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

SUPREME COURT OF THE STATE OF WASHINGTON

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In the Matter of  
RON GIPSON

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RON GIPSON,

Plaintiff - Appellant,

v.

SNOHOMISH COUNTY, a municipal corporation

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER, RON GIPSON

---

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14 WAC 44.14.04007 Pg. 10  
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16 **A. Court of Appeals Decision**

17 The Petitioner seeks reversal of the Court of Appeals ruling  
18 upholding the Trial Courts granting of summary judgment as to the  
19 violation the Public Records Act, dated May 2, 2017.  
20

21 **B. Issues Presented for Review**

22  
23 1. Whether the Public Records Act requires an agency, without a  
24 subsequent records request, to disclose responsive records in  
25 the possession of the agency when the request is received after  
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any applicable exemption no longer applies or does the decision of *Sargent v. Seattle Police Dept.*, 167 Wn.App. 1 (2011) create a bright line rule that the exemption alleviates the agency of future responsibility to fulfill the request.

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.

**C. Statement of the Case**

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

On December 1, 2014, Gipson made a Public Records Request (PRR) to the County which assigned the request number 14-06701. CP 50-56. In response to this public record request Gipson received five installments of documents, all heavily redacted as to substance, along with

1 exemption logs claiming the continuing exemption of RCW 42.56.250(5).  
2 CP 47-49.

3 The MFR investigation concluded on February 2, 2015. CP 374.  
4 On February 19, 2015, the second installment was forwarded to Gipson by  
5 the County. Gipson was informed in the supplied Withholding Log that  
6 an additional 69 various documents were provided in a redacted state, but  
7 the records were being withheld pursuant to RCW 42.56.250(5) “because  
8 the investigation is open and ongoing.” CP 57-58. The MFR  
9 investigation was actually closed 17 days prior to this second installment  
10 being forwarded.  
11

12 On March 5, 2015, Gipson was provided with a third installment of  
13 298 pages which were described as “On-going EEO investigation  
14 records.” CP 137. Under the title Applicable Exemption RCW  
15 42.56.250(5) was again cited. CP 137. This Withholding Log also  
16 included a column entitled “The cited exemption applies because the  
17 withholding information includes the following:” Under this column it  
18 was stated, “Investigative records relating to an active, ongoing  
19 investigation of a violation of the law against discrimination in  
20 employment.” The applicable investigation was actually completed more  
21 than a month prior to forwarding this third installment.  
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1           The Fifth and final installment was forwarded to Gipson on May 4,  
2 2015. CP 139-140. This email string includes an email from Gipson to a  
3 County employee on April 30, 2015. Gipson specifically requested the  
4 County's position on PRR 14-06701. CP 139. The County employee  
5 responded that he was attaching one last installment of responsive records  
6 and that "this request is now closed." There was no indication in this  
7 communication that the MFR investigation had been closed on February 2,  
8 2015.  
9

10           Included with this fifth installment were billing invoices which had  
11 the substantive activity entirely redacted and provided no information to  
12 Gipson. CP 139-140. While being informed that the request was closed  
13 on May 4, 2015, the continued redaction of documents was consistent with  
14 an investigation that remained open and ongoing. This investigation had  
15 actually been concluded three months earlier.  
16

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

3 In 2016 Gipson for the first time retained counsel to assist him.  
4 This litigation was filed on April 25, 2016. Thereafter on May 31, 2016,  
5 Gipson was provided with un-redacted copies of all the billing invoices he  
6 was wrongfully denied in 2014 under PRR 14-06701.  
7

8 **D. Argument**

9 **Public Policy**

10 To effectuate the Public Record Act's purpose the legislature  
11 declared the PRA "shall be liberally construed and its exceptions narrowly  
12 construed." RCW 42.56.030; *Wade's Eastside Gun Shop, Inc. v. Dep't of*  
13 *Labor & Indus.*, 185 Wn.2d 270, 277, 372 P.3d 97 (2016).  
14

15 RCW 42.56.030 in its entirety states:

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

24 The Courts have stated the paramount duty in interpreting a statute  
25 is to ascertain and give effect to the intent of the legislature. *State v.*  
26

27



1 indistinguishable from newly nonexempt documents.” Id. at 11. There is  
2 no citation to any authority to support this comment.

3           Immediately after making this comment the Court in *Sargent* in the  
4 next sentence states that the Washington State Attorney General model  
5 rules are in accord, citing to WAC 44.14.04004 (4). WAC 44.14.04004(4)  
6 however is distinguishable and not in accord. In relevant part WAC  
7 44.14.04004(4) states:  
8

9           An agency must only provide access to public records in  
10 existence at the time of the request. An agency is not  
11 obligated to supplement responses. Therefore, if a public  
12 record is created or comes into the possession of the agency  
13 after the request is received by the agency, it is not  
14 responsive to the request and need not be provided. A  
15 requestor must make a new request to obtain subsequently  
16 created public records.

17           WAC 44.14.04004(4) therefore requires an agency to provide  
18 access to public records in existence at the time of the request. Two  
19 distinct circumstances are outlined where public records are not  
20 responsive to a specific request. First, when a public record is created  
21 after a request is received or second when a public record comes into the  
22 possession of the agency after the request is received. By its plain  
23 language disclosure after an applicable exemption no longer applies is not  
24 addressed by WAC 44.14.04004(4). WAC 44.14.04004(4) does not  
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1 support the Court’s statement that “newly created documents are  
2 indistinguishable from newly nonexempt documents.”

3 The decision in *Sargent* also fails to address WAC 44-14-04007.  
4 WAC 44-14-04007 states an agency has no obligation to search for  
5 records responsive to a closed request, however, when an agency  
6 discovers responsive records after a request has been closed the agency  
7 should provide the later-discovered records to the requestor. WAC 44-14-  
8 04007.

9  
10 WAC 44-14-04007 stating an agency “should” provide a newly  
11 discovered record is fully consistent with both the public policy stated in  
12 RCW 42.56.030 and requiring an agency to disclose records which are  
13 newly no longer subject to an exemption.  
14

15 The *Sargent* decision is also inconsistent in its application of the  
16 recommendations of the *Deskbook*. The *Sargent* decision cited to that  
17 portion of the *Deskbook* stating, “The Public Records Act does not provide  
18 for ‘continuing’ or ‘standing’ requests.” *Id.* at 11; *Deskbook* §5.3(3)(d)  
19 cmt. At 5-31 (2006). The Court however failed to acknowledge §10.3(6),  
20 pg. 10-23, of the *Deskbook* which specifically addressed RCW  
21 42.56.250(5) and states:  
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24 Although there is not yet published authority on these  
25 exemptions, the exemptions cover a very narrow situation,  
26 which rarely applies to typical employee misconduct  
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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)

This *Deskbook* section specifically addresses then RCW 42.56.250(5) which is the specific statute at issue. Therefore the *Deskbook* specifically *does not* support a bright line rule as it clearly states that the records are to be disclosed once an employment related investigation is concluded. Division One in reaching the decision to uphold the Trial Court’s granting of summary judgment mistakenly relies upon *Sargent* and disregards §10.3(6), page 10-23 of the *Deskbook* which is directly contrary to the holding of the Court.

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

Gipson was not notified by the County that the relevant investigation was concluded. He was instead provided with factually

1 misleading information stating in the second and third installment, and  
2 implied in the fifth installment (all heavily redacted and substantively  
3 useless) that the investigation remained open and as a result the status of  
4 the requested records unchanged. This had the effect of dissuading  
5 Gipson from submitting “refresher” requests.  
6

7 The *Sargent* decision establishing the advocated bright line rule is  
8 based non-existent authority. What authority is cited, WAC  
9 44.14.04004(4), by its plain language does not support the decision as  
10 claimed. For all these reasons the decision in *Sargent* should not be  
11 interpreted as creating a bright line rule alleviating the County of its  
12 continuing responsibility to supply the requested records in its possession  
13 on December 1, 2014.  
14

15 ***Wade’s v. L&I***

16 The issue of standing requests was also discussed in the *Wade’s*  
17 decision. In *Wade’s* L&I argued that the exemption in RCW 42.56.240(1)  
18 applied and the narrow open investigation categorical exemption  
19 recognized in *Newman v. King County*, 133 Wn.2d 565, 947 P.2d 712  
20 (1997) was applicable. The *Wade’s* decision rejected this argument  
21 because the exemption regarding open criminal investigations recognized  
22 in *Newman* is to be narrowly construed citing to RCW 42.56.030. *Wade’s*,  
23 supra at 280-81. Ultimately the Court determined that L&I was unable to  
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1 establish the essential to government component of RCW 42.56.240(1)  
2 and therefore this exemption did not apply. *Wade's*, supra at 285-86.

3 The Court recognized that an L&I investigation was unlike an  
4 open, unsolved criminal investigation. Id at 282-83. The Court noted that  
5 the concerns justifying *Newman's* categorical exemption did not exist in  
6 the context of an L&I investigation. The Court stated, "Employers know  
7 that they are being investigated." "There is not the same risk of disclosing  
8 sensitive information that exists in a criminal investigation and could  
9 impede the apprehension of an-as-yet unknown suspect." Id. at 282-83.

11 The present facts of course are directly analogous to an L&I  
12 investigation. The County, its employees as well as Gipson were all aware  
13 the MFR investigation was taking place. This was not an open criminal  
14 investigation with an-as-yet to be determined suspect. There was no  
15 sensitive information involved which if released could potentially impede  
16 an investigation into a criminal matter.

18 In the context of an L&I investigation into safety related working  
19 conditions the Court in *Wade's* specifically addressed a factual scenario  
20 whereby L&I explained in its original response to the requestor it would  
21 not be able to produce requested records until the investigations were  
22 closed. Id. at 289. In that case L&I indicated it would likely be able to  
23 produce records by August 9, 2013. The Court determined it was  
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1 unreasonable for L&I to adhere to an August 9 deadline after the  
2 investigations actually concluded at various times between March and  
3 June 2013. The Court stated “such delay is contrary to the letter and spirit  
4 of the PRA.” Id. at 289. “While agencies may provide a reasonable  
5 estimate of when they can produce requested records, see *Ockerman v.*  
6 *King County Dep’t of Developmental & Env’t. Servs.*, 102 Wn.App.212, 6  
7 P.3d 1214 (2000), they cannot use that estimated date as an excuse to  
8 withhold records that are no longer exempt from disclosure.” (Emphasis  
9 added) Id. at 289.

11 This language from *Wade’s* is contrary to the argument advanced  
12 by the County based on the *Sargent* holding that because the exemption of  
13 RCW 42.56.250(5) applied on December 1, 2014 there was no further  
14 responsibility to provide the requested records in their possession on that  
15 date. This of course begs the question why the County then did in fact  
16 supply the unredacted records on May 31, 2016, nearly 18 months after  
17 they should have been produced if as advocated there was no  
18 responsibility under the PRA or *Sargent* to do so.

22 The holding in *Wade’s* is inconsistent with a “bright line” rule that  
23 applicable exceptions are determined on the date a PRA request is  
24 received by an agency and then continue to alleviate the agency of any  
25 responsibility to provide or make available the subject records. This Court  
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1 made it clear in *Wade's* by this language that the "bright line rule"  
2 advocated by Snohomish County and virtually every agency in the State of  
3 Washington does not as a matter of law exist.

4 In this case it is undisputed that the public record request filed by  
5 Gipson occurred on December 1, 2014 which requested records in the  
6 possession of Snohomish County. The investigation that provided the  
7 basis for an exemption under then RCW 42.56.250(5) concluded on  
8 February 2, 2015. During 2015 Snohomish County produced five heavily  
9 redacted and useless installments.  
10

11 On May 31, 2016, 18 months after his original request and 16  
12 months after the MFR investigation concluded the County finally provided  
13 Gipson the requested MFR billing records in its possession on December  
14 1, 2014 as unredacted documents. This occurred one month *after* Gipson  
15 filed this lawsuit against the County for violating the PRA. This was also,  
16 of course, well after Gipson had lost the election in the fall of 2015. This  
17 is a violation of the PRA and the granting of summary judgment was legal  
18 error.  
19

20  
21 **RAP 2.5(a)**

22 The concept of equitable estoppel and Gipson's reliance to his  
23 detriment on the misleading information provided by the County in  
24 response to his PRR was not briefed, but was argued to the Trial Court  
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1 during oral argument. RAP 2.5 (a) permits this Court to exercise  
2 discretion to consider this issue. The concept of equitable estoppel was  
3 argued before the lower court during oral argument so this issue is not  
4 being raised for the first time on appeal. This issue was also briefed to the  
5 Court of Appeals and the Respondent has had full opportunity to respond.  
6

7 **Equitable Estoppel**

8 Equitable estoppel is based on the view that “a party should be  
9 held to a representation made or position assumed where inequitable  
10 consequences would otherwise result to another party who has justifiably  
11 and in good faith relied thereon.” *Lybbert v. Grant County*, 141 Wn.2d 29,  
12 35, 1 P.3d 1124 (2000). A party claiming equitable estoppel must  
13 demonstrate three elements: (1) an admission, statement or act inconsistent  
14 with the claim afterward asserted, (2) action by another in reasonable  
15 reliance upon that act, statement or admission, and (3) injury to the relying  
16 party from allowing the first party to contradict or repudiate the prior act,  
17 statement or admission. *Id.* at 35. Equitable estoppel is not a favored  
18 doctrine and therefore requires proof by clear, cogent, and convincing  
19 evidence. *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 734,  
20 853 P.2d 913 (1993).  
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24 The Withholding Logs forwarded by the County in 2015 after the  
25 investigation closed falsely continued to claim an exemption that no  
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1 longer applied because the investigation was concluded. Knowingly, or  
2 perhaps even negligently, providing false information which you intend  
3 the receiving party to rely upon is not an appropriate action under the  
4 PRA. This satisfied the first element.

5  
6 Gipson reasonably relied upon the information conveyed by the  
7 County that the investigation was open and ongoing as claimed in the  
8 Withholding Logs supplied with redacted documents. This establishes the  
9 second element of equitable estoppel.

10 The third element requires a demonstration of injury to the relying  
11 party from allowing the County to contradict or repudiate the  
12 communications that the MFR investigation remained open and ongoing  
13 even after as a factual matter it had been concluded. Because Gipson  
14 relied upon these misrepresentations he did not serve Snohomish County  
15 with refresher requests. He was also not able to obtain the necessary  
16 records for him to repudiate the article printed in the Everett Herald.  
17 Gipson lost the 2015 election. Gipson was injured by the actions of the  
18 County and their failure to provide him in a timely fashion the records  
19 requested on December 1, 2014.  
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21

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

3 A manifest injustice is clearly present. Simply put, the County  
4 knowingly presented false information to Gipson with the resulting effect,  
5 whether intentional or not, of discouraging him from presenting refresher  
6 requests.

7  
8 The second requirement that the exercise of governmental  
9 functions not be impaired is also present. Preventing the County from  
10 knowingly presenting false information to a citizen requesting public  
11 records should be encouraged.

12  
13 The County will argue that Gipson was not provided with false  
14 information because, “Mr. Gipson was repeatedly and specifically  
15 informed that the records were exempt in response to his December 1,  
16 2014, request.” Res. Br., pg. 14. Actually that is not what Gipson was  
17 told. In the first disclosure of records provided February 19, 2015, 17  
18 days after the closure of the MFR investigation regarding Gipson the  
19 County stated under the column “Exemption” the records are withheld  
20 because the investigation is open and ongoing. CP 58. That was not true.

21  
22  
23 The third installment provided to Gipson on March 5, 2015  
24 notified him that 298 pages of records were being withheld. The column  
25 “Applicable Exemption” cited RCW 42.56.250(5) and stated,  
26  
27

1 “Investigative records compiled by an employing agency conducting an  
2 active and ongoing investigation as a possible unfair practice under RCW  
3 49.60 RCW or a possible violation of other federal, state, or local laws  
4 prohibiting discrimination in employment are exempt.” CP 137  
5

6 The next column on the Withholding Log states, “The cited  
7 exemption *applies* because the withholding information includes the  
8 following: “investigative records related to an active, ongoing  
9 investigation of a violation of a law against discrimination in  
10 employment.” CP 137 (Emphasis added). The use of the term “applies”  
11 of course implies the present tense. Gipson in reading this claimed  
12 exemption would be informed that the investigation was current and  
13 ongoing. Had the County chosen to properly inform Gipson that the  
14 investigation was closed the County should have used the term “applied”  
15 thereby implying past tense. Then Gipson would be on notice that the  
16 investigation was closed. The choice to use the present tense term  
17 “applies” conveys an entirely different message, however, that the  
18 investigation remained ongoing.  
19

20 The County would argue that Gipson “in no uncertain terms” was  
21 notified that the investigation was closed by multiple letters sent to him  
22 February 2, 2015. Letters indeed were sent to Gipson informing him that  
23 the MFR investigation was closed. There is nothing however in either of  
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1 the Withholding Logs identified above on February 19<sup>th</sup> or March 5<sup>th</sup> that  
2 informed Gipson *which* investigation was ongoing.

3           The elements of equitable estoppel are fully met. The County  
4 should not be permitted to knowingly provide false information to a  
5 citizen requesting the release of public records and expect that such a false  
6 disclosure will be sanctioned simply because they are a governmental  
7 entity burdened with public record requests.  
8

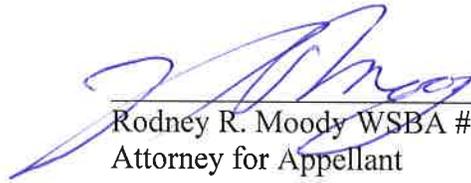
9 **E. Conclusion**

10           Every agency in the State of Washington cites to the *Sargent*  
11 decision purportedly establishing a “bright line rule.” This decision  
12 however is based on a statement made without citation to any authority  
13 and equally flawed by the inconsistent application of the *Public Records*  
14 *Act Deskbook* which speaks directly to the relevant issue and holds  
15 directly contrary to the Court’s decision in *Sargent*. The reasoning behind  
16 this argument is also “contrary to the letter and the spirit of the PRA.”  
17 *Wade’s*, supra at 289.  
18

19           It is respectfully requested that this Court clarify the conflict  
20 between these authorities so that members of the public, such as Gipson,  
21 can request records from various agency’s with certainty that the policy  
22 stated in RCW 42.56.030 will be complied with.  
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RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of December,  
2018.

  
\_\_\_\_\_  
Rodney R. Moody WSBA #17416  
Attorney for Appellant

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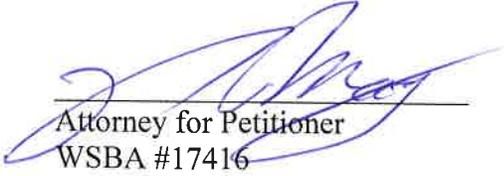
DECLARATION OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on December 28, 2018, I electronically served a true and correct copy and delivered and office copy to Snohomish County of the foregoing addressed as follows:

Washington State Supreme Court  
415 12<sup>th</sup> Avenue SW  
Olympia, WA 98501-2314  
Supreme@courts.wa.gov

Counsel for Snohomish County  
Sara J. DiVittorio  
Snohomish County Deputy Prosecuting Attorney  
3000 Rockefeller  
Everett, WA 98201

DATED this 28<sup>th</sup> day of December, 2018.

  
\_\_\_\_\_  
Attorney for Petitioner  
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**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96164-6  
**Appellate Court Case Title:** Ron Gipson v. Snohomish County  
**Superior Court Case Number:** 16-2-09742-1

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