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NO. 96164-6

SUPREME COURT OF THE STATE OF WASHINGTON

RON GIPSON,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON and
WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. INTRODUCTION

The people have a right to know if government investigations are fair and effective. For years Washington courts have protected the public's right to see investigative records, including after any narrowly applied exemptions have expired. These records help news outlets and citizens evaluate how laws are enforced. For example, The Daily Herald of Everett used the Public Records Act (PRA) to obtain an investigator's findings that appellant Ron Gipson – then an Everett City Councilman – sexually harassed co-workers at Snohomish County's juvenile justice center.¹ Release of those findings in 2015 (in the midst of his reelection campaign) fostered a valuable public discussion about Mr. Gipson's conduct and Snohomish County's handling of it.

Snohomish County was not so forthcoming when Mr. Gipson asked for investigative records in an attempt to exonerate himself. For months after the investigation ended, Snohomish County continued to tell Mr. Gipson that the records were shielded by a temporary exemption for pending discrimination investigations. This Court should reject the County's attempt to extend temporary exemptions beyond the limited period that the Legislature intended, when secrecy no longer

¹ See <https://www.heraldnet.com/news/everett-councilman-ron-gipson-denies-harassment-allegations/>.

benefits the integrity of investigations. This Court should hold that, if an agency is still processing a records request when a temporary exemption ceases to apply, it must release the records. That is the only result that will comport with existing case law and the PRA requirement for maximum disclosure, while protecting the public interest in timely information about investigations and other temporarily sensitive matters.

II. INTEREST AND IDENTITY OF AMICUS PARTY

Allied Daily Newspapers of Washington (“Allied”) is a trade association representing 25 daily newspapers across the state. Its members regularly report on government investigations of suspected criminal and civil violations. Newspaper reporters need timely access to investigative records in order to inform the public about possible threats to the safety, well-being and rights of Washington citizens. Accordingly, Allied has an interest in ensuring that investigative records are withheld no longer than necessary in accordance with the Public Records Act. In general, Allied acts as a voice for the public regarding access to government records.

The Washington Coalition for Open Government (WCOG) is a nonprofit, nonpartisan organization dedicated to promoting and

defending the public's right to know about the conduct of government and matters of public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an informed citizenry. WCOG is interested in this case because prompt disclosure of investigative records is needed for informed participation in government and elections.

III. STATEMENT OF THE CASE

The following facts are not disputed. While employed as a corrections officer at the Snohomish County Juvenile Justice Center, Mr. Gipson was accused of sexual harassment and discrimination. *Gipson v. Snohomish Co.*, 2018 Wn.App. LEXIS 1574, 2018 WL 3344934 (2018), at 2. In 2014, the County hired an attorney to investigate the allegations. *Id.* On December 1, 2014, Mr. Gipson made a public records request to the County for various records related to the investigation. *Id.* While most of Mr. Gipson's PRA request was still pending, on February 2, 2015, the investigation ended. *Id.*² After the investigation was finished, the County produced three installments of heavily redacted records to Mr. Gipson, citing RCW 42.56.250(6) as

² Snohomish County apparently planned from the outset to take five months to complete its response. Supp. Brf. of Resp., p. 5 (five installments were produced "on the dates promised").

justification for withholding content. *Id.* at 2-3. The County closed Mr. Gipson’s request on May 4, 2015, three months after the investigation ended. *Id.*

The exemption which the County relied upon, RCW 42.56.250(6), expressly applies only when an agency is “conducting an active and ongoing investigation” of discrimination. Nevertheless, the trial court and the Court of Appeals found it was lawful to withhold the records after the investigation ended because Mr. Gipson requested them during the investigation when the records were temporarily exempt. *Gipson* at 3, 6.

IV. ARGUMENT

A. The Lower Courts Misapplied the 2011 *Sargent* Opinion.

In affirming the trial court’s granting of summary judgment to Snohomish County, the Court of Appeals said:

Gipson challenges this [RCW 42.56.250(6)] exemption claim because the County produced the records after the investigation ended. **But an agency makes its determination of whether a record is exempt at the time that it receives the request.** So the exemption applied.

Gipson at 1 (bold added). Because Snohomish County received Mr. Gipson’s request when the “ongoing investigation” exemption still applied, the Court extended that temporary exemption through the

entire period when the request was being processed – including the three months after the investigation ended. *Id.* at 6.

The Court attributed its reasoning to *Sargent v. Seattle Police Dept.*, 167 Wn.App. 1, 6, 11, 260 P.3d 1006 (2011), *rev'd in part on other grounds*, 179 Wn.2d 376, 314 P.3d 1093 (2013), which dealt with a different temporary exemption that may apply while an investigation is pending. However, the Court here misread *Sargent*. In fact, the exempt status in *Sargent* hinged on when the records request was denied, not when the request was received. 167 Wn.App. at 10-11.

More specifically, *Sargent* established that when an agency properly denies requested records based on a temporary exemption that applies at the time of denial, there is no duty to supplement the agency's response once the records lose their exempt status. *Id.*³ *Sargent's* holding has no bearing on cases like this one, where requested records are no longer exempt when the agency responds.

1. *Sargent* dealt with records that were denied while a temporary exemption applied.

The facts of *Sargent* are instructive. In that case, Evan Sargent was arrested on July 28, 2009, after an altercation with an off-

³ To put it another way, if the temporary exemption applies at the time of the response, the agency need not revisit its response after the temporary exemption expires.

duty policeman. 167 Wn.App. at 7. On July 30, 2009, the prosecutor declined to file charges against Mr. Sargent but returned the case to the Seattle Police Department for more investigation. *Id.* At that point, because “SPD had resumed its investigation,” the investigative records were still protected from disclosure by RCW 42.56.240(1). *Id.* at 14. On August 31 and September 1, 2009, Mr. Sargent asked the police department for public records related to the altercation. *Id.* at 7. A few days later, on September 4 and 9, 2009, “SPD denied Sargent’s requests on grounds that under RCW 42.56.240(1), the requested documents were exempt from disclosure as records of an open and active law enforcement investigation.” *Id.* When the investigation ended a few months later, the city notified Mr. Sargent, who then “resubmitted and clarified” his records requests. *Id.* at 7-8.

This case is notably different. Instead of quickly denying then-exempt records while the investigation was underway, as the agency in *Sargent* did, here Snohomish County waited for months until after the investigation ended to send the three responses at issue.

2. ***Sargent* dealt with the proposition that an agency must supplement responses to a records request if the reasons for past responses no longer exist.**

The trial court in *Sargent* ruled that SPD violated the PRA by failing to proactively disclose the previously exempt records once the temporary exemption no longer applied. 167 Wn.App. at 10. The trial court reasoned that “[o]nce a person has asked that specific items be turned over to them, then it’s the City’s burden to determine when, if ever, it can do that.” *Id.* The Court of Appeals reversed, stating:

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....

Nothing in the language or history of the statute indicates the legislature intended to impose on agencies an endless monitoring of old requests, or to require updated responses indefinitely to people who may have long since lost interest.

Id. at 10-11. Thus, *Sargent* was concerned with updating “previous responses” to “old requests.” *Id.* It did not deal with requested records that are being processed for the first time as in this case.

Here, the Court of Appeals acknowledged this distinction:

In *Sargent v. Seattle Police Department*, this court held that there are no standing requests under the PRA. This means that **after an agency has properly responded**, it is irrelevant whether a claimed exemption ceases to apply because ‘an agency is not obligated to supplement responses.’ Instead, the requester may submit a ‘refresher’ request.

Gipson at 4 (bold added). The Court expressly noted that this case “**does not involve a standing request** because the County had not yet produced the...[redacted] records when the relevant exemption ceased to apply.” *Id.* at 5-6 (bold added). Thus, the Court acknowledged that unlike *Sargent*, this case does not involve PRA obligations “after an agency has properly responded” to a request. *Id.* at 4. Rather, the County responded in the first instance by producing heavily redacted records even though “the relevant exemption ceased to apply.” *Id.* at 6.

3. The Court of Appeals incorrectly extended *Sargent’s* reasoning from revisiting past responses to determining initial responses.

Despite the distinctions above, the Court of Appeals nevertheless relied on *Sargent* in holding that Snohomish County properly withheld records when they were no longer exempt. According to the Court, “*Sargent* reasoned that the PRA does not permit standing requests because...an agency determines whether a record exists or is exempt at the time that it receives the request.” *Gipson* at 6.

In fact, *Sargent* says no such thing. 167 Wn.App. at 10-15. As explained above, access to the investigative records in *Sargent* was denied a few days after they were initially requested, and this denial

was deemed proper because the investigation had resumed before the records were requested and continued until months after the denial (and other requirements for the exemption were met). *Id.* at 14-15. The *Sargent* court said:

The categorical exemption expired when the case was referred to the city attorney for prosecution. SPD did not violate the PRA...by declining disclosure before that date.

Id. at 15. Thus, the date of declining disclosure, not the date of the request, is what determined whether the withholding was justified by an applicable exemption. *Id.*

The date of a records request matters only in determining which records might be responsive. That is because the PRA only requires producing records that exist, and does not require agencies to create “non-existent” records in response to a request. *Fisher Broadcasting v. City of Seattle*, 180 Wn.2d 515, 522, 326 P.3d 688 (2014); *Smith v. Okanogan County*, 100 Wn.App. 7, 13-14, 994 P.2d 857 (2000). *Sargent* discussed this unremarkable principle solely in the context of the “standing request” issue, explaining that an agency need not update prior responses simply because additional records - whether newly created, or previously exempt - **later** became available. 167 Wn.App. at 11, citing the *Public Records Act Deskbook* §5.3(3)(d)

comment at 5-31 (2006). Again, this is irrelevant here because there was no “standing request,” nor any prior response to be updated. More to the point, neither *Sargent* nor any other authority says that – because records must exist at the time of a request in order to trigger a disclosure obligation – that means any temporary exemption that applies on the date of the request is extended for as long as the agency takes to answer the request. There is simply no logic or legal support for that new rule announced by the Court of Appeals in this case. In sum, because the Court misapplied *Sargent*, this Court should reverse and clarify that an exemption must apply at the time of declining disclosure – not at the time of the records request.

B. Snohomish County’s Position Conflicts with the Letter and Spirit of the PRA.

Defending the flawed reasoning of the Court of Appeals, Snohomish County argues that the exempt status of the withheld records was indelibly marked on the date of Mr. Gipson’s records request, such that the County could take months to answer the request without worrying about whether the status changed. Supp. Brf. of Resp., pp. 5-7, 10. The County asserts: “No appellate court has ruled that an agency is to re-assess exemptions as of the date records are produced to a requestor.” *Id.*, p. 6. Absurdly, the County argues that

withholding records based on expired exemptions actually promotes the policy of prompt disclosure, because it is faster to produce records with unnecessary redactions than to make sure the redactions are still legally justified. *Id.*, pp. 10-11. This position conflicts with both the strict requirements and the underlying policy of the PRA.

1. Only an applicable exemption can justify denial of a public record.

The County's arguments ignore the PRA's core mandate to withhold only those records or parts of records falling under a specific exemption. RCW 42.56.070(1), RCW 42.56.210(1).⁴ Only an applicable exemption can justify withholding. RCW 42.56.070(1), RCW 42.56.550(1).⁵ Inconvenience cannot excuse withholding of a record which is not protected by any statute. RCW 42.56.550(3). On the contrary, "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." *Id.*

⁴ See also *Resident Action Council v. Seattle Housing Authority*, 177 Wn.2d 417, 433 (2013) ("an agency must produce otherwise exempt records insofar as redaction renders any and all exemptions inapplicable").

⁵ RCW 42.45.550(1) says: "The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records."

The County complains that, once it has redacted records not yet produced to the requester, it is too cumbersome to confirm that the redactions are still justified by the time the County gets around to producing the records. Supp. Brf. of Resp., pp. 10-11. In this case, the County says, removing redactions after the exemption expired “would have likely resulted in a delay in production” and deprived Mr. Gipson of the “fullest assistance” required by the PRA. *Id.*, citing RCW 42.56.100. This contention rests on the preposterous notion that full disclosure is optional. It is not. RCW 42.56.070(1), RCW 42.56.210(1), RCW 42.56.550(1). There is no support for the idea that full disclosure is unnecessary if partial disclosure would be faster.

As explained above, *Sargent* enforced – and did not alter – the requirement for an exemption to apply at the time of a denial. That requirement was recognized in *Wade's Eastside Gun Shop v. Dep't of Labor and Indus.*, 185 Wn.2d 270, 289, 372 P.3d 97 (2016), which said agencies cannot use an estimated response time “as an excuse to withhold records that are no longer exempt from disclosure.” Here, Snohomish County admittedly withheld records from Mr. Gipson after RCW 42.56.250(6) no longer applied. To avoid similar violations in the future, this Court should hold that RCW 42.56.070(1) prohibits

withholding records based on an expired exemption, even if it results in inconvenience.

2. Withholding records after they are no longer exempt also violates RCW 42.56.030 and the policy of maximum disclosure.

The PRA is liberally construed and its exemptions are narrowly construed to promote the policy of full disclosure. RCW 42.56.030. This case involves a temporary exemption, RCW 42.56.250(6), which protects “[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.” Under the plain language, the exemption does not apply unless the records were compiled by an agency that is “conducting an active and ongoing investigation.” RCW 42.56.250(6). Here, it is not disputed that the exemption ceases to apply once an investigation has ended.

But under the Court of Appeals ruling, a temporary exemption is applied once - on the date of the request - and then morphs into a permanent exemption shielding the affected records for as long as the agency takes to process the request. *Gipson* at 1. Under this

construction, it does not matter if an investigation is no longer active when an agency responds to a request for investigative records, as in this case. This has the effect of prolonging the period of exemption beyond the “active” investigative period that the Legislature intended to protect. RCW 42.56.250(6). This interpretation divorces the exemption from its purpose to allow investigators to finish their work without interference. It also permits agencies to hide investigative results indefinitely by sitting on a records request, depriving the public of the opportunity to learn about alleged discrimination and how it is handled.

This case illustrates the potentially severe impact on public disclosure and accountability if the Court of Appeals interpretation is upheld. The Gipson investigation ended two months after the public records request, but the County took five months to process the request, so the cited exemption was applied for *three months* after the investigation ended. That’s three months longer than the Legislature intended. RCW 42.56.250(6).

A new report by the Joint Legislative Audit and Review Committee shows that, on average, Washington cities take 299 days (about 10 months) to complete responses to PRA requests while counties take an average of 159 days (more than five months) to

complete disclosure.⁶ If agencies are allowed to extend temporary exemptions throughout these long processing periods, regardless of whether the exemptions actually still apply, investigative records can be hidden for improper purposes such as political expediency or convenience. And threats to the safety and well-being of public employees and citizens may escape awareness and elude solutions.

The Court of Appeals ruling would affect a variety of temporary or conditional exemptions, seriously curtailing public oversight of government by extending secrecy beyond the identified conditions. For example, RCW 42.56.260 protects real estate appraisals while agency transactions are pending. Under the *Gipson* logic, an agency could hide the true value of property for months after its purchase or sale is completed, simply because the information was requested when the deal was pending. In sum, because the Court of Appeals interpretation of the PRA broadens secrecy, it violates the requirement to liberally construe the PRA and narrowly construe its exemptions, and should be reversed. RCW 42.56.030.

⁶ See <https://public.tableau.com/profile/jlarc#!/vizhome/Metric5/Maindashboard>.

V. CONCLUSION

For the foregoing reasons, this Court should reverse and hold that an agency must release records unless an exemption applies at the time of the agency's denial. This Court should clarify that previously exempt records must be disclosed if the relevant exemption expires while the request is still being processed.

Dated this 11th day of January, 2019.

Respectfully submitted,

JOHNSTON GEORGE LLP

By: s/ Katherine George
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 11, 2019, I served a copy of the Motion for Leave to File an Amicus Curiae Memorandum and related memorandum to the following registered parties via the Supreme Court's Web portal:

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