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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.

**RESPONDENT'S ANSWER TO BRIEF OF AMICUS ALLIED
DAILY NEWSPAPERS OF WASHINGTON and WASHINGTON
COALITION FOR OPEN GOVERNMENT**

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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. Amicus, Allied Daily Newspapers of Washington and Washington Coalition for Open Government ("Allied and WCOG") ask this Court to create a system where an agency cannot effectively comply with the law, to the detriment of transparency and vital governmental functions. This Court should affirm the rulings of the lower courts in concluding when a requestor seeks exempt records, an agency is not required to produce those records, regardless of when production occurs.

II. ARGUMENT

The Court of Appeals properly affirmed the trial court's decision and its holding in *Sargent v. Seattle Police Dep't.* when it concluded that the County complied with the PRA. Agencies are not required to produce requested records that are exempt. RCW 42.56.070(1). 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”). On December 1, 2014, Mr. Gipson sought records in an active, on-going investigation into discrimination. The records he requested were exempt from disclosure under RCW 42.56.250(6), and were properly withheld on that basis.

In *Sargent*, 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). *Sargent*’s request was small and finite, seeking, “the incident report and the name and badge number” of the officer involved, the 911 recordings, and the computer aided dispatch log. *Id.* at 383. He sought only records contained in the on-going investigative file. As a result, the agency was able to quickly respond and claim the exemption, denying production of the records. 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 (2011), *aff'd in part, rev'd in part*, 179 Wn.2d 376, 314 P.3d 1093 (2013). Agencies rely on the guidance set forth in the Deskbook and the court of appeals rationale in *Sargent*.

The holding in *Sargent* avoids absurd results. It allows an agency to effectively and efficiently respond to requests. An agency evaluates a request when it is received, determines what records are responsive as of that date, and determines whether an exemption applies to the requested records or whether they must be produced to the requestor. Absurdity would result if the law is interpreted to require an agency to alter this process depending on the size of a request, and the volume of potentially responsive records, and the number of other requests being processed by agency personnel.

Adoption of Allied and WCOG's position in this case exemplifies this absurdity. Unlike in *Sargent*, Mr. Gipson did not simply seek records related to the active, on-going investigation. If he had, the County could have promptly responded, as in *Sargent*, that the investigation was open and on-going and denied the request. However, because of the volume of Mr. Gipson's request (he sought 30 categories of records only some of which were investigative records) and the volume of request pending at the County (Mr. Gipson's was the County's 6,701st of 2014), the County was unable to fully process the request immediately and instead availed itself of the

installment method permitted by the PRA.¹ CP 15. Allied and WCOG's position would require that Mr. Sargent's request and Mr. Gipson's request be treated differently even though both requests sought records of an active, on-going investigation. Consistent with previous opinions, this Court should avoid this absurd result. *Belenski v. Jefferson Cty*, 186 Wn.2d 452, 460-61, 378 P.3d 176 (2016); *Resident Action Council v. Seattle Hous. Auth.*, 177 Wn.2d 417, 431, 327 P.3d 600 (2013), *as amended on denial of reh'g* (Jan. 10, 2014), *citing, Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004) ("In this difficult area of the law, we endeavor to provide clear and workable guidance to agencies insofar as possible". *See Bellevue John Does 1-11 v. Bellevue Sch. Dist. # 405*, 164 Wn.2d 199, 218-19, 189 P.3d 139 (2008)).

As noted by Allied and WCOG, the decision on this matter will impact a variety of temporal exemptions.² For instance, RCW 42.56.240(5) exempts "Information revealing the identity of child victims of sexual

¹ Contrary to Allied and WCOG's suggestion, the County did not "wait for months until after the investigation ended to send the three responses at issue." Rather, the County diligently processed a very large public records request using the installment method, permitted by law. Amicus Brief at 6.

Allied and WCOG also assert that *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn. 2d 270, 372 P.3d 97 (2016) is instructive insofar as the agency, in *Wade's*, purposely delayed disclosure based on a self-imposed installment date as a means to deny production of non-exempt records. Amicus Brief at 12. This case does not present similar facts. There is no evidence the County engaged in deceit in order to prevent Mr. Gipson from receiving non-exempt records.

² This point is also made by amicus Washington State Association of Counties and Washington State Association of Municipal Attorneys at pages 11-12 of their briefing.

assault who are under age eighteen.” Agencies routinely apply this exemption to exempt a child sexual assault victim’s identity regardless of the victim’s age at the time of the request. If a child was 12 at the time of the assault, the agency will not release his or her identity even if the victim is 19 at the time records are disclosed. Adopting the position put forth by Allied and WCOG, an agency would be required to produce the child victim’s identifying information if the child turns eighteen before the agency concludes production of records responsive to a request that was received prior to the child’s eighteenth birthday. This is but one of a multitude of such examples.

Additionally, adoption of Allied and WCOG’s position could lead to less transparency. Under their position, if a record exists as of the date of a request and a discrimination investigation begins the next day that record would be exempt at the date of production. Allied and WCOG argue that adoption of the County’s position means “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.” Amicus Brief at 15. This is equally true with the adoption of Allied and WCOG’s position – an agency seeking to hide records could trigger a temporal exemption after the submission of a public records request in order to avoid disclosure.

Adoption of Allied and WCOG's position would not avoid the broadening of "secrecy." Amicus Brief at 15.

In this complex area of the law, the public and agencies are best served by clarity and consistency in application of the law. This Court has consistently recognized this fact in its decisions. Adoption of Allied and WCOG's position would complicate this portion of the PRA to the detriment of requestors and agencies alike. The Court should not adopt their position.

III. CONCLUSION

For all of the foregoing reasons, the County respectfully requests that the Court affirm the lower courts' rulings that when a request seeks exempt records, the agency is not required to disclose them, regardless of when disclosure occurs.

Respectfully submitted on February 11, 2019.

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DECLARATION OF SERVICE

I, Nicole Magill, hereby certify that on the 11th day of February, 2019, 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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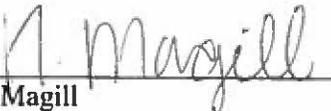
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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 11th day of February, 2019.



Nicole Magill

SNOHOMISH COUNTY PROSECUTING ATTORNEY - MUNI

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Comments:

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