96164-6

No. 76826-3-1

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of

RON GIPSON

RON GIPSON,

Plaintiff - Appellant,

v.

SNOHOMISH COUNTY, a municipal corporation

Respondent.

PETITION FOR REVIEW

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A. Identity of Petitioner

COMES NOW the Petitioner, Ron Gipson, by and through his attorney, Rodney R Moody, and hereby requests this Court accept review of the Court of Appeals, Div. I decision affirming summary judgment on May 2, 2017.

B. Court of Appeals Decision

The Petitioner seeks review of the Court of Appeals ruling upholding the Trial Courts granting of summary judgment as to the violation the Public Records Act, dated May 2, 2017.

C. Issues Presented for Review

1. Does the decision of the Trial Court and Court of Appeals violate the public policy established by RCW 42.56.030 when ruling the decision of *Sargent v. Seattle Police Dept.*, 167 Wn.App. 1 (2011)creates a bright line rule that standing requests under the Public Records Act are not permitted.
2. Did the Court of Appeals error by failing to recognize that the doctrine of equitable estoppel precluded the Defendant from arguing that the burden was on the Plaintiff to submit supplemental public record requests after an employment related investigation was concluded but the Defendant continued to factually misrepresent that the investigation was in fact continuing.

D. Statement of the Case

In 2014 Appellant/Ron Gipson became the subject of several sexual harassment allegations while employed by Snohomish County. The County retained a private attorney, Marcella Fleming Reed (hereafter MFR), to conduct an investigation into these allegations.

On December 1, 2014, Gipson made a Public Records Request to the County which assigned number 14–06701. CP 50-56. In response to this public record request he received five installments of documents, all

heavily redacted as to substance, along with exemption logs claiming the continuing exemption of RCW 42.56.250(5). CP 47-49.

The MFR investigation concluded on February 2, 2015. CP 374. On February 19, 2015, the second installment was forwarded to Gipson by the County. Gipson was informed in the supplied Withholding Log that an additional 69 various documents were provided in a redacted state, but the records were being withheld pursuant to RCW 42.56.250(5) "because the investigation is open and ongoing." CP 57-58. The MFR investigation was actually closed 17 days prior to this second installment being forwarded.

On March 5, 2015, Gipson was provided with a third installment of 298 pages which were described as "On-going EEO investigation records." CP 137. Under the title Applicable Exemption RCW 42.56.250(5) was again cited. CP 137. This Withholding Log also included a column entitled "The cited exemption applies because the withholding information includes the following:" Under this column it was stated, "Investigative records relating to an active, ongoing investigation of a violation of the law against discrimination in employment." The applicable investigation was actually completed more than a month prior to forwarding this third installment.

In 2015 Gipson was the longest-serving member of the Everett City Council and up for reelection that fall. Gipson desired these records in order to assist him in refuting a negative article which appeared in the Everett Herald on March 6, 2015, regarding the allegations of sexual harassment. CP 309. The information included in the article was derived by a reporter for the Everett Herald from information contained in the MFR investigation that had been given to the reporter based on a PRA request prior to March 5, 2015.

The Fifth and final installment was forwarded by to Gipson on May 4, 2015. CP 139-140. This email string includes an email from Gipson to a County employee on April 30, 2015. Gipson specifically requested the County's position on PRR 14–06701. CP 139. The County employee responded that he was attaching one last installment of responsive records and that "this request is now closed." There was no indication in this communication that the MFR investigation had been closed on February 2, 2015.

Included with this fifth installment were billing invoices which again had the substantive activity entirely redacted and provided no information to Gipson. CP 139-140. While being informed that the request was closed on May 4, 2015, the continued redaction of documents

was consistent with an investigation that remained open and ongoing. This investigation had actually been concluded three months earlier.

In 2016 Gipson retained counsel to assist him and this litigation was filed on April 25, 2016. Thereafter on May 31, 2016, he was finally provided with un-redacted copies of all the billing invoices he was wrongfully denied in 2014 under PRR 14–06701.

E. Argument

RAP 13.4 (b)(1) and (4) both provide a basis for acceptance of review by this Court.

Public Policy; RAP 13.4 (b)(4)

To effectuate the Public Record Act's (PRA) purpose the legislature declared the PRA "shall be liberally construed and its exceptions narrowly construed." RCW 42.56.030; *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016). Despite this clear legislative pronouncement of public policy and judicial recognition underpinning the PRA the ruling of both the Trial Court and the Court of Appeals achieves the opposite result; that of narrowly construing the PRA to the benefit of government and detriment of the public.

Regardless of the merit of any argument that reevaluation of public record requests may create additional work for a governmental entity; this

consideration is not part of the legislatively stated public policy. RCW 42.56.030 is stated as:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter in any other act, the provisions of this chapter shall govern.

RCW 42.56.030. Nothing in this policy states that a governmental entity is to be relieved of its obligation to comply with this public policy if the burden is too significant.

The Courts have stated the paramount duty in interpreting a statute is to ascertain and give effect to the intent of the legislature. *State v. Johnson*, 119 Wn.2d 167, 172, 829 P.2d 1082 (1992); citing *City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 669, 818 P.2d 1076 (1991). Each statute is to be interpreted in light of the entire statutory scheme. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007); citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). Where the legislature has prefaced an enactment with a declaration of purpose the declaration serves "as an important guide in determining the intended effect of the operative

sections." *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978); citing *Hartman v. Wash. State Game Comm'n*, 85 Wn.2d 176, 179, 532 P.2d 614 (1975).

The Legislature has stated the public policy of the State of Washington and this Court is required to give credence to that public policy.

Bright Line Rule

The County argues that the decision in *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) created a bright line rule that there are no standing requests under the PRA and that exemptions are applied as of the date of the request. In *Sargent* the Court cited to the Washington State Bar Associations *Public Records Act Deskbook* as authority wherein it states, "The Public Records Act does not provide for 'continuing' or 'standing' requests." §5.3(3)(d) cmt. at 5-31 (2006). The Court noted that instead the comments suggest "refresher" requests while stating, "An agency is not required to monitor whether newly created or newly nonexempt documents fall within a request to which it has already responded." Id. at 11-12.

As noted above the Court in *Sargent* cited to the *Deskbook* as authority in support of its ruling on this point. The facts of that case dealt

with a criminal investigation and the exemption provided under RCW 42.56.240(1). This case however addresses the exemption created by then RCW 42.56.250(5), now RCW 42.56.250(6), which makes these facts distinguishable from *Sargent*.

The *Deskbook* in §10.3(6), pg. 10-23, specifically addresses then RCW 42.56.250(5) and states:

> Although there is not yet published authority on these exemptions, the exemptions cover a very narrow situation, which rarely applies to typical employee misconduct investigations. RCW 42.56.250(5) only applies to "active and ongoing" investigations, and once an investigation is concluded *the records are to be disclosed.* Even if RCW 42.56.250(4) or RCW 42.56.250(5) applies, there may be arguments that the records should be released, with redactions, where doing so would not violate privacy or interfere with efficient government operations or the investigation at issue. (Emphasis added)

The *Deskbook* section specifically addressing then RCW 42.56.250(5) which is the applicable statute in this case specifically *does not* support a bright line rule as it clearly states that the records are to be disclosed once the employment related investigation is concluded.

Sargent is also distinguishable from the facts of the present case because the Seattle Police Department responded to each of Sergeant's requests as they came in, and he was able to appeal those responses. Id. at 11. The Court noted that when the status of the records changed Sargent was notified and he had the opportunity to refresh his request. Id. at 11.

Not only was Gipson not notified by the County that the relevant investigation was concluded; he was provided with factually incorrect information directly stating in the second and third installment, and implied in the fifth installment (all heavily redacted and substantively useless) that the investigation remained open and as a result the status of the requested records unchanged. This of course dissuaded Gipson from submitting "refresher" requests. Unredacted documents which should have been provided in February 2015 were only provided in May 2016 after Gipson had initiated this litigation, and lost his reelection bid.

The Court of Appeals simplistically states:

> After the investigation closed, the County produced to the substantially redacted records in installments, claiming the exemption under RCW 42.56.250 (6)(noting the change from (5) to (6)) for records related to an active and ongoing investigation applied to Gipson's request. Gipson challenges this exemption claim because the County produced the records after the investigation ended. But an agency makes a determination of whether a record is exempt at the time that it receives the requests. So the exemption applied. We affirm.

This ruling disregards the fact that the five installments provided were all heavily redacted and substantively of no use to Gipson or any member of the public in a similar situation. Further, this ruling ignores the fact that the County continued to provide false information claiming that the exemption was still applicable. This ruling also ignore the fact that the

County ultimately on May 31, 2016 did provide the requested records, but only after Gipson himself had initiated this lawsuit.

This begs the question of course why the County produced the records in an unredacted state on May 31, 2016, at all if, as claimed, the County had no legal responsibility to do so because RCW 42.56.250(5) applied as of the date of the December 2014 public record request, there are as the County claims no standing requests, and they were within their legal purview to not produce these records at all until and unless Gipson had initiated a "refresher" request? Gibson did not issue a refresher request. The County's response is legally baseless. It is respectfully submitted that the ruling of the Trial Court which was subsequently upheld by the Court of Appeals is similarly legally baseless and a direct violation of the public policy of the PRA.

This is also directly relevant to the question of whether this Court should accept review. Every governmental entity in the State of Washington cites to *Sargent* for the proposition that there are no standing requests and therefore if an exemption applies on the date a public record request is received that exemption continues to apply unless a refresher request is made. This position flies in the face of the public policy as outlined above and is also contrary to subsequent authority of the *Wade's* decision.

Wade's v. L&I; RAP 13.4(1)

This issue was also indirectly addressed in the *Wade's* decision. The Court of Appeals, Div. I wrongfully upheld the Trial Court's ruling that *Wade's* was distinguishable and did not apply to the facts of this case.

Initially, in *Wade's* L&I argued that the exemption in RCW 42.56.240(1) applied and because of this the narrow open investigation categorical exemption recognized in *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712 (1997)was applicable. The *Wade's* decision rejected this argument because the exemption regarding open criminal investigations recognized in *Newman* was to be narrowly construed based upon RCW 42.56.030. *Wade's* Supra at 280. Ultimately the Court determined that L&I was unable to establish the essential to government component of RCW 42.56.240(1) and therefore this exemption did not apply. *Wade's*, supra at 285-86.

The Court recognized that an L&I investigation was unlike an open, unsolved criminal investigation. Id at 282-83. The Court noted that the concerns that justified *Newman's* categorical exemption did not exist in the context of an L&I investigation. The Court stated, "Employers know that they are being investigated." "There is not the same risk of disclosing sensitive information that exists in a criminal investigation and

could impede the apprehension of an-as-yet unknown suspect." Id. at 282-83.

The present facts of course are directly analogous to an L&I investigation. The County and Gipson were both aware this investigation was taking place. This was not an open criminal investigation with an-as-yet to be determined suspect. There was no sensitive information involved which if released could potentially impede this investigation.

In the context of an L&I investigation into safety related working conditions the Court specifically ruled: "We Affirm the Superior Courts Ruling L&I Violated the PRA When It Failed To Produce the Records after the Investigations Closed." (Emphasis in original) Id. at 289. The Court specifically affirmed the Superior Court's ruling "because L&I continued to improperly withhold records." Id. at 289.

None of the above language is consistent with a "bright line" rule that applicable exceptions are determined on the date of a PRA request and then continue to apply without change. This Court made it clear in *Wade's* that the "bright line rule" so desired by Snohomish County and virtually every governmental entity in the State of Washington did not exist in the context of that case.

The *Wade's* decision also noted that L&I set an unreasonable deadline after the investigations actually concluded to produce records.

The Court noted that such delay is contrary to the letter and spirit of the PRA. Id at 289. The Court stated, "While agencies may provide a reasonable estimate of when they can produce the requested records, *see Ockerman v. King County Dep't of Developmental & Envtl. Servs.*, 102 Wn.App. 212, 6 P.3d 1214 (2000), they cannot use that estimated date as an excuse to *withhold records that are no longer exempt from disclosure.*" (Emphasis added) Id. at 289. Again, why would the Court state in *Wade's* that a governmental entity had no continuing responsibility to produce records no longer exempt from disclosure if a bright line rule exists pursuant to the *Sargent* decision?

In this case it is undisputed that the public records request filed by Gipson occurred on December 1, 20**14**. The investigation that provided the basis for an exemption under then RCW 42.56.250(5) concluded on February 2, 2015. Thereafter during 2015 Snohomish County produced five heavily redacted and useless installments claiming an exemption that no longer applied. Only after litigation was filed in April 20**16** did the County produce the unredacted documents it should have produced in February 20**15** on May 31, 20**16**.

The Court in *Wade's* made it clear that a continuing obligation exists to supplement requested records in the context of an L&I safety investigation once any exception is no longer applicable. Id. at 289. The

L&I investigation into safety related working conditions is directly analogous to this investigation into alleged employment sexual harassment.

On May 31, 2016, 18 months after his original request and 16 months after the MFR investigation concluded the County finally provided Gipson the requested MFR billing records as unredacted documents. This occurred one month *after* Gipson filed this lawsuit against the County for violating the PRA. This was also, of course, well after Gipson had lost the election in the fall of 2015. This is a violation of the PRA and the granting of summary judgment was legal error.

RAP 2.5(a)

The concept of equitable estoppel and Gipson's reliance to his detriment on the misleading information provided by the County in response to his PRR was not brief but was argued to the Trial Court during oral argument. RAP 2.5 (a) permits this Court to exercise discretion to consider this issue. The concept of equitable estoppel was argued before the lower court during oral argument, briefed to the Court of Appeals, and the Respondent has had full opportunity to respond.

Equitable Estoppel

Equitable estoppel is based on the view that "a party should be held to a representation made or position assumed where inequitable consequences

would otherwise result to another party who has justifiably and in good faith relied thereon." *Lybbert v.Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000). A party claiming equitable estoppel must demonstrate three elements: (1) an admission, statement or act inconsistent with the claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. Id. at 35. Equitable estoppel is not a favored doctrine and therefore requires proof by clear, cogent, and convincing evidence. *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 734, 853 P.2d 913 (1993).

The Withholding Logs forwarded by the County in 2015 after the investigation closed were factually incorrect. The investigation was not open and ongoing. Knowingly, or perhaps even negligently, providing false information which you intend the receiving party to rely upon is not an appropriate action under the PRA. This satisfied the first element.

Had Gipson been informed in February 2015 that the MFR investigation related to his PRR was concluded but that the requested records were not going to be provided because of the exemption of RCW 42.56.250(5) he would have had the opportunity to submit refresher requests in a timely manner. Gipson reasonably relied upon the

information conveyed by the County that the investigation was open and ongoing as supported by the evidence of the Withholding Logs supplied with redacted documents. This establishes the second element of equitable estoppel.

The third element requires a demonstration of injury to the relying party from allowing the County to contradict or repudiate the communications that the MFR investigation remained open and ongoing even after as a factual matter it had been concluded. Because Gipson relied upon these misrepresentations he did not obtain the necessary records for him to repudiate the article printed in the Everett Harold negatively impugning him as it relates to the sexual harassment allegations at his place of work. Gipson lost the 2015 election. Gipson was injured by the actions of the County and their failure to provide him in a timely fashion the records requested on December 1, 2014.

Pursuant to *Kramerevecky v. Department of Social and Health Services,* 122 Wn.2d 738, 863 P.2d 535 (1993)Gipson must additionally establish that equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel. Id. at 743.

A manifest injustice is clearly present. Simply put, the County knowingly presented false information to Gipson with the resulting effect,

whether intentional or not, of discouraging him from presenting refresher requests.

The second requirement that the exercise of governmental functions not be impaired is also present. Preventing the County from knowingly presenting false information to a citizen requesting public records should be encouraged. Denying the application of equitable estoppel as advocated by the County will have the opposite effect of encouraging government to act in an inappropriate fashion toward its citizens.

The County will argue that Gipson was not provided with false information because, "Mr. Gipson was repeatedly and specifically informed that the records were exempt in response to his December 1, 2014, request." Res. Br., pg. 14. Actually that is not what Gipson was told. In the first disclosure of records provided February 19, 2015, 17 days after the closure of the MFR investigation regarding Gipson the County stated under the column "Exemption" the records are withheld because the investigation is open and ongoing. CP 58. That was not true.

The third installment provided to Gipson on March 5, 2015 notified him that 298 pages of records were being withheld. The column "Applicable Exemption" cited RCW 42.56.250(5) and stated, "Investigative records compiled by an employing agency conducting an

active and ongoing investigation as a possible unfair practice under RCW 49.60 RCW or a possible violation of other federal, state, or local laws prohibiting discrimination in employment are exempt." CP 137

The next column on the Withholding Log states, "The cited exemption ***applies*** because the withholding information includes the following: "investigative records related to an active, ongoing investigation of a violation of a law against discrimination in employment." CP 137 (Emphasis added). The use of the term "applies" of course implies the present tense. Gipson in reading this claimed exemption would be informed that the investigation was current and ongoing. Had the County chosen to properly inform Gipson that the investigation was closed the County should have used the term "applied" thereby implying past tense. Then Gipson would be on notice that the investigation was closed. The choice to use the present tense term "applies" conveys an entirely different message, however, that the investigation remained ongoing.

The County would argue that Gipson "in no uncertain terms" was notified that the investigation was closed by multiple letters sent to him February 2, 2015. Letters indeed were sent to Gipson informing him that the MFR investigation was closed. There is nothing however in either of the Withholding Logs identified above on February 19th or March 5th that

informed Gipson *which* investigation was ongoing. Gipson would be required to guess that the investigation referred to is related to him and not another employee. Given the public policy as stated in RCW 42.56.030 it is not Gipson's responsibility to guess which investigation is being referred to.

The elements of equitable estoppel are fully met. The County should not be permitted to knowingly provide false information to a citizen requesting the release of public records and expect that such a false disclosure will be sanctioned simply because they are a governmental entity burdened with public record requests.

F. Conclusion

Every governmental entity in the State of Washington cites to the *Sargent* decision purportedly establishing a "bright line rule" which it is argued dictates that there are no standing requests under the PRA and if an exemption exists on the date that a PRR is received that exemption continues to deny the requested records until and unless a standing or refresher request is submitted. This reasoning and argument is in conflict with both the *Public Records Act Deskbook* cited as authority by the Court in *Sargent* as well as this Court's decision in *Wade's.*

It is respectfully requested that this Court accept review and clarify the conflict between these authorities so that members of the public, such

as Gipson, can request records from various governmental entities with certainty that the public policy established by the Legislature in RCW 42.56.030 will be complied with.

RESPECTFULLY SUBMITTED this 8th day of August, 2018.

/s/ Rodney R. Moody
WSBA #17416, Attorney for Appellant

Exhibit A

RCW 42.56.030

Construction.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the 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.

[**2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2.** Formerly RCW **42.17.251**.]

Exhibit B

RCW 42.56.250

Employment and licensing. *(Effective until July 1, 2019.)*

The following employment and licensing information is exempt from public inspection and copying under this chapter:

(1) Test questions, scoring keys, and other examination data used to administer a license, employment, or academic examination;

(2) All applications for public employment, including the names of applicants, resumes, and other related materials submitted with respect to an applicant;

(3) Professional growth plans (PGPs) in educator license renewals submitted through the eCert system in the office of the superintendent of public instruction;

(4) The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal email addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency. For purposes of this subsection, "employees" includes independent provider home care workers as defined in RCW **74.39A.240**;

(5) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter **49.60** RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;

(6) Investigative records compiled by an employing agency conducting an active and ongoing investigation of a possible unfair practice under chapter **49.60** RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment;

(7) Criminal history records checks for board staff finalist candidates conducted pursuant to RCW **43.33A.025**;

(8) Except as provided in *RCW **47.64.220**, salary and benefit information for maritime employees collected from private employers under *RCW **47.64.220**(1) and described in *RCW **47.64.220**(2);

(9) Photographs and month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW **10.97.030**. The news media, as defined in RCW **5.68.010**(5), shall have access to the photographs and full date of birth. For the purposes of this subsection, news media does not include any person or organization of persons in the custody of a criminal justice agency as defined in RCW **10.97.030**; and

(10) The global positioning system data that would indicate the location of the residence of a public employee or volunteer using the global positioning system recording device.

[2017 c 38 § 1; 2017 c 16 § 1; 2014 c 106 § 1. Prior: **2010 c 257 § 1; 2010 c 128 § 9; 2006 c 209 § 6; 2005 c 274 § 405.]**

NOTES:

Reviser's note: *(1) RCW **47.64.220** was repealed by **2010 c 283 § 20.**

(2) This section was amended by 2017 c 16 § 1 and by 2017 c 38 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW **1.12.025**(2). For rule of construction, see RCW **1.12.025**(1).

RCW 42.56.250

Employment and licensing. (*Effective July 1, 2019.*)

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(5) Information that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter **49.60** RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed;

(6) Investigative records compiled by an employing agency conducting an active and ongoing investigation of a possible unfair practice under chapter **49.60** RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment;

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(10) The global positioning system data that would indicate the location of the residence of a public employee or volunteer using the global positioning system recording device; and

(11) Until the person reaches eighteen years of age, information, otherwise disclosable under chapter **29A.08** RCW, that relates to a future voter, except for the purpose of processing and delivering ballots.

[**2018 c 109 § 17.** Prior: **2017 c 38 § 1; 2017 c 16 § 1; 2014 c 106 § 1;** prior: **2010 c 257 § 1; 2010 c 128 § 9; 2006 c 209 § 6; 2005 c 274 § 405.**]

NOTES:

***Reviser's note:** RCW **47.64.220** was repealed by **2010 c 283 § 20.**

Findings—Intent—Effective date—2018 c 109: See notes following RCW **29A.08.170**.

Exhibit C

(6) Unfair practices allegations—RCW 42.56.250(4) and RCW 42.56.250(5)

RCW 42.56.250(4) exempts

> [i]nformation that identifies a person who, while an agency employee: (a) Seeks advice, under an informal process established by the employing agency, in order to ascertain his or her rights in connection with a possible unfair practice under chapter 49.60 RCW against the person; and (b) requests his or her identity or any identifying information not be disclosed.

RCW 42.56.250(5) exempts "[i]nvestigative records compiled by an employing agency conducting an active and ongoing investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment; ...."

Although there is not yet published authority on these exemptions, the exemptions cover a very narrow situation, which rarely applies to typical employee misconduct investigations. RCW 42.56.250(5) only applies to "active and ongoing" investigations, and once an investigation is concluded the records are to be disclosed. Even if RCW 42.56.250(4) or RCW 42.56.250(5) applies, there may be arguments that the records should be released, with redactions, where doing so would not violate privacy or interfere with efficient government operations or the investigation at issue.

§10.3 OTHER CONSIDERATIONS—RECORD RETENTION

Under RCW 42.56.100, once a record has been requested, the agency "shall retain possession of the record, and may not destroy or erase the record until the request is resolved." In other word, "[d]estruction of a requested record violates the PRA and can lead to imposition of penalties." *Neighborhood Alliance of Spokane Cnty. v. County of Spokane*, 172 Wn.2d 702, 750, 261 P.3d 119 (2011) (Madsen, C.J., concurring). The fact that the destruction was otherwise authorized by the retention schedules promulgated by the secretary of state pursuant to Chapter 40.14 RCW is not a defense. *O'Neill v. City of Shoreline* (*O'Neill II*), 170 Wn.2d 138, 149-50, 240 P.3d 1149 (2010).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RON GIPSON, Appellant, v. SNOHOMISH COUNTY, a municipal corporation, Respondent.	)	No. 76826-3-I DIVISION ONE UNPUBLISHED OPINION FILED: July 9, 2018

LEACH, J. — Ron Gipson appeals a summary judgment dismissing his Public Records Act (PRA)[1] claim against Snohomish County (County). In December 2014, Gipson requested records related to an open investigation involving him. The investigation concluded in February 2015. After the investigation closed, the County produced the substantially redacted records in installments, claiming the exemption under RCW 42.56.250(6)[2] for records related to an active and ongoing investigation applied to Gipson's request. Gipson challenges this exemption claim because the County produced the records after the investigation ended. But an agency makes its determination of

[1] Ch. 42.56 RCW.

[2] In 2017, the relevant exemption was renumbered. As a result, the exemption for records related to an active and ongoing investigation into employment discrimination that was previously numbered RCW 42.56.250(5) is now numbered RCW 42.56.250(6). LAWS OF 2017, Reg. Sess., ch. 16 § 1.

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whether a record is exempt at the time that it receives the request. So the exemption applied. We affirm.

FACTS

The County employs Gipson as a corrections officer at the Snohomish County Juvenile Justice Center. In 2014, the County employed Marcella Fleming Reed (MFR), an outside investigator, to investigate select female corrections officers' allegations of sexual harassment and sexual discrimination against Gipson. The investigation continued until February 2, 2015.

Gipson made a public records request (PRR) on December 1, 2014. He requested 30 categories of records. The request's preamble limited it to records "'which in any way mention[ ] the name Ron Gipson.'" The documents requested included a "'copy of all 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 form from the dates of December 27, 2013 to November 5, 2014.'" Gipson also requested records contained in the e-mail accounts of various employees related to an ongoing investigation into the allegations against him.

The County produced five installments of records in response to Gipson's request. It heavily redacted documents in installments two, three, and five, which it provided after the investigation concluded. The responses described the

withheld information as records related to an "active and on-going" investigation into employment discrimination and cited RCW 42.56.250(6). The County closed Gipson's request on May 4, 2015.

On February 18, 2016, Gipson submitted two more public records requests, which the County consolidated. Gipson claims that on May 31, 2016, the County produced unredacted copies of all the billing invoices he had previously received in response to his December 2014 request.

Gipson filed this lawsuit on April 25, 2016. The trial court dismissed the lawsuit on summary judgment, finding that the County met its burden of showing that RCW 42.56.250(6) applied to the records at issue. Gipson appeals.

STANDARD OF REVIEW

The PRA allows the public access to records for inspection and copying.[3] But it exempts some records from disclosure.[4] This case involves the exemption for records related to an "active and ongoing" investigation into employment discrimination under RCW 42.56.250(6).[5] An appellate court reviews de novo an

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[3] Sargent v. Seattle Police Dep't, 167 Wn. App. 1, 9, 260 P.3d 1006 (2011), rev'd in part on other grounds, 179 Wn.2d 376, 314 P.3d 1093 (2013); ch. 42.56 RCW.

[4] Sargent, 167 Wn. App. at 9; ch. 42.56 RCW.

[5] RCW 42.56.250(6) exempts the following employment and licensing information from public inspection and copying: "Investigative records compiled by an employing agency conducting an active and ongoing investigation of a possible unfair practice under chapter 49.60 RCW or of a possible violation of other federal, state, or local laws prohibiting discrimination in employment."

agency's compliance with the PRA.[6] It liberally construes the PRA and narrowly construes its exemptions.[7] The agency bears the burden of proving that an exemption applies.[8]

In reviewing an order of summary judgment, an appellate court engages in the same inquiry as does the trial court.[9] It should affirm a summary judgment "only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[10] It considers the facts in a light most favorable to the nonmoving party,[11] in this case, Gipson.

ANALYSIS

Gipson claims that because the MFR investigation into the allegations against him had concluded before the County responded to his December 2014 PRR, it improperly claimed the exemption for records related to an "active and ongoing" investigation into employment discrimination. We disagree.

In Sargent v. Seattle Police Department,[12] this court held that there are no standing requests under the PRA. This means that after an agency has properly

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[6] RCW 42.56.550(3); Sargent, 167 Wn. App. at 10.
[7] Sargent, 167 Wn. App. at 10.
[8] Sargent, 167 Wn. App. at 10.
[9] Reid v. Pierce County, 136 Wn.2d 195, 201, 961 P.2d 333 (1998).
[10] Reid, 136 Wn.2d at 201.
[11] Reid, 136 Wn.2d at 201.
[12] 167 Wn. App. 1, 6, 260 P.3d 1006 (2011), rev'd in part on other grounds, 179 Wn.2d 376, 314 P.3d 1093 (2013).

responded, it is irrelevant whether a claimed exemption ceases to apply because "'[a]n agency is not obligated to supplement responses.'"[13] Instead, the requester may submit a "refresher" request.[14] To support its decision, this court cited WAC 44-14-04004(4),[15] which states, in part, that "if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided." The court explained that the no-standing-requests rule is consistent with the PRA's policy to provide public access to existing, nonexempt records: "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 documents properly withheld as exempt may later become subject to disclosure."[16]

The Washington State Bar Association's Public Records Act Deskbook reiterates the no-standing-requests rule and states, similarly,

> [T]he determination of whether a record is exempt is made at the time the request is received. If, for example, a temporal exemption expires after the request is made, the agency is not required to produce the record; but the record must be identified on an

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[13] Sargent, 167 Wn. App. at 11 (quoting WAC 44-14-04004(4)).

[14] Sargent, 167 Wn. App. at 11.

[15] The Office of the Attorney General promulgated the model rules at the request of the legislature to provide guidance to agencies and the public. RCW 42.56.570; Sargent, 167 Wn. App. at 11 n.11.

[16] Sargent, 167 Wn. App. at 10-11.

> exemption log, and as a practical matter it may be advisable for the agency to produce the record if it has not yet closed the request.[17]

This case does not involve a standing request because the County had not yet produced the installments containing the requested records when the relevant exemption ceased to apply. But this court's reasoning in Sargent still applies. Sargent reasoned that the PRA does not permit standing requests because, as the WAC and deskbook indicate, an agency determines whether a record exists or is exempt at the time that it receives the request.

Although the County provided installments two, three, and five containing heavily redacted records after the close of the investigation, Gipson submitted the PRR providing the basis for his claim on December 1, 2014, two months before the investigation ended on February 2, 2015. Because he submitted his request while the investigation into the allegations against him for employment discrimination was ongoing, the exemption for records related to an "active and ongoing" investigation into employment discrimination under RCW 42.56.250(6) applied. To receive records subject to this exemption after the investigation ended, the PRA requires that Gipson's submit a refresher request. He did this in February 2016 and ultimately received unredacted copies of the records in

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[17] WASH. STATE BAR ASS'N PUBLIC RECORDS ACT DESKBOOK: WASHINGTON'S PUBLIC DISCLOSURE AND OPEN PUBLIC MEETINGS LAWS § 5.1(4) at 5-8 (2d ed. 2014).

dispute. Gipson has not shown the existence of any genuine issue of material fact about his PRA claim or that the trial court misapplied the PRA.

Gipson also makes an equitable estoppel claim. He asserts that the County misrepresented that the investigation was ongoing by claiming the exemption after the investigation's conclusion. He contends that the County should thus be estopped from claiming that it did not have to produce the records based on the no-standing-requests rule and the requester's obligation to submit a refresher request. But because Gipson's trial counsel did not make an adequate record to preserve this issue for review, we decline to consider it. The trial court properly granted summary judgment.

CONCLUSION

We affirm.

Leach, J.

WE CONCUR:

Spearman, J.

Schindler, J.

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

RON GIPSON, Plaintiff - Appellant, vs. SNOHOMISH COUNTY, Defendant - Appellee.	No. 76826-3-1 Case No.: 16-2-09742-1 SEA King County Superior Court, WA DECLARATION OF MAILING

DECLARATION OF MAILING and SERVICE

I certify that on the 8th day of August, 2018, I filed true and correct copies of Appellants Petition for Review, by depositing the same in the United States mail, postage prepaid, to Washington State Court of Appeals Division I, and by electronic service and also provided a copy by personal service to Sara J. DiVittorio:

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Dated this 8 day of August, 2018.

/s/ Rodney R. Moody
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