

**STATE OF VERMONT
SUPREME COURT**

Human Rights Defense Center,
Appellant,

Case No.: 2020-308

v.

**Correct Care Solutions, LLC and
Correctional Care Solutions
Group Holdings, LLC,
d/b/a Wellpath,**
Appellees.

BRIEF OF THE APPELLANT

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Statement of the Issue

Did the trial court err in finding that a private entity, whose sole presence in the State of Vermont was to undertake the governmental function of providing comprehensive medical services to prisoners in the custody of the Vermont Department of Corrections, was not subject to the requirements of Vermont's Access to Public Records Act, 1 V.S.A. § 315?

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I. Statement of the Case

Appellant Human Rights Defense Center (“HRDC”), plaintiff in the trial court, brought suit against Appellee Correct Care Solutions LLC (“Wellpath”)¹ to enforce the Vermont’s Access to Public Records Act, 1 V.S.A. §§ 315 *et seq.* (the “Act”). HRDC is a non-profit charitable organization that advocates on behalf of prisoner rights throughout the United States. P.C. at 120. As part of its mission, HRDC publishes a magazine, *Prison Legal News*, which contains, among other things, news and analysis of court opinions that implicate prisoners’ rights, management of prison facilities, prison conditions, and other matters pertaining to the rights and interests of incarcerated individuals. Appellant’s Printed Case (“P.C.”) at 121.

Wellpath is a private company whose sole business is the administration and operation of medical services in prisons and jails. P.C. at 117, 125-129. From 2010 to 2015 Wellpath contracted with the Vermont Department of Corrections (“VDOC”) to provide comprehensive health care services to prisoners in VDOC’s custody. P.C. at 117. Under the contract with VDOC, Wellpath was responsible for all aspects of prisoners’ health care, including primary care, emergency services, specialist referrals, transportation to outside facilities, provision of prescription drugs, dental care, chronic and convalescent care, mental health care, and laboratory services. P.C. at 117. The contract between VDOC and Wellpath included 49 pages of very detailed requirements as to how healthcare was to be provided in its facilities. P.C. at 117-118. Wellpath’s clinical director was required to meet “regularly” with VDOC administrators to “discuss health services,” and, in the event that there arose a clinical dispute over inmate care, the contract gave the VDOC Health Services Director the final decision-making authority.

¹ Appellee Correct Care Solutions LLC is now doing business as Wellpath. Appellant will refer to Appellee as “Wellpath” in this brief in order to maintain consistency with the trial court’s decision on the cross-motions for summary judgment.

During its contractual presence in Vermont, Wellpath was paid over \$90 million by the State of Vermont to provide such services. P.C. at 118. Wellpath did no other business in Vermont during that time. P.C. at 118.

On December 19, 2017 HRDC sent a public records request to Wellpath, asking for the complaint or claim form, as well as any verdict, judgment, order, settlement, or decree, relating to Wellpath's provision of medical services to prisoners in Vermont pursuant to contract with VDOC. P.C. at 121. Wellpath did not respond to HRDC's records request before this lawsuit was filed. P.C. at 122.

On February 6, 2019 HRDC filed the instant lawsuit. The trial court denied Wellpath's subsequent Motion for Judgment on the Pleadings, P.C. at 51, which argued that a private entity was not subject to the Act as a matter of law. After discovery, both parties filed a motion for summary judgment. The trial court granted Wellpath's motion, denied HRDC's motion, and entered judgment for Wellpath. HRDC then timely filed notice of this appeal, arguing that the court erred in finding that Wellpath is not subject to the Act.

II. Summary of the Argument

This case involves the public's right to know how tens of millions of dollars in taxpayer money was used. The State is constitutionally and statutorily obligated to provide adequate medical care to prisoners in its custody. *See, e.g., Estelle v. Gamble*, 42 U.S. 97 (1976); 28 V.S.A. § 801(a)². The VDOC contractually delegated this quintessential and mandated governmental function to Wellpath, and paid Wellpath more than \$90 million over 6 years for

² "The Department shall provide health care for inmates in accordance with the prevailing medical standards."

this service. P.C. at 118. Pursuant to the contract Wellpath provided comprehensive medical services at all of VDOC's in-state facilities. P.C. at 117.

It is against that backdrop that this Court must decide whether Wellpath is the functional equivalent of a governmental agency, and therefore subject to the Act. Although the parties disputed which test to apply, the trial court properly chose to employ the functional equivalency analysis in this case. However, the trial court erred in determining that Wellpath was not the functional equivalent of a government agency under that test.

In evaluating functional equivalence, courts weigh the following non-exclusive factors: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.” *Whitaker v. Vt. Info. Tech. Leaders, Inc.*, 2016 Vt. Super. LEXIS 43 at *3 (Vt. Super. Ct., Oct. 27, 2016); *Prison Legal News v. Corr. Corp. of Am.*, 2014 Vt. Super. LEXIS 36 at *21 (Vt. Super. Ct., Jan. 10, 2014). In this case, contrary to the express codified statement of legislative intent that the Act be read broadly to effectuate its purposes,³ the trial court took a much too limited view of what constitutes a governmental function under the first factor. Further, the trial court did not perform any meaningful analysis of the other three factors. The second and third factors strongly support Appellant's case, given that the activity in question was fully funded by the government and VDOC retained significant control over the provision of medical care to prisoners. Ultimately, the court's flawed reasoning led it to the wrong conclusion, that Wellpath was not the functional equivalent of a government agency.

³ “[T]he provisions of this subchapter shall be liberally construed to implement this policy [.]” 1 V.S.A. § 315(a).

III. Legal Standard

An appellate court reviews a grant of summary judgment *de novo*, using the same standards that applied in the trial court. *Stopford v. Milton Town Sch. Dist.*, 2018 VT 120, ¶ 11 (Vt. 2018). A court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3). The moving party bears the burden of proof, *Kelly v. Barnard*, 155 VT 296, 299 (Vt. 1990), and the court affords the non-moving party “the benefit of all reasonable doubts and inferences.” *Doe v. Forrest*, 2004 VT 37, ¶ 9 (Vt. 2004). On appeal, review is not limited to the facts and law cited by the trial court. *Stopford*, 2018 VT 120, ¶ 11.

IV. Argument

A. The Trial Court Correctly Decided to Use the Functional Equivalency Test in this Case.

As a threshold matter, Appellees argued below that the Act did not apply to private entities such as itself. The trial court appropriately rejected this argument, noting that the Act “expounds on a fundamental issue of governmental accountability embodied in the Vermont Constitution: the principle that in a constitutional democracy, officials of government should be accountable to the people.” P.C. at 5. The trial court’s ruling in this regard is fully consistent with the intent of the Act. The Act came into being in the 1970s, in the wake of the Nixon-Watergate scandal, when the federal government and many states enacted open records laws. *Vt. State Emples. Ass’n v. Vt. Agency of Natural Res.*, 2011 Vt. Super. LEXIS 2, *3 (Vt. Super. Ct., Jan. 6, 2011). In the Act’s preamble the Legislature stated that

It is the policy of this subchapter to provide for free and open examination of records consistent with Chapter I, Article 6 of the Vermont Constitution. Officers of government are trustees and servants of the people and it is in the public interest to enable any person to review and criticize their decisions even though such examination may cause inconvenience or embarrassment.

1 V.S.A. § 315(a). Further, “the provisions of this subchapter shall be liberally construed to implement this policy [].” *Id.* Vermont’s courts have recognized the Act’s “strong policy favoring access to public documents and records.” *See, e.g., Doyle v. City of Burlington Police Dept.*, 2019 VT 66 ¶ 11.

To this end, the Legislature enacted a public records law that provides for wide application to government business; it applies “any agency, board, department, commission, committee, branch, instrumentality, or authority of the State.” 1 V.S.A. § 317(a)(2). As the trial court recognized, the terms “instrumentality” and “authority” include circumstances in which the State has given over its power to some other entity. P.C. at 4. Thus, private companies that become an instrumentality of or invoke the authority of a government agency come within the purview of the Act.

Cases from Vermont’s trial courts have also recognized that private companies may, and often do, constitute a “public agency” for purposes of the Act. *Whitaker*, 2016 Vt. Super. LEXIS 43; *Prison Legal News*, 2014 Vt. Super. LEXIS 36. To determine which private entities are an instrumentality of or invoke governmental authority, these court have adopted the functional equivalency test. *Id.* “The predominant factors used to evaluate functional equivalence are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government.” *Whitaker*, 2014 Vt. Super. LEXIS 36 at *3. These factors are non-exclusive. *Prison Legal News*, 2014 Vt. Super. LEXIS 36 at *21. Interestingly, in oral argument on March 17, 2021 in another case interpreting the Act before this Court, *McVeigh v. Vermont School Boards Association*, Docket No. 2020-270, both parties embraced the application of the functional equivalence test, only diverging on its application to the facts of that case. The

position of the parties in that case was consistent with all Vermont trial courts that have addressed the issue, to date. These courts have expressly found that the functional equivalence test applies, given that it realizes the Legislature’s intent to broadly apply the Act to effectuate its purposes. The trial court here was correct to employ it to evaluate this case.

B. The Trial Court Erred in its Application of the Functional Equivalence Test to the Facts of this Case.

Although the trial court was correct to use the functional equivalence test, it erred in its analysis of the factors as applied to this case. The court construed the term “governmental function” too narrowly, in a way that would exclude many governmental activities from its ambit. Moreover, the court did not substantially analyze the other three factors at all. Each of the four factors will be addressed here in turn.

1. Whether the entity performs a governmental function

In completely taking over the State’s obligation to provide medical care to prisoners, Wellpath performed a governmental function. Indeed, absent any delegation by contract, the State would be constitutionally and statutorily mandated to administer medical care itself.

The trial court based its ruling on its belief that “Wellpath exercised no clear governmental decision-making power or policymaking function, it was not woven into the State’s regulation of the healthcare industry or prison operations, and it did not substantially do anything else that required a delegation of governmental power.” P.C. at 5-6. First, that is incorrect. Wellpath’s contract shows that it *was* woven into VDOC’s prison operations. The contract required, in explicit detail, the types of healthcare works that had to be present at each VDOC facility and the number of hours they had to work there each day. The contract also determined when, how many times, and under what circumstances Wellpath could administer certain medical treatment, such as prescription drugs or appointments at outside healthcare

providers. P.C. at 117-118. If there was ever a clinical dispute over inmate care, the contract gave the VDOC Health Services Director the final decision-making authority. Under the contract, Wellpath essentially became a direct arm and agency of VDOC.

Second, even if it weren't the case that the contract so explicitly controlled healthcare in VDOC to the point where the Department retained final say on treatment decisions, Wellpath was the functional equivalent of a government agency because it completely became responsible for discharging a mandatory governmental activity. In formulating "governmental function" the way it did, the trial court adopted a too stringent view of what qualified. The instant case is a good example of why the trial court's formulation is wrong. If a private company's sole business in Vermont is to be paid millions of dollars to do a job the government is both constitutionally and statutorily required to do, that company is performing a governmental function. In determining that Wellpath was not performing a governmental function, the trial court erred.

2. The Level of Government Funding

It is undisputed in this case that Wellpath's activities in Vermont were entirely government funded. The State paid over \$90 million to Wellpath for its services. P.C. at 118. Wellpath had no other customers in Vermont. P.C. at 118. This factor weighs heavily in favor of Appellant.

3. The Extent of Government Involvement or Regulation

This factor also weighs in favor of Appellant. VDOC was heavily involved in Wellpath's provision of medical services through extremely detailed clauses in the contract between them. The contract contains 49 pages of rules for how medical care is to be provided to persons legally committed to the custody of VDOC, including mandates for staffing levels, the frequency which certain prisoners must be seen by health professionals, and timelines for when treatment and

pharmaceuticals must be provided. P.C. at 117-118. Wellpath was also required to provide periodic reports to VDOC about its performance under the contract. While VDOC may not have been making individual treatment decisions, it is clear that it still exerted a substantial amount of control over how medical services were provided at its facilities. Indeed, if there was ever a clinical dispute over inmate care, the contract gave the VDOC Health Services Director the final decision-making authority. Thus, this factor also favors the Appellant.

4. Whether the Entity was Created by the Government

It is also undisputed that Wellpath was not created by the government. Nevertheless, the courts have been clear that a private company can be the functional equivalent of a governmental agency, *see, e.g., Prison Legal News, supra*, and the other factors all point to that being the case for Wellpath. The fact that Wellpath was created privately does not change that outcome. Indeed, the trial court recognized that “there may be circumstances where a private entity has entered into a relationship with the government whereby it subjects itself to the PRA.” P.C. at 60-61.

Finally, the functional equivalence factors are non-exclusive, and there is one more consideration in this case that supports a finding that Wellpath is subject to the Act: the extent to which it performed the government’s responsibility. The trial court found that Wellpath was just a contractor, P.C. at 5-6, but there is a key difference between an entity that sometimes provides services to the government and an entity that has completely and exclusively contracted to fully perform a mandatory governmental function. Wellpath is not a medical group with a private practice who also happens to treat prisoners when the need arises. Indeed, Wellpath has no private customers in Vermont. P.C. at 118. Rather, Wellpath’s entire *raison d’etre* is to do the government’s job for it. P.C. at 117, 125-129. Wellpath was performing an intrinsically, and

constitutionally mandated, governmental function. *Estelle v. Gamble*, 42 U.S. 97 (1976); 28 V.S.A. § 801(a). It is therefore subject to the Act. Such a ruling would be consistent with the national consensus. Other states that have decided this precise issue have uniformly held that private companies that provide health services to prisons and jails are subject to those states' public records laws. *See, e.g., Rushton v. Dept. of Corr.*, 160 N.E. 3d 929 (Ill. 2019); *New Mexico Found. For Open Gov't v. Corizon Health*, 460 P.3d 43 (N.M. Ct. App. 2019); *Prison Health Services v. Lakeland Ledger Publ'g Co.*, 718 So.2d 204 (Fla. 2d Cir. 1998).

V. Conclusion

For the foregoing reasons, Appellant HRDC respectfully requests this Court hold that Wellpath is subject to Vermont's Access to Public Records Act, reverse the trial court's order granting summary judgment in Appellee's favor, and direct the trial court to enter summary judgment for HRDC.

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Respectfully submitted,
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V.R.A.P. 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

This is to certify that the Appellant's Brief contains 2630 words, excluding the statement of issues, tables of contents and authorities, signature blocks, and certificate of compliance based upon the word count function of Microsoft Word 2013.

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