



**THE PUBLIC RECORDS LAW
AND PRIVATE ENTITIES
ENGAGING IN PUBLIC FUNCTIONS**

*RE: NEW ORLEANS BULLDOG SOCIETY
v. LOUISIANA SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS*

I NTRODUCTION

In *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, the Louisiana Supreme Court expanded the Public Records Law to private entities that engage in public functions. This paper examines the procedural history of this case from the district court to the Louisiana Supreme Court. The paper concludes with the impact this decision will have on public entities contracting with private entities for the performance of public functions.

I. INTRODUCTION

The Public Records Law, La. R.S. 44:1, *et seq.*, ensures that public documents are preserved and open to view by the public. The Public Records Law is founded in the guarantee of Article XII, Section 3 of Louisiana Constitution that “no person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law.”¹ The Public Records Law is designed to implement the right of the public to be reasonably informed as to what public records contain and the manner, basis, and reasons upon which governmental affairs are conducted.² The Public Records Law applies to public bodies, which is defined as:

“[. . .] any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function, or an affiliate of a housing authority.”³

In *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*⁴, the Louisiana Supreme Court expanded the Public Records Law to private entities that engage in public functions. This paper examines the procedural history of this case from the district court to the Louisiana Supreme Court. The paper concludes with the impact this decision will have on public entities contracting with private entities for the performance of public functions.

II. THE NEW ORLEANS BULLDOG SOCIETY DECISION

In 2015, the Louisiana Society for the Prevention of Cruelty to Animals (LSPCA), a private, nonprofit corporation, entered into a new Cooperative Endeavor Agreement (CEA), with the City of New Orleans to provide professional animal control services. As with previous CEAs between

¹ La. Constitution of 1974, Art. XII, Section 3.

² *Title Research Corp. v. Rausch*, 450 So.2d 933 (La. 1984).

³ La. R.S. 44:1(A)(1).

⁴ *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, 16-1809 (La. 5/3/17); 222 So.3d 679.

the LSPCA and the City, the 2015 CEA states that the LSPCA's animal control services are done in accord with "the provisions of Chapter 18 of Code of Municipal Ordinances for the City relating to animal control and shelter services."⁵ Pursuant to the CEA, the LASPCA provides "animal control facilities" known as the Shelter and provides "shelter services" including "receiving unwanted animals; impounding, housing, feeding, redemption, adoptions, humane euthanasia and disposal of animals."⁶ As part of these duties, uniformed LSPCA "humane officers" investigate, impound animals and issue citations to people throughout the city, requiring them to appear in municipal court.⁷ The City provides the LSPCA with animal control vehicles as well as fuel and maintenance for those vehicles.⁸ The CEA also provides that the City and the LSPCA will work together to "review and revise municipal ordinances involving domesticated animals."⁹ In exchange for the LSPCA assuming the City's municipal animal control obligations, the City pays the LSPCA a monthly amount of \$153,870, or \$1,846,440 annually.

The New Orleans Bulldog Society (Bulldog Rescue) is a private nonprofit corporation that advocates for dog welfare in New Orleans and the surrounding area. On May 29, 2015, the Bulldog Rescue sent a public records request to the City of New Orleans seeking information related to the number of dogs euthanized, and the euthanization of one particular Cane Corso named Leatrice, in the New Orleans area shelters. The City Attorney's office responded to the Bulldog Rescue's request by letter dated June 4, 2015 that the City was not the custodian of the records and that the records request should be directed to the Louisiana Society for the Prevention of Cruelty to Animals (LSPCA).

On June 5, 2015, the Bulldog Rescue sent its public records request to the LSPCA. On June 10, 2015, the LSPCA responded by letter, signed by its Chief Executive Officer, that the LSPCA was not a "public body" and, therefore, not subject to the Public Records Law. Further, the LSCPA letter stated that the only reporting required of the LSPCA was delineated in the CEA between the City and the LSPCA. The letter concluded that the LSPCA was fulfilling those

⁵ *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, 15-1351, *6 (La.App. 4 Cir. 9/7/16); 200 So.3d 996, 1000 (citing CEA provision 2.1).

⁶ *Id.* at 7; 1001 (citing CEA provision 2.3)

⁷ *Id.* (citing CEA provision 2.2.5).

⁸ *Id.* (citing CEA provisions 3.2, 3.2.2, and 3.3).

⁹ *Id.* (citing CEA provision 2.10).

reporting requirements by submitting the required reports with the City, which were available through the City Attorney's office.

On July 22, 2015, the Bulldog Rescue filed a petition for writ of mandamus in the Orleans Parish Civil District Court, seeking a declaratory judgment and injunctive relief pursuant to the Public Records Law. In response, the LSPCA filed exceptions of unauthorized use of summary proceeding and no cause of action, requesting that the Bulldog Society's petition be dismissed.

1. The *New Orleans Bulldog Society* District Court Decision

On September 17, 2015, a hearing on the matter was held in the Orleans Parish Civil District Court. The LSPCA argued that as a private, nonprofit animal welfare organization and 503(c)(3) charity, it was not affiliated in any way with other private organizations or public entities. The LSPCA stated that it maintained a private board of directors, its primary funding sources was not public funds and it was not formed to complete a public purpose or function. The LSPCA further stated that only certain of its professional animal control services are specific to the City and funded directly by the City pursuant to the CEA. As such, the LSPCA argued that it does not meet the definition of a quasi-public body under the Public Records Law, the hallmarks of which are: (1) not strictly private bodies; (2) primarily funded with public funds; and (3) organized to serve a public purpose or provide a public service.

The Bulldog Society argued that under the CEA between the City and the LSPCA, the LSPCA was being paid to perform essential public functions and should therefore be subject to the Public Records Law.

After the hearing, the District Court granted the LSPCA's motion to dismiss. The District Court found that the LSPCA was not a quasi-public entity under the Public Records Law. Further, the District Court found that even if the LSPCA was a quasi-public entity, all reporting obligations under the Public Records Law had been met when the LSPCA complied with the CEA reporting requirements.

The Bulldog Rescue appealed the decision of the District Court.

2. The New Orleans Bulldog Society 4th Circuit Decision¹⁰

The 4th Circuit reversed the district court in 2-1 decision (Judge Lobrano dissenting).

First, the 4th Circuit found that any law affecting the public's right to access must be interpreted with the most expansive and unrestricted way possible.

Second, the 4th Circuit found that the LSPCA, through the CEA, served as the municipal instrumentality of the City to provide mandated animal control services. The LSPCA is invested with the authority to investigate compliance with municipal code violations related to animals. The LSPCA uses City owned, maintained and fueled vehicles to perform these services. Further, the wearing of uniforms while investigating municipal violations and serving municipal citations indicates a quasi-official status to the public and allows the humane officers to "operate under the color of City authority." Finally, while the almost \$2 million the LSPCA receives to perform these services may be only a percentage of the LSPCA's total budget, the 4th Circuit found this sum to be a substantial amount of money derived from public funds. Therefore, the 4th Circuit held that the LSPCA was a quasi-public entity for purposes of the Public Records Law.

Third, the 4th Circuit further held that the Public Records Law cannot be circumscribed by contract. Therefore, the 4th Circuit rejected the district court's conclusion that the limited reporting requirements contained in the CEA could satisfy its obligations under the Public Records Law.

Finally, the 4th Circuit addressed the concerns of the Louisiana Municipal Association (LMA), which filed an *amicus curiae* brief in matter raising concern it would be detrimental to municipalities if it is construed that a private entity becomes subject to the Public Records Law solely by entering into a contract with a municipality. The 4th Circuit emphasized that its holding in this case was specific to those circumstances wherein an entity, such as the LSPCA here, acts as an instrumentality of the City in rendering mandated municipal services, such as investigating in municipal code violations, seizing animals and serving citations in the course of its investigations, and acts under the color of municipal authority by wearing uniforms and using City

¹⁰ *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, 15-1351(La.App. 4 Cir. 9/7/16); 200 So.3d 996.

vehicles. Such circumstances are not usually present when an entity merely provides services to a city.

Judge Lobrano dissented from the majority opinion. Judge Lobrano would have affirmed the decision of the district court as the LSPCA is not a public body and not subject to the Public Records Law. In Judge Lobrano's view, in order for a private nonprofit corporation, such as the LSPCA, to become quasi-public and subject to the Public Records Law, it must be "designated" to perform a governmental or proprietary function. In this case, the City did not designate, by law, the LSPCA to perform animal control services. Instead, it entered into contractual negotiations with the LSPCA, and the LSPCA voluntarily agreed to perform these governmental functions. Therefore, because the LSPCA was not designated by law to perform these services, but voluntarily entered into a CEA with the City to perform them, it is not a public body subject to the Public Records Law. Additionally, Judge Lobrano believed that the majority's holding would have a detrimental effect on municipalities' ability to contract with private entities as municipalities could not enter into CEAs except for a public purpose.

The LSPCA applied for writ of certiorari to the Louisiana Supreme Court, which was granted on January 9, 2017.¹¹

3. The *New Orleans Bulldog Society* Louisiana Supreme Court Decision¹²

The Louisiana Supreme Court affirmed the decision of the Fourth Circuit.

In its opinion, the Supreme Court re-affirmed longstanding Louisiana law that the Public Records Law is to be construed liberally in favor of free and unrestricted access to public documents.

The Court went on to hold that in addressing the issue of whether the Public Records Law applies to the LSPCA in this case, the Fourth Circuit correctly focused on the function the LSPCA

¹¹ 16-1809 (La. 01/09/17) 214 So.3d 859.

¹² *New Orleans Bulldog Society v. Louisiana Society for the Prevention of Cruelty to Animals*, 16-1809 (La. 5/3/17); 222 So.3d 679.

serves as an “instrumentality” of the City through its CEA to provide animal control services. The Court noted that La. R.S. 44:1 states that entities subject to the Public Records Law include:

[. . .] any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function [. . .] 16-1809, *8 (emphasis in original)(internal footnotes omitted).

The Supreme Court found that the under its CEA with the City, the LSPCA performs certain functions as an instrumentality of the City and acts under the color of City authority through its enforcement and investigation of the municipal code regarding animal control. While the \$1,846,440 the LSPCA received under the CEA for the performance of these duties constituted only 12 percent of LSPCA’s budget, the Court found that “it is not the amount of money which is of concern, it is only that the money provided by the City to the LSPCA in exchange for its animal control services under the CEA is derived from taxpayers.” The Court concluded that the public has a “fundamental right to know how that money is spent by the LSPCA through its animal control services outlined in the CEA.” Therefore, the Court held that in under the particular facts of this case, the LSPCA is a “quasi-public” nonprofit corporation designated to perform a governmental or proprietary function and, therefore, subject to the Public Records Law.

The Court distinguished its fact-specific “functionality” test for the purpose of determining whether the Public Records Law applies to the LSPCA in this case from the “public entity” test utilized in *Property Insurance Association of Louisiana v. Theriot*,¹³ and *Louisiana High School Athletics Ass’n Inc. v. State*.¹⁴ In both of those cases, the Court examined whether the entities in question were public or private by examining the four *Smith*¹⁵ factors:

- (1) Whether the entity was created by the Legislature;
- (2) Whether its powers were specifically defined by the Legislature;
- (3) Whether the property of the entity belongs to the public; and

¹³ 09-1152 (La. 3/16/10), 31 So.3d 1012.

¹⁴ 12-1471 (La. 1/29/13), 107 So.3d 583.

¹⁵ *Smith v. Sate*, 357 So.2d 505 (La. 1978).

- (4) Whether the entity's functions are exclusively of the public character and performed solely for the public benefit.

The Court found both cases distinguishable for two reasons: (1) neither involved the application of the Public Records Law and (2) the entities were not performing municipal functions pursuant to a CEA. That Court noted that in this case, it is undisputed that LSPCA is a private entity. The only question was whether its performance of municipal functions under the CEA with the City subjected it to the Public Records Law.

Finally, the Court rejected LSPCA's contention that if it was found to be subject to the Public Records Law that it satisfied all reporting obligations by producing documents related to its CEA with the City. The Court held that the Public Records Law is purposefully broad and all inclusive, and cannot be circumvented by contract.

Therefore, the Court held that through the discharge of its duties and responsibilities under the CEA with the City, as well as the receipt of public money as remuneration for such service, the LSPCA is functioning as a municipal corporation, and is therefore subject to the Public Records Law. As the LSPCA is required to disclose all documents specifically related to the discharge of its duties and responsibilities under the CEA, the Court remanded the case to the district court to determine which documents satisfy that description.

Justice Hughes dissented in part. He agreed with the majority that the LSPCA has a duty to comply with the Public Records Law, but would have limited the scope of its response only to those documents prepared and maintained pursuant to the CEA and not all those related to the discharge of its duties and responsibilities under the CEA.

III. CONCLUSION

The functionality test established by the Louisiana Supreme Court in the *Bulldog Society* case expands the Public Records Law to private entities that engage in public functions in certain circumstances. The functionality test is fact specific and turns on whether the private entity is acting as an instrumentality of the public entity. The *Bulldog Society* Court was careful to point

out that the Public Records Law would not apply to the other records of the LSPCA that are unrelated to the governmental activities it performs pursuant to its CEA with the City of New Orleans. However, the Court was clear that when a private entity contracts with a public entity to assume its public duties and responsibilities, all documents of the private entity that are related to the discharge of those public duties and responsibilities will be subject to the Public Records Law.

As a result of the *Bulldog Society* decision, public entities contracting with private entities for the performance of public functions, and not merely services, should be aware that the Public Records Law will likely apply to those public duties undertaken by the private entity. When drafting their CEAs with the private entities, the public entities should address both the retention of records and response to records requests.