

No. 76826-3-1

COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

In the Matter of

RON GIPSON

RON GIPSON

Plaintiff - Appellant,

v.

SNOHOMISH COUNTY,

Defendant - Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The Trial Court committed error by ruling that the decision in *Sargent v. Seattle Police Dep't*, 167 Wn.App. 1 (2011) created a bright line rule that standing requests under the Public Records Act are not permitted and that exemptions are applied as of the date of a request.
2. The Trial Court erred 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 the investigation was concluded when the representative for the Defendant factually misrepresented that the investigation was continuing on multiple occasions when in fact it had been concluded.

II. STATEMENT OF THE CASE

Gipson has been a long-term employee of the County working at the Denny Youth Center in a corrections capacity. In 2014 he became the subject of several sexual harassment allegations. 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 assigned number 14-06701. CP 50-56. In response to this public record request he received five installments of documents, all

redacted as to any substance, along with exemption logs claiming the 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 an employee of the County, Brian Lewis. 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.

The Fifth and final installment was forwarded by Mr. Lewis on May 4, 2015. CP 139-140. This email string includes an email from Gipson to Lewis on April 30, 2015, in which Gipson specifically requested the County's position on PRR 14-06701. CP 139. Mr. Lewis responded that he was attaching one last installment of responsive records and that, "this request is now closed." There is no indication in this communication that the MFR investigation had been closed on February 2, 2015. Included with this final installment was a significant volume of billing invoices which once again had the substance of what occurred during each activity redacted and providing virtually no useful information to Gipson. CP 139-140. While being informed that the request was closed on May 4, 2015, the implication by the continued reduction of documents was that the investigation remained open and ongoing.

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 described 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. On March 6, 2015, Gipson himself was provided with the third installment Withholding Log listing exempt documents again informing him that the investigation remained open and ongoing.

In 2016 Gipson retained counsel to assist him with these public record requests. Ultimately on May 31, 2016, he was provided with unredacted copies of all the billing invoices he had previously received in the five installments under PRR 14-06701.

III. ARGUMENT

Public Policy

To effectuate the PRA's 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 and judicial pronouncement of the public policy underlining the Public Records Act (PRA) the County through its argument and the Trial Court through its ruling effectuate a contrary result, that of narrowly construing the PRA to the benefit of the government and detriment of the public.

Bright Line Rule

The Trial Court ruled 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. This is legal error as applied to the facts of this case.

When addressing standing requests in *Sargent* the Court cited to the Washington State Bar Associations *Public Records Act Deskbook* as authority and the comments 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. *Id.* at 11. The Court in *Sargent* stated the PRA does not provide for standing record requests and “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 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 RCW 42.56.250(5) which makes these facts distinguishable from *Sargent*.

The *Deskbook* in §10.3(6), pg. 10-23, specifically addresses RCW 42.56.250(5). In this section the *Deskbook* 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 very authority cited by the Court in *Sargent* as well as by the County and the Trial Court purportedly establishing this bright line rule is directly contradicted by the language in the specific section of the *Deskbook* dealing with RCW 42.56.250(5).

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. Significantly, 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 implying in the fifth installment that the investigation remained open and as a result the status of the requested records unchanged. This of course had the effect of dissuading Gipson from submitting “refresher” requests.

The MFR investigation concluded on February 2, 2015. Gipson was notified by Mr. Lewis on February 19, 2015, 17 days after the closure of the MFR investigation that he was being provided with an exemption log citing an additional 69 pages as being withheld “as part of the active, ongoing investigation, under RCW 42.56.250(5).” In fact the investigation was not active or ongoing and the exemption under RCW 42.56.250(5) no longer applied. This same falsely incorrect information was explicitly conveyed in the third installment provided on March 5, 2015. In addition, it was clearly implied that the investigation was ongoing because redacted documents were provided with the fifth installation provided on May 4, 2015. Whether intentional or not, clear factual misrepresentations were made to Gipson by the County upon which he justifiably relied to his detriment.

The ruling by the Trial Court that some bright line rule applied is legal error.

Wade's v. L&I

This issue was also recently addressed in the *Wade's* decision. The Trial Court ruled that the decision in *Wade's* did not apply to the facts of this case. This ruling is legal error.

Initially, L&I in *Wade's* 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 and recognized that 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 stated however 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 as well as Gipson was well aware of the fact that 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 investigating lead related safe working conditions at a gun firing range there was no need for the same level of confidentiality that might be necessary in a criminal investigation. The present circumstance of course is an administrative investigation into allegations of sexual harassment in the workplace which is similar to a safety related investigation by L&I.

In the context of this 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.” “The records L&I withheld are not exempt and should not have been

withheld in the first place.” “Further, L&I failed to provide evidence to support its claim that it needed additional time after the investigations closed to review the records for additional exemptions.” 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 absolve the governmental agency of any responsibility to respond when the exemption is no longer applicable in the future.

The *Wade’s* decision 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. “While agencies may provide a reasonable estimate of when they can produce the requested records, *see Ockerman v. King County Dep’t of Developmental & Env’tl. 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.

In this case it is undisputed that the public records request filed by Gipson occurred on December 1, 2014. The investigation was concluded on February 2, 2015. Instead of providing the records which were no longer exempt the County provided factually incorrect information to Gipson that the investigation remained ongoing.

The L&I investigation into workplace safety related conditions is directly analogous to the MFR investigation into allegations of sexual harassment within the workplace. As the Court noted in *Wade's* even if the requested material had been temporarily exempt, once the exempt status was no longer applicable the PRA was violated when these requested records were not provided. *Id.* at 287. As the Court noted, L&I failed to demonstrate that it had “a continued need to withhold records” even after releasing some records from one of its interrelated investigations. *Id.* at 287.

The Court in *Wade's* made it clear that a continuing obligation existed to supplement requested records once any exception was no longer applicable. *Id.* at 289. This is the present case, any exception under RCW 42.56.250(5) ended on February 2, 2015. The County continued to engage with Gipson regarding his demands for these records including providing factually incorrect information. Further, the County ultimately upon the involvement of counsel did provide some of the requested records in their unredacted form some 15 months after the investigation was concluded. This is a violation of the PRA.

The County also has not provided any basis to demonstrate that it had a continued need to withhold these records. To the contrary, the County simply relies upon a strict interpretation of RCW 42.56.250(5)

and the *Sargent* decision to argue that its responsibility to provide records was determined on December 1, 2014. The fact that the County continued to provide additional records as well as the fact that it provided knowingly false information upon which Gipson relied the County argues is irrelevant because of the “bright line” rule established in *Sargent*.

Not only did the County provide false information upon which Gipson relied, their actions are also inconsistent with the legal position now assumed. If the County in December 2014 had informed Gipson that the MFR investigation remained open and ongoing and as a result all documents under 14-06701 were exempt and would always remain exempt Gipson would have been placed on notice to take the steps to appeal this response or submit later “refresher” requests as contemplated by the language in the *Deskbook*. The County should not have provided supplemental Withholding Logs citing the exemption of RCW 42.56.250(5) even after it knew the MFR investigation was closed. The simple reality, however, is that the County provided a total of five installments each asserting, wrongfully, that the investigation remained open and ongoing and hence the exception continued to apply. This of course had the effect of manipulating Gipson into not filing “refresher” requests as contemplated by the *Deskbook*.

On May 31, 2016, 18 months after his original request and 16 months after the MFR investigation concluded the County did finally provide to Gipson the requested MFR billing records in an unredacted state. 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.

The County acted inconsistent with its assertion that a “bright line” rule exists under the holding in *Sergent*. It did so with the effect, whether intended or not, of misleading Gipson into the belief that the exemption continue to apply. Under these facts to determine that a “bright line” rule applied justifying the granting of summary judgment was legal error and should be reversed.

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).

As noted above and now conceded by the County the MFR investigation concluded on February 2, 2015. The exemption under RCW 42.56.250(5) no longer applied as of February 3rd because the MFR investigation was concluded. On February 19th and again on March 5th Mr. Lewis forwarded communications to Gipson wrongfully informing him that additional records identified on an exemption log were being withheld “as part of the active, on-going investigation, under RCW 42.56.250(5).”

These Withholding Logs forwarded by Mr. Lewis clearly demonstrate proof of the first element of the equitable estoppel. The claim was made by the County that the exemption of RCW 42.56.250(5) applied in December 2014 continued because the investigation was open and ongoing. Both of the materials provided by the County as well as their actions conveyed that the MFR investigation was open and ongoing when the County knew to the contrary that the investigation had been closed on February 2nd. 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.

Had Gipson been informed in December 2014 that none of the requested records were going to be provided because of the exemption of RCW 42.56.250(5) as noted previously he would have had the opportunity to appeal the County's position and/or submit refresher requests in a timely manner. Gipson reasonably relied upon the information conveyed by Mr. Lewis 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. During 2015 Gipson was the longest-serving member of the Everett City Council and was up for reelection that fall. Because Gipson relied upon these misrepresentations he was not able to obtain the necessary records for him to repudiate the article printed in the Everett Herald 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.

The elements of equitable estoppel are amply established by the clear, cogent, and convincing evidentiary standard. Gipson's reliance on Mr. Lewis' communications was reasonable. The County should not be permitted now to argue that a bright line rule applies abrogating them of any responsibility to provide additional records beyond December 1, 2014 because the exception applied on that date and Gipson did not refresh his request after February 2, 2015. Gipson did not refresh his request because he relied upon the false and misleading information provided by the County. The doctrine of equitable estoppel, even if disfavored, is clearly applicable under the circumstances and permits Gipson recovery for his damages for failure of the County to comply with the requirements the PRA.

In its ruling the Trial Court specifically held that the *Wade's* decision did not apply to this case. The Trial Court noted in its ruling that the *Wade's* decision applied to the application of RCW 42.56.240(1). The Trial Court stated, "Even if it applied to the application of RCW 42.56.250(5) by analogy, the onerous was on the Plaintiff to submit a new request at the conclusion of the investigation." CP 396-98.

The problem with this argument of course is that the Plaintiff was not informed that the investigation was concluded and no separate independent source of information existed to permit him to ascertain this information. Worse, his actions were influenced when he was provided with false and misleading information that the investigation remained open and ongoing. Gipson had no way of knowing that the investigation was concluded, was not informed of this by the County who did have this information, and was provided factually incorrect and misleading information upon which he reasonably relied. In light of this evidence it is clear legal error to rule that the “onerous” was on Gipson to submit a second public records request. This is *exactly* the type of situation that equitable estoppel should be applied to.

IV. CONCLUSION

Under the facts of this case the Trial Court’s reliance on the *Sargent* decision that a “bright line” rule exists was legal error. The *Deskbook* authority cited by the Court in support of its decision is directly contradicted by that very same authority. This case is factually distinguishable and the County was under an obligation to supplement the records requested when it had knowledge that the MFR investigation was completed. It failed to do so and thereby violated the public policy considerations underpinning the PRA.

The elements of equitable estoppel are well-established. The County through its agent provided factually incorrect information upon which Gipson reasonably relied and he suffered damages as a result. The granting of summary judgment was legal error and should be reversed.

RESPECTFULLY SUBMITTED this 8th day of August 2017.

s/ Rodney R. Moody
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CERTIFICATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 8, 2017, I caused to be delivered via US Mail and Email Service the foregoing to:

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DATED this 8th day of August 2017.

s/ Rodney R. Moody

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