

Sunshine and Public Records, nonprofit medical center

Number: INFORMAL

Date: November 14, 1997

Subject:

Sunshine and Public Records, nonprofit medical center

The Honorable Anna Cowin
Senator, District 11
240 Senate Office Building
Tallahassee, Florida 32399-1100

Dear Senator Cowin:

You state that a number of your constituents have contacted your office regarding a potential merger of the Leesburg Regional Medical Center with the Orlando Regional Health Service. The citizens are concerned that the merger will occur without the input or approval of the community.

You ask whether the Leesburg Regional Medical Center is subject to the state's open government laws and, if so, what is the effect of action taken in violation of those laws. This office has only limited information regarding the medical center, therefore, any comments must be general in nature.

Florida's Government in the Sunshine Law, section 286.011, Florida Statutes, provides that all meetings of a board or commission of "any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision . . . at which official acts are to be taken are declared to be public meetings open to the public at all times[.]"[1]

Florida courts have stated that it was the Legislature's intent to extend application of the Sunshine Law so as to bind "every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control." [2] The statute has been held applicable to private organizations when the private entity has been created by public agencies, when there has been a delegation of the public agency's governmental functions, or when the private organization plays an integral part in the decision-making process of the public agency.[3]

In interpreting the Sunshine Law, the courts have looked to the provisions of the Public Records Law, Chapter 119, Florida Statutes, stating that as the policy behind Chapter 119, Florida Statutes, and the policy behind section 286.011, Florida Statutes, are similar, they should be read *in pari materia*. [4] In determining the applicability of either the Public Records Law or the Sunshine Law to a private organization, the courts and this office have generally reviewed the relationship between the private entity and the public agency.

For example, the Supreme Court of Florida in *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, [5] articulated a totality of factors test to determine

whether a private entity is acting "on behalf of" a public agency for purposes of Chapter 119, Florida Statutes. This analysis involves consideration of the following:

- "1) Creation--did the public agency play any part in the creation of the private entity?
- 2) Funding--has the public agency provided substantial funds, capital or credit to the private entity or is it merely providing funds in consideration for goods or services rendered by the private entity?
- 3) Regulation--does the public agency regulate or otherwise control the private entity's professional activity or judgment?
- 4) Decision-making Process--does the private entity play an integral part in the public agency's decision-making process?
- 5) Governmental Function--is the private entity exercising a governmental function?
- 6) Goals--is the goal of the private entity to help the public agency and the citizens served by the agency?"

Using this test, the *Schwab* Court concluded that an architectural firm, under contract with a school board to provide architectural services associated with the construction of school facilities, was not "acting on behalf of" the school board. Therefore, the architectural firm was not subject to the requirements of Chapter 119, Florida Statutes.[6]

Recently, the Fifth District Court of Appeal in *News-Journal Corporation v. Memorial Hospital-West Volusia Inc.*,[7] reviewed the relationship between a hospital authority and the not-for-profit company leasing the public hospital's facilities for purposes of Article I, section 24, Florida Constitution.[8] The district court, however, recognized a distinction between a contract in which the private entity provides services to a public body and a contract in which the private entity provides services in place of the public entity:

"If one merely undertakes to provide material--such as police cars, fire trucks, or computers--or agrees to provide services--such as legal services, accounting services, or other professional services--for *the public body to use* in performing its obligations, then there is little likelihood that such contractor's business operation or business records will come under the open meetings or public records requirements. On the other hand, if one contracts to relieve a public body from the operation of a public obligation--such as operating a jail or providing fire protection--and uses the same facilities or equipment acquired by public funds previously used by the public body then the privatization of such venture to the extent that it can avoid public scrutiny would appear to be extremely difficult, regardless of the legal skills lawyers applied to the task."

The court held that the not-for-profit company, which was specifically created to contract with a public hospital authority for the operation of the authority hospital established by public funds, was subject to constitutional open records and open meeting requirements. The decision of the district court has been appealed to the Supreme Court of Florida.[9]

While you state that the medical center is built on property owned by the city, that factor alone, while certainly relevant would not in and of itself be determinative of whether the medical center's meetings and records were open. I also note that Chapter 95-508, Laws of Florida, authorizes funding by the board of trustees of the North Lake County Hospital District to the Leesburg Regional Medical Center Charitable Foundation, Inc., upon written request that such

funds are needed.[10] There may be other factors that would be relevant to a judicial inquiry on this issue.

I hope that the above discussion will be of assistance in determining whether the medical center is subject to the Sunshine and Public Records Laws or the provisions of Article I, section 24, Florida Constitution.

If it is determined that the medical center is subject to the Sunshine Law and Public Records Law, both statutes prescribe penalties for violation of their provisions.[11] In addition, section 286.011, Florida Statutes, states that no resolution, rule, or formal action shall be considered binding except as taken or made at an open meeting. The courts have held that action taken in violation of the law is void ab initio.[12] However, the courts have also recognized that where a board does not merely perfunctorily ratify or ceremoniously accept at a later open meeting those decisions that were made at an earlier secret meeting but rather takes "independent, final action in the sunshine," the decision of the board will not be disturbed.[13] Only a full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine.[14]

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

[1] Section 286.011(1), Fla. Stat.

[2] See *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), disapproved in part on other grounds, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985).

[3] See, e.g., Ops. Att'y Gen. Fla. 92-53 (1992) (direct-support organization created for purpose of assisting public museum subject to s. 286.011); 83-95 (1983) (where county accepted services of nongovernmental committee to recodify and amend county's zoning laws, committee subject to Sunshine Law).

[4] See, e.g., *Cape Coral Medical Center, Inc. v. News-Press Publishing Company, Inc.*, 390 So. 2d 1216, 1218 (Fla. 2d DCA 1980); *Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979), in which the court looked to the Public Records Law's definition of "agency" in interpreting the term for the Sunshine Law since "[t]he statute most analogous to the Sunshine Law is Chapter 119, Florida Public Records Law, which also exists to assure openness in and access to government."

[5] 596 So. 2d 1029 (Fla. 1992).

[6] The *Schwab* Court relied on several earlier district court opinions in developing the totality test. In *Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230 (Fla. 4th DCA 1977), the district court concluded that a nonprofit, volunteer fire department was subject to Chapter 119, Florida Statutes, since the fire department had been given stewardship over firefighting, it conducted its activities on public property, and it was funded in part by public money. The Court also relied on *Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991), in which the district court held that a not-for-profit corporation created and funded by a public hospital district to further the provision of health care needs of the people of the district, was an agency for purposes of Chapter 119, Fla. Stat. Compare *Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc.*, 512 So. 2d 999 (Fla. 1st DCA 1987), *review denied*, 531 So. 2d 1352 (Fla. 1988), concluding that the Shands Teaching Hospital and Clinics, Inc., was not subject to the Sunshine and Public Records Laws.

[7] 695 So. 2d 418 (Fla. 5th DCA 1997).

[8] See Art. I, s. 24, Fla. Const., providing that the public has a right to review the records of any public body "or persons acting on their behalf," and that any meeting of a collegial public body in which public business is discussed or transacted shall be open to the public.

[9] Case No. 90,835 (Fla. 1997).

[10] Section 4.C., Ch. 95-508, Laws of Florida, authorizes the Board of Trustees of the North Lake County Hospital Tax District to levy ad valorem taxes within the district; s. 4.D., Ch. 95-508, *supra*, provides that future proceeds generated from within the northwest territory, less one half of the amount reserved annually by the board of trustees to pay for maintenance and services for the board, shall be paid to Leesburg Regional Medical Center Charitable Foundation, Inc., upon written request by the foundation that the funds are needed for health care.

[11] There are criminal penalties for violating the Sunshine Law or Public Records Law. See s. 286.011(3)(b) and ss. 119.02 and 119.10(2), Fla. Stat. The statutes also provide for the imposition of noncriminal infraction fines, see, s. 286.011(3)(a) and s. 119.10(1), Fla. Stat. Injunctive relief is also available.

[12] See *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991) (contract for sale and purchase of real property voided because board failed to properly notice meeting under s. 286.011).

[13] See, e.g., *Tolar v. School Board of Liberty County*, 398 So. 2d 427, 429 (Fla. 1981).

[14] See *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694 (Fla. 3d DCA 1988).