al*, No. 90413-8. *See also* Brief of Appellant Washington State Patrol at 6, *John Doe A, et al v. Washington State Patrol et al*, No. 90413-8.

<sup>28</sup> Brief of Appellant Washington State Patrol at 6, *John Doe A, et al v. Washington State Patrol et al*, No. 90413-8.

<sup>29</sup>*Id.*.

<sup>30</sup> RCW 42.56.070(1).

<sup>31</sup> Brief of Appellant at p. 8-9.

<sup>32</sup> *Id.* at p.11.

<sup>33</sup> *Id.* at pps. 13-17.

<sup>34</sup> Brief for The Washington Association of Criminal Defense Lawyers as Amici Curiae Supporting Plaintiffs/Respondents at 8, *John Doe A, et al v. Washington State Patrol et al*, No. 90413-8.

<sup>35</sup> *Id.* at 3.

records are maintained and disclosed. The amount of information available to law enforcement is not simply what is shown on the website, it includes all related information and documentation maintained by law enforcement and it is unclear what is encompassed in the “source documents” referenced by WSP.

## **The Relationship Between Ch. 42.56 RCW and RCW 4.24.550**

It is important to note that the policy behind the Public Records Act is to allow citizens to maintain control over their government, while the public policy related to release of sex and kidnapping offender information is to further public safety. The actual legal relationship between Ch. 42.56 RCW and RCW 4.24.550 may be decided by the Supreme Court when they issue their decision on *Doe*. Until then, observations can be made based on examination of these statutes together and how other states treat disclosure of registration of information.

## **Liability and Immunity for Disclosure of Offender Information**

The Public Records Act requires a government agency to respond to a request for information within five days. Within that timeframe, an office or agency must either provide the record, an internet link to the information, or an acknowledgement of the request with a predicted time frame of when the agency can respond or deny the request.<sup>36</sup> Although RCW 42.56.060 protects agencies, officials, public employees or custodians from a cause of action related to loss or damage based upon the release of a record if they acted in good faith in an attempt to comply with the chapter,<sup>37</sup> the act has strict penalties for delay or non-disclosure of records.

By contrast, RCW 4.24.550(7) provides immunity from civil liability to public officials, public employees, a public agency as defined in RCW 4.24.470 or units of local government and its employees as provided in RCW 36.28A.010 unless they act with gross negligence or in bad faith. It also includes a statement of non-liability for failure to release information under the section.<sup>38</sup>

The contrast between the approaches of the two statutes becomes apparent when an agency receives a request for offender records. If an agency is asked to comply with the disclosure requirements of both Ch. 42.56 RCW and RCW 4.24.550, it is clear that the most prudent route for an agency to take is to liberally disclose records because there is a strict monetary penalty for non-disclosure under the Public Records Act, and immunity of disclosure or non-disclosure of a record is provided for under RCW 4.24.550. There is little incentive to adhere to the guidelines of RCW 4.24.550, as the agency is liable for potentially large financial penalties under Ch. 42.56 RCW if it withholds a document that is considered public.

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<sup>38</sup> RCW 42.56.520.

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<sup>38</sup> RCW 42.56.060.

<sup>38</sup> RCW 4.24.550(8).