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Inside this Issue

All of the following short articles are based on inquiries from our clients during the last year. We anticipate, therefore, that other agencies might have similar legal questions.

EXTRATERRITORIAL SERVICE: DOES IT CREATE EXTRA LIABILITY EXPOSURE?

Fire districts and regional fire authorities, like all municipal corporations, exist primarily to fulfill their statutory mission within their boundaries. However, many such agencies often provide service, especially in emergency situations, *outside* of their boundaries. Our clients sometimes ask if this creates added liability exposure. We believe that, in theory, it does, but there are ways to mitigate those risks. Mutual aid agreements provide one very common way to address and limit such risks. Sometimes individual fire protection contracts are used, particularly with large industrial "customers."

Absent such protective documents, however, there is some liability exposure under current case law. For instance, if response time is longer than the average response time *within* the district, there may be complaints akin to that in the *Norg*[1] case, which has been discussed in these pages in the past. Perhaps the flip side of those facts present an exposure too. Suppose your response time is very slow within the

[1] https://www.firehouselawyer.com/Newsletters/January2023FINAL.pdf

district and the plaintiff can show that your normal "first due" unit was outside the district for an undue amount of time and therefore another district unit had to drive several miles to the scene within the district. These are just a few examples of how service outside your district presents risk management concerns.

PUBLIC RECORDS—REQUEST FOR CLARIFICATION IGNORED

Suppose you get a vague or ambiguous public records request under the Public Records Act—RCW 42.56. We routinely advise our clients to ask for clarification, which is clearly your right, so that you can provide the fullest assistance. But what if they do not answer? What should you do next?

If there is no part of the original PRA request that does *not* need clarification, we advise clients to send a notice to the requestor stating that, having requested clarification and received no response after a date ten (10) days hence, it is your intent to close the PRA request due to abandonment.

However, if you can answer part of the PRA request you should advise the requestor in your normal way as to that part and in that letter (which typically tells them when you will be providing the records in whole or in part) also explain that you are *not* doing anything with the remainder of the request until you get that clarification you requested.

TAX INCREMENT FINANCING AND MITIGATION AGREEMENTS

What should you do when the city or other proponent of a project financed under the relatively new tax increment financing law—chapter 39.114 RCW—tells you that your proposed mitigation agreement is unacceptable because it will not consider "anticipated demand" data? In other words, your district has studied the projected impact of the city's project upon your district, such as increased demand for services. You request mitigation but the city replies that it is not willing to pay any mitigation for impacts *until such time as they actually occur.*

To us, this seems to fly in the face of the entire statutory scheme underlying this type of financing. Indeed, the law *requires* the proponent (a city, in our example) to describe the expected development in the required project analysis. Thus, the entire TIF statutory scheme is based on projections. In fact, typically the consultant's work includes a schedule of anticipated incremental tax receipts, which would be paid to the city instead of the other junior taxing districts over the life of the TIF diversion.

We think it would be easy, therefore, to agree for example that when the city gets diverted tax monies from properties developed within the tax increment area, an agreed percentage would be remitted to the fire district. Obviously, the city could not be expected to remit 100% of the amount diverted to the fire district/RFA and other junior districts, or there would be little or no benefit to using TIF. It may be that payment of the mitigation amounts will not be made until the increments start arriving in city coffers, but that does not justify saying that the city will not even agree to mitigate until that occurs.

We recognize that the TIF statute, at RCW 39.114.020, absolutely *requires* a mitigation agreement insofar as a fire district/RFA has an

annual report or an adopted capital facilities plan.

A mitigation plan is also mandatory if the analysis shows the project impacts "at least 20 percent of the assessed value in" the fire district/RFA. We are not certain what that language means, but probably the best interpretation is that it would only apply when the pre-existing AV within the TIA is at least 20% of the district's entire AV. We have not seen any proposal for a TIF that would even be remotely near that 20% threshold.

We are assuming that neither of these two situations are applicable; the city is voluntarily negotiating a mitigation agreement that is not absolutely required. However, some cities are unwilling to adopt language like that we have suggested—which would tie mitigation payments to projected service demands.

PUBLIC RECORDS REQUESTS: WHEN IS THIRD PARTY NOTIFICATION NECESSARY OR APPROPRIATE?

Often a public records request may seek records pertaining to your employees, such as a request for training records. Under what circumstances should you (or must you) notify the employees involved of the request so that they have a chance to resist the disclosure? RCW 42.56.250 (2) is explicit and tells you what you *must* do when you receive a request for information located exclusively in an employee's personnel file or their payroll or training file. The district must then provide notice to the employee, to any applicable union, and the requestor stating the date of request, the nature of the requested record, and that the agency will release the non-exempt information in the file or record at least ten (10) days from and after the notice date. Then the statute provides that the employee may seek to enjoin release of the records by using RCW 42.56.540.

What if the scenario were different? What if the record sought is the result of a psychological evaluation by a licensed psychologist, and the requestor is the applicant who "failed" the psych evaluation? In other words, it is akin to a patient requesting their own medical records. That right of course is protected under both HIPAA and RCW 70.02, our state statute on patients' medical records.

We have encountered psychologists who resist disclosure of their "work product" to the failed applicant. What would you do? Release it to the person who failed the psych evaluation? Notify the psychologist that you intend to release the record, but that he or she can seek an injunction on or before a specified date certain, or else you will release it to the person? We recommend, by analogy to the foregoing statute, that you may use the second option above and see if the psychologist feels strongly enough about the issue to bring it before a judge. We say this because technically there is no express statutory exemption that applies to this situation and therefore it is a non-exempt public record.

A psychologist might argue that the psych eval is exempt from disclosure under RCW 42.56.250(1)(b), which protects from disclosure certain application materials such as an applicant's name, resumes, and other related materials submitted with respect to an applicant. Indeed, a certain psychologist did try that approach, but the court denied injunctive relief. We believe it is important to consider the purpose of the foregoing statute, which is to protect the privacy of the applicant. When it is

actually the applicant that seeks the record, that particular concern seems to fall away.

PURCHASING THROUGH CO-OPS-CURRENT STATUS

Clients often ask us about their desire to purchase equipment or apparatus through cooperative arrangements operating in many different states, such as Sourcewell, NPP.gov, and similar coops. In a nutshell, what do you have to do to ensure that your purchase does not lead to audit findings with the State Auditor?

Currently, to successfully navigate this perilous journey you need a legal opinion that addresses the following: (1) does the cooperative procurement process meet the notice laws and other statutes of the state in which it operates; (2) is the client a member of the coop? (3) does the purchase fall within the scope of the cooperative's selection of the best bidder?

Your attorney needs to familiarize himself or herself with the applicable procurement laws of the state in which the coop is registered to do business. The attorney needs to confirm that any membership fees have been paid and that the actual purchase is essentially the same item that the procurement process of the coop selected. Often, the item is not the same as the basic item selected by the coop, due to add-ons that the client desires, or just due to the many options available. Sometimes, the procurement is more than two years old. The attorney must advise whether the procurement is still viable and not "stale."

We have often advised that increases of up to 10 or even 15% are justifiable and that the procurement is still viable. In summary, although this may sound self-serving, we recommend that you never purchase through a coop, unless you have a legal opinion advising that the purchase meets the intent of Washington procurement law and satisfies the particular coop's state-law requirements.

APPLICATION OF A VERIFICATION OF WAGES POLICY

A few agencies have a verification of wages policy, which essentially requires each employee to verify the time they have worked in the pay period. But what if an employee just fails to do it one time? Is it permissible to enforce the policy and not issue a paycheck until they submit their verification for their hours worked? After all, you know they worked and are entitled to some wages. Besides, there are relatively painful remedies for failure to pay wages when due, such as double damages and attorney fees, embodied in Washington state statutes.

Nonetheless, we believe that such policies are enforceable. One would argue that paying an employee without verification of hours worked is a gift of public funds or "extra compensation," both of which are unconstitutional under Washington law.

One caveat, however, is in order: If you allow employees to certify their own hours worked, you cannot really question or challenge their verification, unless you have ironclad proof that there is an error. Perhaps that is why we don't recommend wage verification by the employee as a personnel policy.

HOW DOES THE REVIEW BOARD PROCEDURE WORK WITH THE BENEFIT CHARGE WE ENACTED?

Suppose your district has just adopted, for the first time in history, the benefit charge (usually called "fire benefit charge") as a part of your district's revenue streams. RCW 52.18.070 and RCW 52.26.250, applicable to fire districts and regional fire authorities respectively, require the convening of a review board for at least a two-week period to review complaints by any property owners who in their opinion have been charged too much.

So let us assume that the district's governing body has adopted the benefit charge and has also held the hearing (required annually before November 15th) to review and establish the benefit charges for the ensuing year, as to each property subject to the charges.

Next, pursuant to the aforementioned statutes, the agency has to give notice of the amount of the charges applicable to each property and in this notice the agency notifies the property owner of the right to file a complaint and the convening of the review board. This notice provides both the deadline for filing any complaint, appeal, or protest and also provides the date the 14-day review period commences. We recommend establishing a deadline for filing complaints, no more than 21 calendar days after the date of that notice.

Next, the 14-day review period commences, beginning the day after that filing deadline. At the end of that review period, the review board presents all of its recommendations to the governing body to accept or reject the complaints and finalize the assessment roll.

By the way, we recommend that the review board be comprised of key administrative staff, such as the Fire Chief, the chief financial person of the agency, and one other staff member. We do not recommend that the governing board members (in whole or in part) serve on the review board, although that would not violate the statutes.

The statutes clearly provide that only the governing body, however, actually makes the decision to reduce the amount due, to a sum they believe to be the true, fair and just amount due. In other words, the review board is merely advisory. Most of the agencies using the "fire benefit charge" method of financing their district follow a procedure much like the foregoing.

LEASING SPACE TO A NONPROFIT—BE CAREFUL

Suppose a nonprofit corporation is seeking the rental of an office or other space in one of your agency's buildings. What would the State Auditor say about how you price that lease? We believe the SAO would expect you to receive "fair market value" or "fair rental value." The concern is compliance with Article 8, Section 7 of the Washington Constitution, which prohibits the gifting of public funds.[2]

Compare that with the similar analysis if the lessee were another municipal corporation. The interlocal agreement or lease would be subject to a different analysis. Fair market value would not be expected, but true and fair value would,

[2] That is because leasing to a nonprofit corporation is generally going to be found to *not* be the "fundamental purpose" of the government in question, with this "fundamental purpose" principle being outlined in this AG opinion: https://www.atg.wa.gov/ago-opinions/constitutionality-using-school-district-funds-pay-cost-providing-meals-school-breakfast

based upon RCW 43.09.210. The concept of "true and full value" is less stringent.[3]

AN IMPORTANT PRA CASE

On December 16, 2024, Division 1 of the Court of Appeals decided what may turn out to be an important Public Records Act (PRA) case. In *Valderrama v. City of Sammamish,* No. 86195-6-I,[4] Mr. Valderrama sued the city, alleging Sammamish violated the PRA by failing to adequately search for and produce records of communications between council members and citizens stored on their private devices.

Ever since the *Nissen* case, the practice of using private devices to create, use, or store government business records on private devices has resulted in methods and procedures to search for such records. In this case, in which the Court of Appeals affirmed the trial court's ruling to grant summary judgment to the city, the court has (we believe) validated the best practices that we have been using in these circumstances since the *Nissen* came down.

As many of our readers already know, *Nissen* stands for the proposition that records existing on private devices of local government officials are just as subject to the PRA as they would be if stored solely on public devices, such as servers and other computers.

So, what was the procedure followed by the City of Sammamish? Mr. Valderrama, a former city council member, filed in 2022 a series of PRA requests, so that ultimately he was seeking communications on "external channels" such as WhatsApp, Signal, Slack, Telegram and the like; he also asked for telephone logs or lists of calls made to citizens from council members since 2019. The city responded to the requests in installments or batches of documents.

The city promptly emailed current and former council members to notify them of the requests and ask them to search their private devices for responsive documents. The city also asked them to provide the records to the city and to complete "*Nissen* affidavits," attaching blank template affidavits for that purpose. (Under *Nissen,* any employee who has stored public records on their private device must submit an affidavit, supported by sufficient facts, to show that any withheld records are not public records as that term is defined in the PRA.)

The city's public records officer attested in court papers that she worked extensively with the city's City Attorneys and with outside counsel to draft and customize the affidavits. Between February and June of 2022, the city produced five installments of affidavits and records, notifying Valderrama each time of the status and when further installments might be forthcoming. We might add here that the PRA requires the government to provide "the fullest assistance" possible to the requester, and these steps appeared to be designed to show that.

Between June 2022 and March 2023, the city continued to provide records and affidavits, but the flow of materials was slowing, probably because most of the available records had already been produced. By early March of 2023, there appeared to be only one council member with outstanding records. Upon request

[3] https://www.atg.wa.gov/ago-opinions/state-counties-cities-and-towns-municipal-corporations-public-funds-relationship

[4] https://www.courts.wa.gov/opinions/pdf/861956.pdf

on March 9, 2023 the city provided two updated affidavits, but on that same day Valderrama filed suit, alleging that the city violated the PRA by failing to conduct an adequate search for the requested records.

After the suit was filed, the city continued to provide responsive records and affidavits. All told, by November 2023 the city had provided Valderrama with hundreds of responsive records and 43 *Nissen* affidavits from former and current city council members and other city staff.

Given this extensive record of efforts to search as thoroughly as possible for records on private devices, the Court of Appeals panel concluded that the city's efforts were sufficient. Disagreeing with the plaintiff's allegation of bad faith, the court said: "despite its imperfections, the process strikes an acceptable balance between personal liberty and government accountability."

CAN A TAXING DISTRICT IMPOSE A RESIDENCY REQUIREMENT FOR SERVICE ON A PRO OR CON COMMITTEE?

Effective January 1, 2025, a local government proposing a local ballot measure must appoint persons residing "within the jurisdictional boundaries" of the government to serve on a *Pro* committee. *See* RCW 29A.32.280 (2).[5] The law goes on to say that "whenever possible," the local government must appoint persons residing "within the jurisdictional boundaries" of the government to serve on a *Con* committee. We have interpreted the term "whenever possible" to mean that the local government must make diligent efforts to locate persons within its boundaries to serve on a Con committee. We have not interpreted the term "whenever possible" to mean that if the local government cannot find persons within its jurisdiction to serve on the committee, it must seek and appoint those without its jurisdiction.

But we do not stop there. We also interpret this change in the law to mean that a local government can require residency within its boundaries to serve on a *Con* committee. That is because it would be illogical to require residency to serve on a *Pro* committee—as the law effectively does, as of January 1, 2025—but *not* require that for those who serve on a *Con* committee.

By making this change in the law, it seems that the Legislature wants persons that have a *stake* in a local election to serve on such committees. Perhaps the same rationale could be applied to the *Public Records Act.* Perhaps it is time for the Legislature to require a person to prove that they actually have a *stake* in the proper administration and use of their taxpayer dollars to demonstrate a valid need for public records from a local government. After all, millions of taxpayer dollars are wasted each year fighting PRA lawsuits brought by persons that live far outside of the agency's boundaries. But that is for another day.

[5] https://app.leg.wa.gov/RCW/default.aspx?cite=29A.32.280