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VERY IMPORTANT PUBLIC RECORDS ACT CASE – "STANDING PUBLIC RECORDS REQUESTS"

In October 2019, the Washington Supreme Court answered the following question: whether an agency may continue to withhold or redact public records based on an expired temporary exemption that was effective at the initiation of a records request. The Court answered this question in the affirmative in *Ron Gipson v. Snohomish County*, No. 96164-6 (2019).[1]

The *Gipson* Court ruled in this manner because the case involved a "temporal" exemption—i.e. an exemption that is no longer applicable after a specific event occurs (or only applicable for a period of time). In *Gipson*, the applicable exemption was as follows: Records compiled by an agency in connection with an "active and ongoing" investigation into discrimination in the workplace, under RCW 42.56.250 (6). This exemption is "temporal" because the exemption no longer applies once the investigation is complete.[2]

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[1] http://www.courts.wa.gov/opinions/pdf/961646.pdf

[2] A similar "temporal exemption" would be the deliberative process exemption set forth at RCW 42.56.280. That exemption no longer applies when a preliminary note, draft. recommendation or intra-agency memorandum is "publicly cited" by an agency in connection with an agency action. In other

The *Gipson* Court held that an agency's reliance on a temporal exemption applies *at the time the request is received*, and the exemption continues to apply for the duration of an installment request, even if the exemption expired at some point prior to completion of the request.

The Court found that the public agency—in this case, a county—was not required to update its response at the time the investigation ended because the Public Records Act does not allow for "standing requests" that public agencies must supplement as soon as they are aware that an exemption no longer applies. In reaching its decision, the Court noted the *Sargent* case in which a Washington court of appeals found that "[A]n agency is not required to monitor whether newly created or newly nonexempt documents fall within [such] a request to which it has already responded."

Here are the facts of *Gipson:*

The member of a city council was being investigated for discrimination in 2014. He submitted a public records request to the county in November 2014, in which he requested "all records which in any way mentions the name Ron Gipson." The investigation was closed on February 2, 2015.

The county responded to the request in five installments over several months, the second of five being provided on February 19, 2015 (over two weeks after closure of the investigation). The last installment was provided on May 4, 2015.

The county produced heavily redacted records, in each installment—including those provided after the investigation closed—relying on the "active and ongoing" investigation exemption set forth under RCW 42.56.250 (6).

The requestor sued under the PRA in April 2016, arguing that the county improperly relied on the "active and ongoing" investigation exemption because the investigation was not "active and ongoing" after the first installment of records was provided. Therefore, he argued, the county should have proceeded as though the exemption no longer applied as to installments two through five. The Court disagreed, holding as follows:

> Thus, we hold that a records request is satisfied when an agency receives a public records request, identifies a legitimate exemption under the PRA *at that time*, and clearly notifies the requester that the request will be treated *in accordance with that exemption*.

(emphasis added).

Put another way, the Court found that a public agency can state that a temporal exemption shall apply for the entire period in which installments are going to be provided, even if the exemption, at some point during the installment period, is no longer applicable. The Court found that this was sufficient notice to the requestor, such that if the requestor wanted, he or she could submit a

words, a "triggering event" must occur before the exemption no longer applies.

"refresher request" that would negate the applicability of the temporal exemption.

In effect, the Court placed the burden to overcome reliance on a no-longer-applicable exemption on the requestor. This case is important. The requestor argued, quite logically, that once a temporal exemption "expires", there is no exemption and the records must be produced in an un-redacted condition.

The Court disagreed. Dismissing the requestor's argument, the Court reasoned that an agency should not treat each installment as a separate records request because that would amount to a "standing request" which is not permitted under the PRA. In doing so, the Court noted the long-standing precedent that agencies are not required to supplement their answers to public records requests as soon as they become aware of new records or exemptions that may no longer apply.[3] Essentially, the Court held that the exemptions that apply at the time of the request are the exemptions that are applicable throughout the consideration of that request.

So what does *Gipson* stand for? The holding of this case is of great import because an agency may now withhold records that were exempt when the request was made but which become "non-exempt" with the passage of time, despite there being a pending public records request to which the agency is responding in installments.

The *Firehouse Lawyers* suspect that open government advocates will be very dissatisfied with this holding because (1) it seems inconsistent logically with a temporal exemption and more importantly perhaps because (2) it flies in the face of the remedial purpose of the PRA to foster openness in government by construing exceptions narrowly, not broadly, to effectuate the purpose of the legislation to achieve transparency in government.

SAFETY BILL

If you are driving to the Washington Fire Commissioners Association yearly conference at the Tulalip Resort this year, understand that it is illegal to pass another vehicle at the time the highway is separated by a double yellow line or other barrier no less than 18 inches wide, as per RCW 46.61.150. In such cases, stay on the right side of the road unless there is a clear indication otherwise. Hopefully we will see you at WFCA.

DISCLAIMER

[3] The Model Rules to the Public Records Act specifically state as such: "[a]n agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses." WAC 44-14-04004(4)(a). One might argue that this model rule is intended to apply to new *records* that come into existence after a request is made, and is *not* intended to apply to exemptions that are no longer applicable during the period in which records are being provided in installments.