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Hon Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON AT RICHLAND

JOHN DOE 1; JOHN DOE 2; JANE DOE 1; JANE DOE 2; JANE DOE 3; and all persons similarly situated,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS; STEPHEN SINCLAIR, Secretary of The Department of Corrections, in his official capacity,

Defendants,

and

BONNEVILLE INTERNATIONAL, INC. a Utah Corporation, d.b.a KIRO Radio 97.3 FM; THE MCCLATCHY COMPANY, LLC, a California Limited Liability Company, d.b.a. The Tacoma News Tribune; and , an individual,

Interested Parties.

No. 4:21-cv-05059-TOR

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

NOTING DATE: May 10, 2021

ORAL ARGUMENT REQUESTED

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs, on behalf of themselves and all others similarly situated,[1] seek a temporary restraining order and preliminary injunctive relief to prevent the Washington Department of Corrections (DOC)[2] from releasing records that disclose their status as transgender,[3] gender non-conforming,[4] or intersex[5] individuals, including records that contain intensely personal and private information regarding their sexual history and orientation, history of sexual victimization, genital anatomy, and mental and physical health. DOC has identified these records as responsive to requests submitted by two news media outlets (News Tribune of Tacoma and KIRO-FM) and an individual ( ) (collectively, Interested Parties) under the Washington Public Records Act (PRA), chapter 42.56 RCW, and DOC has indicated

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[1] For readability, this brief generally refers simply to "Plaintiffs," even though the arguments apply equally to the members of the proposed class.

[2] DOC refers to both Defendants here.

[3] A transgender individual is someone who has a gender identity (i.e., innate sense of being male, female, both, or neither) that is different from the person's sex assigned at birth. Declaration of Dan Karasic, M.D. (Karasic Decl.) ¶ 7.

[4] A person who is gender non-conforming, or non-binary, is someone who does not identify as exclusively male or female, and may not identify as either. Karasic Decl. ¶ 7.

[5] A person who is intersex is born with sex traits or reproductive anatomy that do not fit the typical definitions of female or male. Karasic Decl. ¶ 8.

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that, absent a court order, it will begin releasing the records to Interested Parties on or before April 9, 2021. Interested Parties apparently intend to publish the records, and/or the information contained in them, to the general public.

Plaintiffs' complaint identifies no less than *five* legal grounds prohibiting DOC's disclosure of the records at issue here:

First, disclosure would violate the Eighth Amendment to the United States Constitution because it would constitute deliberate indifference to a known risk of harm. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (a prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment). It is well settled that disclosure of a prisoner's transgender status leads to an increased risk of sexual and other violence at the hands of other inmates. *See Powell v. Schriver*, 175 F.3d 107, 113 (2d Cir. 1999) ("in the sexually charged atmosphere of most prison settings, such disclosure might lead to inmate-on-inmate violence"). Disclosing Plaintiffs' transgender, gender non-conforming, and/or intersex status would violate DOC's duty to protect them from such harms.

Second, disclosure would violate the Fourteenth Amendment to the United States Constitution, both as to transgender, gender non-conforming, and/or intersex individuals who are currently incarcerated and as to those who have been released. The right of a transgender individual to keep that status confidential is constitutionally protected as "excrutiatingly [sic] private." *Powell*, 175 F.3d at 111. Accordingly, disclosure of the records at issue here is prohibited unless it serves a compelling state interest and is narrowly drawn to further that interest. *Whalen v. Roe*, 429 U.S. 589, 606 (1977); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014). Neither

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of those elements is satisfied, and indeed there are strong public policy reasons *against* disclosure here.

Third, disclosure would violate Article 1, Section 7 of the Washington Constitution, which similarly protects individuals' privacy interests. See *Wash. Pub. Emps. Ass'n, UFCW Local 365 v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 194 Wn.2d 484, 506, 450 P.3d 601 (2019); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 136, 580 P.2d 246 (1978).

Fourth, most of the requested records are protected from disclosure by the PRA itself as specific intelligence information under RCW 42.56.240(1). The risk assessments and housing protocols used by DOC to make security classification and housing decisions constitute specific intelligence information within the meaning of the PRA statute, and disclosure of that information would inhibit effective law enforcement because it would adversely impact prison safety. *See Fischer v. Wash. State Dep't of Corr.*, 160 Wn. App. 722, 728, 254 P.3d 824 (2011) (holding prison video surveillance records were exempt from disclosure under PRA). Furthermore, disclosure would constitute an invasion of Plaintiffs' privacy, which provides an independent basis to prohibit disclosure of specific intelligence information. *See* RCW 42.56.240(1).

Finally, some if not all of the requested records contain health care information that is protected from disclosure under RCW 70.02.020 and the Health Insurance Portability and Accountability Act. Pub. L. No. 104-191, § 264, 110 Stat. 1936. Intersex status is itself a medical condition, and transgender and non-binary identities are considered protected health information by medical providers. Moreover, some

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of the records at issue contain descriptions of, among other things, genital anatomy; mental health diagnoses; and information regarding hormone therapy, surgical interventions, and other treatment for gender dysphoria. Such information is protected from disclosure under the PRA.

Disclosure of the records identified by DOC as responsive to Interested Parties' PRA requests should be preliminarily enjoined pending adjudication of Plaintiffs' claims because it would preserve the status quo and prevent irreparable harm to Plaintiffs. Furthermore, Plaintiffs have no adequate remedy at law, and the balance of equities tips sharply in their favor—especially because there is no countervailing public interest in immediate disclosure of the requested records. Accordingly, Plaintiffs respectfully request that this Court issue a preliminary injunction to bar release of the records pending the conclusion of trial in this action.

II. STATEMENT OF FACTS

A. Factual Background

Plaintiffs John Doe 1, John Doe 2, Jane Doe 1, Jane Doe 2, Jane Doe 3, and the Class of similarly situated persons identified in the Complaint, are individuals who have identified as transgender, gender non-conforming, and/or intersex and are currently, or were formerly, incarcerated in the custody of the Washington Department of Corrections (DOC). Declaration of John Doe 1 (John Doe 1 Decl.), ¶¶ 2-3; Declaration of John Doe 2 (John Doe 2 Decl.), ¶¶ 2-4; Declaration of Jane Doe 1 (Jane Doe 1 Decl.), ¶ 2; Declaration of Jane Doe 2 (Jane Doe 2 Decl.), ¶¶ 2-3; Declaration of Jane Doe 3 (Jane Doe 3 Decl.), ¶¶ 2-3.

The federal Prison Rape Elimination Act (PREA), 34 U.S.C. § 30301, et seq.,

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provides funding to help prevent, detect, and respond to sexual violence in correctional facilities throughout the United States. *See* Declaration of Katherine Dennehy-Fay (Dennehy Decl.), ¶ 18. Among other things, PREA provides for assessments to screen and classify inmates at risk of experiencing or committing sexual assault, including those who are at risk because of their transgender, gender non-conforming, and intersex status. *See id.* ¶¶ 24-27. The information provided during these assessments is used to make individualized security classification and housing decisions. *See id.* ¶ 24. The records created as part of the PREA risk assessment process and housing protocol for transgender, gender non-conforming, and intersex individuals includes detailed information and analysis regarding an individual's gender identity, sexual history and orientation, physical anatomy (including genital anatomy and descriptions of genitalia), history of sexual victimization, and other intensely personal information. *See id.* ¶ 34; *see also* Declaration of Ethan Frenchman (Frenchman Decl.), ¶¶ 14-16 (attaching forms used by DOC in conducting PREA risk assessment process and housing protocol).

Plaintiffs were required to participate in the PREA risk assessment and transgender, gender non-conforming, and intersex housing protocol processes upon arrival in custody and periodically thereafter. *See* Dennehy Decl. ¶ 24; *see also, e.g.*, John Doe 2 Decl. ¶ 6; Jane Doe 3 Decl. ¶ 5; Jane Doe 2 Decl. ¶ 4. Plaintiffs provided candid information to corrections staff in order to ensure their safety while in custody, even though some of them actively hid their gender identity from other inmates. *E.g.*, Jane Doe 3 Decl. ¶¶ 5, 8; Jane Doe 1 Decl. ¶ 3. Plaintiffs were also required to disclose their gender identity in order to gain access to necessary gender-affirming property

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and medical treatments, such as gender-affirming clothing, hormone replacement therapy, and gender-affirming surgery. *E.g.*, Jane Doe 2 Decl. ¶ 5; Jane Doe 3 Decl. ¶ 7; John Doe 2 Decl. ¶ 3; *see also* Dennehy Decl. ¶ 31.

Plaintiffs reasonably believed that the information they provided to DOC staff would remain confidential and did not realize that the information might be made public. *E.g.*, John Doe 2 Decl. ¶ 6; Jane Doe 2 Decl. ¶ 4; *see also* Dennehy Decl. ¶¶ 32-33. Several DOC policies provide that gender identity be kept "confidential" by staff. For example, DOC Policy 490.700, Transgender, Intersex, and/or Gender Non-Conforming Housing and Supervision, states that "[a]n individual's sexual orientation, gender expression/transition status, intesex status, or gender identity will be maintained as confidential and will only be disclosed on a need to know basis." Frenchman Decl. ¶ 15 & Ex. N at 4. The policy further states that such information will be kept "in a secure imaging system" by the Statewide PREA Coordinator. *Id.* DOC staff who access this database are subject to a PREA Database Access Confidentiality Agreement, which instructs DOC staff, "[i]t is vital that the people we interact with know this personal information is safe and maintained as confidential." Frenchman Decl. ¶ 14 & Ex. H at 1.

Similarly, DOC Policy 490.820, PREA Risk Assessments and Assignments, dictates that "[a]n offender's transgender/intersex status will be maintained as confidential and only disclosed on a need to know basis." Frenchman Decl. ¶ 14 & Ex. F at 8. When DOC performs housing reviews for such individuals, again, those documents must be "scanned into a secure site in the electronic imaging system" accessible only to authorized staff. *Id.* at 9. Indeed, as soon as an individual is

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identified as transgender or intersex, DOC policy dictates that a "[a] confidential PREA hold will be established in the electronic file." *Id*. at 10.

Although they cooperated with the PREA process, Plaintiffs have attempted, along with DOC, to conceal their status in various ways in order to remain safe and promote their healthcare. One Plaintiff, Jane Doe 1, has had gender-affirming surgery, a legal name change, and changed her government gender marker before she was incarcerated. Jane Doe 1 Decl. ¶ 2. She was first incarcerated with other women in a county jail before being transferred to the Washington Corrections Center for Women (WCCW). *Id.* She has done her best to keep her fellow inmates from knowing that she was assigned the male sex at birth. *Id.* ¶ 3. Jane Doe 3, on the other hand, is a transgender woman who lives in the Monroe Correctional Complex – a men's prison. Jane Doe 3 Decl. ¶ 2. Although she lived in the community as a woman and legally changed her name to a feminine name, she was transferred to DOC with her previous male name. *Id.* ¶ 3. She decided to use her old male name and live in DOC with the other men in her prison as a man. *Id.* ¶ 4. Most men think that she is gay and do not know that she is a woman. *Id.* Both plaintiffs are protecting their gender identity in order to keep themselves safe. In addition, John Doe 2 is a formerly incarcerated man who lived a women's prison. John Doe 2 Decl. ¶¶ 3-4. John Doe 2 has had gender-affirming surgery and legally changed his name and gender marker to correspond to his gender identity. *Id.* ¶ 3. He introduces himself as a man and does what he can to ensure that most people do not know that he is transgender because he fears discrimination and victimization in the community. *Id.* ¶ 4.

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B. The Subject Public Records Requests

On or about March 12, 2021, Stacia Glenn of News Tribune of Tacoma submitted a PRA request seeking (i) the number of transgender or gender non-conforming[6] inmates who have been transferred to the Washington State Corrections Center for Women in Purdy in recent months; (ii) the dates the transgender or gender non-conforming inmates were moved to Purdy, and the facilities from which they were moved; (iii) the names and ages of the transgender or gender non-conforming inmates moved to Purdy and the convictions they are serving time for; and (iv) the number of and any records or documents related to complaints or disciplinary action taken against the transgender or gender non-conforming inmates moved to Purdy. Frenchman Decl. ¶ 9 & Ex. A.

On or about March 16, 2021, an individual named Aaron (Last Name Unknown) of KIRO-FM submitted a PRA request seeking (i) the number of transgender inmates currently housed in DOC prison facilities; (ii) the number of transgender inmates who are currently waiting to be transferred to a prison matching their sexual identity; (iii) the number of inmates evaluated and confirmed by DOC to be transgender;[7] (iv) the number of transfer requests made by transgender individuals that have been approved and denied; (v) records explaining the reasoning for any

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[6] The request itself consistently uses the phrase "gender non-conformists" rather than "gender non-conforming," which is the description used by DOC.

[7] Here and in some other places the request uses the term "transgendered" rather than the term "transgender," which is the description used by DOC.

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denial of a transgender incarcerated individual's request for transfer; (vi) the number of transgender incarcerated individuals who have requested gender reassignment surgery; (vii) the number of transgender incarcerated individuals who have requested and received gender reassignment surgery; (viii) the number of transgender incarcerated individuals who are currently scheduled for gender reassignment surgery; (ix) the names of all transgender incarcerated individuals who have requested, received or are scheduled for gender reassignment surgery; (x) any infractions, complaints, reports, concerns submitted by other staff or other incarcerated individuals regarding the following individuals: [names kept confidential here]; and (xi) "have four transgender inmates at the Washington Corrections Center for Women who have male names requested state assistance in obtaining gender re-assignment surgery?" Frenchman Decl. ¶ 12 & Ex. C.

On or about March 19, 2021, submitted a PRA request seeking (i) a complete and accurate count of inmates who identify as transgender (gender identity differs from sex identified at birth) in the custody of the Washington Department of Corrections, with a request to break this information down by location; (ii) total number of inmates transferred from a men's facility to a women's facility since January 01, 2021; (iii) total number of "male persons who identify as female, non-binary, or any other gender identity" currently housed in a women's facility; (iv) total number of inmates transferred from a women's facility to a men's facility since January 01, 2021; and (v) total number of "female persons who identify as male, non-binary or any other gender identity" currently housed in a men's facility. Frenchman Decl. ¶ 11 & Ex. B.

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C. Procedural History

Disability Rights Washington (DRW), which is one of Plaintiffs' counsel in this matter, is a private non-profit advocacy organization that is federally mandated to provide protection and advocacy services to individuals with disabilities in the state of Washington pursuant to the Protection and Advocacy of Individuals with Mental Illnesses ("PAIMI") Act, 42 U.S.C. § 10801, et seq., the Protection and Advocacy for Individual Rights ("PAIR") Act, 29 U.S.C. § 794e, the Developmental Disabilities Assistance and Bill of Rights ("DD") Act, 42 U.S.C. § 15041, et seq., and the regulations promulgated thereto, and RCW 71A.10.080. Frenchman Decl. ¶ 2.

DRW's work includes the AVID program, which focuses on improving conditions, treatment, services, and reentry for people with disabilities who are incarcerated in Washington State's jails and prisons. Frenchman Decl. ¶ 2. In July 2017, DRW launched an investigation into the treatment of transgender people with disabilities in DOC custody. *Id.* ¶ 3. As part of that investigation, DRW staff have spoken with more than 50 transgender individuals across DOC facilities and security levels. *Id.* DRW has also met with many DOC custodial staff, DOC medical providers, and outside medical experts. *Id.* The federal laws that establish the protection and advocacy systems, including DRW, also authorize DRW's access to all records of any individual who has authorized the agency to have such access. *See, e.g.*, 42 U.S.C. § 10805(a)(4)(A); 42 C.F.R. § 51.41(b)(1); Frenchman Decl. ¶ 4. DRW has used this authority numerous times to review individual records and DOC policies. *Id.* During this time DRW has also advocated directly on behalf of certain individuals when, in its opinion, DOC's failure to provide necessary

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accommodations, housing, and PREA protections has placed its constituents at serious and immediate risk of harm. *Id.* ¶ 3.

On December 12, 2019, DRW entered into a structured negotiations agreement with DOC as an alternative to litigation about DRW's concerns about access to equal and gender-affirming medical care, housing, property, and programming for transgender, intersex, and non-binary people with disabilities. Frenchman Decl. ¶ 7. These negotiations continue to the present time, and DRW remains in close contact with DOC and its counsel at the Corrections Division of the Washington Office of the Attorney General (Attorney General) regarding the treatment and conditions of such people in DOC. *Id.*

Following the leak of private information about transgender inmates at WCCW by purported DOC staff to KIRO-FM on March 10, 2021, Frenchman Decl. ¶ 8, on or around March 15, 2021, the Attorney General communicated by email to DRW that the Tacoma News Tribune had requested information regarding transgender people in custody. *Id.* ¶ 9. The Attorney General notified DRW of additional information requests by KIRO-FM and by on or around March 23, 2021. *Id.* ¶¶ 11-12.

The Attorney General, on behalf of DOC, has indicated in discussions with DRW that DOC does not create records in response to requests for aggregate numerical information. Frenchman Decl. ¶ 11 & Ex. B. Instead, the Attorney General explained that DOC will identify as responsive and provide records from which Interested Parties may derive answers to their own questions. *Id.* DOC has not provided DRW a list of what records have been identified by DOC as responsive to

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the requests. *Id.* Based on DRW's knowledge of DOC records, such records likely include but may not be limited to the following: Form 02-384 Protocol for the Housing of Transgender and Intersex Offenders; Form 02-385 Housing Review For Transgender, Intersex, And Gender Non-Conforming Individuals; Form 02-420 Preferences Request; Form 02-422 Transgender, Intersex, and Gender Non-Conforming Housing Multi-Disciplinary Team; Form 07-019 PREA Risk Assessment Questionnaire; records related to requests for gender-affirming clothing, commissary, or property due to a person being transgender, non-binary, and/or intersex; PREA holds put in place immediately upon a person's disclosure of a non-conforming gender identity to DOC staff; email communications among staff; grievances, appeals, and letters about gender-affirming housing, healthcare, and other issues related to the needs of transgender, intersex, and/or non-binary people; requests change one's name or gender marker within DOC; records documenting cross-gender strip and pat searches; infractions, behavior observation entries, and PREA incident reviews and reports that identify a person as transgender, intersex, and/or non-binary; call-out meetings with peer support groups and administrators about the status of accommodations and safety for transgender, intersex, and/or non-binary people in DOC; and spreadsheets that compile information on the above at the unit, facility and statewide level. *Id.* ¶¶ 4, 14-16 & Exs. F-O.

On or around April 2, 2021, DRW gave notice to the Attorney General that DRW, ACLU of Washington, MacDonald Hoague & Bayless, and Munger, Tolles & Olson LLP would file a complaint on April 7, 2021, seeking preliminary and permanent injunctive relief prohibiting the disclosure of the records at issue.

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Frenchman Decl. ¶ 13. DRW sought the Attorney General's consent to a temporary restraining order (TRO) to preserve the status quo pending a hearing on the instant Motion for Preliminary Injunction. *Id.* While the Attorney General does not stipulate to a temporary restraining order, the Attorney General has represented that the Defendants do not oppose a temporary restraining order preserving the status quo during the briefing and consideration of the motion for preliminary injunction. *Id.*

III. ARGUMENT

A. Plaintiffs Meet the Standard For Preliminary Injunctive Relief On Their Constitutional Claims

Plaintiffs are entitled to preliminary injunctive relief on their constitutional claims if they show that they are likely to succeed on the merits, likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and an injunction is in the public interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011), *quoting Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). Under the "sliding scale" approach applied in the Ninth Circuit, Plaintiffs need only show "serious questions going to the merits" provided the balance of hardships tips sharply in their favor. *All. for the Wild Rockies*, 632 F.3d at 1135. Plaintiffs meet this standard here.

1. Plaintiffs' constitutional claims are likely to succeed on the merits.

(a) Disclosure of the requested records would violate the Eighth Amendment's prohibition against cruel and unusual punishment.

The treatment a prisoner receives in prison and the conditions under which the prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel and unusual punishment. *Farmer v. Brennan*, 511 U.S. 825, 832

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(1994). A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment. *See id.* at 828; *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Prison officials have a duty under the Eighth Amendment "to protect prisoners from violence at the hands of other prisoners." *Farmer*, 511 U.S. at 833.

To succeed on such a claim, an inmate must first demonstrate they are "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. Sexual abuse and harassment suffered in custody constitutes "serious harm." *See id.* at 833-34 (treating sexual assault as serious harm); *Seaton v. Mayberg*, 610 F.3d 530, 535 (9th Cir. 2010) (recognizing Eighth Amendment right to protection from "a sexually violent predatory roommate whose proclivity to rape his roommate is known to the prison"); *Brown v. Budz*, 398 F.3d 904, 910-11 (7th Cir. 2005) (finding that a "beating suffered at the hands of a fellow detainee . . . clearly constitutes serious harm[]"). A plaintiff "can establish exposure to a significantly serious risk of harm by showing that [s]he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates." *Farmer*, 511 U.S. at 843 (quotation marks omitted).

Second, the inmate must show prison officials acted with deliberate indifference to that risk, which requires a subjective inquiry into a prison official's state of mind. *Farmer*, 511 U.S. at 838-39. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. The very obviousness of the risk

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may suffice to establish the knowledge element. *See Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995) (well-known risk of danger from asbestos established deliberate indifference as to inmates sent to clean attics unprotected and without prior inspection).

It is well settled that incarcerated individuals who are known to be transgender, gender non-conforming, or intersex are at particular risk of sexual assault, sexual abuse, and violence at the hands of other inmates and correctional staff. *See, e.g.*, *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 WL 5830730, at *2-3 (S.D. Ill. Nov. 7, 2018) (department of corrections ordered to train all prison staff on transgender issues); *Perkins v. Martin*, No. 3:14-cv-00191- SMY-PMF, 2016 WL 3670564, at *3 (S.D. Ill. July 11, 2016) (citing *Farmer* and listing "transgender prisoner with feminine characteristics in male prison" as a situation "where the prisoner plaintiff exhibits characteristics that make them more likely to be victimized"); *Doe v. D.C.*, 215 F. Supp. 3d 62, 77 (D.D.C. 2016) (finding that a jury could infer that prison officials "knew Doe faced a substantial risk of rape because of her status as a transgender woman."); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 691 (S.D. Tex. 2016) (citing 2011 data from the Bureau of Justice Statistics, which "reported that 34.6% of transgender inmates reported being the victim of sexual assault," approximately nine times the rate of other prisoners, and stating that "[t]he vulnerability of transgender prisoners to sexual abuse is no secret."); *see also* Dennehy Decl. ¶¶ 19-23.

Beyond the mere fact of transgender status, the risk of physical harm from the *disclosure* of that status takes on particular urgency in the prison context. *See Powell*

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v. Schriver, 175 F.3d 107, 113 (2d Cir. 1999) ("in the sexually charged atmosphere of most prison settings, [the disclosure of an inmate's transsexualism] might lead to inmate-on-inmate violence."); Dennehy Decl. ¶¶ 26-28; 34-37; Karasic Decl. ¶¶ 12-13.

DOC's disclosure of the records requested here would not only violate but would run entirely contrary to its Eighth Amendment duty to protect Plaintiffs from harm. As inmates who are transgender, gender non-conforming, or intersex, Plaintiffs have established that they "belong[] to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates." *Farmer*, 511 U.S. at 843. And the risk of harm stemming from disclosure of that status is both obvious, *Wallis*, 70 F.3d at 1077, and well established both by legal precedent and social science. *See Powell*, 175 F.3d at 113; Dennehy Decl. ¶¶ 19-23; Karasic Decl. ¶¶ 6-11.

To be clear, this is not a situation where Plaintiffs assert that DOC should have known of a potential for harm and failed to take action in response to the threat. Rather, DOC's *own action* of disclosing the requested records is what will create a heightened risk of harm by publicly "outing" Plaintiffs' transgender, gender non-conforming, or intersex status. Dennehy Decl. ¶¶ 19-23, 29-37; Karasic Decl. ¶¶ 12-14. Indeed, DOC's own policies reflect the importance of keeping such information confidential. Frenchman Decl. ¶¶ 14-15 & Exs. I & N; Dennehy Decl. ¶ 30.

And as damaging as the disclosure of transgender, gender non-conforming, or intersex status alone would be, many of the requested records reveal far more that could be used to harm Plaintiffs. The requested records include DOC's analysis of

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why and how each individual is particularly vulnerable to sexual abuse, descriptions of their physical anatomy, and other intimate details. Dennehy Decl. ¶¶ 24-25, 34; Karasic Decl. ¶¶ 12-14. DOC goes to considerable lengths to ensure confidentiality in gathering and analyzing this information, conducting the interviews in private; limiting which staff members can see the records; and carrying out housing reviews in a confidential setting. Dennehy Decl. ¶ 30. During those reviews, staff discuss all the reasons why an individual may be particularly vulnerable to sexual assault. *See* Dennehy Decl. ¶ 34. To produce the records associated with this process in response to a PRA request would subject Plaintiffs to an increased risk of exactly the harm that DOC's own process is intended to prevent. Frenchman Decl. ¶¶ 14-16 & Exs. G-O (DOC policies explaining that PREA risk assessment and housing protocol is designed to reduce risk of harm to inmates); Dennehy Decl. ¶¶ 18, 24-25, 28-29, 34, 37; Karasic Decl. ¶¶ 12-14.

Disclosure of the requested records will also create a known risk of harm to Plaintiffs' mental health, including the serious risk of self-harm and/or decompensation. Karasic Decl. ¶¶ 6, 9-14; Dennehy Decl. ¶¶ 20, 35-37. DOC has a legal duty to ensure that inmates receive adequate medical treatment of mental health conditions so that they are not put at risk. *Edmo v. Corizon, Inc.*, 935 F.3d 757 (2019) (transgender inmate stated claim under Eighth Amendment where denial of appropriate treatment for gender dysphoria caused severe, ongoing psychological distress and high risk of self-castration and suicide); *Madrid v. Gomez*, 889 F. Supp. 1146, 1261-67 (N.D. Cal. 1995) (correctional agencies must refrain from keeping inmates with serious mental illness in conditions of confinement that risk or cause

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serious harm); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) (same). Outing the names and private information of transgender, intersex, and non-binary people—many of whom it can be inferred from the records and policies at issue have gender dysphoria—is anti-therapeutic. Karasic Decl. ¶¶ 6, 10-14; Dennehy Decl. ¶¶ 20, 25, 36. Such a disclosure would be a gross departure from the standard of treatment typically afforded such patients, and risks causes or aggravating serious psychological damage for some of the most vulnerable and at-risk patients in DOC. Karasic Decl. ¶¶ 12 ("outing transgender people in settings of increased risk may have *particular psychological harm*") (emphasis added); *see also id.* ¶¶ 10-11, 13-14; Dennehy Decl. ¶¶ 20, 25, 36.

There can be no question under these circumstances that disclosure would violate DOC's Eighth Amendment duty to protect Plaintiffs and that the requisite scienter exists. Plaintiffs are therefore likely to succeed on the merits of their claim arising under the Eighth Amendment.

(b) Disclosure of the requested records would violate the Fourteenth Amendment's Guarantee of Substantive Due Process

The Fourteenth Amendment protects the right of transgender, gender non-conforming, and intersex individuals to maintain their transgender status in confidence. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism"); *Love v. Johnson*, 146 F. Supp. 3d 848, 856-57 (E.D. Mich. 2015) (plaintiffs stated cognizable claim under Fourteenth Amendment that policy for changing gender marker on state-issued identification was unconstitutional because it

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would force plaintiffs to reveal their transgender status). "The excrutiatingly [sic] private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate." *Powell*, 175 F.3d at 111.

Courts have recognized that serious harm can result from the disclosure of an individual's transgender status. *See Powell*, 175 F.3d at 113 (recognizing that revealing an individual's transgender status exposes that individual to "hostility and intolerance"). Where the disclosure of personal information by the government would result in bodily harm, the interest in preventing its disclosure rises to the level of a fundamental right. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (finding "no reason to doubt that where disclosure of [highly personal] information may fall into the hands of persons" harboring animus against the affected individuals, there is a "very real threat to [Plaintiffs'] personal security and bodily integrity"). Accordingly, laws that require Plaintiffs to disclose their transgender status "directly implicate[] their fundamental right of privacy." *Love*, 146 F. Supp. 3d at 856.

Where a state action infringes upon a fundamental right, "such action will be upheld under the substantive due process component of the Fourteenth Amendment only where the governmental action furthers a compelling state interest and is narrowly drawn to further that state interest." *Kallstrom*, 136 F.3d at 1064; *accord*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014); *Love*, 146 F. Supp. 3d at 856. While laws granting access to government records generally, and the PRA in particular, serve a public interest in transparency of government proceedings, *see* RCW 42.56.030 (PRA "promote[s] the public policy of keeping Washington residents

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informed and in control of their public institutions"), there is no compelling state interest—or indeed any legitimate interest—in disclosing Plaintiffs' transgender, gender non-conforming, or intersex status.

In fact, the state has a distinct interest in *maintaining* the confidentiality of this information, since its secrecy furthers the goal of prison safety and carrying out its duty of care to Plaintiffs. *See Powell*, 175 F.3d at 115 ("In our view, it was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's . . . transsexualism could place that inmate in harm's way."); *Lojan v. Crumbsie*, No. 12-CV-0320(LAP), 2013 WL 411356, at *4 (S.D.N.Y. Feb. 1, 2013) (acknowledging risk to inmate based on "knowledge of [her] transgender status"); 34 U.S.C. § 30302(2) (purposes of PREA include "mak[ing] the prevention of prison rape a top priority in each prison system"); Frenchman Decl. ¶¶ 5, 14-16 & Exs. G-O; Dennehy Decl. ¶¶ 18, 24-25, 28-29, 34, 37; Karasic Decl. ¶¶ 12-14.

Furthermore, as discussed above, *supr*a Part II.B, the records that DOC may disclose in response to the PRA requests here go far beyond what any reasonable person could consider to further an interest in government transparency. No one's genital anatomy, personal history of sexual victimization, or similar intensely private information warrants public disclosure for this purpose.[8] If anything, state

[8] Requiring disclosure of Plaintiffs' medical information similarly implicates the Fourteenth Amendment. *See Schwenk v. Kavanaugh*, 4 F. Supp. 2d 110, 114 (1998) (disclosure of inmate's medical records, including mental health treatment information, violated right to substantive due process); *Doe v. Delie*, 257 F.3d 309,

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government has an interest in protecting transgender, non-binary, and intersex individuals against discrimination based on their gender identity. *See* Washington Law Against Discrimination (WLAD), RCW 49.60.030; *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 785, 317 P.3d 1009 (2014) (recognizing that WLAD protects against discrimination based on gender identity).

Accordingly, Plaintiffs are likely to succeed on the merits of their claim arising under the Fourteenth Amendment.

(c) Disclosure of the requested records would violate Article 1, Section 7 of the Washington Constitution.

Article 1, Section 7 of the Washington Constitution also protects Plaintiffs' privacy interests in preventing disclosure of the requested records here. *Wash. Pub. Emps. Ass'n, UFCW Local 365 v. Wash. State Ctr. for Childhood Deafness & Hearing Loss*, 194 Wn.2d 484, 506, 450 P.3d 601 (2019) (personal privacy protections of WASH. CONST. art. I, § 7 have been "incorporated into the PRA via the 'other statutes' exemption").

While the court in *Washington Public Employees Association* applied a "rational basis analysis" and held that disclosure of personal information must be "carefully tailored to meet a valid governmental interest" and "[no] greater than is reasonably necessary," *id.* at 505, its reasoning depended on its conclusion that the disclosure at issue there—public employees' dates of birth—would not be highly

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315-16 (3d Cir. 2001) (recognizing privacy interest in confidentiality of prisoner's medical information).

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offensive: "[B]irth date information is widely available in the public domain and does not involve the same level of intimacy as, for example, *mental health records or sexual history, which have been deemed private affairs.*" *Id.* at 507 (emphasis added). The decision does not indicate what standard would apply, and whether or how "careful tailoring" might be addressed, in cases where disclosure would be highly offensive.

Yet this is just such a case. Any disclosure of Plaintiffs' transgender, gender non-conforming, or intersex status would be highly offensive to a reasonable person. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 136, 580 P.2d 246 (1978) ("Every individual has some phases of his life and his activities and some facts about himself that he does not 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.").

Such information is not only "excrutiatingly [sic] private," *Powell*, 175 F.3d at 111, but is often actively concealed in the interest of personal safety, as reflected in the record here. *E.g.*, Jane Doe 1 Decl. ¶¶ 2-3; Jane Doe 3 Decl. ¶¶ 2-4; John Doe 2 Decl. ¶¶ 3-4; Dennehy Decl. ¶¶ 26-27, 31; Karasic Decl. ¶¶ 11-12. Furthermore, the requested records not only would disclose Plaintiffs' and the Class Members' status as transgender, gender non-conforming, or intersex individuals, but they are rife with intimate personal details regarding their sexual history and mental health. *See* Dennehy Decl. ¶¶ 20, 24-25, 34-35, 37; Karasic Decl. ¶¶ 11-14. Such details are at

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the very core of personal privacy rights. *See Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (sexual matters "involve[e] the most intimate and personal choices a person may make in a lifetime"); *Hoppe*, 90 Wn.2d at 36 (acknowledging that sexual matters are among the most private in people's lives); *Delie*, 257 F.3d at 315-16 (recognizing privacy interest in confidentiality of medical information).

Under any standard that might apply, DOC's proposed response to the PRA requests at issue here is plainly not "carefully tailored" or limited to what is "reasonably necessary" to promote the state's valid interest in government transparency. For these reasons, Plaintiffs are likely to succeed on their claim that Article 1, Section 7 of the Washington Constitution precludes disclosure of the requested records.

2. Plaintiffs will suffer irreparable harm absent a preliminary injunction.

Plaintiffs will unquestionably suffer irreparable harm absent a preliminary injunction here. Disclosure of private information causes injury in itself, *see, e.g.*, *Coulter v. SageStream, LLC*, No. 20-1820, 2020 WL 6747106, --- F.Supp.3d ----, at *3 (E.D. Pa. 2020) (disclosure of private information itself constituted injury), and such injury cannot be remedied by money damages or otherwise. And in this particular case, the requested records will disclose Plaintiffs' transgender, gender non-conforming, or intersex status, which will expose them to a materially increased risk of harassment, violence, and sexual assault at the hands of fellow inmates and correctional staff. *See, e.g.*, *Powell*, 175 F.3d at 115.

Moreover, as previously discussed, many of the records contain intensely

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personal details including descriptions of their genital anatomy and history of sexual victimization. Disclosure will cause psychological harm and risk of anxiety, depression, and suicidal ideation, undo Plaintiffs' efforts to maintain the confidentiality of their gender identity, intersex status, and/or sexual orientation, and damage their personal relationships with others who are not aware of their transgender, gender non-conforming, or intersex status. *See supra* Part III.A.1.(a).

Furthermore, the harms resulting from disclosure here would not end upon release. Individuals who are known to be transgender, gender non-conforming, or intersex experience not only targeted violence but discrimination and other barriers in many facets of daily life:

> The systemic violence transgender people experience neither begins nor ends with hate crimes, physical assault or homicide. Transgender people are more likely than the general population to experience discrimination, harassment, and violence in every facet of life, including family relations, education, employment, housing, public accommodations, obtaining accurate identification documents, and accessing adequate and appropriate medical treatment.

Matter of M.E.B., 126 N.E.3d 932, 936-37 (Ind. App. 2019), *citing* James et al., The Report of the 2015 U.S. Transgender Survey (2016), available at http://www.ustranssurvey.org/reports/; National Coalition of Anti-Violence Programs, A Report from the National Coalition of Anti-Violence Programs: Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2013 (2014), available at http://www.avp.org/ storage/documents/ 2013_ncavp_hvreport_final.pdf; Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2 (2011), available at http//www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.; James, S. E.,

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Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016); *see also* The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality; Karasic Decl. ¶¶ 8-11. Several of the Plaintiffs here have worked to maintain the confidentiality of their transgender status precisely to avoid these sorts of harms. *E.g.*, Jane Doe 1 Decl. ¶¶ 2-3; Jane Doe 3 Decl. ¶¶ 2-4; John Doe 2 Decl. ¶¶ 3-4.

Indeed, disclosure of the requested records will impact Plaintiffs' lives long after release from custody:

> [Plaintiff, who is transgender,] provided evidence that, as an out member of the transgender community, he would face a significantly higher risk of violence, harassment, and homicide. He has personally witnessed a transgender friend being violently assaulted because of her gender identity. He has personally experienced discrimination in the workplace after a discrepancy between the way he looked and the way he was identified by Social Security outed him as a transgender individual. Publication of his birth name and new name would enable members of the general public to seek him out, placing him at a significant risk of harm. ***And in today's day and age, information that is published in a newspaper is likely to be published on the Internet, where it will remain in perpetuity, leaving [him] at risk for the rest of his life.***

In re A.L., 81 N.E.3d 283, 290-91 (Ind. App. 2017) (emphasis added) (holding publication of notice of plaintiff's petition for name change would create significant risk of substantial harm); *see also, e.g.*, John Doe 2 Decl. ¶¶ 4-8; Jane Doe 3 Decl. ¶ 9.

3. A preliminary injunction is in the public interest.

"The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be

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injured by the grant of preliminary relief." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1114-15 (9th Cir. 2010) (internal quotations omitted). Here, there is no public interest that would be injured by a preliminary injunction preventing disclosure of the requested records until this Court can determine the merits of Plaintiffs' claims. In fact, the public interest is *served* here by preventing disclosure of the requested records, because non-disclosure furthers the goal of prison safety. *See supra* Part III.A.1.(b).

4. The balance of the equities favors granting a preliminary injunction.

Plaintiffs should be granted a preliminary injunction because the balance of the equities overwhelmingly favors Plaintiffs. Indeed, here, the balance of hardships tips sharply in their favor such that they need only "serious questions going to the merits" under the Ninth Circuit's "sliding scale" analysis in order to obtain injunctive relief. *All. for the Wild Rockies*, 632 F.3d at 1135.

As described above, *supra* Part III.A.2, Plaintiffs face irreparable and substantial harm in the absence of an injunction. By contrast, DOC will not be prejudiced by entry of a preliminary injunction. Indeed, in the unlikely event that none of Plaintiffs' claims ultimately succeed, the only consequence of granting preliminary injunctive relief is delayed disclosure. And while Plaintiffs maintain that the public interest is served here by the *secrecy* of the requested records, not by their disclosure, they respectfully submit that any public interest in immediate disclosure is vastly outweighed here by the irreparable harm that Plaintiffs face.

B. Plaintiffs Also Satisfy the Standard Governing Preliminary Injunctive Relief Under the PRA

The PRA has its own standard for injunctive relief that includes a slightly

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different balancing of public and private interests. Under RCW 42.56.540, a trial court can grant injunctive relief when it finds that examination of records "would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions." More specifically, Plaintiffs seeking preliminary injunctive relief under the PRA must show that (1) they have a clear legal or equitable right, (2) they have a well-grounded fear of immediate invasion of that right, and (3) the acts complained of will result in actual and substantial injury to them. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). Plaintiffs here satisfy all three elements. Furthermore, Plaintiffs lack other adequate remedies at law, and as stated previously, the balance of equities overwhelmingly supports a preliminary injunction.

1. Plaintiffs and the class members have a clear legal right at stake.

In determining whether a party has a clear legal or equitable right, "the court examines the likelihood that the moving party will prevail on the merits." *Rabon v. City of Seattle*, 135 Wn.2d 278, 285, 957 P.2d 621 (1998). The PRA requires agencies to produce public records upon request "unless the record falls within the specific exemptions of subsection (8) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records." *See* RCW 42.56.070(1). At least three such exemptions protect the records requested here from disclosure.

(a) The requested records are exempt from disclosure under the "other statute" exemption set forth in RCW 42.56.070(1).

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The PRA does not require the disclosure of a public record that "falls within the specific exemptions of . . . [an]other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). As set forth above, the Eighth and Fourteenth Amendments and Article 1, Section 7 of the Washington Constitution all preclude disclosure of the Requested Records. These constitutional provisions are incorporated in the PRA's "other statute" exemption. *White v. Clark Cnty.*, 188 Wn. App. 622, 631-32, 354 P.3d 38 (2015) (holding that the PRA's "other statute" exemption is derived from a combination of the privacy protections afforded by the Washington Constitution and various other statutes and regulations and noting that "[i]f the identity of a voter could be determined by a review of certain ballots, Article VI, Section 6 would preclude production of those ballots"); *see also Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 808, 246 P.3d 768 (2011) ("'other laws' includes the United States Constitution"); *see also Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013) ("the PRA must give way to constitutional mandates").

Plaintiffs therefore have a clear legal right at stake as required to obtain injunctive relief under the PRA here.

(b) The PREA-related records constitute specific intelligence information exempt from disclosure under RCW 42.56.240(1).

The requested records that were compiled by DOC for the purpose of PREA compliance are also exempt from disclosure as "[s]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline

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members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy[.]" RCW 42.56.240(1). Examples of what may comprise specific intelligence information include "'the gathering or distribution of information, especially secret information,' or 'information about an enemy' or 'the evaluated conclusions drawn from such information.'" *Haines-Marchel v. Dep't of Corr.*, 183 Wn. App. 655, 667, 334 P. 3d 99 (citing *King Cnty. v. Sheehan*, 114 Wn. App. 325, 337, 57 P.3d 307 (2002)).

Here, the PREA records were compiled by DOC, a penology agency, and constitute special intelligence information because they gather specific information about Plaintiffs—including a great deal of otherwise secret information—and are used to evaluate appropriate security classifications and housing assignments. Dennehy Decl. ¶¶ 18, 24-37; Frenchman Decl. ¶¶ 14-16 & Exs. G-O. Furthermore, nondisclosure of such records is essential for effective law enforcement because keeping the information confidential is important to maintain prison safety. Dennehy Decl. ¶ 31 ("Publicizing this information puts [Plaintiffs'] safety and the safety of the institution at risk."); Karasic Decl. ¶ 13; Frenchman Decl. ¶ 4-5, 14-16 & Exs. G-O (records are only visible to certain high level staff within DOC after they are created because of the sensitive information they contain). In light of the known risk of harm to transgender, gender non-conforming, and intersex inmates whose status is disclosed to others, there is a clear penological interest in maintaining the

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confidentiality of PREA records.[9]

(c) Certain of the requested records contain health care information exempt from disclosure under the PRA.

The PRA explicitly states that "Chapter 70.02 RCW applies to public inspection and copying of healthcare information of patients." RCW 42.56.360(2). RCW 70.02.010(17) defines "health care information" as "any information . . . in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care." Washington law commands that "a health care provider . . . may not disclose health care information about a patient to any other person without the patient's written authorization." RCW 70.02.020(1).[10]

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[9] Nondisclosure is also essential to protect Plaintiffs' privacy rights. *See* RCW 42.56.240(1) (special intelligence records protected if disclosure is essential for effective law enforcement *or* to protect a person's privacy rights). In this context, the exemption protects privacy rights where disclosure would be highly offensive to a reasonable person and not of legitimate concern to the public. RCW 42.56.050. For the reasons stated previously, *supra* Part III.A.1.(b), disclosure here would be highly offensive to a reasonable person. Nor is there any legitimate public interest in the transgender, gender non-conforming, and intersex status of any particular inmate, and indeed, protecting the records from disclosure serves the public interest in prison safety.

[10] Such records also protected from disclosure under the Health Insurance Portability

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While disclosures to law enforcement agencies are an exception to this rule, *State v. Sanchez*, 177 Wn.2d 835, 849, 306 P.3d 935 (2013), nothing in the law gives DOC permission to release health records to the general public. RCW 42.56.360(2) (exempting from PRA information covered by RCW 70.02); RCW 72.02.230(1) (except under enumerated circumstances, "records compiled, obtained, or maintained in the course of providing mental health services to either voluntary or involuntary recipients of services at public or private agencies must be confidential"). Instead, as RCW 70.02.005 recognizes, "[i]t is the public policy of [Washington] 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." RCW 70.02.005(4). See also *Planned Parenthood of Great Nw. v. Bloedow*, 187 Wn. App. 606, 620 350 P.3d 660 (2015) (RCW 43.70.050(2) is an "other statute" exemption because it "unambiguously" exempts "health-related data . . . '*in any form* where the patient or provider of health care can be identified.'")

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and Accountability Act of 1996 (HIPAA). Under HIPAA, a health care provider may not disclose protected health information of an individual except as permitted or required by HIPAA's implementing regulations. *See* 45 C.F.R. § 164.512 (setting forth limited circumstances under which disclosure of protected health information is permitted without an individual's authorization); *United States v. DeLeon*, 426 F. Supp. 3d 878, 911-12 (2019) (government not required to disclose mental health records held by corrections department because records protected by HIPAA disclosure rules).

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(emphasis added).

The requested records here include health care information including the fact of transgender/intersex status, which is itself medical/mental health information. Karasik Decl., ¶¶ 13-14. There is also more specific information contained in the records that constitutes health care information, including information about genital anatomy, whether the individual is undergoing hormone treatment, and which, if any, surgical procedures an individual has requested or undergone to align their physical characteristics with their gender identity. *E.g.*, Jane Doe 2 Decl. ¶ 5; Jane Doe 3 Decl. ¶ 7; John Doe 2 Decl. ¶ 3; *see also* Dennehy Decl. ¶ 31. Furthermore, as explained *supra* Part III.A.1.(c), the requested records also detail Plaintiffs' mental health conditions and associated treatment. Such information is protected from disclosure under the PRA.

2. Plaintiffs Have a Well-Grounded Fear of Immediate Invasion of Their Rights.

Plaintiffs have a well-grounded fear that their rights will be invaded immediately absent preliminary injunctive relief. DOC has indicated its intent to release the requested records beginning no later than April 9, 2021. Once released, there is no "undoing" the release. *See Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 758-59, 958 P.2d 260 (1998) (recognizing that a "trial on the merits would have been fruitless if the records had already been disclosed"). This is especially true in the age of the internet, where data can spread rapidly and remain available indefinitely. *See In re A.L.*, 81 N.E.3d at 290-91. Plaintiffs have no remedy here other than preventing disclosure of the records, and their rights will imminently

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be invaded without the requested injunction.

3. DOC's Actions Will Result In Actual And Substantial Injury To Plaintiffs.

As explained *supra* Part III.A.1.(c), Plaintiffs will be substantially and irreparably damaged by the release of the Requested Records.

4. Plaintiffs And The Class Members Lack An Adequate Remedy At Law.

"[l]njunctive relief will not be granted where there is a plain, complete, speedy and adequate remedy at law." *Kucera*, 140 Wn.2d at 209. Courts have found remedies to be inadequate where the injury complained of by its nature cannot be compensated by money damages. *Id.* (citation omitted). This is such a case. There is no means by which Plaintiffs and the Class Members could be compensated for the irreparable damage that disclosure would have upon their lives. This is not a circumstance where monetary damages could remedy the situation. Rather, it is the prototypical case where only injunctive relief can remedy the real and irreparable harm Plaintiffs imminently face.

5. <u>The Balance of Equities Favors Plaintiffs.</u>

"[S]ince injunctions are addressed to the equitable powers of the court, the . . . criteria [for a preliminary injunction] must be examined in light of equity including balancing the relative interests of the parties and, if appropriate, the interests of the public." *Kucera*, 140 Wn.2d at 209. As explained above, the balance of equities here sharply favors Plaintiffs. The agency will not even, for example, be liable for attorney's fees where an injunction sought by a third party (here, Plaintiffs) blocks disclosure of a public record. *See Confederated Tribes*, 135 Wn.2d at 757-58.

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IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request on behalf of themselves and all others similarly situated that the Court issue a preliminary injunction preventing DOC from disclosing any and all of the records requested by Interested Parties here.

Dated this 8th day of April, 2021.

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