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Inside this Issue

When is a Third Person the "Functional Equivalent" of a Public Agency under the Public Records Act?

The answer is simple: Whenever the public agency asks him or her to be. This is important for the following reason: Just because a third-party creates or holds records for a public agency does not mean those records are not public, and whether those records are exempt depends on *how* those records are utilized and *why* those records are utilized. Remember that Washington courts, when interpreting RCW 42.56, the Public Records Act (PRA), are concerned with substance, not form. The case we shall discuss came down last year from the Washington Court of Appeals, Division One. Nevertheless, the implications of this case have become apparent to our firm in recent months.

As a general rule, records created and possessed by a third-party that is the "functional equivalent" of a public agency are public records. *Telford v. Thurston County Board of Commissioners,* 95 Wn.App. 149 (1995). In *Cedar Grove Composting, Inc. v. City of Marysville,* 188 Wn.App. 695 (2015), Division One was presented with this question of "functional equivalency." The records requestor was a composting company (Cedar Grove). A

number of neighbors complained about a strong odor coming from one of its facilities. Various agencies levied fines and penalties against Cedar Grove; Cedar Grove became suspicious that a hostile public relations campaign was being brought against it. Various mailers had been sent out to neighbors regarding the odor, and how to file a complaint against Cedar Grove. These mailers were sent by a public relations firm called Strategies 360 ("Strategies"). Cedar Grove submitted a fairly broad public records request to the City of Marysville (City), asking for "any and all available information" related to communications between the City and third parties, with respect to Cedar Grove.

The City called the vice president of Strategies, and notified him that Cedar Grove may be launching a public records request that would cover emails between the City and Strategies, relating to Cedar Grove. The City provided a first installment of documents to Cedar Grove, which did not include any emails.

A few months later, the City provided Cedar Grove with heavily redacted emails between an employee of Strategies and the City's attorney. These were heavily redacted, on the grounds of "Attorney Client Privilege/Work Product." (hereinafter, we will call the attorney-client privilege the "AC privilege") The City produced more heavily redacted documents, citing the same reason for redaction. Cedar Grove asked whether e-mails between the City and Strategies were "inadvertently redacted." The City responded that Strategies **"was hired as a professional consultant to the City,"** and again asserted attorney-client privilege as a reason for redaction. An attorney for Cedar Grove sent an email to the City attorney, threatening litigation.

Nine months from when the original request was made, the City produced the un-redacted emails. Several of these emails were sent from Strategies to the City attorney, asking that the emails be forward to the City administrator. That way, Strategies admitted in an email, the emails would be covered under the attorney-client privilege. After all, Strategies asserted, the City "did not want Cedar Grove to see the trail on this."

Cedar Grove sued for violation of the PRA, less than a month later. Cedar Grove also subpoenaed the records directly from Strategies. This subpoena uncovered approximately 30 new records that the City had not produced. Cedar Grove alleged that the City unlawfully withheld 22 responsive records on the grounds of the AC privilege. The following year, Cedar Grove, as part of the litigation, moved to compel production of the mailers that had been sent out to neighbors, advising them of their right to complain about the odors.

The trial court found that the City violated the PRA, and granted Cedar Grove's motion to compel further records. This

resulted in nearly 300 new responsive records being produced. This new information demonstrated that Strategies worked very closely with the City in the public relations campaign against Cedar Grove. Furthermore, the parties often used telephone conversations to avoid the records requests, and admitted to doing so within the produced emails. The trial court initially imposed penalties totaling $143,740. Cedar Grove sought more. The trail court revised its order to $127,644. The City appealed, and Cedar Grove cross-appealed, alleging the penalty was too low.

Division One began its analysis by reminding the parties that the PRA is a strongly worded mandate for the broad disclosure of public records. *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 127 (1978). The City argued that Cedar Grove lacked standing to sue. Division One swiftly disagreed.[1] The City also argued that its provision of many of the un-redacted records before Cedar Grove sued cured the violation, and therefore the City should not have been so harshly penalized. Division One swiftly disagreed.

The court underlined that "[s]ubsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time." *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 715 (2011). In other words, and in a general sense, if an agency wrongfully withholds records in October 2016, but produces those records entirely in October 2017, the agency will be assessed penalties retroactively to the date of the initial wrongful withholding of public records. There are exceptions to thid rule, but those are exceedingly rare.

The City further challenged the trial court's finding that 173 responsive records were public records, because those records were not possessed by the agency. Essentially, the City asserted that Strategies was not a "public agency," and therefore the records it created or possessed were not public records. Division One swiftly disagreed and analyzed the issue at the heart of this litigation: When is a third party the "functional equivalent" of a public agency?

In this case, Division One found the answer was simple. First, the City admitted to the requestor that Strategies "was hired as a professional consultant to the City." Division One reasoned that the "definition [of a "public record"] does not limit the term to documents prepared by government officials." In fact, Division One further reasoned that a public record is "any conceivable government record related to the conduct of government," regardless of its source or form, referencing *Nissen v. Pierce County*, 183 Wn.App. 581,

[1] See *Firehouse Lawyer* article on "standing": http://www.firehouselawyer.com/Newsletters/August2016.pdf

590 (2014).[2] The Washington State Association of Municipal Attorneys, assisting the City in this litigation, argued that finding that Strategies was a "functional equivalent" of the City "would bring all documents generated by a government contractor working on a government contract within the scope of the PRA." Division One swiftly disagreed.

The court ultimately based its holding on the *"Telford* factors," which are utilized to determine whether a third-party is the "functional equivalent" of a public agency: The court will consider (1) the extent the entity performed a governmental function, (2) the extent public funds paid for the activity, (3) the extent of government involvement or regulation, and (4) if the government created the entity. *See Telford* at 162. Division One noted that the City "cited no authority" to support that a public agency can *admit* that a third party is a "functional equivalent" of the agency—which the City did—and simultaneously assert the AC privilege.

The second reason that Strategies was the "functional equivalent" of the City—beyond the City's explicit admission of such functional equivalency—was that "Strategies took a number of significant actions after direct consultation with Marysville or at Marysville's direction." Consequently, where the third-party contractor lacks the **discretion** to act independently and without consultation or direction from the public agency, the more likely it shall be that the third-party contractor is the "functional equivalent" of the agency.

Of course, Division One noted, the fourth *Telford* factor—that the agency *created* the third-party entity—was not met. But the *Telford* factors are non-exclusive, and therefore all four of these factors need not be met to find "functional equivalency." At the core of the *Telford* analysis is the discretion and independence of the third-party contractor. Most importantly, Division One noted, Strategies' activities "served a public function, were paid in large part with public funds, and were directed and approved by" the City. Again, importantly, Division One found that "Strategies records not relating to its actions as the functional equivalent of a city employee are not subject to PRA requests." Again, understand the importance of discretion and independence.[3]

[2] *See Firehouse Lawyer* articles discussing *Nissen*: http://www.firehouselawyer.com/Newsletters/September2015_ThidDraft.pdf

http://www.firehouselawyer.com/Newsletters/v12n04dec2014.pdf

[3] The City also argued that it did not "use" the records created by Strategies; but Division One swiftly dismissed this argument, and further found that an agency need not possess a record to "use" that record.

Cedar Grove stands for the proposition that a third-party contractor must exhibit nearly complete—if not entirely complete—independence from the direction and control of the public agency that hired the contractor. Otherwise, the third-party contractor will be found to be the "functional equivalent" of that agency. Of course, all attorneys have an ethical duty of loyalty, but additionally, all attorneys have an ethical duty to exercise independent judgment. Importantly, Division One limited its ruling: "We wish to be clear about what we are not doing in this opinion. We are not articulating a new standard that makes every record a government contractor creates during its engagement with an agency a public record subject to the PRA." Ultimately, records created by the "functional equivalent" of a public agency are public records. The next question is whether those public records are exempt. *See* RCW 42.56.070.

Cedar Grove stands for the proposition that the AC privilege is weakening as a reason to withhold public records. The PRA specifically states that the "work product" exemption will be narrowly construed: "It is further the intent of the legislature that specific descriptions of work performed be redacted only if they would reveal an attorney's *mental impressions, actual legal advice, theories, or opinions,* or are otherwise exempt" under the laws of AC privilege. *See* RCW 42.56.904 (emphasis added). Importantly, Division One rebuffed the City's argument that the AC privilege should be construed broadly, while the duty set forth under the PRA—to provide public records unless they are specifically exempt—should be construed narrowly.

For the AC privilege to be applicable, the public agency must be seeking legal advice, and the services performed by the attorney must relate to that advice, instead of the attorney merely being used as a subterfuge to avoid the broad mandates of the PRA. Of course, records that would not otherwise be admissible under the rules of pre-trial discovery are exempt from disclosure. RCW 42.56.290. This would include attorney-client privileged communications and work product, but only insofar as those communications are essential to providing legal advice, or represent the mental impressions of an attorney in the performance of his or her independent duties. Speaking of the attorney-client privilege…

The Corporate Attorney-Client Privilege is Not as Broad as You Think

The Washington Supreme Court recently decided that the corporate attorney-client privilege does not extend to communications between the corporate lawyer—such as a lawyer for a fire district, which is a municipal corporation—and *former* employees of that corporation. *Newman v. Highland School District No.*

203, NO. 90194-5 (2016). This case may be a game-changer, to some extent.

Newman involved a high school football player who suffered a traumatic brain injury in a football game. The player's family sued the school district. The attorney for the school district interviewed various former football coaches for the school, presumably to discern what safety measures those coaches implemented to protect the players. When asked by the plaintiff's attorney to produce such communications, on the grounds that those former employees were not represented by counsel, the school district's attorney asserted that those communications were attorney-client privileged. The trial court agreed with the school district, and denied the plaintiff's motion to compel discovery of those communications.

This went straight to the Washington Supreme Court (the Court), which reversed the trial court. This was a matter of first impression: This issue has never been brought before the Court. Ultimately, the Court held that "[the corporate attorney-client privilege] does not broadly shield counsel's postemployment communications with former employees." *Newman* stands for the proposition that an attorney for a governmental agency may not be tasked with communicating with former employees—who are no longer represented by that attorney—and then claim that those communications are privileged. This may have various implications for investigations into employee misconduct, or workplace investigations in general.