



EDUCATION PRACTICE

ALERT

IT'S GOVERNMENTAL MY DEAR

When Sherlock Holmes says "its elementary," he's saying "of course this is the way it is." He's looked into the facts, discovered his clues and come up with the only answer that could possibly fit the facts.

Now, the OOR and the Commonwealth Court are saying the same when investigating if the job an agency is having an outside party do is "a governmental function." Of course, it is a pretty easy investigation.

If fact, you may not even want to bother with that part of the equation. This is because the court has made it REALLY easy on you: everything the agency does is a governmental function, so when the agency has someone else do that something for it, it is governmental, too.

In case you had been hoping that the East Stroudsburg case would turn out to be an anomaly or rely on its unusual facts, I have bad news. In a panel decision written by Judge Pelligrini, the court in *Buehl v. OOR* reiterated the language from the earlier case before coming up with a somewhat less controversial finding that the operation of the Dept of Corrections' commissary is a governmental function. Therefore, if someone else runs or supplies the commissary, it is also a governmental function.

When the RTKL first came out, the general

understanding was the 'governmental function' language referred to the various court rulings determining 'intrinsic governmental functions' (which are core functions of governmental agencies and are the opposite of 'proprietary functions', essentially when a government acts as a business). If that turned out to be the proper interpretation, the only time documents held by a school district's contractors would be available would be if that contractor's job was directly involved in teaching. The *Buehl* and earlier *East Stroudsburg* cases dispell that idea. Now, if a school contracts for lining the football field, documents directly relating to that task in the hands of the contractor will be available to a requester.

(Actually, there is a second requirement, but my point concerns the definition. Interestingly, the proposed amendment to the RTKL currently kicking around Harrisburg calls for further restrictions on what documents in the hands of a third party are available to a requester).

So, in the end, if Sherlock wants a more challenging game, he should try instead to discover what will NOT be a governmental function. Tally Ho! The game is a foot!

If you have any questions about this Alert, please contact Kyle Berman at 610.397.7980 or aberman@foxrothschild.com, or any member of [Fox Rothschild's Education Law Group](#).