Open Government -- Private Organizations

Number: INFORMAL

Date: January 02, 2015

Subject:
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Mr. V. James Dickson
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150 Second Avenue North
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St. Petersburg, Florida 33701

Dear Mr. Dickson:

Thank you for your letter of December 8, 2014, on behalf of the St. Petersburg Area Chamber of Commerce, Inc., regarding the applicability of Florida's Government in the Sunshine Law and Public Records Law to that organization. You have included a memorandum prepared by the State Attorney for the First Judicial Circuit in Escambia County determining that those open government laws did apply to the Pensacola Bay Area Chamber of Commerce. As you and I discussed, this office is not statutorily authorized to provide legal advice and opinions to private entities[1] but, in an effort to be helpful, I offer the following informal comments.

You ask whether the St Petersburg Area Chamber of Commerce, Inc. (the chamber), as a private entity is subject to Florida's open government laws. The discussion below should not be read as a comment on Mr. Eddins' findings and I must caution that investigation and prosecution (both civil and criminal) of violations of Florida's open government laws is the province of the State Attorney for the judicial circuit in which these violations are alleged to have occurred. The following comments represent official Attorney General Opinions which this office has issued in the past and may not be understood to be an analysis of or comment on any particular situation in which the St. Petersburg Area Chamber of Commerce may currently be involved.

Is a private organization subject to Florida's Public Records Law, Chapter 119, Florida Statutes?

The mere act of contracting with, or receiving public funds from, a public agency is not sufficient to subject a private entity to the Public Records Law, however, under certain circumstances, the statute has been held applicable to private entities. There is no single factor which is controlling on the question of when a private corporation, not otherwise connected with government, becomes subject to the Public Records Act. However, the courts have held that the mere act of contracting with a public agency is not dispositive.[2]

Again, the receipt of public funds, standing alone, is not determinative of the organization's status for purposes of Chapter 119, Florida Statutes.[3] The courts have relied on "two general sets of circumstances" in determining when a private entity is "acting on behalf of" a public agency and must therefore produce its records under Chapter 119, Florida Statutes.[4] These

two tests are briefly outlined below. Additional discussion of the tests, case law, and relevant Attorney General Opinions can be reviewed in the 2014 Government in the Sunshine Manual available at: www.myfloridalegal.com.

Delegation test

While the mere act of contracting with a public agency is not sufficient to bring a private entity within the scope of the Public Records Act, there is a difference between a party contracting with a public agency to provide services to the agency and a contracting party which provides services in place of the public body.[5] Stated another way, when a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity(s performance of that duty become public records.[6]

Accordingly, if a private entity contracts to relieve the public body from the operation of a public obligation such as operating a jail or providing fire protection, the open government laws apply.[7]

"Totality of factors" test

Recognizing that "the statute provides no clear criteria for determining when a private entity is 'acting on behalf of' a public agency," the Supreme Court adopted a "totality of factors" test to serve as a guide for evaluating whether a private entity is subject to Chapter 119, Florida Statutes.[8]

Accordingly, when a public agency contracts with a private entity to provide goods or services to facilitate the agency(s performance of its duties, the courts have considered the "totality of factors" in determining whether there is a significant level of involvement by the public agency so as to subject the private entity to Chapter 119, Florida Statutes.[9]

The factors identified by the Florida Supreme Court include the following:

1) the level of public funding;
2) commingling of funds;
3) whether the activity was conducted on publicly-owned property;
4) whether the contracted services are an integral part of the public agency(s chosen decision-making process;
5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;
6) the extent of the public agency(s involvement with, regulation of, or control over the private entity;
7) whether the private entity was created by the public agency;
8) whether the public agency has a substantial financial interest in the private entity;
9) for whose benefit the private entity is functioning.

Thus, the application of the totality of factors test will often require an analysis of the statutes, ordinances, or charter provisions which establish the function to be performed by the private entity as well as the contract, lease or other document establishing the relationship

between the governmental entity and the private organization.

I would also note that section 119.0701, Florida Statutes, adopted by the Legislature in 2013, mandates that all agency contracts for services with "contractors" must contain specific provisions requiring the contractor to comply with public records laws, including retention and public access requirements. The term "contractor" is defined to mean "an individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency as provided under s. 119.011(2), [F.S.]."[10]

Is a private organization subject to Florida's Sunshine Law, section 286.011, Florida Statutes?

The Attorney General's Office has recognized that private organizations generally are not subject to the Sunshine Law unless the private organization has been created by a public entity, has been delegated the authority to perform some governmental function, or plays an integral part in the decision-making process of a public entity.[11] However, as discussed below, the Sunshine Law applies to private entities created by law or by public agencies, and to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties.

Private entities providing services to public agencies

Much of the litigation regarding the application of the open government laws to private organizations doing business with public agencies has been in the area of public records, and the courts have often looked to Chapter 119, Florida Statutes, for direction in applying the Sunshine Law.[12]

As the courts have emphasized in analyzing the application of Chapter 119, Florida Statutes, to entities doing business with governmental agencies, the mere receipt of public funds by private corporations is not, standing alone, sufficient to bring the organization within the ambit of the open government requirements.[13]

Similarly, a private corporation performing services for a public agency and receiving compensation for such services is not by virtue of this relationship alone subject to the Sunshine Law unless the public agency(s governmental or legislative functions have been delegated to it.[14] However, although private entities are generally not subject to the Sunshine Law simply because they do business with public agencies, the Sunshine Law can apply if a public entity has delegated "the performance of its public purpose" to a private entity.[15] Thus, in *Keesler v. Community Maritime Park Associates, Inc.*,[16] the court deemed it "undisputed" that a not-for-profit corporation charged by the City of Pensacola with overseeing the development of public waterfront property "is subject to the requirements of the Sunshine Law."[17]

In accordance with these principles, the Attorney General's Office has found meetings of the following entities to be subject to the Sunshine Law: Family Services Coalition, Inc., board of directors, performing services for the Department of Children and Families which services would normally be performed by the department;[18] Astronauts Memorial Foundation when performing duties funded under the General Appropriations Act;[19] nonprofit organization designated by county to fulfill role of county's dissolved cultural affairs council;[20] nonprofit corporation

specifically created to contract with county for operation of a public golf course on county property acquired by public funds;[21] downtown redevelopment task force which, although not appointed by city commission, stood in place of the city commission when considering downtown improvement issues;[22] and a private nonprofit corporation, if the county accepts the corporation's offer to review, recodify, and prepare draft amendments to the county zoning code.[23]

Further, this office has determined that the Sunshine Law applies to a private economic development entity when there has been a delegation of a public agency's authority to conduct public business such as carrying out the terms of the county's economic development strategic plan.[24] Without commenting on the Escambia County State Attorney's opinion, it appears that his conclusion that the Pensacola Chamber of Commerce was a provider of economic development services and had been delegated governmental functions were deciding factors in his determination that the Chamber was subject to Florida's open government laws. As discussed above, this office has come to a similar conclusion in a number of Florida Attorney General Opinions.

I trust that these informal comments will assist you in advising your client, the St. Petersburg Area Chamber of Commerce. If you wish to do additional research into the application of Florida's open government laws, please visit our website to find the 2014 Sunshine Manual. The manual discusses relevant judicial decisions and Attorney General Opinions on open government topics as well as providing the statutes and exemptions to both the Public Records Law and the Sunshine Law. You may also read and print any of the Attorney General Opinions cited in this letter from our website: www.myfloridalegal.com / Legal Resources / AG Opinions.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/tsh

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[1] *See* s. 16.01(3), Fla. Stat., and Department of Legal Affairs Statement Concerning Attorney General Opinions (available at www.myfloridalegal.com / Legal Resources / AG Opinions / Frequently Asked Questions).

[2] *See, e.g., News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992) (private corporation does not act "on behalf of" a public agency merely by entering into a contract to provide architectural services to the agency); *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343 (Fla. 3d DCA 1983); *Stanfield v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract with county to provide services does not in and of itself subject the organization to Ch. 119 disclosure requirements). *And see Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (fact that private development is located on land the developer leased from a governmental agency does not transform the leases between the developer and other private entities into public records).

[3] *See Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991) (mere provision of public funds to the private organization is not an important factor in this analysis, although the provision of a substantial share of the capitalization of the organization is important); and *Times Publishing Company v. Acton*, No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999) (attorneys retained by individual commissioners in a criminal matter were not "acting on behalf of " a public agency for purposes of Ch. 119, Fla. Stat., even though county commission subsequently voted to pay the legal expenses in accordance with a county policy providing for reimbursement of legal expenses to officers successfully defending charges filed against them arising out of the performance of their official duties). *Cf.* Inf. Op. to Cowin, dated November 14, 1997 (fact that nonprofit medical center is built on property owned by the city would not in and of itself be determinative of whether the medical center's meetings and records are subject to open government requirements).

[4] See *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002); *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008), *review denied*, 4 So. 3d 1220 (Fla. 2009); and *County of Volusia v. Emergency Communications Network, Inc.*, 39 So. 3d 1280 (Fla. 5th DCA 2010).

[5] *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997), *approved*, 729 So. 2d 373 (Fla. 1999).

[6] *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

[7] *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997), *approved*, 729 So. 2d 373 (Fla. 1999). *And see Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 307 (Fla. 3d DCA 2001) (consortium of private businesses created to manage a massive renovation of an airport was an "agency" for purposes of the Public Records Act because it was created for and had no purpose other than to work on the airport contract; "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be"); and *Fox v. News-Press Publishing Company*, 545 So. 2d 941, 943 (Fla. 2d DCA 1989) (upholding a trial court decision finding that business records maintained by a towing company in connection with its contract with a city were public records, as the company "was clearly performing what is essentially a governmental function, *i.e.*, the removal of wrecked and abandoned automobiles from public streets and property"). *See also* Op. Att'y Gen. Fla. 08-66 (2008) (Public Records Act applies to not-for-profit corporation contracting with city to carry out affordable housing responsibilities and screening applicant files for such housing). *Compare* Op. Att'y Gen. Fla. 87-44 (1987) (records of a private nonprofit corporation pertaining to a fund established for improvements to city parks were not public records since the corporation raised and disbursed only private funds and had not been delegated any governmental responsibilities or functions).

[8] *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992). *See New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993); *Wells v. Aramark Food Service Corporation*, 888 So. 2d 134 (Fla. 4th DCA 2004).

[9] *See Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

[10] Section 119.0701(1)(a), Fla. Stat.

[11] Op. Att'y Gen. Fla. 07-27 (2007).

[12] *See Cape Coral Medical Center, Inc. v. News-Press Publishing Company, Inc.*, 390 So. 2d 1216, 1218 n.5 (Fla. 2d DCA 1980) (inasmuch as the policies behind Ch. 119, Fla. Stat., and s. 286.011, Fla. Stat., are similar, they should be read together); *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983); and *Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979).

[13] *See, e.g., News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992) (records of private architectural firm not subject to Ch. 119, F.S., merely because firm contracted with school board).

[14] *McCoy Restaurants, Inc. v. City of Orlando*, 392 So. 2d 252 (Fla. 1980) (airlines are not by virtue of their lease with the aviation authority public representatives subject to the Sunshine Law); and Op. Att'y Gen. Fla. 98-47 (1998) (Sunshine Law does not apply to private nongovernmental organization when the organization counsels and advises private business concerns on their participation in a federal loan program made available through a city). *Cf.* Op. Att'y Gen. Fla. 80-45 (1980) (the receipt of Medicare, Medicaid, government grants and loans, or similar funds by a private nonprofit hospital does not, standing alone, subject the hospital to the Sunshine Law); and Inf. Op. to Gaetz and Coley, dated December 17, 2009 (mere receipt of federal grant does not subject private economic development organization to Sunshine Law).
[15] *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 382-383 (Fla. 1999).

[16] *Keesler v. Community Maritime Park Associates, Inc.*, 32 So. 3d 659, 660 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1289 (Fla. 2010).

[17] *Compare Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 927 So. 2d 961 (Fla. 5th DCA 2006), in which the Fifth District applied the "totality of factors" test set forth in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., supra*, and determined that a private corporation that purchased a hospital it had previously leased from a public hospital authority was not "acting on behalf of " a public agency and therefore was not subject to the Public Records Act or the Sunshine Law.

[18] Op. Att'y Gen. Fla. 00-03 (2000).

[19] Op. Att'y Gen. Fla. 96-43 (1996).

[20] Op. Att'y Gen. Fla. 98-49 (1998).

[21] Op. Att'y Gen. Fla. 02-53 (2002).

[22] Op. Att'y Gen. Fla. 85-55 (1985).

[23] Op. Att'y Gen. Fla. 83-95 (1983). *Cf.* Inf. Op. to Bedell, dated December 28, 2005 (private nonprofit organization which entered into an agreement with a city to operate a theater, received city funding in the form of a loan for this purpose, and leased property from the city, should comply with the Sunshine Law when holding discussions or making decisions regarding the theater).

[24] Op. Att'y Gen. Fla. 10-30 (2010). *See also* Op. Att'y Gen. Fla. 10-44 (2010) (Sunshine Law applies to nonprofit corporation delegated authority to carry out the terms of the county's green economic development plan). *Compare* Inf. Op. to Gaetz and Coley, dated December 17, 2009 (open government laws did not apply to private economic development corporation since no delegation of a public agency's governmental function was apparent and the corporation did not appear to play an integral part in the decision-making process of the agency). *Accord* Inf. Op. to Hatcher and Thornton, dated September 15, 1992 (Sunshine Law not applicable to private nonprofit corporation established by local business people to foster economic development where no delegation of legislative or governmental functions by any local governmental entity has occurred and the corporation does not act in an advisory capacity to any such entity).