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NO. 96164-6
COURT OF APPEALS NO. 76826-3-1

SUPREME COURT OF THE STATE OF WASHINGTON

RON GIPSON,
Petitioner,

v.

SNOHOMISH COUNTY,
Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Appellant, Ron Gipson, submitted a public records request to Snohomish County (the County). The County properly responded to Mr. Gipson's request by claiming, in part, an exemption under RCW 42.56.250(6). Mr. Gipson's lawsuit and his appeal challenge the application of this exemption.

The superior court dismissed Mr. Gipson's case on summary judgment. In doing so, the court followed established public records case law in concluding that an exemption that applies to records applies as of the date the request is received by the agency. That conclusion complies with the Washington State Supreme Court's ruling in *Sargent v. Seattle Police Department*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Further, the court properly concluded that the Supreme Court's holding in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016) does not apply to the facts of this case or the County's claim of exemption.

The court of appeals unpublished decision in this case correctly applied the ruling in *Sargent* and rejected Mr. Gipson's unpreserved equitable estoppel argument. The court of appeals affirmed the dismissal of Mr. Gipson's case. This case does not warrant this Court's review under

RAP 13.4(b)(1) and (4). The Court should deny Mr. Gipson's petition for review.

II. RESTATEMENT OF THE ISSUE

For the reasons outlined below, this matter does not warrant the Court's discretionary review. However, if the Court were to grant review, the following issues should be considered by the Court.

Did the County properly claim investigative records exempt under RCW 42.56.250(6) when the investigation into discrimination was active and on-going as of the date of the request?

Is Mr. Gipson barred from arguing an issue raised for the first time on appeal?

III. RESTATEMENT OF THE CASE

A. Investigation Background

The County investigated Mr. Gipson for allegations of sexual harassment and sexual discrimination in 2014-2015. CP 14. The County's Human Resources Department oversaw this investigation and employed an outside investigator, Marcella Fleming Reed (routinely referred to as "MFR"). *Id.* This investigation was active and on-going until February 2, 2015. *Id.* This investigation resulted in both substantiated and unsubstantiated findings of misconduct on the part of Mr. Gipson. *Id.*

B. Public Records Request 14-06701

The county received a public records request from Mr. Gipson on December 1, 2014. CP 15. This request sought 30 categories of records.

Id. Item number 19 of this request sought the following:

A copy of all of MFR's paid invoices and legers [sic] to date emails & phone/cell records in native format with all metadata, attachments including all folders, junk mail & sent items on cd in electronic format from the dates of December 27, 2013 to November 5, 2014.

Id. Additionally, seven items of this request sought records contained in the email accounts of various employees related to the active, on-going investigation of sexual harassment and discrimination, of which Mr. Gipson was the subject. *Id.* This request was assigned tracking number 14-06701 as it was the 6,701st request received by the County in 2014. *Id.*

The County responded to Mr. Gipson's request producing 5 installments of records. *Id.* The request was closed on May 4, 2015, five months after Mr. Gipson's request was received. *Id.* In installment 2, provided to Mr. Gipson on February 19, 2015, Mr. Gipson was provided with an exemption log citing 69 pages as being withheld as part of the active, on-going investigation, under RCW 42.56.250(6). *Id.* 77 pages of redacted invoices from Ms. Reed were also withheld based on this exemption. *Id.* In installment 3, provided to Mr. Gipson on March 5, 2015, Mr. Gipson was provided an exemption log notifying him that 298 pages of

records were being withheld as part of the active, on-going investigation, under RCW 42.56.250(6). *Id.* In installment 5, provided to Mr. Gipson on May 4, 2015, the County provided an additional 34 pages of redacted invoices from Ms. Reed based on the same exemption. CP 15-16.

C. Case Proceedings

On April 25, 2016, Mr. Gipson filed his lawsuit. CP 1-12. The County moved for summary judgment. CP 13-252. The superior court granted summary judgment concluding that exemptions apply to records as of the date an agency receives a request. CP 396-398. Here, because the discrimination investigation into Mr. Gipson was open and on-going as of the date of the request, the records were exempt from disclosure under RCW 42.56.250(6). *Id.* The superior court also concluded that Ms. Reed's billing statements were appropriately redacted as their content related to the active, on-going discrimination investigation and were exempt under RCW 42.56.250(6). *Id.* Finally, the superior court concluded the County met its burden for asserting RCW 42.56.250(6) applied to the records at issue and that the Washington State Supreme Court's holding in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016) does not apply to this case. *Id.* Mr. Gipson appealed.

The court of appeals affirmed the trial court concluding an agency properly makes its determination of whether a record is exempt at the time

it receives the request. The court of appeals also declined to consider Mr. Gipson's equitable estoppel argument because it had not been preserved for review. Mr. Gipson now petitions for discretionary review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should not grant discretionary review in this case because the Court of Appeals' decision is consistent with Washington law and does not present an issue of substantial public interest requiring determination by this Court. *See* RAP 13.4(b)(1) and (4).

A. The County Appropriately Relied on RCW 42.56.250(6) in Exempting Records When it Received Mr. Gipson's Request.

The Court of Appeals properly affirmed the trial court's decision and its holding in *Sargent v. Seattle Police Dep't.* in concluding that an exemption applies as of the date an agency receives a request. Agencies are not required to "monitor whether documents properly withheld as exempt may later become subject to disclosure." *Sargent v. Seattle Police Dep't.*, 167 Wn. App. 1, 10-11, 260 P.2d 1006 (2011), *aff'd in part, rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013) *citing*, *ACLU of Wash. v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 695, 937 P.2d J 176 (1997). "Likewise, the determination of whether a record is exempt is made at the time the request is received." Washington State Bar Association *Public Records Act Deskbook: Washington's Public*

Disclosure And Open Public Meetings Laws Second Edition (Ramsey Ramerman and Eric M. Stahl, eds., 2014) at §5.1 (4) (“the *Deskbook*”). The *Deskbook* goes on to articulate that the exemption cited in RCW 42.56.250(6) “only applies to ‘active and ongoing’ investigations, and once an investigation is concluded, the records are to be disclosed.” *Id.* at §10.3(6). Here, however, the active and ongoing investigation was not closed until two months after Mr. Gipson’s request was received.

1. Public Policy Supports the Court of Appeals Ruling.

Mr. Gipson’s request was received by the County on December 1, 2014. CP 15. The investigation into whether Plaintiff had committed sexual harassment and sexual discrimination was open, active, and on-going on that date. *Id.* That investigation was not completed until two months later on February 2, 2015. CP 14. In accordance with the requirements of the PRA, as held in *Sargent*, the County produced only those records in existence as of the date of Mr. Gipson’s request and cited to those exemptions applicable as of that same date. CP 15-16. The records withheld were part of an active, on-going investigation into “a possible violation of other federal, state, or local laws prohibiting discrimination in employment.” RCW 42.56.250(6). As a result, they were exempt from disclosure under RCW 42.56.250(6).

The fact that the records were produced and exemptions were claimed in installments did not violate the PRA. *See* RCW 42.56.120. Further, the fact that some of those installments were produced after the conclusion of the investigation did not violate the PRA. *Id.* and RCW 42.56.520. Finally, the fact that the County did not re-evaluate Mr. Gipson's December request and make new determinations as to which records were responsive and what exemptions applied after the conclusion of the investigation did not violate the PRA. *Sargent*, 167 Wn. App. at 10-11.

Mr. Gipson's claims rest on his assertion that because he (as the subject of the investigation) received notification that the investigation was closed on February 2, 2015, that exemptions cited in response to his December request were no longer valid. Public policy does not support his argument. The PRA is to be "liberally construed and its exemptions narrowly construed." RCW 42.56.030. Assessing the application of exemptions at the time a request is received does not conflict with this policy. Rather, the assessment of a request to determine the universe of responsive records and which exemptions may apply to those records as of the date the request is received insures the people's prompt, efficient access to public records.

If an agency is required to re-evaluate what new records have been created or what exemptions may no longer apply every time an installment of records is produced, then the response times for public records requests would be severely hampered. In the present case, the County had received 6,700 requests in the 11 months prior to the receipt of Mr. Gipson's request. Assuming, arguendo, only 15% of those requests required the production of records in installments, then the County would be required to re-evaluate and re-process 1,005 requests multiple times. This would result in a delayed production of records for all requestors on all requests, not just these 1,005. Increasing response times in this manner conflicts with the public policy supporting the prompt disclosure of records.

2. The Court of Appeals' Decision Comports with PRA Jurisprudence.

The Court of Appeals decision follows its holding in *Sargent* that the PRA does not provide for standing requests. In *Sargent*, the requestor sought records in a law enforcement investigation. The Seattle Police Department argued that the records were exempt because the investigation was open and on-going. The Court rejected this argument on other grounds, but concluded that the PRA does not provide for "standing" requests and that an agency determines exemptions applicable on the date of the request. *Sargent*, 167 Wn. App. at 10-11. In so doing, the court stated, "The

legislature requires agencies of government to respond to requests in a timely and clear fashion. But it does not require that agencies provide updates to previous responses, or monitor whether document properly withheld as exempt may later become subject to disclosure.” *Id.*

As noted above, this conclusion is also supported by the Washington State Bar Association’s *Public Records Act Deskbook*. The *Deskbook* does not require that agencies re-open requests, permit standing requests, or require re-assessment of exemptions when a request is received before an investigation is concluded. Rather, it simply states that when an investigation is concluded, the exemption no longer applies. But that is not the case before the Court. Here, there is no dispute that the investigation was open and active in December when Mr. Gipson’s request was received. Both the *Sargent* case and the *Deskbook* support the County’s position and the Court of Appeals decision.

Further, no case law conflicts with this case law and secondary source. Mr. Gipson argues that this Court’s ruling in *Wade’s Eastside Gun Shop, Inc. v. Dep’t of Labor & Indus.*, 185 Wn. 2d 270, 372 P.3d 97 (2016) (“*Wade’s*”) controls this case. This argument is misplaced. The *Wade’s* case dealt with two issues: imposition of PRA penalties and application of RCW 42.56.240(1), the “categorical investigative records exemption” to an L&I investigation. This case addresses neither.

The County did not cite to RCW 42.56.240(1) as a basis for withholding records in its active, on-going discrimination investigation. Rather, the County cited to RCW 42.56.250(6), which specifically applies to employment discrimination investigations. This is distinct from *Wade's* where the agency cited to RCW 42.56.240(1) (which applies to criminal investigations) in a non-criminal case. The application of RCW 42.56.240(1) must meet a three-part test. *Wade's*, 185 Wn.2d at 281. First, the agency must establish that the records at issue are investigative in nature. *Id.* Second, the agency must establish they were created or compiled by a law enforcement, penology, or investigative agency. *Id.* Third, the agency must demonstrate that nondisclosure of the records is either essential to effective law enforcement or to protect an individuals' right to privacy. *Id.* In *Wade's* the Court concluded the agency inappropriately applied RCW 42.56.240(1) because L&I did not establish that nondisclosure was essential to effective law enforcement. *Id.* at 283.

Additionally, in *Wade's* the Court considered the production of records in installments. *Id.* at 289. The Court concluded that the delay in production of records based on an inaccurate estimate of when the investigation would be concluded was inappropriate. *Id.* Specifically, L&I told the requestors the investigation would not be done until August and indicated the requestor could re-submit their request after that date. *Id.* This

turned out to be a falsehood. *Id.* In fact, L&I concluded their investigations in March and June. *Id.* The Court found this to be egregious, because it appeared the agency gave an estimated date of August “as an excuse to withhold records that [we]re no longer exempt from disclosure.” *Id.* The Court concluded this was a violation of the PRA because L&I improperly withheld records “without meeting its burden of showing how the records were—even temporarily—exempt.” *Id.* at 290.

Wade’s does not apply to Mr. Gipson’s case. First, the County did not cite the criminal investigation exemption cited in *Wade’s*. Second, the exemption cited by the County, RCW 42.56.250(6), does not involve a three-part analysis. Rather, the legislature created a specific exemption for the type of investigation at issue in this case: an investigation into discrimination in employment. RCW 42.56.250(6). This exemption only requires that the investigation be “active and ongoing” at the time of the request. There is no requirement that non-disclosure of the records be essential to a governmental purpose. If the legislature had intended to make this requirement it would have done so. It did not.

Further, RCW 42.56.250(6) applied at the time the County received Mr. Gipson’s request. The County did not purposely set-out installments to delay production in order to keep Mr. Gipson from getting records. The County similarly did not lie to Mr. Gipson about when the investigation

would be completed in order to keep him from getting records to which he was otherwise entitled. The Court's holding in *Wade's* does not apply to the facts of this case.

In this case, the requirement of RCW 42.56.250(6) was met. The County was conducting an active and ongoing investigation into allegations of discrimination in employment and appropriately withheld the requested records based on the facts as they existed on December 1, 2014. *See Sargent* 167 Wn.App. at 10-11. The court of appeals ruling furthers public policy, comports with this well-settled case law, and does not conflict with any Supreme Court decision. The Court should deny discretionary review under RAP 13.4(b)(1) and (4).

B. The Court of Appeals Properly Rejected Mr. Gipson's Equitable Estoppel Claim.

Mr. Gipson did not argue, and the trial court did not rule on, equitable estoppel in the lower court. See CP 361-373 and CP 396-398. As a result, the court of appeals properly refused to consider this unpreserved issue. Mr. Gipson's equitable estoppel argument still fails to meet the requirements of RAP 2.5(a). Equitable estoppel does not impact the trial court's jurisdiction, does not demonstrate a failure to establish relief can be granted, nor is it an issue of manifest error effecting a constitutional right. Rather it is an issue that was not asserted, not briefed, and to which the

County did not have an opportunity to respond in the trial court. The Court should not grant review on this issue.

Further, Mr. Gipson's equitable estoppel claim fails as a matter of law. The elements of equitable estoppel are: "1) a party's admission, statement or act inconsistent with its later claim; 2) action by another party in reliance on the first party's act, statement, or admission; and 3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission." *Kramerevecky v. Department of Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993), citing, *Robinson v. Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, cert. denied, 506 U.S. 1028, (1992). Additionally, equitable estoppel against the government is not favored and requires proof of two additional elements: 1) equitable estoppel must be necessary to prevent a manifest injustice; and 2) the exercise of governmental functions must not be impaired as a result of the estoppel. *Kramerevecky*, 122 Wn.2d at 743¹. Additionally, "[c]ourts should be most reluctant to find the government equitably estopped when public revenues are involved." *Kramerevecky*, 122 Wn.2d at 744². The burden is on the party asserting

¹ Citing, *Shafer v. State*, 83 Wash.2d 618, 622, 521 P.2d 736 (1974); *Finch v. Matthews*, 74 Wash.2d 161, 175, 443 P.2d 833 (1968)

² Citing, *Harbor Air Serv., Inc. v. Board of Tax Appeals*, 88 Wash.2d 359, 367, 560 P.2d 1145 (1977)

equitable estoppel to demonstrate the factors are present by clear, cogent, and convincing evidence. *Kramerevecky* at 744.³

Mr. Gipson asserts the County should be equitable estopped from arguing he should have re-submitted his request. Mr. Gipson bases his equitable estoppel argument on his assertion that the County's representative factually misrepresented that the investigation was continuing on multiple occasions when in fact it had been concluded. Mr. Gipson's argument fails because the County's representative did not provide him with false information. Mr. Gipson was repeatedly and specifically informed that records were exempt **in response to his December 1, 2014, request**. This is factually accurate. The records were exempt because the discrimination investigation was active and on-going on December 1, 2014. The County did not give Mr. Gipson inaccurate information.

Further, contrary to Mr. Gipson's assertion that he was discouraged from submitting refresher requests⁴, he did submit a refresher request on February 18, 2016. CP 37-42. Additionally, Mr. Gipson, as the subject of the discrimination investigation, was informed in no uncertain terms that the investigation was closed, by multiple letters sent to him on February 2,

³ Citing, *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wash.App. 758, 760-61, 695 P.2d 996 (1985).

⁴ Appellant's Brief at 19.

2015.⁵ Indeed, he was told this was why the local newspaper was being provided a copy of the records. He was similarly informed of his right to seek an injunction under RCW 42.56.540, an action which he chose not to take.

Mr. Gipson cannot establish the three basic elements of equitable estoppel. The County has never admitted, stated, or acted inconsistent with its assertion that the discrimination investigation was active and on-going on December 1, 2014, when his public records request was received. As a result, there was no admission, statement, or action on which Mr. Gipson could have relied to his injury. Additionally, Mr. Gipson cannot demonstrate the additional two elements for finding equitable estoppel against the County, a government agency. Mr. Gipson has not demonstrated a finding of equitable estoppel is necessary to prevent a manifest injustice or that such a finding would not impair the exercise of governmental functions. Mr. Gipson has failed to meet his burden. The court should not grant discretionary review on this issue.

⁵ The County is unable to cite to a CP for this factual assertion – not because there are not documents in support of this assertion, but because the documents are not part of the lower court’s record. The letters were provided to the County by Mr. Gipson as exhibits in his Trial Exhibits. Because this case was resolved on summary judgment, these letters were not admitted into the lower court record.

This conundrum illustrates the policy behind RAP 2.5(a). Because this issue has been raised for the first time on appeal, the County is denied the opportunity to defend itself with documentary evidence.

If the court intends to consider Mr. Gipson’s equitable estoppel argument, the County requests leave to supplement the records with these letters.

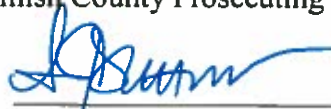
V. CONCLUSION

For all of the foregoing reasons, this Court should deny Mr. Gipson's petition for review under RAP 13.4(b).

Respectfully submitted on September 26, 2018.

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By:



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DECLARATION OF SERVICE

I, Kathy Murray, hereby certify that on the 27th day of September, 2018, I caused to be delivered and served a true and correct copy of the foregoing pleadings upon the entity and persons listed herein by the following means:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 27th day of September, 2018.


Kathy Murray

SNOHOMISH COUNTY PROSECUTING ATTORNEY - MUNI

September 27, 2018 - 11:01 AM

Transmittal Information

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