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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON No. 48925-2-II

BY 
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THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SHAPPA BAKER

Appellant

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Department, in its brief, claimed that the facts in this case do not support Mr. Baker's claim the Public Records Act (PRA) was violated. The Department claims that since the original records had been scanned into an electronic database maintained by a third party, the Bank of America, and then destroyed, the subsequent electronic records are not responsive to Mr. Baker's requests. Mr. Baker will show that this argument is flawed and the documents are public records.

II. ARGUMENT

A. THE OWNERSHIP OF THE DOCUMENT IS IRRELEVANT TO THE ISSUE OF WHETHER OR NOT AN AGENCY USED THE DOCUMENT.

The Department has continually conflated ownership with use. It has argued that this Court's holding in *West v. Thurston Cty.* and the Supreme Court's holding in *Nissen v. Pierce County* are on point. *West v. Thurston Cty.*, 168 Wn. App. 162, 275 P.3d 1200 (2012); *Nissen v. Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015). Nothing could be further from the truth.

There is no disagreement between the parties as to the facts of *West*. He sought records of invoices sent by a law firm to the Washington Counties Risk Pool for defending Thurston County in litigation. *Id.* at 167. The process requires the firm to send invoice to the Risk Pool. If the amount invoiced has

not yet reached the \$250,000 deductible limit, it is then forwarded to the County for payment. If the deductible has been met, the invoice is paid for by the Risk Pool and the County no longer receives the invoices. *Id.*

The *West* Court looked at whether or not the County used the invoices. It looked to *Concerned Ratepayers* to determine if the documents were used. *Id.* at 185 (citing *Concerned Ratepayers Ass'n. v. Public Utility Dist. No. 1 of Clark County*, 138 Wn.2d 950, 983 P.2d 635 (1999)). *West* stated “that an agency ‘use[s]’ a public record if the record contains information that the agency either ‘(1) employ[s] for; (2) applie[s] to; or (3) ma[k]e[s] instrumental to a governmental end or purpose.’” *Id.* (quoting *Concerned Ratepayers*, 138 Wn.2d at 960). Applying *Concerned Ratepayers* further, the *West* Court stated that “but information that is reviewed, evaluated, or referred to and has an impact on an agency's decision-making process would be within the parameters of the [PRA].” *Id.* (quoting *Concerned Ratepayers*, 138 Wn.2d at 961) (citations omitted). Contrary to the application here, the *West* trial court ruled there was no evidence Thurston County “reviewed, evaluated, referred to or otherwise considered defense invoices over their \$250,000 deductible . . .” *Id.* at 185-86.

Here, the Department deposited checks sent to inmates into the Bank of America system. CP 136-39. Each amount is also entered in the Trust

Accounting System (TAS) by Department employees to track deposits for individual inmates into their sub-accounts. CP 135-36, 163-67. These deposits may be subject to statutory deductions. CP 136, 157, 168-72. The information on these instruments was employed by and was instrumental to a governmental end – maintaining funds on behalf of inmates and making sure that inmates' financial obligations were met. The information on these instruments is reviewed, and has an impact on the Department's deduction obligation. Thus, pursuant to *West's* interpretation of *Concerned Ratepayers*, the scanned financial instruments are public records. Especially since the Department, unlike Thurston County, actually views the scanned documents to make sure it was properly deposited. CP 149. The documents were clearly used.

Then there is the fact that the Department may obtain and use a copy of these documents at any time for any purpose. They are used for reconciliation purposes and can be used for audits. If an inmate believes it was mis-deposited or have questions, they have access to the records. Given that TAS depends on accurate entries and the Department's fiduciary duty to the inmate funds under its care, if it didn't scan these documents into the Bank of America's system, it would have to store them itself. The scanning system enables the Department to limit storage requirements.

The Department's use of *Nissen* is also flawed. In *Nissen*, it was determined that text messages on a county employee's cell phone were public records. *Nissen*, 183 Wn.2d at 879. However, documents created without the input of the county employee, namely call and text message logs, were not public records. *Id.* at 882. The Department then mistakenly cited language favorable to Baker in its argument, namely that "[t]he call and text message logs were prepared and retained by Verizon, and *Nissen* does not contend that the County evaluated, reviewed, or took any other action with the logs necessary to 'use' them." Response Brief, p. 9 (citing *Nissen*, 183 Wn.2d at 882). The language favors Baker because the Department prepared the electronic documents and those documents, while retained by the Bank of America, were accessible by the Department. It is also unfortunate for the Department because its employees reviewed the scanned documents to ensure that the entries into the TAS were accurate so it both took an action and used them.¹

B. THE FACT THAT THE BANK OF AMERICA IS NOT A FUNCTIONAL EQUIVALENT OF A PUBLIC AGENCY IS ABSOLUTELY IRRELEVANT TO WHETHER THE REQUESTED DOCUMENT IS A PUBLIC RECORD.

Generally, when a request is made, the "agency" status of the recipient

¹At a minimum, the viewing of the scanned financial instrument constitutes use that brings the scanned document within the rubric of the PRA.

is not in question. However, the distinction between agency and non-agency is not always binary or fixed. Washington courts first addressed this question in *Telford v. Thurston County Bd. of Com'rs*, 95 Wn. App. 149, 156, 974 P.2d 886 (1999). In *Telford*, the court had to determine whether “quasi-public agencies” – private non-profits funded entirely by dues paid with public funds, controlled by elected and appointed officials, and whose membership almost exclusively comprised elected and appointed officials – qualified as “any state or local agency.” *Id.* at 155-56. The term “agency” was defined in RCW 42.17.020(1) (now RCW 42.56.010(1)) to include “other local public agencies.” *Id.*, at 156.

Telford and subsequent cases (discussed below) that adopt its analysis establish clear parameters for the application of the functional equivalent analysis (FEA) test. From these cases, the following rule emerges: Where preparation, ownership, use, or retention of a record related to the performance of a governmental function are established, not in an established governmental entity but, instead, either (1) a quasi-public entity or (2) a private third party to whom the performance of that same governmental function has been delegated, FEA may be applied to attribute preparation, use, ownership, or retention to “agency” as that term is defined in RCW 42.56.010(1). However, the FEA is inappropriate “where there is no

ambiguity as to an entity's non-governmental status.” *Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 608, 137 P.3d 120 (2006).

Examples of quasi-public agencies include an animal shelter, a multi-agency task force, and a non-profit zoological society. *See Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 181 P.3d 881 (2008); *Worthington v. WestNET*, 182 Wn.2d 500, 341 P.3d 995 (2015); and *Woodland Park Zoo v. Fortgang*, 192 Wn. App. 418, 368 P.3d 211 (2016). Then there is the private third-party delegatee, cited by the Department. *See Cedar Grove Composting, Inc. v. The City of Marysville*, 188 Wn. App. 695, 354 P.3d 249 (2015). In *Cedar Grove*, there was no ambiguity as to the non-governmental identity of the consultant. *Id.* at 704. However, because Marysville had delegated the performance of a governmental function to the consultant, use of the FEA test was deemed appropriate to determine whether or not, under the circumstances, the consultant was the functional equivalent of a government agency or employee. *Id.*, at 716-18. However, the FEA is not applicable here.

Taken together, the *Telford* line of cases establish that the application of FEA is appropriate only when the governmental status of the entity that either prepared, used, owned, or retained records relating to the conduct of

government is ambiguous or when a governmental function has been delegated. In the matter before this Court, Mr. Baker submitted his request to the Department, an agency, for records relating to the management of his trust account and deductions taken by the Department. There is no ambiguity as to the governmental identity of the Department.

Moreover, the Department did not delegate the task of depositing monies received by inmates from friends, family and other sources or managing inmate trust accounts to a private entity. Nor does the Department delegate its governmental function when it uses a bank's services in the performance of that function. Had the Department hired a private third party to make deductions and manage inmate trust accounts, utilizing the FEA may have been appropriate to use because of the delegation of its governmental function. But that is not the case here because the Department did not delegate any of its functions. Thus, the FEA is inappropriate. *See Spokane Research*, 133 Wn. App. at 608. If the FEA is not applicable, then the *Concerned Ratepayers* test must be applied.

C. PAYMENT FOR RECORDS MEANS NOTHING TO WHETHER THE DOCUMENTS WERE USED.

The Department has claimed that because it costs the department to obtain copies of financial instruments from the Bank of America, it does not own the documents. This argument misses the basic point – owning is not the

same as using. In *Concerned Ratepayers*, the public utility district did not own the plans for the turbine. 138 Wn.2d at 960. It still was determined that it used the document that was once reviewed by public officials at the offices of Cogentrix. *Id.* at 961.

This situation is analogous to paying a fee to a third party to store documents owned by the agency. In this scenario, the agency is required to pay a fee to store the documents and if it doesn't pay the fee, access would be denied. Here, rather than pay for the storage, the Department has chosen to pay a fee every time it accesses a document to perform some accounting or other function.

The Department may require Mr. Baker to pay for the costs of retrieving the requested records from the Bank of America. RCW 42.56.120 permits the Department to be reimbursed for the amount necessary to obtain the records. The Department knows the cost to obtain each record from the Bank of America and it can ask Baker to pay that amount before providing him the records. The fact that the Department may have to pay for copies of records does not affect their status as public documents subject to the Public Records Act.

III. CONCLUSION

For the reasons stated above, Baker asks this Court to find that the Department violated the Public Records Act and remand the case back to the trial court for a determination of possible penalties. He also asks that on remand the trial court determine reasonable attorney fees and costs. Baker finally asks this Court to award reasonable attorney fees and costs on appeal.

Respectfully submitted this 1st day of November, 2016.

KAHRS LAW FIRM, P.S.



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CERTIFICATE OF SERVICE STATE OF WASHINGTON

I certify under the penalty of perjury under the laws of the State of Washington that on November 1, 2016, in Seattle, County of King, State of Washington, I emailed and deposited the following documents with the United States Mail, postage prepaid and 1st class on the following parties:

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