

STATE OF NEW MEXICO  
COUNTY OF DONA ANA  
THIRD JUDICIAL DISTRICT COURT

HAUSSAMEN PUBLICATIONS, INC.,

Plaintiff,

v.

No. D-307-CV-2016-01220

CITY OF LAS CRUCES and THE MERCER  
GROUP, INC.,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT,  
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DISMISSING CASE WITH PREJUDICE**

THIS MATTER comes before the Court on Defendant The Mercer Group, Inc.'s ("Mercer") Motion for Summary Judgment, Defendant City of Las Cruces' ("City") Renewed Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment, all filed April 24, 2017. The Court, having considered the briefing on the motions and hearing argument from the parties at a hearing on August 8, 2017, finds as follows:

1. The Court agrees with the parties that there are no disputed material facts to preclude summary judgment. Thus, the Court applies the law to the facts to determine whether Mercer acted "on behalf of" the City in the recruiting and selection of a City Manager such that documents in Mercer's possession (but which were not provided to the City) are subject to the Inspection of Public Records Act ("IPRA").
2. The proper analytical framework in this matter is the nine-factor test set forth in *State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶¶ 20, 22. Plaintiff suggests that the appropriate test is the "delegation of function" test utilized


by Florida courts. New Mexico courts have never adopted the delegation of function test. Regardless, the Court does not believe the delegation of function test is applicable to the undisputed facts of this case. Florida's courts have applied the "delegation of function" test in place of the *Schwab/Toomey* factors where "the delegation of governmental responsibility is clear and compelling." *Putnam Cty. Humane Soc., Inc. v. Woodward*, 740 So.2d 1238, 1239 (Fla. 5<sup>th</sup> DCA 1999) ("Rather than providing services *to* the county, the Salvation Army provided services *in place of* the county.") (emphasis added). Here, the City did not abdicate or delegate its responsibilities with regard to hiring a City Manager to an extent that would warrant application of the delegation of function test. The undisputed material facts show that the City maintained control of the majority of the process of recruiting and hiring a City Manager.

3. Application of the *Toomey* factors shows that Mercer did not act "on behalf of" the City such that its records are subject to IPRA. Those factors are 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether the services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for whose benefit the private entity is functioning. *Id.* at ¶ 13.

4. The City paid Mercer a fee pursuant to a one-time contract for professional services. Mercer receives no other or ongoing public funding. There is no evidence to suggest that the City and Mercer have ever commingled funds. The evidence demonstrates that while there was some use of City facilities or property by Mercer, such as use of the telephone system or conference rooms, this use was minimal and incidental to performance under the professional services contract. As to whether the services contracted for are an integral part of the public agency's chosen decision-making process, the City hired Mercer to assist it in the process of hiring a City Manager, but it retained control over all key decisions in the process, including establishing the requisite qualifications, determining which candidates to interview and ultimately which candidate to select. Likewise, Mercer assisted the City in the search and hiring process for a City Manager, but did not perform that function in lieu of the City. Mercer exercised some professional judgment, and therefore control, with regard to its initial screening of candidates to determine whether they met the qualifications established by the City. There is no evidence to suggest that the City was involved in the creation of Mercer, or that it has any substantial financial interest in Mercer. Finally, the professional services contract between the parties benefited both the City and Mercer.
5. No single *Toomey* factor is determinative. However, on balance, the *Toomey* factors weigh in favor of a finding that Mercer provided a specific, contracted-for service on behalf of the City, and did not act "on behalf of" the City such that IPRA would apply.

6. Therefore, Defendant The Mercer Group, Inc.'s Motion for Summary Judgment is GRANTED.
7. Defendant City of Las Cruces' Renewed Motion for Summary Judgment is GRANTED;
8. Plaintiff's Motion for Summary Judgment is DENIED.
9. All claims in this matter against Defendants The Mercer Group, Inc. and City of Las Cruces are hereby dismissed with prejudice.

IT IS SO ORDERED.

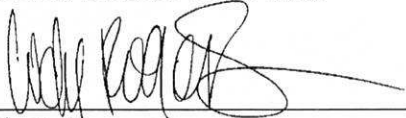


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HONORABLE JAMES T. MARTIN  
DISTRICT COURT JUDGE

SUBMITTED:

MILLER STRATVERT P.A.



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Approved via e-mail 8/30/2017

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