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North Carolina Court Holds Records in Possession of Third-Party Contractor Subject to Public Records Disclosure Requirements

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In a case of first impression for North Carolina's intermediate appellate court, the Court of Appeals issued a sweeping decision holding that city records in the possession of a third-party consulting company must be disclosed in response to a public records request. See [Gray Media Grp., Inc. v. City of Charlotte](#), 2023 N.C. App. LEXIS 566 (Sept. 12, 2023).

The court also held that even though requestor Gray Media Group, Inc., d/b/a Charlotte television station WBTV, received the records before a final ruling on the merits, it was entitled to recover its attorneys' fees under North Carolina's public records law mandating fee awards to claimants who substantially prevail in compelling disclosure of public records.

Background

In April 2020, the city of Charlotte, North Carolina hired the consulting company Ernst & Young to help the city "advance more streamlined and effective local government operations." Under the parties' contract, the city had "exclusive ownership" over EY work product. The contract stated EY was required to produce the data "to the City in machine readable format upon the City's request at any time," and explicitly provided that any data supporting EY's work, excluding confidential information of EY, "shall be treated as a public record under North Carolina law."

On December 11, 2020, EY circulated surveys titled "Leadership and Teaming Assessment" to the city council members through their work emails. The surveys asked that the council members evaluate their own leadership and team building competencies, as well as their fellow members' capabilities. The Charlotte Mayor and all but one sitting council member completed at least portions of the surveys. Six months later, EY provided Charlotte its "final report," which provided recommendations based on interviews with council members and the EY survey responses.

In March 2021, a WBTV journalist requested copies of the contract and the EY surveys and responses pursuant to the North Carolina Public Records Act, N.C. Gen. Stat. § 132-9 *et seq.* The city refused to produce the EY surveys and responses, claiming they were not public records because EY, not Charlotte, had custody of them.

Legal Proceedings

Shortly after its request was denied, WBTV sued the city of Charlotte in Mecklenburg County Superior Court, seeking a declaratory judgment that the city's failure to produce the EY surveys and responses violated the Public Records Act, as well as an order compelling disclosure.

In response to WBTV's lawsuit, the city filed an omnibus motion requesting, among other things, that the court dismiss the lawsuit in its entirety for failure to state a claim or failure to join a necessary party, EY. On November 12, 2021, the trial court entered an order denying the city's motion to dismiss the public records claim on grounds that Plaintiff had in fact stated a claim and EY was not a necessary party.

On April 19, 2022, WBTV moved for summary judgment, requesting that the court enter an order in the nature of a writ of mandamus instructing the city to promptly obtain and produce the EY surveys and responses to WBTV pursuant to the Public Records Act.

Instead of responding to WBTV's motion, the city served a subpoena on EY demanding that the consulting company produce "documents sufficient to indicate" the EY survey questions and responses underlying this litigation. On June 10, 2022, sixteen months after the initial request, EY provided the city with the precise materials WBTV sought in its initial public records request: an Excel spreadsheet reflecting the survey questions and Council members' responses. The city turned the records over to WBTV on the same day.

On July 28, 2022, Charlotte filed its motion for summary judgment, conceding that the survey responses were public records once provided to the city pursuant to the subpoena, but arguing that the case was moot because WBTV now had copies of the requested records. Charlotte continued to argue that it had no duty to fulfill WBTV's records request when it was submitted because the records were not in the municipality's custody at the time of the request.

On October 11, 2022, the trial court entered an order determining that the case was moot because WBTV had copies of the records. On this basis, it granted the city's motion for summary judgment, denied WBTV's cross-motion for summary judgment and request for attorneys' fees, and ordered that the case be dismissed.

WBTV appealed the trial court's decision, asserting that the court erred (1) by holding the lawsuit was moot, (2) by denying its motion for summary judgment when the city's conduct violated the Public Records Act, and (3) by denying WBTV's request for fees, which are mandatory when "a party seeking disclosure of public records ... substantially prevails." N.C. Gen. Stat. § 132-9(c).

The Court of Appeals' Decision

Following argument and the closing of briefing, the Court of Appeals unanimously reversed the trial court's order on all three grounds of appeal.

First, the Court of Appeals held that the case was not moot because the Superior Court never decided WBTV's request for declaratory judgment. The court noted that the city only turned the survey responses over after WBTV moved for summary judgment, and "still vigorously contends that the requested documents were not public records when in EY's physical possession." The court stated it would alternatively reach the merits of the case under the "capable of repetition yet evading review" exception of the mootness doctrine, because "given the City's position that the Public Records Act does not apply to documents in the physical custody of a third party and Gray Media's interest in timely news coverage of city government activity, it is likely that these parties will end up in our courts again." The court further noted that if this issue arose again, Charlotte could "exercise its ownership rights, demand production from the third party, and turn the documents over to the requesting party long after the initial request but before the hearing date, thereby frustrating the intent of the Public Record Act, while still evading review."

Second, moving to the merits, the court determined that because "the City maintained custody through constructive possession of the records," it was required to exercise its contractual right to demand the records from EY when WBTV submitted its public records request. The court explained:

To accept the argument that a hyperlinked survey instead of an attached survey removes the document from the universe of public records requires us to read the statutory language much too narrowly. Such a reading would defeat the purpose of the statute, creating a clear path to hide huge swaths of governmental work from public scrutiny.

Third and finally, because WBTV "substantially prevailed" in compelling production of the records through litigation, it was entitled to its attorneys' fees. The court noted the extensive litigation between the parties, and that Charlotte only requested the surveys and responses after WBTV had moved for summary judgment. WBTV's litigation "substantially precipitated the ultimate disclosure of the records," which mandated a fee award.

North Carolina recognizes an exception to an award of attorneys' fees in a successful public records lawsuit if the government body "acted in reasonable reliance" on a court opinion or opinion by the Attorney General. Throughout the litigation, Charlotte had relied on Court of Appeals decisions establishing a test for records made by contractors and in the contractors' custody. The court held that test was inapplicable because city council members created the survey responses, and "an erroneous legal interpretation of those cases cannot excuse a governmental entity from its financial obligations to parties authorized to claim attorneys' fees by statute."

The Court of Appeals remanded the case with instructions that the trial court enter summary judgment in WBTV's favor and determine WBTV's attorneys' fees award following a hearing.

Kaitlin Gurney and Lauren Russell of Ballard Spahr LLP and Elizabeth Greene of Flannery Georgalis, LLC represented Plaintiff Gray Media Group, Inc., and Daniel Peterson of Parker Poe Adams & Bernstein LLP represented the City of Charlotte.

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