

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.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

Respondent's Argument Misconstrues Public Policy

The Respondent argues the lower Court's ruling complies with *Sargent* and furthers public policy. The ruling in *Sargent v. Seattle Police Dep't*, 167 Wn.App. 1, 260 P.2d 1006 (2011) did not establish public policy; it simply noted the PRA from the Court's perspective did not provide for standing requests. *Id.* at 11.

The Respondent furthers this mistaken argument when it devotes an entire paragraph to the number of public record requests received and the resulting burden on government. The County states it had received 6,700 requests in the 11 months prior to receipt of Mr. Gipson's request. It argues the impact that reevaluation of these requests upon the County would be onerous. Argument is then made that the *Sargent* decision establishes that public policy of the PRA relieves a governmental entity of this burden. *Br. of Res.* Pg. 8.

Regardless of the merit of any argument that reevaluation of public record requests may create additional work for governmental entity; this consideration is not a correct statement of the applicable public policy. The applicable public policy was clearly outlined by the Legislature in RCW 42.56.030. This statute reads:

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 made it very clear that RCW 42.56 et.seq. is to be *liberally* construed and its exemptions such as RCW 42.56.250(5) are to be *narrowly* construed. The argument made by Respondent would reverse these concepts simply to relieve some perceived burden on government because of voluminous public records requests.

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

WSBA PRA Deskbook

While simultaneously citing to the *Washington State Bar Association Public Records Act Deskbook* as authority the Respondent asserts a curious paragraph seeking to avoid the obvious flaw in their argument as it relates to section §10.3(6) which specifically addresses RCW 42.56.250(5). The County argues:

The Deskbook goes on to articulate that the exemption cited in RCW 42.56.250(5) “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.

Br. of Res., pg. 6.

Inexplicably the argument stops at this point. The County fails to address why after the “active and ongoing” MFR investigation was concluded on February 2, 2015 they failed to provide the requested records until May 31, 2016, some 15 months later.

The quoted section clearly states, *once an investigation is concluded, the records are to be disclosed*. The County knew that the investigation had concluded and then failed to disclose the requested records for another 15 months. Given full opportunity to explain its actions in relation to the authority established in the *Deskbook* the Respondent fails to do so and simply hopes this Court will avoid the entire issue by just ignoring this authority. Once again it must be pointed out that the *Sargent* decision while seeming to pronounce a broad statement about reevaluation of public record requests while also citing to the *Deskbook* as authority was only dealing with RCW 42.26.240, not 42.56.250.

The County's conduct is also inconsistent with their argument. Logically if one accepts the County's "bright line" argument they should never have provided the records requested in December 2014. The County did, however, provide unredacted records on May 31, 2016. It is respectfully submitted that the County recognized that they had an obligation to disclose these records, but chose not to do so until after the fall 2015 election when the harm had already been realized. Now, the County argues that because of the "bright line" rule in *Sargent* they were not required to provide these records. If the County was not required to provide the records, why did they? The inconsistency in their argument and their actual conduct is readily apparent.

Wade's Eastside Gun Shop, Inc.

The Appellants' position regarding the *Wade's* decision is fully stated in its opening brief. Respectfully, nothing cited by the Respondent in Respondent's Brief warrants further comment by the Appellant, and the Appellant stands on the argument made in the Opening Brief.

***Sargent* Distinguishable**

In the Opening Brief it was pointed out that *Sargent* is 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 requests. Id. at 11. Gipson was not provided with information that the status of the records had changed. Gipson was knowingly and deliberately provided with factually incorrect information by the County. In reliance thereon he was actively discouraged from refreshing his requests.

The County in the Brief of Respondent fails to address this distinction.

RAP 2.5(a)

The concept of equitable estoppel and Mr. Gipson's reliance to his detriment on the misleading information provided by the County in response to his PRR was argued at the lower court before Judge Craighead during oral argument. She did not rule on this issue, but it was specifically argued to her. RAP 2.5 (a) also permits this Court to exercise discretion by use of the term "may" as opposed to the term shall which would divest this Court of discretion. Regardless, the concept of equitable estoppel was argued before the lower court during oral argument and briefed before this Court. The Respondent has had full opportunity to respond.

Equitable Estoppel

The elements of equitable estoppel are outlined in the Opening Brief and will not be repeated. It is acknowledged that pursuant to the authority of *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. Gipson was knowingly misled by the County and now the County asks that they be excused because they are a governmental entity with a heavy burden from public record requests. The second requirement that the exercise of governmental functions not be impaired is also clearly present. Equitable estoppel in this case is not preventing the County from acting as required; indeed the County has not acted as it should. 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.

Finally, the County argues 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 in the Withholding Log clearly 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 to RCW 42.56.250(5) and stated, “Investigative records compiled by an employing agency conducting an and 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 It could be argued that this is a true statement.

The next column on the Withholding Log however 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 certainly 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 then argues 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. Following the County’s argument 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 burden is on the County to convey accurate and complete information as in *Sargent*, but once again the argument of the County would shift that burden to Gipson.

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 overburdened with public record requests.

I. CONCLUSION

The argument of the County misconstrues the applicable public policy outlined by the Legislature in RCW 42.56.030. The Legislature clearly told the citizens of this State as well as its Courts that the policies stated in that chapter were to be “liberally construed” and its exemptions “narrowly construed.” The County argues because they received 6,700 requests in the 11 month period prior to the receipt of Gipson’s request that the burden on government is so onerous that this Court should excuse their failure to provide factually accurate information and the requested records to Gipson.

Indeed the very authority cited by the Court in the *Sargent* case and again cited by the County, the *WSBA Deskbook*, would require the supplementation of these records as outlined in §10.3(6). The County

cites to this section, but then fails to answer the question why they did not comply with the requirements of this authority after the MFR investigation was complete. The County fails to address this question because there is no appropriate response. The County was required to supplement these records once the investigation was complete and they failed to do so.

Not only did the County fail to address the conflict between their argument and §10.3(6), the County also failed to address the distinction between the factual circumstances in *Sargent* and the factual circumstances present in this case. The County failed to address this distinction because there is no argument that can be made by the County refuting this distinction.

Sargent was provided updates regarding the status of his public record requests and thereby placed in a position to make supplemental or “refresher” requests. Gipson was not provided this information. To the contrary, he was provided with false information which clearly had the effect of discouraging his submitting refresher requests. The question of whether this was intentional or not by the County is irrelevant. The effect of their communications was to dissuade Gipson from submitting the refresher requests. Again, the County argues the onerous burden placed upon the government by refresher requests.

Finally, the legal principles of equitable estoppel were argued before the lower court and the County has been placed on full notice of this argument. The elements of equitable estoppel are fully met. Under no circumstances should a governmental entity be encouraged to provide information to a citizen requesting public records that the government knows is inaccurate and will likely have the effect of dissuading the citizen from submitting refresher requests.

Gipson was provided factually inaccurate information. He was dissuaded from submitting refresher requests because of this factually incorrect information. He suffered consequences when as a result of the County's failure to provide him with the information that he needed he was not in a position to refute the MFR investigative report and the article published in the Everett Herald. Arguably, as a result this contributed towards his loss in the fall 2015 election. He has suffered damages as a result of the deliberately false information provided to him by the County.

The granting of summary judgment under these facts was legal error in this court should reverse the lower court's decision.

RESPECTFULLY SUBMITTED this 4th day of October 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 October 4, 2017, I caused to be delivered via US Mail and Email Service the foregoing to:

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DATED this 4th day of October 2017.

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