6-2-2014

Hymas v. Meridian Police Dept. Supplement's Appellant's Brief Dckt. 41156

IN THE SUPREME COURT OF THE STATE OF IDAHO

GRETCHEN HYMAS, BREANNA HALOWELL and TRAVIS FORBUSH. Petitioners-Appellants, vs. THE MERIDIAN POLICE DEPARTMENT, Respondent.	Supreme Court Docket No. 41156-2013 Ada County Docket No. CV OC 2012-23460

APPELLANTS' *SUPPLEMENTAL* BRIEF

Appeal from the District Court of the Fourth Judicial District County of Ada
The Honorable Melissa Moody
District Judge Presiding

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II. CASES AND AUTHORITIES

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III. SUPPLEMENTAL ARGUMENT

A. The Supreme Court in *Wade v. Taylor, et al*, Supreme Court Docket No. 40142 (March 18, 2014) specifically rejected Judge Moody's "categorical" denial of the disclosure of a requested records based on a claim the investigation was ongoing.

The record below established that Judge Moody ruled, despite not having reviewed a single document in the MPD investigation file, that the MPD was entitled to categorically deny disclosure of a single document as long as its investigation was ongoing. Apparently, the District Court ruled the MPD was entitled to some type of presumption that *all* document were exempt from disclosure because of the status of the investigation. However, the *Wade* Court rejected such a contention.

> We decline to adopt this categorical approach to Idaho Code section 9-335(1). The structure of the statute does not suggest that there is a variable burden of proof on the withholding agency that is dependent upon on the nature of the alleged harm resulting from disclosure. We conclude that the burden of demonstrating that disclosure of the records would result in a harm identified by Idaho Code section 9-335(1)(a)–(f) is the same for each subdivision of that statute. **The district court is to make this determination in light of the record before it, not based on a generalization of the types of documents withheld, but by a thorough review of the investigatory record and consideration of the likelihood that the harms identified in Idaho Code section 9-335(1) will be realized.**

Wade v. Taylor, et al, Supreme Court Docket No. 40142 (March 18, 2014), p. 9. (Emphasis added.)

The *Wade* Court once again rejected any contention that some type of blanket exemption applied as long as an investigation was continuing.

> As we held in *Bolger v. Lance*, 137 Idaho 792, 53 P.3d 1211 (2002), "[t]he statutory scheme for disclosure of public records, and this Court's interpretation thereof, clearly envisions that, in responding to an order to show cause, the agency bears the burden of persuasion and must 'show cause,' or prove, that the documents fit within one of the narrowly-construed exemptions." *Id.* at 796, 53 P.3d at 1215.

Wade v. Taylor, et al, at p. 9-10.

Accordingly, as the Appellants argued below, the Court is required to review the file and consider at the order to show cause hearing whether or not the Respondent had established any of the documents it refused to disclose were exempt from disclosure. Simply because the MPD had released its file two days before the order to show cause hearing did not relieve the Court of its duty to review the file as it existed on the date of the denial, or relieve the MDP of its burden to establish at the show cause hearing that releasing the documents when requested would somehow "interfere with enforcement proceedings."

B. The proper inquiry requires an analysis of requested file at the time of the denial, not at the time of the hearing.

Judge Moody erred when she found because the MPD had disclosed its investigation file, its initial denial was moot and not subject to review.

> Finally, we note that the inquiry should focus on whether the withholding agency has shown a reasonable probability of a harm identified in Idaho Code section 9-335(1)(a)–(f) at the time of the denial of the public records request rather than at the time of the hearing. This is because Idaho Code section 9-335(4) states that in the event the "judge determines that the public official *was justified* in refusing to make the record public," the district judge "shall return the item to the public official . . . ." (emphasis added). **This language makes it clear that the relevant inquiry is the time of the denial.** *See also* I.C. § 9-344(2) ("If the court determines that the public official was justified in refusing to make the requested record available, he shall return the item to the public official without disclosing its content and shall enter an order supporting the decision refusing disclosure."). Here, the district court continued the hearing in an apparent effort to provide CCPA additional time to make its charging decision. This suggests that the district court was focused on whether an exemption applied at the time of its decision, not whether CCPA was justified in refusing disclosure on March 22, 2012, when it denied Wade's public records request. For these reasons, we vacate the district court's order requiring disclosure of the records.

Wade v. Taylor, et al, at p. 10-11. (Emphasis added.)

Here, there is no dispute that Judge Moody failed to consider or review the file as it existed in December 2012 because she stated she had not reviewed any of the file documents.

C. Judge Moody erred when she failed to review a single document in the MPD investigatory file, regardless of MPD's ultimate disclosure just prior to the show cause hearing.

The *Wade* court ruled it is not a defense for an agency like the MPD to refuse to disclose the contents of their entire file by claiming that because certain documents or information might be exempt, the entire file was therefore exempt. That apparently is what Judge Moody ruled below.

> The district court, in reviewing a denial of a public records request, engages in the same analysis as the custodian when determining whether or not the records requested are exempt from disclosure. *See* I.C. § 9-343(1). As such, both the district court and the public agency in custody of the requested public record have a duty to examine the documents subject to the request and "separate the exempt and nonexempt material and make the nonexempt material available for examination." I.C. § 9-341. **This obligation exists even if exempt material is contained in the same public record as nonexempt material; that which is nonexempt must be made available.** I.C. §§ 9-338, 341.

Wade v. Taylor, et al, at p. 11. (Emphasis added.)

Again, there is no blanket "ongoing investigation" exemption as Judge Moody ruled. It is and remains the burden of the MPD to review the file and release all non-exempt documents at the time of the receipt of a valid public records request. If the MDP fails in its burden, it may be subject to the sanction of paying the Appellants' costs and attorney fees. It is also the duty of the reviewing court to review the file and to independently determine whether any of the documents withheld are properly exempt from disclosure at the time the request was denied, regardless of whether the MPD had eventually released the file.

D. The Petitioners are entitled to attorney fees on Appeal according to I.C. § 9-344.

The *Wade* Court ruled that the prevailing party is entitled to attorney fees on appeal according to Idaho Code section 9-344(2). The Appellants requested attorney fees below based on Idaho Code section 9-344, and on Idaho Code section 12-117 on appeal because Idaho Code

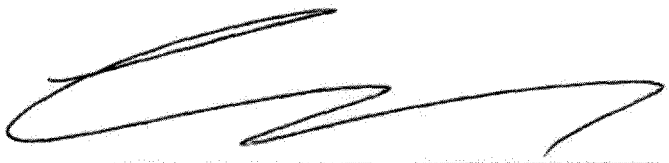
section 9-344 does not address attorney fees on appeal. However, in *Wade*, the Supreme Court ruled, "Thus, Idaho Code section 9-344(2) is the only statute that applies to Wade's request for attorney fees." *Wade v. Taylor, et al*, at p. 14. In light of the ruling in *Wade*, the Appellant's now request attorney fees on appeal according to Idaho Code section 9-344 if they are the prevailing party on appeal.

IV. CONCLUSION

Once more, the Respondent failed to make a record below that any of its file documents were exempt, and therefore, its denial of the Appellants' Public Records Request was frivolous and without foundation. Moreover, the Court, regardless of whether the MPD had released its file, had a duty to evaluate the file to determine whether that denial was justified as it existed in December 2012 when the MPD denied the Appellants' request for records. Accordingly, the *Wade* decision warrants reversal of Judge Moody's refusal to award attorney fees and costs to the Appellants.

RESPECTFULLY SUBMITTED this 2nd day of June, 2014.

CLARK & ASSOCIATES, ATTORNEYS



Eric R. Clark, For the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of June, 2014, I served the foregoing, by having two true and complete copies delivered via hand delivery to:

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