

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CIVIL ACTION

MULTIMEDIA HOLDINGS CORPORATION
 INC.,

Plaintiff,

vs.

CASE NO. 03-CA-3474-G

CRSPE, INC., a Florida Corporation,
 and POST, BUCKLEY, SCHUH & JERNIGAN,
 INC., a Florida Corporation,

Defendants.

AGREED AMENDED ORDER GRANTING WRIT OF MANDAMUS

THIS CAUSE came on to be heard on September 16, 2003 upon the Alternative Writ of Mandamus entered in this cause commanding Defendants to show cause why certain documents were not subject to Chapter 119, Florida Statutes (the Public Records Act), and the Court having considered the admissions in the pleadings, the stipulated evidence, the testimony of Defendants' witness, and argument of counsel, the Court makes the following findings of fact:

1. The Town of Fort Myers Beach (Town) is a municipality located in Lee County, Florida, and as such, a public agency within the meaning of the Public Records Act (the Act).

2. In December 2001, the Town entered into a certain Cooperative Agreement with the Federal Highway Administration and the Florida Department of Transportation to conduct a feasibility study to address traffic congestion problems of the Town, including a pre-project study phase (congestion mitigation

study).

3. As required by the Cooperative Agreement, the Town entered into a Local Agency Certification Qualification (LAP) Agreement with the Florida Department of Transportation.

4. The Town agreed in the LAP Agreement that "...they have the means to provide adequate expertise and will have support staff available to perform the functions being subdelegated. The support staff may include consultant or state services."

5. The LAP Agreement provides that "The Town Manager and her staff are responsible for the activities described" in the LAP Agreement, and that "[I]n accordance with the Town's minimal government philosophy, Town staff is limited, and the hiring of consultants is anticipated for completion of this work."

6. The LAP Agreement provides that the Town will validate the accuracy of and approve invoices submitted by consultants and contractors.

7. In April 2002, the Town entered into a contract with Defendant, CRSPE, Inc. to perform the congestion mitigation study required by the Cooperative Agreement. The CRSPE contract provides that the services contemplated by the contract could be performed by subconsultants and further provides that Defendant, Post, Buckley, Schuh & Jernigan, Inc. (PBSJ), was an anticipated subconsultant.

8. In September 2002, CRSPE entered into a subconsultant agreement with PBSJ to provide a substantial number of the services CRSPE agreed to perform for the Town under the CRSPE

contract, which included a mid-island bridge study budgeted at a cost of \$50,000.00, and further providing that PBSJ would be compensated at an hourly rate.

9. Both the CRSPE contract and the subconsultant agreement provide in the description of Defendants' respective services under those contracts that the purpose of the Fort Myers Beach congestion mitigation study is "to develop an implementation plan for a long-term solution to the Town's traffic congestion problem, and that their (the Defendants) services are "...designed to accomplish the goals outlined in the Cooperative Agreement."

10. The services to be performed by CRSPE under its contract with the Town and the services to be provided by PBSJ under the subconsultant agreement constitute all or substantially all of the services for which the Town is responsible to perform under the Cooperative Agreement and LAP Agreement.

11. In February 2003, as part of their respective services under the CRSPE contract and subconsultant agreement, CRSPE and PBSJ prepared and submitted a Mid-Island Bridge Study to the Town, for which PBSJ invoiced CRSPE the sum of \$40,352.12 for 427.50 hours of time.

12. The invoices submitted for such work only detail the name of each employee of PBSJ who performed the work and the number of hours attributed to each employee, and contain no description whatever of the date or nature of services performed.

13. In August, 2003, the Plaintiff (News-Press) made both an

oral and written public records request upon CRSPE and PBSJ for their records concerning the mid-island bridge study, including PBSJ's time sheets and internal billing records.

14. CRSPE produced all the records in its possession. PBSJ produced all of the records in its possession, except its time sheets and internal billing records relating to the study.

15. CRSPE maintains it is not acting on behalf of the Town under its contract with the Town within the meaning and intent of the Act.

16. PBSJ maintains it is not acting on behalf of the Town under its subconsultant agreement with CRSPE, and further maintains that, even if it were, its time sheets and internal billing records relating to the study are not public records.

This case boils down to two legal issues for determination by the Court: (1) Are Defendants, both private corporations, acting on behalf of the Town, a public agency, when performing the services contemplated by the CRSPE contract and subconsultant agreement, thereby subjecting them to the Act, and (2) are the time records and internal billing sheets of PBSJ "public records" within the meaning of the Act.

Based upon the foregoing findings of fact, the Court first concludes that CRSPE and PBSJ have been delegated by the Town the Town's responsibility under the Cooperative Agreement and LAP Agreement to perform all or substantially all of the services contemplated by those agreements. That being the case, under the controlling case law, as discussed below, both CRSPE and PBSJ are

private corporations acting on behalf of a public agency in connection with their services for the Town under the CRSPE contract and subconsultant agreement, and thereby subject to the Act.

The Act includes within its definition of an "agency" a "private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." Section 119.07 (2), Fla. Stats. The Florida Supreme Court has observed that that section of the Act is broadly designed to ensure that an agency cannot avoid the law by contractually delegating to a private entity its agency responsibilities. News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992). A number of case decisions have formulated two distinct standards for determining whether a private entity is subject to the Act under that statute; and those standards have been succinctly summarized by the Second District Court of Appeals in the case of Weekly Planet, Inc. v. Hillsborough County Aviation Authority, 829 So.2d 970 (Fla. 2nd DCA 2002).

In that case, the 2nd DCA stated that Florida courts have recognized two circumstances in which a private entity is subject to that law. The first is when the public agency contracts with a private entity for goods or services that merely facilitate the agency's performance of its duties. In that instance, a "totality of factors" test is applied to determine if there is present a significant level of public involvement by the private entity. See, Schwab, supra; and Sarasota Herald-Tribune Co. v. Community

Health Corporation, Inc., 582 So.2d 730 (Fla. 2nd DCA 1991). The News-Press has conceded that the Defendants do not reach the level of public involvement required by that test. The Court will not therefore further discuss the various factors as they may or may not apply to the Defendants.

The second circumstance delineated by the 2nd DCA, however, only requires that a public agency delegate a public function or responsibility to a private entity for it to perform in place of the agency. In that circumstance, it has been held that the totality of factors test need not be applied. See, Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp., 729 So.2d 970 (Fla. 1999); Dade Aviation Consultants v. Knight Ridder, Inc., 800 So.2d 302 (Fla. 3rd DCA 2001); Putnam County Humane Society, Inc. v. Woodward, 740 So.2d 1238 (Fla. 5th DCA 1999); and Stanfield v. Salvation Army, 695 So.2d 501 (Fla. 5th DCA 1997). The facts of this case fit squarely within that second circumstance.

The Town is charged in the LAP Agreement with the responsibility to perform the tasks outlined in the Cooperative Agreement and LAP Agreement, including a congestion mitigation study. The Town represented in the LAP Agreement that it had the expertise and staff to perform those tasks; that, because of its limited staff size, it would need to utilize consultants to perform all or part of those tasks; and that the consultants were to be considered part of its staff.

To that end, the Town entered into the CRSPE contract, the stated purpose of which was the performance of the congestion

mitigation study and the goals of the Cooperative Agreement. The Town acknowledged in that contract that CRSPE would engage subconsultants to perform all or part of its tasks and approved PBSJ as a subconsultant in that contract. CRSPE then entered into the subconsultant agreement with PBSJ to perform a substantial amount of the services CRSPE had been delegated by the Town in the CRSPE agreement. Part of the congestion mitigation study was a mid-island bridge study. The Defendants jointly prepared and submitted that study as part of the services contemplated by their respective contracts.

In short, the Town delegated its responsibility to perform the tasks under the Cooperative Agreement and LAP Agreement to the Defendants. The Defendants performed those tasks in place of the Town, rather than simply supplying services to the Town, all as contemplated by the operative agreements. By accepting that responsibility and performing those tasks, the Defendants subjected themselves to the requirements of the Public Records Law in regard to documents generated as a result of those services.

While PBSJ argues it was not delegated any responsibility by the Town, as it contracted only with CRSPE, CRSPE was an "agency" at the time of contracting with PBSJ by virtue of the delegation of the Town's responsibilities to it. As noted above, the Public Records Act cannot be so easily circumvented simply by CRSPE delegating its responsibilities to yet another private entity. Moreover, PBSJ was a contemplated subconsultant from the start of

the delegation process, and acknowledged in its contract with CRSPE that the purpose of its services were to achieve the goals of the Cooperative Agreement. PBSJ was performing the very public responsibilities that CRSPE was obligated to perform under its direct contract with the Town. For all intents and purposes, PBSJ accepted the responsibility of performing the Town's obligations under the Cooperative Agreement as much as CRSPE had. Thus, both CRESPE and PBSJ are subject to the Act as to the services provided under their respective contracts.

The remaining question is whether the time sheets and internal billing records of PBSJ are public records or remain the private records of PBSJ. A public record is defined in the Act as "...all documents...made or received...in connection with the transaction of official business by any agency." Section 119.011 (1), Fla. Stats. Because the Defendants have been held to fall within the statutory definition of an "agency", as set forth above, all documents that they have made or have received in connection with the performance of their services under their contracts are subject to inspection, unless expressly exempted by law.¹ The determination of whether a particular document is a public record is made on a case by case basis. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla. 1980).

In that case, the Florida Supreme Court deemed that public records include not only formal documents prepared under a consultant's contract with an agency, but "...any material

prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type". Such materials include "[I]nter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product." Id. (court's emphasis). See also, Johnson v. Butterworth, 713 So.2d 985 (Fla. 1998), citing Shevin. In its latest pronouncement on the issue, the Florida Supreme Court observed that, when deciding whether a document is a public record, "[T]he determining factor is the nature of the record, not its physical location." State v. City of Clearwater, 2003 WL 22097478 (Fla. 2003).

The documents at issue, time sheets and internal billing records, were created by PBSJ as a result of the services performed under the subconsultant agreement. Under that agreement, PBSJ is to be paid for its services at an agreed upon hourly rate, and is to submit monthly invoices to CRSPE for payment. Under its agreement, PBSJ is also responsible for the completeness and accuracy of not only its work, plans and supporting data, but all "...other documents and information prepared or compiled under its direction."

As a corollary to that responsibility, the Town is charged under the LAP Agreement to validate the accuracy of those invoices, and to maintain cumulative cost records for each consultant agreement to "assure that costs are allowable, allocable and reasonable."

¹ No statutory exemptions exist for the requested documents.

The invoices submitted by PBSJ do not enable the Town to validate invoice accuracy. The only records from which that accuracy might be determined are the time sheets and internal billing records of PBSJ that relate to its services under its contract. Those records were prepared by PBSJ in performance of, and as a result of, its services under its contract, and were obviously intended to perpetuate the knowledge or information contained in them.

Thus, when the terms of the various contracts are construed together, and the law applied to those circumstances, the Court must conclude that those records are public records within the meaning of the Act. Therefore, it is,
Ordered and Adjudged that:

1. Defendant, Post, Buckley, Schuh & Jernigan, be and is hereby ordered to forthwith permit Plaintiff to inspect and copy under the provisions of Chapter 119, Florida Statutes, the time sheets and internal time records in its possession, custody or control relating to its services relating to the mid-island bridge study.

2. As addressed in a prior order, Defendant, CRSPE, Inc., has been dismissed as a party to this action, the Court finding that it was not entitled to possession or custody of the subject time records under the subconsultant agreement at the time the request was made by the Plaintiff.

3. The Court reserves jurisdiction over the parties and subject matter of this action for the purpose of enforcement of

this Order and for consideration of the amount of attorney's fees and costs to which Plaintiff may be entitled from Defendant, Post Buckley, Schuh & Jernigan, Inc..

DONE AND ORDERED at Fort Myers, Lee County, Florida, this
3 day of Dec., 2003.

WILLIAM C. MCIVER, Circuit Judge

Conformed copies to:

MICHAEL J. CICCARONE, ESQ.
STEVEN CARTA, ESQ.
JAMIE BILLOTTE MOSES, ESQ.