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May 22, 2009

Mr. Prestidge:

You requested an opinion from this Office that addresses the following issues:

- (1) Are State trained and certified Erosion Prevention and Sediment Control Professionals (hereinafter "EPSC Professionals") the "functional equivalent" of a governmental entity?
- (2) If the EPSC Professionals are the "functional equivalent" of a governmental entity, are the reports that they generate public records?

I. EPSC Professionals

The Federal Water Pollution Control Act, commonly known as the Clean Water Act (hereinafter "Act"), was originally enacted in 1948 and significantly amended in 1977 by the United States Congress. In the Act, the federal government declared that protecting U.S. water ways from pollution and establishing programs to ensure such protection is to be a priority for federal, state, and local governmental agencies. In an effort to comply with both the federal Act and the Tennessee Water Quality Control Act of 1977, Metropolitan Government of Nashville and Davidson County (hereinafter "Metro"), through the Metropolitan Department of Water and Sewerage Services' (hereinafter "MWS") Storm Water Program Division, established standards to which developers in Nashville-Davidson County must adhere to on construction sites in order to control erosion and sedimentation issues that could affect water quality.

On June 1, 2002, Metro determined that "every development project requiring a Metro grading permit shall be required to designate/attain the services of an individual which

has been certified via the ongoing TDEC Water Pollution Control Erosion Prevention and Sediment Control training class.” http://www.nashville.gov/stormwater/epsc_professional.htm. These individuals are referred to by Metro as EPSC Professionals. The Metropolitan Nashville-Davidson County Stormwater Management Manual (hereinafter “SWMM”) requires developers who are seeking grading permits to hire EPSC professionals to assist the developers in complying with federal and state standards regarding erosion prevention and sediment control and its impact on water quality. The only qualifications that MWS sets out for these professionals are that they have “successfully completed the TDEC Level 1 Erosion Prevention and Sediment Control training class or obtained a waiver from the requirements from MWS.” Volume 1, Section 4.3.3 of the SWMM, lists the major responsibilities of the EPSC Professional as:

- 1.) Sign and be identified as the EPSC Professional on the Pre-Construction Meeting Application submitted to MWS;
- 2.) Attend the Pre-Con;
- 3.) Oversee the installation and maintenance of EPSC measures;
- 4.) Direct the contractor to immediately cease land disturbance activities if Community Waters not identified on the plans are encountered. The EPSC Professional must notify MWS and TDEC and ensure that necessary permission for the alteration of these features are obtained before work can continue;
- 5.) Communicate the site’s EPSC considerations (including buffer and conservation areas) to all applicable contractors that are to work on the site;
- 6.) Conduct routine inspections twice every calendar week. Inspections shall be performed at least 72 hours apart;
- 7.) Provide copies of the inspection reports in a timely manner upon request by MWS;
- 8.) Oversee the installation of buffer boundary markers to prevent buffer disturbance;
- 9.) Facilitate communication between MWS and the appropriate parties for the development; and
- 10.) Verify final stabilization.

Additionally, Volume I, Section 4.4.3 of the SWMM requires that all inspections performed be documented in writing, provides a list of the information that *should* be included in the bi-weekly inspection reports, and repeats the requirement that the EPSC Professional provide the inspection reports to MWS in a timely manner, if MWS requests the reports.

II. The Functional Equivalency Test

The functional equivalency test was first recognized by the Tennessee Supreme Court in *Memphis Publishing Company v. Cherokee Children and Family Services, Inc.*, 87 S.W. 3d 67 (Tenn. 2002). In *Cherokee*, a request was made by Memphis Publishing Company (hereinafter “MPC”) and the Tennessee Comptroller of the Treasury (hereinafter “COT”) for access to records maintained by Cherokee Children and Family Services, Inc.,

(hereinafter “Cherokee”) a non-profit under contract with the Tennessee Department of Human Services (hereinafter “TDHS”) to administer a state-subsidized day care program. *Id.* at 72-73. Cherokee denied both requests and subsequently lawsuits were filed by both MPC and the COT seeking access to the records. *Id.* In determining whether Cherokee was subject to the Tennessee Public Records Act (hereinafter “TPRA”), the court looked to case law in other jurisdictions that examined whether or not the records of private entities were subject to the open records laws of those particular jurisdictions. *Id.* at 77-78. The court concluded that the “functional equivalency” test that had been adopted in a number of other states and in the federal courts was the most appropriate means to measure whether a private entity’s records were subject to the TPRA. *Id.* at 78. The court explained that the factors to be considered in determining whether a private entity is the functional equivalent of a governmental entity include but are not limited to:

- 1) whether and to what extent the entity performs a governmental or public function;
- 2) the level of government funding of the entity;
- 3) the extent of government involvement with, regulation of, or control over the entity; and
- 4) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

Id. at 79.

The court also explained that no one factor was dispositive in determining whether the private entity was the functional equivalent of a governmental entity, but rather a case-by-case analysis was required. *Id.* The court ultimately concluded that Cherokee was the functional equivalent of a governmental entity because “Cherokee’s business activities were, by its charter, dedicated exclusively to the servicing of TDHS contract,... Cherokee’s operations were financed with public funds (over ninety-nine percent of its funding came from governmental sources,” and there was “a significant level of government control and oversight.” *Id.* at 79-80.

However, in making this decision, the court also said the following:

We caution that our holding clearly is not intended to allow public access to the records of every private entity which provides any specific, contracted-for services to governmental agencies. A private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government. But when an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency, the Tennessee Public Records Act guarantees that the entity is held accountable to the public for its performance of those functions.

Id. at 79.

This issue was again analyzed in *Allen v. Day*, 213 S.W. 3d 244 (Tenn. Ct. App. 2006). In *Day*, the Tennessee Court of Appeals applied the functional equivalency test set out above and found that a private entity was the functional equivalent of a governmental entity. *Id.* at 252. However, the court concluded that in order to determine whether or not the first prong of the functional equivalency test was met, it was necessary to define “governmental function” since the performance of a governmental function is the cornerstone of the analysis. *Id.* at 253. The court adopted the following:

“Governmental function” means the administration or management of a program of a public agency, which program has been authorized by law to be administered or managed by a person, where (A) the person receives funding from the public agency for administering or managing the program, (B) the public agency is involved in or regulates to a significant extent such person's administration or management of the program, whether or not such involvement or regulation is direct, pervasive, continuous or day-to-day, and (C) the person participates in the formulation of governmental policies or decisions in connection with the administration or management of the program and such policies or decisions bind the public agency. “Governmental function” shall not include the mere provision of goods or services to a public agency without the delegated responsibility to administer or manage a program of a public agency.

Id. at 253-254.

III. Analysis

While this Office cannot determine definitively how a court would rule on the issue of whether or not EPSC Professionals are the functional equivalent of a governmental entity, the Office can opine as to whether or not the EPSC Professionals are performing a “governmental function” and whether or not the EPSC Professionals are the functional equivalent of a governmental entity when using the factors that the courts have used to analyze this issue in the past.

It is important to first determine whether or not the EPSC Professionals perform a governmental function, as this is the “cornerstone” of the functional equivalency analysis. *Cherokee*, 87 S.W. 3d at 79. In looking at the test set out in *Day*, the EPSC Professionals must first be authorized by law to either administer or manage a program on behalf of Metro. Volume I, Section 2.2 of the SWMM states in part:

Metro reserves the right to require an “erosion prevention and sediment control professional” or other similar person designated by the TDEC or Metro to be on site for inspection and enforcement of proper construction and maintenance of erosion prevention and sediment control management practices at construction sites.

Even though Metro now requires every construction site to have a designated EPSC Professional performing inspections and providing guidance regarding compliance with

the law, these individuals are hired by and work on behalf of the developer or permit holder and not for Metro. Metro's Stormwater Division employs its own inspectors that periodically inspect construction areas for compliance purposes as well. Having determined that the EPSC Professionals do not meet the threshold test for what constitutes a "governmental function," the analysis now turns to the second prong of the functional equivalency test.

The second prong of the analysis involves the level of government funding provided. As stated above, the EPSC Professionals are hired by the developers or permit holders. Metro provides no compensation or funding to the EPSC Professionals for the services they provide.

The next prong of the analysis focuses on the extent of government involvement, regulation, and control over the entity. With the exception of specifying the level of state training that the EPSC Professional is required to have, the major responsibilities of an EPSC Professional, and requiring that notice must be given if the EPSC Professional withdraws from a project, Metro does not control or regulate any of the EPSC Professional's activities. Additionally, with regard to the reports that are at issue in this opinion, Metro only reserves the right to request copies of the reports; there is no mandatory requirement that Metro review the reports or even maintain copies of the reports.

Metro has asserted to this Office that these reports are not routinely requested. We understand that as of today, there has been no request made that the reports be provided to Metro. However, in an effort to amicably resolve this issue, Metro did request that the EPSC Professionals provide you with the requested reports. In response to Metro's request, at least one of the EPSC Professionals has declined to provide the reports to you based upon the assertion that the reports are the property of the client/permit holder and the client/permit holder has not authorized the reports to be released to you.

The final prong of the functional equivalency test that has been considered by the courts is the manner in which the entity was created. Courts specifically look at whether or not the entity was created by the legislature or whether the records have been found to be public records in the past. EPSC Professionals were not created by an act of the legislature. Additionally, this Office has found no legal authority that supports the position that the reports have been found to be public records in the past.

IV. Conclusion

In light of the analysis presented above, it is the opinion of this Office that the EPSC Professionals who are hired by developers/permit holders in order to maintain compliance with state and federal water quality standards are not the functional equivalent of a governmental entity. As set out above, EPSC Professionals are not performing a governmental function, they receive no government funding, there is minimal government control and involvement in the day-to-day activities of the EPSC

Professional, and EPSC Professionals were not created by the legislature nor have their records been found to be public in the past.

Again, since the courts have concluded that the functional equivalency test should include, but is not limited to, the factors outlined above, and that no one factor is dispositive, we are unable to state with certainty how a Tennessee Court would decide on this issue. However, considering the factors that the courts have previously used when deciding whether or not the functional equivalency test is met, it is this Office's opinion that the EPSC Professionals are not the functional equivalent of a governmental entity and as such, the records that they produce and maintain in their possession are not public records available for inspection and copying pursuant to the Tennessee Public Records Act.

Please feel free to call either myself or Ann V. Butterworth at (615) 401-7891 if you have any further questions.

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