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SPOKANE | COEUR D'ALENE

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August 7, 2014

Wes Somerton
Mike Gridley
City of Coeur d'Alene
710 E. Mullan Avenue
Coeur d'Alene, ID 83814

Re: Denial of Scott Maben's Public Records Request and Renewal of Said Request for Public Information Regarding the "Arfee" Incident

Dear Wes and Mike:

This letter constitutes a second request, valid as of today's date, for a copy of the incident report and all documents related to the July 9, 2014 shooting of the dog "Arfee". This request includes any account of the shooting written by any officer who witnessed the shooting as well as any witness statements related thereto.

The following are the relevant facts:

- My client, the Spokesman-Review's, employee, Scott Maben, made a public record request dated July 11, 2014 for public records related to the killing of the dog Arfee by a City of Coeur d'Alene police officer. See attached Exhibit A.

- On July 15, 2014, Wes Somerton, Chief Deputy City Attorney, sent Mr. Maben a response to his public record request that simply said "denied" and cited I.C. § 9-335(1) without any explanation. See attached Exhibit B.

- On August 4, 2014, Mr. Maben was forwarded an email from Mike Gridley which cites I.C. § 9-355(1)(a)(b)(c)(e) and (f) as authority for a blanket denial of his July 11, 2014 request. See attached Exhibit C.

608 Northwest Boulevard, Suite 300 Tel: 208.**667.4000**
Coeur d'Alene, Idaho 83814-2174 Fax: 208.**667.8470**
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ANALYSIS

As I am sure you both know, the Idaho Supreme Court recently issued a decision clarifying certain aspects of Idaho's Public Records Law in *Wade v. Taylor,* 156 Idaho 191, 320 P.3d 1250 (2014), issued on March 18, 2014 and enclosed for your convenience.

The Court reiterated that every person has a right to examine and take a copy of any public record of this state unless an exemption is expressly provided by statute. I.C. § 9-338(1). Under Idaho law, a Court presumes that "all public records are open unless expressly provided otherwise by statute." The Idaho Supreme Court narrowly construes exemptions to the duty of public disclosure. *Federated Publications, Inc. v. Boise City,* 128 Idaho 459, 463, 915 P.2d 21, 25(1996).

The Idaho Supreme Court held in *Wade v. Taylor* that the entity withholding records has the burden of demonstrating that the records are exempt from disclosure. As such, I believe it is incumbent upon the City of Coeur d'Alene to specifically designate which sections of § 9-335(1)(a)-(f) are implicated by this request and specify why each exemption applies. *See Wade v. Taylor,* 320 P.3d at 1258-1259. The Idaho Supreme Court did emphasize that the probability of harm identified in I.C. § 9-335(1)(a)-(f) should be viewed at the time of the denial of the public records request rather than any other time. Hence, my concurrent request for the same records Scott Maben requested on July 11, 2014.

Obviously, some time has passed since the bad publicity generated by the Arfee shooting, so I suggest you reconsider whether the harms set forth in the above statute are still present. The Idaho Supreme Court made clear in *Wade v. Taylor* that the withholding agency must engage in an analysis of what records are and are not exempt from disclosure:

> The public agency and custodian of the requested public records 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 within the same public record and nonexempt material: that which is nonexempt must be made available. I.C. § 9-338, 341,

Wade v. Taylor, 320 P.3d at 1260.

Based on the guidance of *Wade v. Taylor,* the City of Coeur d'Alene's blanket denial of every single scrap of information related to the Arfee shooting violates the Idaho Public Record law and the City of Coeur d'Alene has seemingly shirked its duty to examine the public records and separate nonexempt information and release it to the public. For example, how can the City withhold the written statements of Arfee's owner when he has already spoken with several media outlets? Interviewing witnesses is not an "investigation technique and procedure" protected by I.C. § 9-335(e). Similarly, the City could redact officer's names if it, in good faith, believes that disclosure would "endanger the life or physical safety of law enforcement personnel" under I.C. § 9-335(1)(f).

We look forward to resolving this issue short of a public records lawsuit compelling the City to disclose these records that belong to the public.

Please fully respond to this public records request made at the onset of this letter.

Sincerely,

WITHERSPOON • KELLEY

Joel P. Hazel

JPH/am
Encs.
cc: Mayor Steve Widmyer
Scott Maben
K:\wdocs\cdamain\84614\0503\C0105179.DOCX

608 Northwest Boulevard, Suite 300 Tel: 208.667.4000
Coeur d'Alene, Idaho 83814-2174 Fax: 208.667.8470
www.witherspoonkelley.com

Exhibit A

From: Scott Maben
Sent: Friday, July 11, 2014 9:44 AM
To: PD-Reportrequests@cdaid.org
Subject: Public records request 2

July 11, 2014

To: Coeur d'Alene Police records
From: Scott Maben, The Spokesman-Review

Under the Idaho public records law, I am requesting a copy of the incident report of the July 9, 2014, shooting of the dog Arfee. This would include any account of the shooting written by the officer who fired the shot, as well as any witness statements.

I can be reached at (509) 808-9689.

Exhibit B

W

Coeur d'Alene Police
Protect and Serve

3818 SCHREIBER WAY
CŒUR D'ALENE, ID 83815
208-769-2320 – FAX 208-769-2307
www.cdapolice.org

PUBLIC RECORDS REQUEST

Date: 07/11/14

Name: Scott Mabes

Mailing Address: _____

Phone Number / Email Address: 509-808-9689 / Scottm@spokesman.com

I am requesting a copy or to examine certain records from the Coeur d'Alene Police Department which may be identified as follows:

See request.

Accepted by: R. Mumford

Response

[ ] **Request granted.** The requested record is attached to this response.

[ ] **Response delayed.**

Additional time is necessary to locate or retrieve the requested public records. You should have a response no later that 10 working days following the date of your request.

[ ] Documents not known to exist, or statute of limitation has expired for retention.

[ ] The Coeur d'Alene Police Department is not the custodian of the requested record.

DATE RECEIVED BY CITY ATTORNEY'S OFFICE: _____

Request reviewed by: Wes Somerton
Title: Chief Criminal Deputy City Attorney WJS 7-15-14

_____ Release without redaction
_____ Release as redacted by attorney
* Denied*
Statutory/Legal Authority for Denial 9-335(1) Idaho Code

*The party requesting the denied records has 180 days from the date of mailing this notice of denial to file a petition contesting the denial with the District Court in Kootenai County. The City of Coeur d'Alene shall keep all documents or records in question until the end of the 180 day appeal period or until a decision has been rendered on a properly filed appeal, whichever is longer.

Exhibit C

From: WOOD, CHRISTIE [mailto:cwood@cdaid.org]
Sent: Monday, August 04, 2014 3:20 PM
To: Scott Maben
Cc: ERICKSON, KEITH
Subject: FW: checking back on another records question

Hi Scott,

Below is a response to your question from City Attorney Mike Gridley. He has offered to talk to you if you have any further questions. Thanks for your patience.

Christie

-----Original Message-----
From: GRIDLEY, MIKE
Sent: Monday, August 04, 2014 3:18 PM
To: WOOD, CHRISTIE
Cc: CLARK, RON; JUDD, DAVID; ERICKSON, KEITH
Subject: RE: checking back on another records question

Hi Christie: Sorry about the delay in getting back to you. Things are CRAZY busy around here!

Wes is on vacation but the answer to Scott's question is IC-9-335(1)(a)(b)(c)(e) and (f). The main reason is 9-335(1)(a). We have an active investigation so we would not release reports, etc. until the investigation is completed. And, given the "lynch mob" mentality and the threats that have been made, I would certainly argue that (b), (c), and (f) apply. I think that (e) applies because the incident is still being investigated. I am not aware of any confidential sources so (d) would not be applicable.

Feel free to have Scott or Joel call me if they want to talk about this. Again, I apologize for the delay.

IC-9-335. Exemptions from disclosure -- Confidentiality. (1) Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would:
(a) Interfere with enforcement proceedings;

(b) Deprive a person of a right to a fair trial or an impartial adjudication;

(c) Constitute an unwarranted invasion of personal privacy;

(d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, confidential information furnished only by the confidential source;

(e) Disclose investigative techniques and procedures; or

(f) Endanger the life or physical safety of law enforcement personnel.

-----Original Message-----
From: WOOD, CHRISTIE
Sent: Wednesday, July 30, 2014 2:27 PM
To: GRIDLEY, MIKE
Cc: CLARK, RON
Subject: FW: checking back on another records question

Mike,

Can you please respond to Scott's request. I told him I would see if I could find you today and get an answer. Thank you.

Christie

-----Original Message-----
From: Scott Maben [mailto:ScottM@SPOKESMAN.com]
Sent: Wednesday, July 30, 2014 12:20 PM
To: WOOD, CHRISTIE
Subject: checking back on another records question

Hi Christie,

I sent a question to Chief Clark a couple of weeks ago (July 15) asking for clarification on the denial of a records request. I didn't hear back from anyone on that.

Here's my question again:

"I do need some clarification on your denial of the officer's report on the dog shooting. The denial references 9-335(1), but that exemption from disclosure applies only in 6 specific instances referenced in the statute. The denied record request does not indicate which, if any, of those instances applies in this situation. Without knowing that, it's difficult for us to understand precisely why the city is withholding this public record and how you applied the provisions of subsection (1)(a-f) to the decision to deny."

I don't know if the chief sent this to Wes Somerton or what. Again, I received no response from anyone. Is this a question the city is willing to answer for us?

Scott

Scott Maben
Deputy City Editor
The Spokesman-Review

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156 Idaho 91
Supreme Court of Idaho,
Boise, December 2013 Term.

Jamee Lee WADE, Plaintiff–Respondent,
v.
Bryan F. TAYLOR, County Prosecuting Attorney,
Canyon County Prosecuting Attorney's Office,
a public agency, Defendants–Appellants.

No. 40142. | March 18, 2014.

Synopsis

Background: Person who had be shot by police officer filed petition under Idaho **Public Records** Act (IPRA) seeking disclosure of records of **investigation** into shooting. The Third Judicial District Court, Canyon County, Thomas J. Ryan, J., ruled that records were not exempt from disclosure, but ordered disclosure limited to petitioner and his attorney. Office appealed.

Holdings: The Supreme Court, Horton, J., held that:

[1] office's appeal was not rendered moot by post-judgment disclosure of records to petitioner;

[2] **investigatory** records were not inactive, as required to defeat statutory exemption from disclosure;

[3] office did not have to show that it would suffer statutory harm from disclosure, but only that there was reasonable probability that it would;

[4] office's evidence did not show reasonable probability that disclosure of records to petitioner would interfere with enforcement proceedings or deprive person of fair trial or impartial adjudication;

[5] harm determination had to based on probability of harm at time request was made, and not probability of harm on date of hearing;

[6] petitioner's motivation for seeking records, namely, for purposes of filing tort claim, was not relevant to whether records were exempt from disclosure;

[7] district court lacked statutory authority to limit disclosure of records to petitioner and his attorney;

[8] district court had jurisdiction to amend judgment and consider petitioner's request for attorney fees and costs after office filed notice of appeal; and

[9] IPRA was petitioner's exclusive remedy on request for attorney fees and costs on appeal.

Vacated and remanded.

J. Jones, J., specially concurred, with opinion.

West Headnotes (22)

[1] **Records**
Judicial enforcement in general

When considering an appeal from a **public records** request, Supreme Court will not set aside district court's findings of fact unless they are clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal.

Cases that cite this headnote

[2] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

An appellate court exercises free review over questions of law, including the interpretation of a statute.

Cases that cite this headnote

[3] **Records**
Judicial enforcement in general

Appeal by prosecuting attorney's office from district court's order for disclosure of records relating to shooting of petitioner by police officer was not rendered moot by office's post-judgment disclosure of records to petitioner, where issue of petitioner's request for attorney fees remained

to be resolved. West's I.C.A. §§ 9–335(4), 9–344(2).

Cases that cite this headnote

[4] **Appeal and Error**
Existence of actual controversy

Appeal and Error
Determination of questions of jurisdiction in general

Whether an appeal is moot is a question of appellate court's jurisdiction and may be raised at any time.

Cases that cite this headnote

[5] **Action**
Moot, hypothetical or abstract questions

A case is "moot" if the party lacks a legally cognizable interest in outcome or if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief.

Cases that cite this headnote

[6] **Records**
Judicial enforcement in general

In cases regarding **public records** requests, even when disputed records are produced, if records were not provided until after lawsuit was instituted to compel production of records and issue of attorney fees remains, case is not "moot" and Supreme Court has jurisdiction to hear the appeal.

Cases that cite this headnote

[7] **Records**
Matters Subject to Disclosure; Exemptions

Because of presumption under Idaho **Public Records** Act (IPRA) that all **public records** are open unless expressly provided otherwise by statute, courts narrowly construe exceptions to the duty of public disclosure. West's I.C.A. § 9–338(1).

Cases that cite this headnote

[8] **Records**
Judicial enforcement in general

In reviewing a trial court's order on a request for disclosure of records under Idaho **Public Records** Act (IPRA), Supreme Court's first inquiry is whether writings requested are **public records**; if so, Court presumes records to be open to public, unless it is shown that an exemption applies. West's I.C.A. § 9–338(1).

Cases that cite this headnote

[9] **Records**
Investigatory or law enforcement records

Granting an individual right to examine **public records** which relate to that person, even if otherwise exempt, is limited by Idaho **Public Records** Act's (IPRA) statutory exemption from disclosure of records of a law enforcement agency in an active or ongoing **investigation**. West's I.C.A. §§ 9–335, 9–342.

Cases that cite this headnote

[10] **Records**
Investigatory or law enforcement records

Investigatory records of shooting by police officer were not inactive, as required to defeat Idaho **Public Records** Act (IPRA) exemption from disclosure for records of prosecutor's office as part of active **investigation**, simply by virtue of fact that last **investigative** act was undertaken over four months prior to petition for access to **public records**, even if records involved person shot, where records involved related **investigation** into possible criminal charges and prosecutor had not yet determined whether charges would be filed. West's I.C.A. § 9–335(1).

Cases that cite this headnote

[11] **Records**
Evidence and burden of proof

Under Idaho **Public Records** Act (IPRA), entity withholding records has burden of demonstrating

that records are exempt from disclosure. West's I.C.A. § 9–335.

Cases that cite this headnote

[12] **Records**
Judicial enforcement in general

Under Idaho **Public Records** Act (IPRA), district court is to make determination as to whether agency withholding records has demonstrated that disclosure of records would result in one of statutorily enumerated harms in light of record before it, not based on a generalization of types of documents withheld, but by a thorough review of **investigatory** record and consideration of likelihood that the harms identified will be realized. West's I.C.A. § 9–335(1).

Cases that cite this headnote

[13] **Records**
Evidence and burden of proof

Idaho **Public Records** Act's (IPRA) scheme for disclosure of **public records**, and court's interpretation thereof, clearly envisions that, in responding to an order to show cause challenging non-disclosure of a **public record**, agency bears burden of persuasion and must show cause, or prove, that documents sought fit within one of narrowly-construed exemptions. West's I.C.A. § 9–335(1).

Cases that cite this headnote

[14] **Records**
Evidence and burden of proof

On petition under Idaho **Public Records** Act (IPRA) for **investigatory** records relating to shooting of petitioner by police officer, prosecutor's office did not have burden of proving that disclosure would interfere with enforcement proceedings or would deprive person of fair trial or impartial adjudication; rather, office was only required to show reasonable probability that disclosure of requested records would do so. West's I.C.A. § 9–335(1)(a, b).

Cases that cite this headnote

[15] **Records**
In general; request and compliance

Chief criminal deputy's affidavit regarding **investigation** into shooting of petitioner by police officer, stating that county prosecutor had requested that he review incident for potential criminal charges, that he had requested **investigator** and chief deputy sheriff's office to review files, and that **investigation** was ongoing, was not evidence demonstrating reasonable probability that disclosure of records to petitioner would interfere with enforcement proceedings or deprive person of fair trial or impartial adjudication, so as to be exempt from disclosure under Idaho **Public Records** Act (IPRA); affidavit addressed only whether records were part of active **investigation**, not whether disclosure could result in harm. West's I.C.A. § 9–335(1)(a, b).

Cases that cite this headnote

[16] **Records**
Investigatory or law enforcement records

Determination of whether prosecutor's office demonstrated reasonable probability that disclosure to petitioner of records of **investigation** into shooting of petitioner by police officer would interfere with enforcement proceedings or would deprive person of fair trial, so as to be exempt from disclosure under Idaho **Public Records** Act (IPRA), had to be based on probability of harm at time petition for records was made, not at time of hearing on petition. West's I.C.A. § 9–335(4).

Cases that cite this headnote

[17] **Records**
Persons entitled to disclosure; interest or purpose

In responding to a request for disclosure of **public records**, under Idaho **Public Records** Act (IPRA), motivation of person requesting **public record** is irrelevant; public's right, and

consequently, any individual person's right, to inspect a **public record** is conditioned solely on whether document is a **public record** that is not expressly exempted by statute. West's I.C.A. § 9–338(5).

Cases that cite this headnote

[18] **Records**

Matters Subject to Disclosure; Exemptions

Whether a **public record** is subject to disclosure or exempt from disclosure is an objective analysis, both for the custodian and for the district court. West's I.C.A. § 9–338.

Cases that cite this headnote

[19] **Records**

Persons entitled to disclosure; interest or purpose

Petitioner's motivation for seeking from prosecutor's office all records of **investigation** of shooting by police officer, namely, for purposes of filing tort claim, was not relevant to whether records were exempt from disclosure under Idaho **Public Records** Act (IPRA). West's I.C.A. § 9–338.

Cases that cite this headnote

[20] **Records**

Findings and order; injunctive relief

On petitioner's request under Idaho **Public Records** Act (IPRA) for records that were in custody of prosecutor's office and that involved **investigation** into shooting by police officer, district court, upon determination that records were not exempt from disclosure, could not limit disclosure to petitioner and his attorney; rather, under IPRA, once district court found that office's decision to refuse disclosure was not justified, its authority was statutorily limited to ordering office to make records available. West's I.C.A. § 9–344(2).

Cases that cite this headnote

[21] **Records**

Judicial enforcement in general

Records

Costs and fees

After prosecuting attorney's office filed notice of appeal from order that it make available to petitioner records of **investigation** into shooting of petitioner by police officer, trial court had jurisdiction to amend judgment and consider petitioner's request for attorney fees and costs. Appellate Rule 13(b)(4, 9).

Cases that cite this headnote

[22] **Records**

Costs and fees

Section of Idaho **Public Records** Act (IPRA) providing that "court shall award reasonable costs and attorney fees to the prevailing party if it finds that the request or refusal to provide [**public**] **records** was frivolously pursued" was exclusive remedy for petitioner's request for attorney fees and costs on prosecuting attorney's office's appeal from district court's ruling that records of **investigation** of shooting by police officer were not exempt from disclosure, and thus, because petitioner did not prevail on appeal, he was not entitled to recover attorney fees and costs. West's I.C.A. § 9–344(2).

Cases that cite this headnote

Attorneys and Law Firms

***1253** Canyon County Prosecuting Attorney's Office, Caldwell, for appellants. Michael K. Porter argued.

James K. Dickinson, Boise, for amicus curiae Idaho Prosecuting Attorneys Association.

Camacho Mendoza Coulter Law Group, Eagle, for respondent. Ronaldo A. Coulter argued.

Opinion

HORTON, Justice.

This appeal arises from a Petition for Access to **Public Records** filed by Jamee Wade seeking the disclosure of

investigatory records in the possession of the Canyon County Prosecuting Attorney's Office (CCPA). The district court ordered CCPA to produce the records pursuant to the request, but limited disclosure to Wade and his counsel. CCPA timely appealed. We vacate the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 22, 2011, Wade was shot twice by a Fruitland police officer (the Officer) in Payette County after an altercation. Intending to file a claim under the Idaho Tort Claims Act, Wade sought copies of **investigatory** records related to the incident pursuant to the Idaho **Public Records** Act (IPRA), I.C. §§ 9–337 through –350. On March 13, 2012, Wade sent his first request to the Idaho State Police (ISP), requesting all records of ISP's **investigation** into the shooting. ISP denied Wade's request, citing Idaho Code sections 9–335, 337(6) and 340B, and informed Wade that the **investigation** was ongoing but that he could request the records from the Payette County Prosecutor.

Wade then made a request to the Payette County Prosecutor, asking for the complete **investigation** records received from ISP and the Fruitland Police Department. The Payette County Prosecutor denied Wade's request, stating the documents were exempt from disclosure pursuant to ***1254** Idaho Code section 9–335(1) as they were subject to an ongoing **investigation**, but informed Wade that upon completion of the ISP **investigation** all materials had been forwarded to CCPA for review. In February, 2012, the Payette County Prosecutor had sent three binders compiled by ISP to CCPA after requesting CCPA to serve as special prosecuting attorney and to determine whether charges should be brought against Wade or the Officer.

Citing Idaho Code sections 9–337 through –347, Wade made a **public records** request to Bryan Taylor, the Canyon County Prosecutor, on March 23, 2012. The request sought "[t]he complete **investigation**, to include all reports, and all documentary evidence" compiled by ISP, the Fruitland Police Department, and the Payette County Sheriff's Office regarding the shooting. On March 30, 2012, CCPA, citing Idaho Code section 9–335, denied Wade's request and asserted that the **investigation** was ongoing and disclosure would interfere with enforcement proceedings and could deprive the parties of their right to a fair trial or impartial adjudication. Wade filed a Petition to Access to **Public Records** in Canyon County district court on April 19, 2012. CCPA responded to the petition and moved to dismiss citing Idaho Code section 9–335(1)(a) and arguing that disclosure would interfere with enforcement proceedings.

The **investigatory** records at issue contain Wade's medical records, photocopies of his social security card, debit card, and photo identification, along with police reports regarding the incident, interviews with witnesses, interviews with Wade and the Fruitland Police Officer involved, 911 audio recordings from the night in question and the previous evening, dispatch reports, photographs, and a video of the shooting.

After holding one hearing and giving CCPA additional time to complete its **investigation**, the district court held a second hearing on May 17, 2012. At that hearing, CCPA informed the district court that CCPA's **investigation** and review of the documents was still ongoing. The district court determined that an *in camera* review of the documents was necessary. On June 5, 2012, after reviewing the **investigatory** records *in camera,* the district court issued its decision and order, along with a final judgment, granting Wade's **public records** request and ordering disclosure of the records. The district court concluded that under Idaho Code section 9–335, CCPA failed to show that disclosure would interfere with enforcement proceedings or deprive a person of a right to a fair trial, and therefore, CCPA's refusal to disclose the records was not justified. CCPA moved to alter or amend the judgment. The district court granted this motion and entered an amended judgment, limiting disclosure of the records to Wade and his counsel and prohibiting the records from being "disclosed outside of the pending Tort Claim before Payette County or any subsequent civil litigation."[1] CCPA filed its notice of appeal on July 11, 2012. Wade moved to alter or amend the judgment on August 2, 2012, and the district court amended the judgment to allow Wade to seek attorney ***1255** fees and costs at the conclusion of this appeal.

Meanwhile, Wade filed a civil rights complaint in the United States District Court for the District of Idaho. On December 11, 2012, the Fruitland Police Department produced reports and records of the shooting incident in response to Wade's request for production. This material was identical to that which was sought in Wade's **public records** request to CCPA.

II. STANDARD OF REVIEW

[1] [2] When considering an appeal from a **public records** request, this Court will not set aside the district court's findings of fact unless they are "clearly erroneous, which is to say that findings that are based upon substantial and competent, although conflicting, evidence will not be disturbed on appeal." *Bolger v. Lance,* 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002). "This Court exercises free review over questions of law, including the interpretation of a statute." *Ward v. Portneuf Med. Ctr., Inc.,* 150 Idaho 501, 504, 248 P.3d 1236, 1239 (2011).

III. ANALYSIS

This case involves the application of the IPRA, specifically whether **investigatory** records are exempt from disclosure under Idaho Code sections 9–335 and 9–340B(1). We address various aspects of Idaho Code section 9–335 today. First, we conclude that **investigatory** records under prosecutorial review are active, not inactive, **investigatory** records. We next determine that under Idaho Code section 9–335(1), the party withholding disclosure has the burden to show a reasonable probability that disclosure of the **investigatory** records would result in one or more of the harms identified by Idaho Code section 9–335(1)(a)–(f). We also clarify today that when the district court is reviewing a petition to access **public records**, the district court's inquiry is whether the exemption from disclosure was justified at the time of the refusal to disclose rather than at the time of the hearing. Further, in the event that the request covers both exempt and nonexempt records, the district court has an obligation to distinguish those records that are exempt from disclosure from those that are not. Finally, we reiterate that whether or not a record is exempt from disclosure is an objective inquiry. Thus, as these are ***public*** **records,** the district court cannot limit the disclosure of nonexempt records to certain individuals for certain purposes.

A. This controversy is not moot.

[3] As a threshold matter, Wade argues that this appeal is moot because he has obtained access to all the documents he sought in his petition through the discovery process in his federal civil rights case. CCPA argues that this appeal is not moot because the issue of attorney fees remains an issue to be resolved. We agree.

[4] [5] [6] Whether an appeal is moot is a question of this Court's jurisdiction and may be raised at any time. *Arambarri v. Armstrong,* 152 Idaho 734, 738, 274 P.3d 1249, 1253 (2012). A case is moot if the party lacks a legally cognizable interest in the outcome or "if it does not present a real and substantial controversy that is capable of being concluded through judicial decree of specific relief." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.,* 141 Idaho 849, 851, 119 P.3d 624, 626 (2005). Here, Wade argues he is entitled to attorney fees on appeal pursuant to Idaho Code sections 9–335(4), 9–344(2), 12–121, and I.R.C.P. 54(e)(1). Wade obtained the records sought after he instituted this lawsuit to compel their production but he did not obtain the records from CCPA. Further, the issue of attorney fees below and on appeal remains unresolved. In cases regarding **public records** requests, even when the disputed records are produced, if the records were not provided until after the lawsuit was instituted to compel the production of the records and the issue of attorney fees remains, the case is not moot and this Court has jurisdiction to hear the appeal. *Henry v. Taylor,* 152 Idaho 155, 161, 267 P.3d 1270, 1276 (2012).

B. The district court applied an erroneous legal standard in its analysis under I.C. § 9–335.

CCPA argues that the district court erred by ordering disclosure of the records. This ***1256** argument involves several distinct alleged errors: (1) that the district court erred in concluding **investigatory** records are inactive when under prosecutorial review; (2) that the district court held CCPA to a heightened standard of proof not required by Idaho Code section 9–335; and (3) that the district court misapplied the law by considering the subjective intent of the parties and limiting disclosure of the documents it ordered to be disclosed. To address these claims, it is necessary to explain this dispute in the context of the IPRA.

A **public record** is "any writing containing information relating to the conduct or administration of public business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics." I.C. § 9–337(13). The IPRA provides a statutory mechanism by which members of the public may review **public records** so that they may be knowledgeable of the operations of their government, the performance of public officials, and the formulation of public policy. In fact, "[e]very person has a right to examine and take a copy of any **public record** of this state" unless an exemption is "expressly provided by statute." I.C. § 9–338(1).

[7] [8] Because this Court presumes that "all **public records** are open unless expressly provided otherwise by statute," this Court narrowly construes exceptions to the duty of public disclosure. *Federated Publ'ns, Inc. v. Boise City,* 128 Idaho 459, 463, 915 P.2d 21, 25 (1996). Thus, this Court's first inquiry is whether the writings requested are **public records**; if so, this Court presumes the records to be open to the public, unless it is shown that an exemption applies. *See Cowles Publ'g Co. v. Kootenai Cnty. Bd. of Cnty. Comm'rs,* 144 Idaho 259, 262, 159 P.3d 896, 899 (2007).

Neither party disputes that the requested records are **public records**; specifically that these were **investigatory** records compiled by a law enforcement agency.[2] Thus, the critical question is whether an exemption applies to exclude these records from otherwise-mandatory disclosure. Idaho Code sections 9–340A through –340H specify **public records** that are exempt from disclosure. *Bolger,* 137 Idaho at 795, 53 P.3d at 1214. Records that are exempt from disclosure include "medical records," along with "records of psychiatric care or treatment and professional counseling records relating to an individual's condition." Idaho Code section 9–340C(13). Some **investigatory** records are also exempt pursuant to Idaho Code section 9–340B(1) and 9–335.

Investigatory records are governed by Idaho Code section 9–340B, which exempts from disclosure "[i]nvestigatory records of a law enforcement agency, as defined in section 9–337(7), Idaho Code, under the conditions set forth in section 9–335, Idaho Code." I.C. § 9–340B(1). Idaho Code section 9–335(1) provides:

> Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of **investigatory** records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would:
>
> (a) Interfere with enforcement proceedings;
>
> (b) Deprive a person of a right to a fair trial or an impartial adjudication;
>
> (c) Constitute an unwarranted invasion of personal privacy;
>
> (d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal **investigation**, confidential information furnished only by the confidential source;
>
> (e) Disclose **investigative** techniques and procedures; or
>
> ***1257** (f) Endanger the life or physical safety of law enforcement personnel.

I.C. § 9–335(1). Under Idaho Code section 9–335(3), "[a]n *inactive* **investigatory** record shall be disclosed unless the disclosure would violate the provisions of subsection (1)(a) through (f) of this section." I.C. § 9–335(3) (emphasis added).

Exempting **investigatory** records from disclosure if they would interfere with enforcement proceedings is intended to prevent premature disclosure of the government's case, "thus enabling suspected violators to construct defenses in response thereto, enabling litigants to discern the identity of prospective government witnesses, as well as confidential information, or the nature of the government's evidence and strategy, and exposing affiants and potential witnesses to intimidation or harassment." Wetzel, Op. Id. Att'y Gen. 86–87 p. 4 (1986). The purpose of exempting records that may deprive a person of a fair trial is to ensure "that parties will not be prejudiced by premature release of information concerning their case." *Id.*

[9] However, there is a special rule regarding records relating to a specific person. Under Idaho Code section 9–342(1), "[a] person may inspect and copy the records of a public agency or independent public body corporate and politic pertaining to that person, even if the record is otherwise exempt from public disclosure." This Court has already determined that this right is limited, and an individual does not have a right to inspect "[o]therwise exempt **investigatory** records of a public agency ... if the **investigation** is ongoing" or inspect "[i]nformation which is otherwise exempt from disclosure by statute or court rule." I.C. § 9–342(3)(a), (c). As such, Idaho Code section 9–342, granting an individual the right to examine **public records** which relate to that person even if otherwise exempt, is limited by Idaho Code section 9–335. *Bolger,* 137 Idaho at 796, 53 P.3d at 1215. It is because of the complexity of this statutory interplay and the unique nature of **investigatory** records that we are sympathetic to the district court's efforts to ascertain whether these records should have been disclosed.

1. The records Wade requested were active investigatory records governed by Idaho Code section 9–335(1).

[10] The first inquiry is which section of Idaho Code section 9–335 applies. The district court found that the last "active **investigation** into this incident" was over four months prior to Wade's request and, thus, the records were inactive **investigatory** records governed by Idaho Code section 9–335(3). CCPA argues that records undergoing prosecutorial review in the course of making a decision whether to bring criminal charges are active **investigatory** records governed by Idaho Code section 9–335(1). Wade argues that the records he requested were the records of **investigations** that had already been completed, and thus, they were not active **investigations**. He argues that simply because the completed **investigation** records were in the hands of the prosecutor does not change the fact that the **investigations** were inactive. Thus, the issue presented is whether the district court erred in concluding that the **investigatory** records Wade sought were inactive **investigatory** records under Idaho Code section 9–335. We hold that it did.

Idaho Code section 9–335(1) applies to **investigatory** records generally, while Idaho Code section 9–335(3) deals with *inactive* **investigatory** records, indicating there is a distinction between active and inactive **investigatory** records. There is no statutory definition of these terms and this Court has not previously attempted to determine the distinction between active and inactive records in the possession of a prosecuting attorney. From the structure of the statute, we can glean that the legislative intent underlying Idaho Code section 9–335 is to prevent the premature disclosure of information that may compromise an **investigation**, the state's case in court, or the defendant's right to a fair trial. I.C. § 9–335(1)(a)–(f). In light of these statutory objectives, we are unable to accept Wade's position that the **investigatory** records completed by ISP were no longer active when they were transferred to CCPA for review, as this conclusion would negate the purpose of Idaho Code section 9–335 by requiring disclosure of information relating ***1258** to potential criminal charges prior to the prosecutor's determination whether charges are to be filed. Further, because the office of a prosecuting attorney is defined to be a law enforcement agency by both Idaho Code sections 9–335(3) and 9–337(7), so long as the prosecutor's office is engaged in an ongoing review of **investigatory** records in good faith, those records are active for purposes of Idaho Code section 9–335.

In this case, the **investigation** completed by ISP was sent to the Payette County Prosecutor, which in turn forwarded the records to CCPA for the purpose of reviewing the matter to determine whether charges should be brought against the Officer or Wade. Thus, though ISP had completed its **investigation** into the matter, it is clear that CCPA was still contemplating prosecution of either Wade or the Officer and was evaluating the information compiled by ISP. Treating the records as inactive would interfere with CCPA's ability to determine whether it was appropriate to initiate prosecution. Therefore, we hold that **investigatory** records under active prosecutorial review are not inactive **investigatory** records, but are active **investigatory** records, requiring the application of Idaho Code section 9–335(1). Thus, the district court erred in applying Idaho Code section 9–335(3).

2. CCPA must demonstrate a reasonable probability that harm contemplated by Idaho Code section 9–335(1)(a)–(f) would result through disclosure.

[11] Under Idaho Code section 9–335, the entity withholding the records has the burden of demonstrating that the records are exempt from disclosure. *Bolger,* 137 Idaho at 796, 53 P.3d at 1215. Thus, our next inquiry is whether CCPA met its burden to show that the records were exempt. The district court determined that CCPA failed to satisfy its burden because CCPA only demonstrated that interference with enforcement proceedings might possibly result, but failed to show that interference would certainly result.

CCPA argues that this Court should adopt the federal courts' interpretation of the Freedom of Information Act, 5 U.S.C. § 552. CCPA asks this Court to require the party withholding disclosure pursuant to Idaho Code section 9–335(1)(a) to prove only that disclosure of these types of records would, in general, tend to interfere with enforcement proceedings. Wade argues that CCPA simply failed to meet its burden under Idaho Code section 9–335 as it failed to show how disclosure would have any result identified in Idaho Code section 9–335(1)(a)–(f).

CCPA asks this Court to adopt the United States Supreme Court's reasoning in *N.L.R.B v. Robbins Tire,* 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978), which interpreted 5 U.S.C. § 552(b)(7)(A), a statute with nearly identical language to Idaho Code section 9–335(1). *Id.* at 216, 98 S.Ct. 2311. In *Robbins,* the Court considered whether disclosure of the statements of witnesses whom the National Labor Relations Board intended to call at a hearing regarding unfair labor practices would "interfere with enforcement proceedings." *Id.* The Court noted that unlike the other harms contemplated in the statute, such as deprivation of a fair trial or an unwarranted invasion of personal privacy,

the word "proceedings" is plural, suggesting that "certain generic determinations" could be made, whereas the other harms required a more specific showing. *Id.* at 223–24, 98 S.Ct. 2311. Thus, the Court concluded that with respect to particular kinds of proceedings, "disclosure of particular kinds of **investigatory** records while a case is pending would generally 'interfere with enforcement proceedings.' " *Id.* at 236, 98 S.Ct. 2311.

[12] 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 ***1259** 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.

[13] 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. There, we held that the "documents themselves were substantial and competent evidence to satisfy the AG's burden of persuasion" and that "disclosure of the documents would clearly 'interfere with law enforcement proceedings' or 'disclose **investigative** techniques and procedures.' " *Id.*

[14] Although the agency resisting disclosure bears the burden of proof, this Court has never required the withholding agency to prove with certainty that disclosure of the records would cause one of the harms identified in Idaho Code section 9–335(1). Rather, we hold that the withholding agency has the burden to demonstrate a reasonable probability that disclosure of the requested records would result in a harm listed in Idaho Code section 9–335(1)(a)–(f).

[15] Here, although CCPA offered a great deal of argument before the district court that disclosure of the records would interfere with enforcement proceedings or deprive a person of a fair trial or an impartial adjudication, prior to the district court's order compelling disclosure of the documents, the only evidence (apart from the records themselves) offered in opposition to Wade's petition was the affidavit of Christopher Topmiller, CCPA's Chief Criminal Deputy. Topmiller's affidavit addressed whether the records were active or not, rather than any harm that might result from their disclosure. His affidavit simply stated that the Payette County Prosecutor had requested that he review the incident for potential criminal charges, that he had requested an **investigator** in his office and the Chief Deputy of the Canyon County Sheriff's Office to review the files, and that his **investigation** was ongoing. The district court reviewed the entire record *in camera.* The district court, however, applied an erroneous standard, interpreting Idaho Code section 9–335(1) as requiring it to find that disclosure "will interfere" with enforcement proceedings. On remand, the district court must determine whether CCPA showed a reasonable probability that disclosure of the records would interfere with enforcement proceedings or deprive a person of a fair trial or an impartial adjudication.

[16] 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.

C. The district court has a duty to identify exempt and nonexempt records.

For guidance on remand, we turn more generally to the application of the IPRA. Pursuant to Idaho Code section 9–343(1), "[t]he sole remedy for a person aggrieved by the denial of a request for disclosure is to *1260 institute proceedings in the district court of the county where the records or some part thereof are located, to compel the public agency ... to make the information available for public inspection in accordance with the provisions of sections 9–337 through 9–348, Idaho Code." *See also* I.C. § 9–335(4). 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.

In this case, the district court concluded that the entire **investigatory** record was nonexempt and ordered disclosure. Even a cursory examination of the records reflects that this was error. Even if these records are not exempt under Idaho Code section 9–335, Wade's medical records would be exempt pursuant to Idaho Code section 9–340C(13), but for the fact that Wade was making the request pursuant to Idaho Code section 9–342. Likewise, if anyone but Wade had made the request, the copies of Wade's social security card, his debit card information and his photo identification would be exempt under Idaho Code section 9–335(1)(c) as making this information public would certainly constitute an unwarranted invasion of Wade's personal privacy.

D. Whether a public record is exempt from disclosure is an objective inquiry.

Ultimately, the district court directed the disclosure of all of the **investigatory** records, but limited disclosure to Wade and his counsel for the purpose of pursing his tort claim. CCPA argues that the district court erred in its analysis under Idaho Code section 9–344 by engaging in a subjective analysis and by crafting a remedy not authorized by statute. We conclude that the district court erred in two respects in conducting its review under Idaho Code sections 9–344 and –335(4). First, the district court erred by taking into consideration Wade's motivation for the request; and second, by limiting disclosure of records, which it determined were not exempt from disclosure, to particular people and for particular purposes.

[17] **[18]** Once a request for **public records** is made, the custodian of the records is to make no inquiry of the person making the request, except as explicitly provided in Idaho Code section 9–338(5). Thus, with the exception of ensuring compliance with Idaho Code section 9–338(5), the motivation of the person requesting the **public record** is irrelevant. The public's right, and consequently, any individual person's right, to inspect a **public record** "is conditioned *solely* on whether the document is a **public record** that is not expressly exempted by statute." *Idaho Conservation League, Inc. v. Idaho State Dep't of Agric.*, 143 Idaho 366, 369, 146 P.3d 632, 635 (2006) (emphasis added). Thus, whether a **public record** is subject to disclosure or exempt from disclosure is an objective analysis, both for the custodian and for the district court.

[19] Here, the district court, in making its determination that the records were not exempt from disclosure, considered the purpose for which Wade was seeking the records. Specifically, the district court noted that Wade sought the records for the purpose of filing a claim under the Idaho Tort Claims Act and that in order to effectively pursue his claim he needed access to the requested documents. The purpose for which Wade sought the records is irrelevant in analyzing whether or not the records were exempt from disclosure. *See* I.C. § 9–338.

[20] The district court ordered CCPA to disclose the records after determining the **investigatory** records were not exempt from disclosure, but then entered an order limiting disclosure to Wade "and his legal counsel" such that the records "may not be disclosed outside of the pending Tort Claim before Payette County or any subsequent civil litigation *1261 that may result from said tort claim." When the district court is reviewing a denial of a **public records** request, the district court has limited options. Particularly:

> If the court finds that the public official's decision to refuse disclosure is not justified, *it shall order* the public official to make the requested disclosure. 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.

I.C. § 9–344(2) (emphasis added); *see also* I.C. § 9–335(4). Thus, the district court may either order disclosure of the **public record**, or uphold the exemption and return the **public record**. The district court may not restrict the manner in which nonexempt **public records** are utilized. This is true despite Idaho Code section 9–342. While Idaho Code section 9–342 authorizes a person to inspect records that are otherwise exempt when they pertain to that person, Idaho Code section 9–342 does not provide the district court with authority to restrict the manner in which that individual may use the records.

E. Although it was not legal error, it would have been preferable for the district court to have ruled on Wade's request for attorney fees.

[21] CCPA filed its Notice of Appeal on July 11, 2012. The district court then amended the judgment on October 5, 2012, "to allow [Wade], to seek attorney fees and costs at the conclusion of" this appeal. CCPA argues that the district court did not have jurisdiction to enter the judgment regarding fees because the district court did not seek leave from this Court to amend under I.A.R. 13.4. As such, CCPA asserts that the issue of costs and fees should not be raised on appeal nor be argued below. Wade does not address this argument.

CCPA's reliance on I.A.R. 13.4 is misplaced because this is not a permissive appeal under I.A.R. 12, nor is it an appeal from a "partial judgment certified as final" under I.R.C.P. 54(b). Pursuant to I.A.R. 13(b), during the pendency of the appeal, the district court has the authority to rule on a motion and enter an order regarding attorney fees incurred in the trial of the action at the district court level, and to amend the judgment. I.A.R. 13(b)(4), (9). Thus, the district court had jurisdiction to rule on the motion regarding fees. However, the district court made no actual decision regarding attorney fees, but merely reserved the issue until resolution of this appeal. Although it was not legal error, by failing to make a ruling on this issue, the district court left the door open for a second appeal solely on the issue of attorney fees. The interests of the parties, as well as judicial economy, are such that the better practice is for the district court to rule on attorney fees requests so that all issues may be resolved in a single appeal.

F. Attorney fees requested in connection with a public record request are governed by Idaho Code section 9–344(2) but are not appropriate in this appeal.

[22] Wade requests attorney fees on appeal pursuant to Idaho Code sections 9–335(4), 9–344(2), 12–121, and I.R.C.P 54(e)(1). Idaho Code § 9–344(2) provides that in any **public records** action, "the court shall award reasonable costs and attorney fees to the prevailing party or parties, if it finds that the request or refusal to provide records was frivolously pursued." In *Henry v. Taylor* this Court determined:

> Idaho Code section 9–344(2) sets forth the standard for awarding reasonable costs and attorney fees in actions pursuant to the **Public Records** Act. To base an award on some other statute would be contrary to the legislature's intent in including in the Act an attorney fee provision with a specified standard for awarding attorney fees in proceedings to enforce compliance with the Act. That statute is the exclusive basis for such an award.

152 Idaho 155, 162, 267 P.3d 1270, 1277 (2012). Thus, Idaho Code section 9–344(2) is the only statute that applies to Wade's request for attorney fees. Because Wade has not prevailed in this appeal, he is not entitled to attorney fees.

IV. CONCLUSION

We vacate the order of the district court compelling disclosure of the records and remand ***1262** to the district court for further proceedings consistent with opinion. Costs on appeal are awarded to CCPA.

Chief Justice BURDICK, Justice EISMANN and Justice Pro Tem SCHROEDER concur.

J. JONES, Justice, special concurrence.

I fully concur in the Court's opinion but wish to make an observation regarding Part III.B.1. While I agree that **investigatory** records under active prosecutorial review are not inactive **investigatory** records, this should not be regarded by prosecutors as a perpetual safe haven for such records. In other words, "active prosecutorial review" should mean just that. If the **investigatory** records are left to languish

in the prosecutor's office for a long period of time without any attention or if this categorization is used as a means of merely keeping records off limits from public inspection, the categorization as inactive **investigatory** records may well be more appropriate. In other words, if the **investigatory** records are under review, they should be being reviewed instead of just gathering dust.

Parallel Citations

320 P.3d 1250

Footnotes

1 CCPA also raised the issue that disclosure would constitute an unwarranted invasion of privacy in their Motion to Amend the Judgment under I.R.C.P. 59(e). The district court declined to consider the issue as it was not made at the original hearing. On appeal, CCPA again asserts that disclosure could constitute an unwarranted invasion of privacy by disclosing the identities of those cooperating with police and stigmatizing a suspect.

This Court recently explained:

> Consideration of I.R.C.P. 59(e) motions must be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based. A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation. Such motion cannot be used to present new information that the trial court did not have before it rendered its judgment. A Rule 59(e) motion cannot be used to raise issues and offer evidence that, in hindsight, the litigant wishes it would have presented prior to the entry of a final judgment.

City of Pocatello v. State, 152 Idaho 830, 837, 275 P.3d 845, 852 (2012) (internal quotations and citations omitted). Because the issue of whether disclosure would constitute an unwarranted invasion of personal privacy was not raised to the district court prior to the entry of judgment, it could not be raised by a motion under I.R.C.P. 59(e). Therefore, we will not address this issue on appeal.

2 We note, however, that in this case the **investigatory** record contained photocopies of the front and back of Wade's Idaho Identification Card, his debit card, his social security card, and other personal possessions and information. Generally, these items would not be **public records**, but because they were collected by ISP in the **investigation** of the shooting, they became part of the **investigatory** record, and as such, became a **public record**. *See* I.C. § 9–335.

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