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Animals: New York City Pet Store Regulations are not Preempted and do not Violate Dormant Commerce Clause

***New York Pet Welfare Association v. City of City of New York*, No. 15-4013-cv (2d Cir. Mar. 2, 2017).**

New York City's laws requiring City pet shops to buy cats and dogs directly from federally-licensed breeders and to spay or neuter them before sale to the public are not preempted and do not create an impermissible burden on interstate commerce, the Second Circuit has found.

In 2015, New York City (City) passed various pet shop regulations, including one requiring City pet shops to purchase dogs and cats directly from federally licensed breeders (Sourcing Law) and one mandating that pet shops sterilize dogs and cats before releasing them to consumers (Spay/Neuter Law). The New York Pet Welfare Association (NYPWA) brought suit to block the mandates. It claimed that the Sourcing Law violates the dormant Commerce Clause and was preempted by the federal Animal Welfare Act (AWA), and that the Spay/Neuter Law was preempted by New York law. The district court dismissed NYPWA's complaint.

The Second Circuit affirmed. It found that the AWA's only preemptive provisions related to the federal licensing of animal breeders, and Congress otherwise envisioned that states and municipalities could derive their own local regulations which did not interfere with the licensing scheme:

> Breeders and distributors' ability to sell to City pet shops has no bearing on the licensing scheme's ability to facilitate federal enforcement activities. Distributors will still have to get licenses, will still have to provide information to federal officials, and will still have to open their facilities to federal inspection.

The Circuit also found that requiring City pet stores to buy directly from federally-licensed breeders (as opposed to "middlemen" who purchased the animals and then resold them to stores) did not have an impermissibly broad impact on interstate commerce. Some breeders would not have the resources to reach City pet stores, but that was an incidental impact and did not disproportionately hurt out-of-state breeders. "Where the cost of compliance with the Sourcing Law would be the same in Pittsburgh as in Buffalo, the Law cannot be said to impose a special burden on interstate commerce."

Finally, the Spay/Neuter Law was not preempted by state law. New York law grants broad powers to local governments to make their own laws "to the extent that they are not inconsistent with either the State Constitution or any general law." NYPWA argued that sterilizing a dog or cat at the minimum age and weight allowed by the Spay/Neuter Law-eight weeks old, and two pounds-while the animal is still in the custody of the pet shop, would violate a veterinarian's purported duties under New York law to (1) apply independent professional judgment, and (2) obtain the informed consent of the owner before performing a surgical procedure. But this unsupported allegation did not establish that the Spay/Neuter Law undermined statewide veterinarian regulations, because vets could always decline to perform the procedure.

LINK

Courts: Fact That City Employees Kept Plaintiff's Abated Property for Personal Use, While Unknown at Time of Prior Claim, Not Enough to Overcome Claim Preclusion

Anderson v. City of St. Paul, No. 16-1661 (8th Cir. Mar 1, 2017).

Court rules that core of nuisance abatement case was about taking and destroying-not retaining; therefore, claim preclusion applies.

Leonard Anderson owns 2.3 acres in St. Paul, Minnesota (City), on which he collected, stored,

and arguably, abandoned various items ranging from vehicles, trailers, and commercial containers to barrels, boats and broken-down lawnmowers. The City, finding this a nuisance, began trying to clean up the property in 2011. The deadline for clean-up came and went, prompting the City to enter the property and abate the nuisance. This resulted in a lawsuit in state district court, where Anderson unsuccessfully alleged Fifth and Fourteenth Amendment violations. The case then wandered through the state courts - including an appeal denial from the Minnesota Supreme Court. Anderson took his case to federal district court, where the court dismissed it, holding claim preclusion prevented him from relitigating claims he could have argued in the state case and denying his argument that he raised a "continuing wrong claim."

The Eighth Circuit determined that claim preclusion "applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." The Circuit found all of these elements present in comparing Anderson's previous state cases and his hoped-for federal case. Anderson argued that the fact that city employees kept some of the property abated for personal use was new and, as such, made the circumstances different. The court disagreed, noting that while this fact may have been unknown, the core of the federal case is about taking and destroying - not retaining - Anderson's property. As for whether the same parties were involved, while Anderson added seven parties - including the excavating company and counselors - the court found they were all in privity with the City. The state judgments clearly were final and, lastly, the Circuit found Anderson had every opportunity to pursue all his claims, theories, defenses, and all the procedural safeguards in the state court. It affirmed the lower court dismissal.

LINK

Courts: State Court is not Enjoined from Hearing Case Involving Prior Federal Court Consent Judgment Where Not All State Law Issues were Definitively Resolved

202 North Monroe, LLC v. City of Rockford, No. 16-1982 (6th Cir. Mar. 1, 2017).

Where a federal district court had resolved a zoning dispute via a consent judgment, the Anti-Injunction Act barred the federal courts' enjoining a state court action brought by non-parties to the consent judgment raising new issues of state law, and the relitigation exception would not apply because the non-parties were not bound by the prior judgment.

202 North Monroe, LLC sought to develop property in Rockford, Michigan. To do so it needed to rezone its property from "R-2 Single Family Residential" to "Planned Unit Development" (PUD). Under state law, when residents file a protest petition to such a zoning change, a super-majority of the city council is required to make the change. In this case, some residents did file such a petition and the rezone failed 3-2 at the City of Rockford (Rockford) city council.

202 North Monroe sued in state court, alleging that Rockford violated its substantive due process rights and effected an unconstitutional regulatory taking. Rockford removed the case to federal district court where it settled. The district court entered a consent judgment, including ordering that the property be rezoned from R-2 to PUD. Thereafter a community group, Neighbors for Neighborhood (Neighbors), filed suit in state court claiming that Rockford circumvented provisions of the state law and Rockford's own ordinances by "rezoning . . . the property through

the Consent Judgment" and seeking an injunction.

This prompted Rockford *and the developer* to file a complaint and emergency motion for a preliminary injunction against the Neighbors in federal district court, asking it to enjoin the state court from granting Neighbors' motion for a preliminary injunction. The district court held it lacked jurisdiction, prompting Rockford and the developer to appeal to the Sixth Circuit.

Rockford argued the district court could have exercised ancillary jurisdiction over the state case since its action was filed in the federal court to preserve a federal court judgment in the original action. The Sixth Circuit began by repeating the rule that "a federal court can exercise ancillary jurisdiction over a subsequent action involving settlement only if the settlement terms are made part of the order of dismissal-either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order." It then looked to the federal consent judgment and found that the district court indeed listed all fourteen terms of the settlement agreement in that judgment, meaning it explicitly incorporated the parties' entire agreement, thus meeting the test.

This led the Court to review the Anti-Injunction Act, which empowers federal courts to enjoin state courts *only* in certain, narrow, prescribed circumstances, namely, "as [1] expressly authorized by Act of Congress, or [2] where necessary in aid of its jurisdiction, or [3] to protect or effectuate its judgments." Only the third exception was at issue, and to meet it Rockford had to show that "the claim or issue raised in state court [was] previously presented to and actually decided by a federal court." Reviewing the facts, the Circuit found Rockford "failed to make the required strong and unequivocal showing that the issue in state court-whether the City's approval of the settlement complied with state and local law-was previously raised, argued, and decided." The Court identified Neighbors' state case as asking the *state court* to decide whether Rockford has the power *under state law*, to rezone a property through a consent judgment without complying with the requirements of a *state law*.

That simply was not previously decided and, even if it was, Neighbors was not a party bound thereby it since their motion to intervene had been objected to and ultimately denied by the initial federal court. As the Court said "we note that denial of the motion to intervene, followed by settlement on the terms of the consent judgment, meant that a challenge to the rezoning through further litigation was likely. The City thus invited its current dilemma, and the district court apparently failed to foresee the implications of the denial of the motion to intervene as well."

LINK

Deference: DHHS Agency Entitled to Deference in Classifying Roads as "Primary" or "Secondary" for Hospital Medicare Reimbursement

Baylor County Hospital District v. Price, No. 16-10310 (5th Cir. Mar. 7, 2017).

An agency of the Department of Health and Human Services was entitled to *Skidmore* deference in classifying roads to determine whether rural hospitals qualified as "critical care hospitals."

In 1997, Congress created a Medicare reimbursement advantage for rural hospitals categorized as "critical care hospitals"-a classification awarded to those facilities that were connected to the next nearest hospital by a "secondary road." Congress never defined "secondary road." The Department of Health and Human Services (DHHS), through an agency, subsequently defined "primary roads" as numbered federal highways or state highways with at least two lanes each

way or divided by a median.

Baylor County Hospital District d/b/a Seymour Hospital (Seymour) sought the advantaged status, but DHHS determined that, because 28 of the 31 miles connecting Seymour to the next closest hospital was a "primary road," Seymour could not qualify as a critical care facility. Seymour filed suit, challenging the legitimacy of DHHS's road definitions and arguing that DHHS was required to evaluate each hospital's road status on a case-by-case basis. The district court granted summary judgment to DHHS.

On appeal, the Fifth Circuit affirmed, concluding that DHHS was entitled to *Skidmore* deference in its road classifications. In attempting to fulfill Congressional intent, DHHS had considered a spectrum of factors, including a road's alphanumeric designation. The agency's assumption that federal highways were usually more substantial, more traveled and better-maintained than state roads was not arbitrary or capricious and the quality of its analysis about the issue was sufficient to justify *Skidmore* deference.

LINK

Employment: Under FLSA, No Compensation for Unauthorized Restroom Break Extensions

Sheehy v. Santa Clara Valley Transp. Auth., No. 15-15465 (9th Cir. Mar. 1, 2017).

The Ninth Circuit has affirmed summary judgment for a transportation authority after deeming assertions from plaintiff and testimony from plaintiff's union head to be legal conclusions.

Harold Sheehy worked as light rail operator at the Santa Clara Valley Transportation Authority (VTA) for twenty years. Until 2010, he operator Train 10 and his duties included returning the train to storage at the end of his shift - to "pull-in" the train. For roughly two decades, he was allotted forty-six minutes to do this maneuver and he consistently did it with a few extra minutes to spare every day. In July 2010, VTA adjusted the schedule, reducing the time allotted for pull-in by five minutes a day. For the next three years, Sheehy did the pull-in fifteen minutes behind schedule consistently, resulting in overtime requests, which VTA paid initially, but then investigated. VTA's investigation concluded Sheehy was taking an extra restroom break and denied him the overtime, resulting in Sheehy alleging VTA violated the Fair Labor Standards Act (FLSA). The district court granted VTA summary judgment and Sheehy appealed.

The district court held that while FLSA compensates workers for authorized breaks, it does not do so for unauthorized restroom break extensions. It found Sheehy was engaging in the latter. The Ninth Circuit disagreed with Sheehy's charge that the lower court erred in not finding there was a dispute of material fact about whether the breaks were authorized. It held instead that Sheehy made only blanket assertions that he was not required to seek approval to take a break and submitted the testimony of a union leader who worked as a bus driver, not a train operator. As a result the Circuit held the lower court correctly found that these did not create a genuine dispute of material fact. The Court did not agree with VTA that the appeal was frivolous either however, and denied its request for fees.

LINK

Ordinances: Court Cannot Remedy Ambiguous Ordinance Not Explicitly Providing for Utility Reimbursement due to Clerical Error

NIBCO Inc. v. City of Lebanon, No. 16-3395 (6th Cir. Feb. 27, 2017).

Where a city ordinance did not specifically provide for reimbursement of electricity undercharges which occurred due to clerical error, the customer could not be required to repay more than $1 million based merely on public policy grounds.

Lebanon, Ohio (City) made a clerical error, applying an incorrect meter multiplier and undercharging NIBCO, Inc. (NIBCO) for electricity for 65 months. The City thereafter sought to collect the $1.27 million undercharge by adding roughly $20,000 to each NIBCO monthly bill until the shortfall was made up. Instead of paying the additional money, NIBCO filed suit for declaratory judgment, asserting it had no obligation to make the payment. The district court held that the parties' relationship was governed not by contract but by a City ordinance, which was silent as to undercharges for this type of error. Nevertheless, the court concluded that not allowing the City to recoup the lost monies would be an "absurd result," and required NIBCO to pay.

On appeal, the Sixth Circuit noted that the ordinance allowed for recouping undercharges in two situations - meter malfunctions and theft of service - limited to a 12-month "statute of limitations" but no others. NIBCO argued that language limited the scenarios where undercharges could be recouped, while the City argued there were unlimited recovery options for anything other than the two specifically listed. The Court agreed with NIBCO, noting that state precedent held that a silent ordinance is not necessarily an ambiguous one; here, the narrow language was clear, making broad public policy arguments inappropriate.

The City also argued that a different state precedent required that NIBCO pay for all the electricity it *used*. The Circuit disagreed, noting that the case cited by the City involved a contract, not an ordinance. The court declined to solve the City's dilemma: "The City's puzzling request to 'void' its own legislative 'silence' is, at bottom, a thinly-veiled plea that the federal judiciary rewrite its Code of Ordinances to provide a remedy that did not exist at the time of its errors."

LINK

Fourth Amendment: Arrestees Have No Reasonable Expectation of Privacy While Conversing in Police Van.

United States v. Paxton, Nos. 142913 (7th Cir. Feb. 17, 2017).

Reversing the district court, the Seventh Circuit has found that arrestees who have been placed in a police van before being given *Miranda* warnings and whose whispered conversation is picked up by hidden recording devices in the vehicle do not have a reasonable expectation of privacy.

Five defendants who had been recruited by an undercover agent were arrested as they were preparing to execute a planned robbery of a fictitious narcotics "stash house." Two of the defendants, Randy Walker and Randy Paxton, were arrested outside of a restaurant and placed into a clearly marked police transport van. The back of the van's interior was divided into three compartments for detainees by two solid steel walls and small double plexiglass viewing windows. After Walker and Paxton were placed into the van, officers drove the van a short

distance to a warehouse where officers then arrested the other three defendants involved in the sting operation.

The later three defendants were placed into the rear-most compartment of the van along with Walker and Paxton "shoulder to shoulder, knee to knee" and all with their wrists handcuffed behind their backs. None were given *Miranda* warnings before being placed into the van, though each individual was asked to state his name and give other identifying information (*Miranda* warnings were later at the field office). The district court determined that the defendants could expect for their voices to be heard outside the van if they spoke in an above-normal tone of voice.

During the drive to the field office, the five defendants quietly conversed; however, unbeknownst to them, two recording devices had been hidden in the rear compartment of the van to capture their conversation. While one defendant remarked that the van was "probably bugged," the defendants continued the conversation and made several incriminating statements. The Seventh Circuit reversed the district court's suppression of the recorded statements, holding that the defendants lacked an objectively reasonable expectation of privacy in the van.

LINK

Police: Excessive Force Claim is Barred Where Plaintiff Was Convicted of Resisting, Delaying, and Obstructing Officer in Lawful Exercise of Officer's Duties

Galindo v. City of Orange, No. 15-55792 (9th Cir. Feb. 24, 2017). (Unpublished).

A Section 1983 claim is barred where actions leading to the plaintiff's conviction occurred concurrently with the elements of his excessive force claim.

Jorge Galindo was convicted of violating California Penal Code Sec. 148(a)(1). He filed a §1983 claim thereafter, alleging excessive force by the officer involved and pursuing the City of Orange for damages. The district court summarily dismissed the case under *Heck v. Humphrey,* 512 U.S. 477 (1994). The Ninth Circuit affirmed.

Under *Heck*, a plaintiff's §1983 claim for damages automatically fails if success on the claim would "necessarily imply" the invalidity of a related prior criminal conviction. In Galindo's case, the Circuit pointed out two bases upon which the City succeeded. First, for Galindo's §1983 claim to succeed he would have negated an element of his conviction under the California Code - the precise element of which was that he "resisted, delayed, or obstructed a police officer in the lawful exercise of" his duties. Moreover, his allegations in the §1983 suit were inconsistent with the admissions that supported his conviction - more precisely, his §1983 allegation was that he was acting lawfully and did not resist, but his guilty admission was that he resisted the lawful actions of a police officer. As a result, the City won the appeal.

LINK

Police: Officer's Interpretation of Tail Light Law is Just as Reasonable as Defendant's Interpretation and Supports Admissibility of Evidence

United States of America v. Bowers, No. 16-1362 (8th Cir. Mar. 2, 2017).

Where a police officer's interpretation of a Missouri tail light statute was equally valid as the interpretation requested by the defendant, the officer's actions qualified as objectively reasonable and required admission of traffic stop evidence.

In 2014 a Columbia, Missouri police officer stopped Charles Minton Bowers after noticing his tail light emitted *both* white and red light. Once stopped the officer obtained consent to search the vehicle and found cocaine and marijuana, leading to charges of possession with intent to distribute under federal law. Bowers then challenged the traffic stop, alleging it was unlawful and therefore the drugs found were suppressed under the fruit of the poisonous tree doctrine. The district court denied the motion to suppress, leading Bowers to appeal.

Beginning with the state law, the Court noted Missouri Revised Statute § 307.075(1) requires that "[e]very motor vehicle . . . shall be equipped with at least two rear lamps, . . . which when lighted will exhibit a red light plainly visible from a distance of five hundred feet to the rear." Bowers contended this law does *not* prohibit a tail light from emitting *any* white light, only that two taillights be operable and that the white light not overpower the red light visible from at least 500 feet. He contested the officer's reading of the law as meaning that any white light emission was illegal as not "objectively reasonable." The government countered that the officer's reading was just as reasonable as Bowers'. The Eighth Circuit held it need not decide this thorny question, rather it relied on *Heien v. North Carolina*, 135 S.Ct. 530 (2014), wherein the Supreme Court held officers' reasonable mistakes of *law* do not require suppressing evidence. Here the court found both parties' interpretations of the statute were reasonable, meaning that the officer's stop was, at a minimum, based on an objectively reasonable mistake of law and the evidence need not be suppressed.

LINK

Prisons: Severity and Duration, Not Resulting Injury is Most Appropriate Lens Through Which to Assess Unsanitary Confinement Conditions

Darnell v. City of New York, No. 15-2870 (2d Cir. Feb. 21, 2017).

The Second Circuit has clarified the deliberate indifference standard as it pertains to sanitary conditions, remanding for consideration with respect to *Kingsley v. Hendrickson*.

Plaintiffs, twenty state pretrial detainees who had been held for less than twenty four hours, filed suit under 42 US.C. § 1983 alleging that the City of New York and the supervisory officers of pre-arraignment holding facility were deliberately indifferent to allegedly unconstitutional conditions within the holding facility. Specifically, they alleged they were subjected to "degrading" conditions such as overcrowded and unsanitary cells, as well as rotten food and undrinkable water. One plaintiff testified that his cell was so crowded that he could not determine if it had a bathroom. Other plaintiffs testified that the toilets were overflowing onto the floors of the cells and, consequently, were unusable. Pursuant to prison policy, cells did not contain trashcans and detainees were expected to throw trash onto the floor, which Plaintiffs alleged attracted vermin and further created unsanitary living conditions that prevented detainees from sleeping.

The U.S. District Court for the Eastern District of New York granted summary judgment in favor of the defendants and denied a subsequent motion for reconsideration. The court held that, under *Caiozzo v. Koreman*, the Plaintiffs had failed to meet an objective and subjective prong necessary to demonstrate deliberate indifference. With respect to the objective prong, the district

court concluded the plaintiffs had not suffered a serious injury and had not been regularly denied basic human needs for a period greater than twenty four hours. With respect to the subjective prong, the court noted that plaintiffs had not established that defendants were actually aware of any dangerous conditions.

The Plaintiffs appealed. The Second Circuit reversed in part and remanded in part, concluding that the district court had misapplied precedents. Referencing *Willey v. Kirkpatrick*, the Second Circuit indicated that the proper lens through which to analyze allegedly unconstitutional unsanitary conditions of confinement was with reference to their severity and duration rather than the detainee's resulting injury. Moreover, under *Kingsley v. Hendrickson* the Supreme Court directs that deliberate indifference should be measured only through the objective prong in due process cases, rather than through both objective and subjective lenses. Because the district court did not account for *Kingsley* in its opinion and instead employed both an object and subjective prong, the Second Circuit remanded the case.

LINK

Public Records: California High Court Rules that Governmental Communications on Personal Devices are Discoverable Public Records

City of San Jose v. Superior Court of Santa Clara County, No. S218066 (Ca. Mar. 2, 2017).

Reversing a contrary holding by the state's Court of Appeals, the California Supreme Court has ruled that communications by governmental employees about governmental issues that are sent, received or stored via personal emails, texts or the like are discoverable under California's Public Records Act.

Ted Smith (Smith), a resident of the City of San Jose (City), suspected that City officials were hiding communications about a proposed redevelopment project (Project) in the City's downtown, by sending private emails and texts on personal computers and cellphones. The Project involved prior City mayor Tom McEnery, who ultimately obtained a $6 million loan from the City's Redevelopment Agency.

Smith requested that the City turn over 32 categories of public records regarding the Project. The City complied as to communications on City telephones and computers but declined the demand for "any and all voicemails, emails or text messages sent or received on private electronic devices used by Mayor Chuck Reed or members of the City Council, or their staff, regarding any matters concerning the City of San Jose, including any matters concerning Tom McEnery."

Smith sued for declaratory relief, arguing that "public records" under the California Public Records Act (CPRA) includes all communications about official business, regardless of how they are created or stored. The City responded that private communications are not public records because they are not within the City's "custody or control."

Nearly a decade of litigation ensued. The trial court agreed with Smith; the Court of Appeals reversed. On March 2, the California Supreme Court concluded that such communications cannot avoid CPRA scrutiny:

> Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act. . . . The City's interpretation would allow evasion of CPRA

> simply by the use of a personal account. We are aware of no California law requiring that public officials or employees use only government accounts to conduct public business. If communications sent through personal accounts were categorically excluded from CPRA, government officials could hide their most sensitive, and potentially damning, discussions in such accounts.

The CPRA was enacted in 1968 and states that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." In 2004, voters made this principle a part of the California Constitution. As the California Supreme Court noted, although the law was originally designed to cover paper documents, it must be applied to "evolving methods of electronic communication." Current interpretation of the CPRA further requires the recognition that, "in today's environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained workplace."

The decision saw a clear mandate in the CPRA and the Constitutional amendment favoring public disclosure. They create "a presumptive right of access to any record *created or maintained* by a public agency that relates in any way to the business of the public agency." (citation omitted). Merely creating or storing records outside of workplace facilities would not avoid that mandate:

> We likewise hold that documents otherwise meeting CPRA's definition of "public records" do not lose this status because they are located in an employee's personal account. A writing retained by a public employee conducting agency business has been "retained by" the agency within the meaning of section 6252, subdivision (e), even if the writing is retained in the employee's personal account.

The court disagreed with the City's argument that the term "public agency" excluded individual workers in their private capacity, or that omitting the word "officer" from the definition of "local agency" reflected a legislative intent that CPRA apply to individuals who work in state agencies but notto employees in local government: "The City offers no reason why the Legislature would draw such an arbitrary distinction."

Despite acknowledging the City's assertion that searches of private emails could unearth purely personal information, the court found that the privacy concerns of government workers should yield to the public's interest in transparency, and that the employees could be relied on to determine which records required disclosure:

> As to requests seeking public records held in employees' nongovernmental accounts, an agency's first step should be to communicate the request to the employees in question. The agency may then reasonably rely on these employees to search their own personal files, accounts, and devices for responsive material.

LINK

California is not alone in reaching this conclusion. As Ramsey Ramerman, Everett Washington Assistant City Attorney reported in 2015, a unanimous Washington State Supreme Court ruled in *Nissen v. Pierce County,* 357 P.3d 45 (Wa. 2015), that "text messages sent and received by a public employee in the employee's official capacity are public records of the employer, even if the employee uses a private cell phone."

The Washington lawsuit arose after the Pierce County prosecutor acknowledged he had used his personal cell phone to make calls and exchange text messages for county business. The Court required disclosure under the state's Public Records Act (PRA) for all records in the exclusive possession of an employee if the employee was acting in the capacity of a city employee when the record was created or received--including e-mails on a personal computer or in a private e-mail account, as well as paper records in a home office.

Mr. Ramerman pointed to passages in the Washington Supreme Court decision that would facilitate the determination as to what was discoverable and what remained private-and placed the ultimate responsibility for that decision on the employee:

> **When is a record in the exclusive control of an employee a "public record"?**To determine whether a record on an employee's private device is a city "public record," the *Nissen* Court adopted a relatively simple test: did the employee create or receive the record on the device while acting "within the scope of employment"? "An employee's communication is 'within the scope of employment' only when the job requires it, the employer directs it, or it furthers the employer's interests." In other words, was the employee wearing the official "city hat" or the employee's "personal hat" when the record was created or received? Employees will almost always know what "hat" they are wearing at the time they are handling the particular records at issue.
>
> **How does a city obtain records held by employees and prove its compliance with the PRA?** The most contentious issue in the *Nissen* case related to what the county was required to do or could do to obtain records off of a personal cell phone. While the Court ruled that those text messages were public records, it rejected the requestor's claims that the employee had waived his privacy interests by using the phone for county business and that the county was required to seize and search that phone. Instead, the Court ruled that an agency like the county could fully comply with the PRA by relying on the employee to conduct the search himself: "To satisfy the city's burden to show it conducted an adequate search for records, we permit employees in good faith to submit 'reasonably detailed, nonconclusory affidavits' attesting to the nature and extent of their search." In addition, if there are records that could appear to be public records but the employee has determined that the records were not created or received in the capacity of an employee, the declaration should explain that determination.

The full text of Mr. Ramerman's article is available in the November/December 2015 *CityVision Magazine*, accessible HERE.

THIS JUST IN: Municipal Attorney Pleads Guilty to Securities Fraud in Munibond Case

Last year IMLA member Robert Doty alerted us to the continuing scrutiny and increased enforcement activities being brought to bear on municipalities by the SEC in connection with municipal bond offerings.

One of those actions, involving the Town of Ramapo, New Jersey, has resulted in what Mr. Doty believes is the first known instance of a municipal attorney pleading guilty to securities fraud charges. Aaron Troodler, an assistant Ramapo Town Attorney and executive of the Ramapo Local Development Corporation has pleaded guilty to criminal federal securities fraud in connection with $150 million of bonds sold by Ramapo to finance, among other things, a baseball stadium.

During a six-year period when Ramapo's primary operating fund actually accumulated a deficit of $14 million, Mr. Troodler and others falsely depicted positive balances on the Town's books, masking facts from investors.

The Bond Buyer article referenced by Mr. Doty may be accessed HERE.

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