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STATE OF WASHINGTON
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NO. 96164-6

SUPREME COURT OF THE STATE OF WASHINGTON

RON GIPSON,

Petitioner,

v.

SNOHOMISH COUNTY,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

The Public Records Act (PRA), chapter 42.56 RCW, is a broadly written public mandate codifying the importance of government transparency. In order to enable agencies to comply with its requirements and fulfill their essential governmental functions, the legislature has created mechanisms for an agency's response. Petitioner's argument in this case seeks to revoke some of those mechanisms to the detriment of transparency and the fulfillment of vital governmental functions. Instead, Petitioner asks this Court to create a system where an agency cannot effectively comply with the law. This Court should affirm the rulings of the lower courts in concluding that Petitioner's position is untenable.

II. STATEMENT OF THE ISSUE

Did the County properly claim investigative records exempt under RCW 42.56.250(6) when the investigation into discrimination was active and on-going on the date of the request?

III. STATEMENT OF THE CASE

A. Investigation Background

The County investigated Mr. Gipson for allegations of sexual harassment and sexual discrimination in 2014-2015 ("discrimination investigation"). CP 14. The County's Human Resources Department employed an outside investigator to conduct the discrimination

investigation, Marcella Fleming Reed. *Id.* The discrimination investigation was active and on-going until February 2, 2015, when Mr. Gipson and other involved parties were notified of its completion. *Id.* The discrimination investigation resulted in both substantiated and unsubstantiated findings of misconduct on the part of Mr. Gipson. *Id.*

B. Public Records Request 14-06701

The County received a public records request from Mr. Gipson on December 1, 2014, over 2 months before the discrimination investigation was completed. CP 52-56. The request sought 30 categories of records.

Id. Category number 19 of the request sought the following:

A copy of all of MFR's [Marcella Fleming Reed'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 format from the dates of December 27, 2013 to November 5, 2014.

Id. The remainder of this request sought records contained in the email accounts of over 30 employees related to the discrimination investigation, of which Mr. Gipson was the subject. *Id.* These employees included multiple members of Snohomish County Superior Court, Ms. Fleming Reed, the County Sheriff, the County Prosecuting Attorney and three members of his office, the County's Human Resources Director, and the County's EEO Investigators, among others. *Id.* This request was assigned

tracking number 14-06701 as it was the 6,701st request received by the County in 2014. *Id.*

The County responded to Mr. Gipson's request by producing 5 installments of records.¹ CP 48. In installment 2, provided to Mr. Gipson on February 19, 2015, the County withheld records under RCW 42.56.250(6). CP 58. In installment 3, provided to Mr. Gipson on March 5, 2015, the County withheld records under RCW 42.56.250(6). CP 137. In installment 5, the County withheld records under RCW 42.56.250(6). CP 139-252. The request was closed on May 4, 2015, five months after Mr. Gipson's request was received. CP 139.

C. Case Proceedings

On April 25, 2016, Mr. Gipson filed this lawsuit. CP 1-12. The County moved for summary judgment. CP 13-252. The superior court granted summary judgment concluding that exemptions apply to records as of the date an agency receives a request. CP 396-398. Here, because the discrimination investigation into Mr. Gipson was open and on-going as of the date of the request, the records were exempt from disclosure under RCW 42.56.250(6). *Id.* The superior court also concluded that Ms. Reed's billing statements were appropriately redacted as their content related to the active,

¹ The production of records provided in installments one and four are not at issue in this case.

on-going discrimination investigation and were exempt under RCW 42.56.250(6). *Id.* Finally, the superior court concluded the County met its burden for asserting RCW 42.56.250(6) applied to the records at issue and that the Washington State Supreme Court's holding in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 372 P.3d 97 (2016) does not apply to this case. *Id.* Mr. Gipson appealed.

The court of appeals affirmed the trial court concluding an agency properly makes its determination of whether a record is exempt at the time it receives the request. The court of appeals declined to consider Mr. Gipson's equitable estoppel argument because it had not been preserved for review. On November 28, 2018, this Court accepted review.

IV. ARGUMENT

A. The County Complied with the PRA.

The Court of Appeals properly affirmed the trial court's decision and its holding in *Sargent v. Seattle Police Dep't.* in concluding that the County complied with the PRA.

1. The County's Response Satisfied RCW 42.56.100, 42.56.520, and WAC 44-14-040(10).

An agency is obligated to respond to a request within five business days by providing a reasonable estimate of time as to when records will be made available. RCW 42.56.520. An agency is also required to provide

“the fullest assistance to inquirers and the most timely possible action on requests” while preventing “excessive interference with other essential agency functions.” RCW 42.56.100. “When the request is for a large number of records, the public records officer or designee will provide access for inspection and copying in installments... .” WAC 44-14-040(10). Here, the County responded to Mr. Gipson’s request within five days, informing him of when records would be made available. Mr. Gipson’s request sought a large number of records, so the County produced records in installments. The County met its internal deadlines and produced its first installment, and subsequent installments, on the dates promised.

2. The County’s Claim of Exemption Under RCW 42.56.550(6) Complied with the PRA.

Agencies are not required to “monitor whether documents properly withheld as exempt may later become subject to disclosure.” *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). “[T]he determination of whether a record is exempt is made at the time the request is received.” Washington State Bar Association *Public Records Act Deskbook: Washington’s Public Disclosure And Open Public Meetings Laws Second Edition* (Ramsey Ramerman and Eric M. Stahl, eds., 2014) at §5.1 (4) (“the Deskbook”). The County received Mr. Gipson’s

request on December 1, 2014. Accordingly, the status of the records and exemptions on December 1, control the outcome of this case.

RCW 42.56.250(6) allows an agency to withhold a discrimination investigation while it is “active and ongoing.” *Id.* at §10.3(6); RCW 42.56.250(6). Once the investigation is concluded, the records must be disclosed. *Id.* Here, on December 1, 2014, the discrimination investigation was active and ongoing. It was not closed until February 2, 2015, two months after the County received Mr. Gipson’s request.

In *Sargent v. Seattle Police Department*, this Court considered the application of RCW 42.56.240(1), the “categorical criminal investigative records exemption,” to an employment investigation involved in a criminal investigation. *Sargent v. Seattle Police Dep’t*, 179 Wn. 2d 376, 314 P.3d 1093 (2013). In that case, the court of appeals concluded that the PRA does not provide for standing requests and that an agency determines exemptions applicable on the date of the request. *Sargent v. Seattle Police Dep’t*, 167 Wn. App. 1, 6, 260 P.3d 1006, 1009 (2011), *aff’d in part, rev’d in part*, 179 Wn. 2d 376, 314 P.3d 1093 (2013). The case was reversed in part by this Court, but was done so on other grounds. *Sargent*, 179 Wn. 2d at 402. No appellate court has ruled that an agency is to re-assess exemptions as of the date records are produced to the requestor. As a result, agencies rely on the guidance set forth in the Deskbook and the court of appeals rationale in

Sargent that there are no standing public records requests and responsive records are determined and exemptions are applied as of the date the request is received.

Mr. Gipson argues that this Court's ruling in *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn. 2d 270, 372 P.3d 97 (2016) ("*Wade's*") controls this case. This argument is misplaced. The *Wade's* case dealt with two issues: imposition of PRA penalties and application of RCW 42.56.240(1) to an L&I investigation. Neither of those issues are presented in this case.

In *Wade's* this Court emphasized that the application of RCW 42.56.240(1) must meet a three-part test. *Wade's*, 185 Wn.2d at 281. First, the agency must establish that the records at issue are investigative in nature. *Id.* Second, the agency must establish they were created or compiled by a law enforcement, penology, or investigative agency. *Id.* Third, the agency must demonstrate that nondisclosure of the records is either essential to effective law enforcement or to protect an individuals' right to privacy. *Id.* In *Wade's* the Court concluded the agency inappropriately applied RCW 42.56.240(1) because L&I did not establish that nondisclosure was essential to effective law enforcement. *Id.* at 283.

Additionally, in *Wade's* the Court considered the production of records in installments. *Id.* at 289. The Court concluded that the delay in

production of records based on an inaccurate estimate of when the investigation would be concluded was inappropriate. *Id.* Specifically, L&I told the requestors the investigation would not be done until August and indicated the requestor could re-submit their request after that date. *Id.* This turned out to be a falsehood. *Id.* In fact, L&I concluded its investigation in March and June. *Id.* The Court found L&I's false representation egregious, because it appeared the agency gave an estimated date of August "as an excuse to withhold records that [we]re no longer exempt from disclosure." *Id.* The Court concluded this was a violation of the PRA because L&I improperly withheld records "without meeting its burden of showing how the records were—even temporarily—exempt." *Id.* at 290.

Wade's does not apply to this case. First, the County did not rely on the categorical criminal investigation exemption, RCW 42.56.240(1). Second, unlike RCW 42.56.240, RCW 42.56.250(6), does not involve a three-part analysis. Rather, the legislature created a specific exemption for the type of investigation at issue in this case: an open investigation into discrimination in employment. RCW 42.56.250(6). This exemption only requires that the investigation be "active and ongoing" at the time of the request. There is no requirement that non-disclosure of the records be essential to a governmental purpose. If the legislature had intended to make this requirement it would have done so. It did not.

Further, RCW 42.56.250(6) applied at the time the County received Mr. Gipson's request. The County did not purposely set-out installments to delay production in order to keep Mr. Gipson from getting records. The County similarly did not lie to Mr. Gipson about when the investigation would be completed in order to keep him from getting records to which he was otherwise entitled. The Court's holding in *Wade's* does not apply to the facts of this case.

When the County received Mr. Gipson's request on December 1, 2014, the employees responsible for processing the request assessed the request, preserved potentially responsive records that existed as of the date of the request, and determined what exemptions applied. Essentially, the agency took a snapshot of the records as of that date, preserving those records and what portions were subject to release as of that date. The County took its snapshot and then went to the business of processing the records for production for Mr. Gipson in compliance with the PRA. The County's actions complied with the PRA.

3. Public Policy Supports the Court of Appeals Ruling.

This Court should affirm a brightline rule that an exemption is determined as of the date the request is received. A brightline rule was established with regard to determining what records are responsive to a request. *Sargent v. Seattle Police Dep't*, 167 Wn. App. 1, 6, 260 P.3d 1006,

1009 (2011), *aff'd in part, rev'd in part*, 179 Wn. 2d 376, 314 P.3d 1093 (2013). Rather than have an agency re-assess what records to produce on the date it produces a record, an agency makes that determination based on what records are responsive on the date the request is received. This Court should adopt a similar rule with regard to determining whether an exemption applies. Such a brightline rule is supported by the public policy behind both the PRA and the need to exempt certain information in the public record.

Public policy supports the application of exemptions at the time a request is received. The assessment of a request to determine the universe of responsive records and which exemptions may apply to those records as of the date the request is received insures the people's prompt, efficient access to public records. Contrary to the legislative intent, if this Court adopts Petitioner's argument, access and production of records would become less efficient and result in longer wait times. Agencies would be placed in the untenable position of scrambling to determine the status of each document immediately before production, or risk liability under the statute. Any new information would delay the production of records. As an illustration, in this case, if the County had to assess the exemption on the date of each production, it would have gathered and redacted records from December 1, 2014, to February 1, 2015, only to have to re-do the work on

February 2, 2015, when the investigation was completed. This need to redo the response would have likely resulted in a delay in production. The absurdity of this result is evident in light of an agency's responsibility to provide the "fullest assistance" and "most timely possible action on requests." *See* RCW 42.56.100.

This Court must balance the PRA's access requirement with the legislature's determination that discrimination "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state." RCW 49.60.010. In order to effectuate this policy, the County has implemented a system to investigate claims of discrimination. As a part of the investigation process it is necessary to temporarily insulate the investigation from outside review. This insures the integrity of the investigative process by allowing investigators to gather facts and evidence without having witnesses worry about the disclosure of their information prior to the resolution of the complaint. It also insures that the subject of a complaint (like Mr. Gipson, here) does not have access to investigative records while the investigation is on-going. This prevents potential retaliation, witness tampering, and corruption of the investigative process.

The Legislature has already balanced the public policy goals of the PRA and chapter 49.60 RCW by ensuring that the public records request

process does not have an adverse impact on the investigation while it is active. Accordingly, it adopted RCW 42.56.250(6), and limited its application to the period that the investigation is most vulnerable to outside influence, when it is open an active. Surely the legislature did not envision that the public records process would drive the discrimination investigation process – to the contrary, RCW 42.56.250(6) contemplates the opposite – that the integrity of the investigation process should not be impacted by the disclosure of public records.

B. The Court of Appeals Properly Rejected Mr. Gipson’s Equitable Estoppel Claim.

The County incorporates by reference its arguments related to equitable estoppel presented in its Answer to the Petition for Review. Equitable estoppel was not presented, argued, or briefed at the trial court level and does not meet the requirements of RAP 2.5(a). Additionally, Mr. Gipson has not met his burden for demonstrating the elements of equitable estoppel. As a result, the Court should not consider his argument on this issue.

V. CONCLUSION

For all of the foregoing reasons, the County respectfully requests that the Court affirm the lower courts’ rulings that an agency determines

application of exemptions as of the date the public records request is received by the agency.

Respectfully submitted on December 28, 2018.

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DECLARATION OF SERVICE

I, Nicole Magill, hereby certify that on the 20th day of December, 2018, I caused to be delivered and served a true and correct copy of the foregoing pleadings upon the entity and persons listed herein by the following means:

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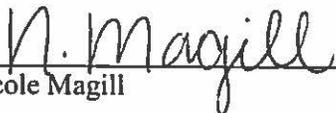
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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 20th day of December, 2018.



Nicole Magill

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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