Sunshine and Public Records--Florida's Great Northwest

Number: INFORMAL

Date: December 17, 2009

Subject:
Sunshine and Public Records--Florida's Great Northwest

The Honorable Don Gaetz
Senator, District 4
4300 Legendary Drive, Suite 230
Destin, Florida 32541

The Honorable Marti Coley
Representative, District 7
3094 Indian Circle, Room 186
Marianna, Florida 32446

Dear Senator Gaetz and Representative Coley:

You each ask whether Florida's Great Northwest, Inc., a Florida nonprofit corporation, is subject to the state's open government laws. If so, the issue of whether the exemption in section 288.075, Florida Statutes, applies to the nonprofit corporation has been raised.

While this office is precluded from formally commenting on this matter since the authority of this office to issue opinions to public officials is limited to responding to questions relating to their own official duties, the following informal comments are offered in an effort to be of assistance.[1]

Section 286.011, Florida Statutes, the Government in the Sunshine Law, 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."[2] The courts have stated that the Legislature intended 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."[3]

While the Sunshine Law does not generally apply to private organizations, the statute has been held applicable when the private entity has been created by a public agency, 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.[4] The mere receipt of public funds, however, does not subject a private entity to section 286.011.[5]

Thus, for example, this office in Attorney General Opinion 2000-03 concluded that meetings of the board of directors of the Family Services Coalition, Inc., an entity performing services for the Department of Children and Family Services pursuant to statute, which services would normally

be performed by the department, was subject to the Sunshine Law. More recently, this office stated that a property owners association, delegated performance of services otherwise performed by a municipal services taxing unit, was subject to the Sunshine Law.[6]

However, this office has also recognized that the Sunshine Law does not apply to a private nonprofit corporation that has been established by local business people to foster economic development when there is no delegation of legislative or governmental functions by any local governmental entity and the corporation does not act in an advisory capacity to any such entity.[7] More recently, this office in Attorney General Opinion 98-47 concluded that a private nonprofit corporation, created to promote economic development in the City of Hollywood and whose members include both public and private entities, was not subject to the Sunshine Law by its activities in counseling and advising applicants for participation in a federal loan program received by the city to provide a source of financing for economic development.[8]

The term "agency" as used in Chapter 119, Florida Statutes, the Public Records Act, includes private entities "acting on behalf of any public agency."[9] The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility.[10]

The Florida Supreme Court adopted a totality of factors test for determining whether a private entity is "acting on behalf of any public agency" for purposes of Chapter 119, Florida Statutes. While recognizing that there is no single factor that is controlling, the Court in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*,[11] set forth the following factors to be considered:

"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 and therefore was not subject to the Public Records Law.

The courts, however, have also applied a delegation test to determine whether a private entity is "acting on behalf of" a public entity. In *Stanfield v. Salvation Army*,[12] the court held that where a public agency has transferred or delegated its statutory responsibility to a private entity, "it is unnecessary to engage in the factor-by-factor analysis outlined by *Schwab*." In *Stanfield*, Marion

County contracted with the Salvation Army to take over the county's role as the provider of probationary services. The court held that because the contract provided for the "complete assumption of a governmental obligation," the Salvation Army was provided services in place of the county and thus was subject to the Public Records Act.[13]

Thus, case law establishes two sets of circumstances in which documents in the possession of private entities must be produced as public records:

"First, 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. . . . Second, when a public entity contracts with a private entity for the provision of certain goods or services to facilitate the public agency's performance of its duties, the private entity's records in that regard may be public if the "totality of the factors" indicates a significant level of involvement by the public agency."[14]

You have advised this office that Florida's Great Northwest was incorporated by private individuals in 2002 as a Florida not-for-profit corporation to facilitate economic and workforce development within the sixteen county region of northwest Florida.[15] Membership in the organization is open to any person or entity with an interest in the economic development of the state;[16] and consists primarily of private development organizations, post-secondary education institutions, and workforce development boards. Management of the corporation is vested in a board of directors comprised of thirty-five individuals representing public and private sector members of the organization with an eleven-member executive committee which, with certain exceptions, exercises the powers of the board. According to information provided to this office, over half of the members of the board of directors and a majority of the members of the executive committee represent private entities. This office has also been advised that the corporation conducts business from its own facilities which are leased from a private entity.

This office has not been presented with information indicating that there has been a delegation of a public agency's governmental function or that the corporation plays an integral part in the decision-making process of a public agency. The fact that public entities are members of the organization does not, in and of itself, subject the organization to either the Sunshine Law or the Public Records Law.[17] Your letters state that the corporation is not involved in any agency decision-making process and that the corporation operates independently of any public or governmental entity and the public members of the organization operate independently of the corporation. Nor have you provided this office with any information indicating that any state or local public agency has transferred or delegated its statutory responsibilities to the corporation. In fact, you state:

"[I]t does not appear that any local government entity has delegated a governmental function to Florida's Great Northwest. The member economic development organizations continue to operate and provide economic development services for their respective geographic territories. The educational members of Florida's Great Northwest continue to provide educational services independent of any involvement with Florida's Great Northwest."[18]

While economic development may be a governmental function, such a function is not exclusively a governmental function and you have advised this office that the corporation is not acting on

behalf of any particular public agency in accomplishing this function. Although the corporation operates for the economic benefit of the region, including the public agencies and the citizens served by the public agencies as well as private industry in the region, you have advised this office that it is not operating for any particular agency.

According to your letters, the corporation has received $617,000 in membership pledges for the current year, approximately seventy-four percent of the corporation's membership funding comes from private entities. You state that the corporation is not financially dependent on any single entity, whether public or private. The corporation, however, has received several grants, including a substantial grant from the U.S. Department of Labor (USDOL).[19] While all of the funds from the grant come from the USDOL, you state that the funds "pass through the Agency for Workforce Innovation ('AWI') which serves as a fiscal agent on behalf of the USDOL[.]"[20] AWI receives an annual fee from the USDOL for acting as fiscal agent; however, you advise that "[o]versight, funding, consideration of any modifications, and any other substantive matters pertaining to the program rest solely with the U.S. Department of Labor."[21] The corporation has also been awarded a grant from the United States Department of Agriculture to fund an analysis of infrastructure in the rural counties of northwest Florida as well as a grant from Enterprise Florida to fund the corporation's international business initiative objectives.[22]

While a substantial portion of its funds are derived from public funds, such funding is from the federal government rather than from a state or local governmental entity. This office cannot state that a grant from the federal government, an entity not subject to this state's open government laws, subjects an otherwise private entity to such laws.[23] While the funds pass through AWI, you indicate that AWI acts solely as a pass-through and has no authority to oversee or modify the grant; rather such authority rests solely with the U.S. Department of Labor.

To the extent that an agency as defined in section 119.011(2), Florida Statutes, expends public funds in payment of dues or membership contributions to a private entity, section 119.01(3), Florida Statutes, provides that the private entity's financial, business and membership records pertaining to the public agency are public records and subject to the provisions of section 119.07, Florida Statutes. However, in light of the above and based upon the information provided to this office, this office cannot conclude that the corporation is generally acting on behalf of a state or local governmental agency for purposes of the open government laws of this state.

It should be noted that this office has not been presented with any contracts or agreements that the corporation may have with state or local government. There may be existing or future agreements that would subject the corporation to the open government laws. For example, reference is made on the corporation's website to a corporation goal that the corporation "shall assist in the development of a seaport strategy that expands the region's port capacity and, in a post 9-11 world, is a model for homeland security."[24] The website further indicates that a strategy of the corporation is to establish the framework and partnerships necessary to approach the Florida Legislature during its 2010 legislative session for statutory authority and appropriations to replicate the Florida High Tech Corridor in Northwest Florida: "This includes creating a research partnership between Florida State University, Florida A&M University, the University of West Florida, the University of Florida, and the Institute for Human and Machine Cognition."[25] As noted above, however, this office has no specific information regarding any contract that the corporation may have with state or local government nor has this office received

any detailed information relating to the relationship between the corporation and public agencies.

This office is also aware that an analogy has been made between this organization and TEAM Santa Rosa Economic Development Council, Inc., a private not-for-profit corporation organized to increase the economic wealth of Santa Rosa County. TEAM Santa Rosa has been determined by the State Attorney's Office for the First Judicial Circuit to be subject to the Government in the Sunshine Law and the Public Records Law.[26]

An examination of the State Attorney's Report noted that TEAM Santa Rosa and the county had entered into a funding program agreement whereby TEAM Santa Rosa agreed to provide services to the county "for the promotion and development of industrial, military, agricultural and commercial economic development." The State Attorney's Office determined that the county had delegated the performance of its function relating to economic development to the private entity by contract and that TEAM Santa Rosa was carrying out such a function in place of the county. The report, thus, concludes that TEAM Santa Rosa played an integral role in the public agency's decision-making process. Unlike the situation presented in TEAM Santa Rosa, this office has not been presented with information regarding any contract to relieve the public body from the operation of its public obligation.

I hope that the above informal comments may be of assistance to you.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] *See* s. 16.01(3), Fla. Stat., and this office's statement concerning Attorney General Opinions, available online at: http://myfloridalegal.com/opinions. As noted in this office's statement, "Attorney General Opinions are intended to address only questions of law, not questions of fact, [or] mixed questions of fact and law . . . ." Thus, the conclusions reached in any opinion of this office are based upon the facts as presented to this office and may change if material facts were omitted or misstated in a request for an opinion. *See, e.g.,* n. 1, Op. Att'y Gen. Fla. 98-47 (1998). It is the local state attorney who is responsible for prosecuting violations of the open government laws and thus may conduct an investigation to determine whether the facts indicate whether a violation has occurred.

[2] Section 286.011, Fla. Stat. *And see* Art. I, s. 24 (b), Fla. Const., the constitutional counterpart to s. 286.011, Fla. Stat., stating that "[a]ll meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public . . . ."

[3] *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); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

[4] *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).

[5] *See, e.g., 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); Ops. Att'y Gen. Fla. 78-161 (1978) (receipt of public funds by private nonprofit corporation under contract with public agency did not subject corporation to s. 286.011); 80-45 (1980) (receipt of Medicaid, Medicare, government grants and loans or similar funds by a private nonprofit entity does not, standing alone, subject private entity to Sunshine Law).

[6] Attorney General Opinion 07-44 (2007). *And see* Ops. Att'y Gen. Fla. 04-32 (2004) (Sunshine Law applies to board of directors meetings of volunteer fire departments that provide firefighting services to county and use facilities and equipment acquired with county funds) and 07-27 (2007) (local health councils, whose duties are prescribed by statute and which provide an integral role in the decision-making process of a state agency in providing for coordinated planning of health care services, are subject to s. 286.011, Fla. Stat.).

[7] *See* Inf. Op. to Mr. Louis E. Hatcher, Assistant State Attorney, and Mr. Randall N. Thornton, Sumter County Attorney, dated September 15, 1992. *And see* Op. Att'y Gen. Fla. 76-194 (1976) (industrial board, a nonprofit, nongovernmental organization, is not subject to Sunshine Law even though it received contributions from governmental agencies as it was not a board or commission of any agency or authority of any local government and did not serve in an advisory capacity to any such governmental body).

[8] *Compare* Op. Att'y Gen. Fla. 98-24 (1998), stating that such a private entity would be subject to the Sunshine Law if it assisted the city in the operation of the program.

[9] Section 119.011(2), Fla. Stat.; *and see* Art. I, s. 24(a), Fla. Const., the constitutional counterpart to Ch. 119, Fla. Stat., stating "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . ."

[10] *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc*., 596 So. 2d 1029 (Fla. 1992). *And see Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991) (mere provision of public funds to private organization is not an important factor in this analysis, although provision of substantial share of organization’s capitalization is important); *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (fact that private development is located on land developer leased from governmental agency does not transform leases between developer and other private entities into public records). *Cf. Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 381 (Fla. 1999), noting that the "totality of factors" test

presents a "mixed question of fact and law;" thus, the appellate court "correctly reviewed the legal effect of the undisputed facts in this case."

[11] *Schwab, supra* at 1032.

[12] 695 So. 2d 501, 503 (Fla. 5th DCA 1997).

[13] *Id.* at 502-03. *And see B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008) (transfer of an "actual public function" to private entity brings documents generated by private entity within purview of Ch. 119, to extent documents created in performing that public function); *Putnam County Humane Society, Inc. v. Woodward*, 740 So. 2d 1238 (Fla. 5th DCA 1999) (where county humane society assumed governmental function of investigating acts of animal abuse pursuant to statutory authority, records created in connection with this function were governed by Public Records Act); *Dade Aviation Consultants v. Knight Ridder, Inc.* , 800 So. 2d 302, 307 (Fla. 3d DCA 2001) ("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"); *Prison Health Services, Inc. v. Lakeland Ledger Publishing Company*, 718 So. 2d 204 (Fla. 2d DCA 1998), *review denied*, 727 So. 2d 909 (Fla. 1999) (private company under contract with sheriff to provide medical services for inmates at county jail must release its records relating to a settlement agreement with an inmate).

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

[15] *And see* Art. II, Florida’s Great Northwest, Inc., Bylaws (corporation is "organized and will be operated exclusively to enrich economic life in Northwest Florida through efforts that encourage new and expanding quality growth by recruiting new business while fostering expansion of existing tourism, business and industrial bases." The geographic area served by the corporation is comprised of the following counties: Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Jefferson, Leon, Liberty, Okaloosa, Santa Rosa, Wakulla, Walton, and Washington Counties.

[16] *See* Art. VII, s. 1, Bylaws, *supra*.

[17] *See, e.g.,* Ops. Att'y Gen. Fla. 04-32 (2004) (meetings of the Escambia County Volunteer Firemen's Association, Inc., for the purpose of providing a forum for the county volunteer fire departments to meet and discuss common county firefighting concerns and issues are not subject to the Government in the Sunshine Law); 00-08 (2000) (fire commissioners' forum, a nonprofit corporation created by fire control and rescue districts, whose membership was limited to the fire control districts in the county, is subject to Sunshine Law if forum operates as a collegial body for incipient decision-making for fire and rescue districts; however, as an organization providing an opportunity to network and discuss common concerns, forum would not by itself be subject to the open meetings law.

[18] Letter from Representative Marti Coley, dated December 2, 2009, p. 3. *And see* Letter from Senator Don Gaetz, dated December 1, 2009, p. 4.

[19] This office has been advised that the grant is in the amount of $15,000,000, $3,751,633 of which was budgeted during the current fiscal year.

[20] Letter from Representative Marti Coley, dated December 2, 2009, p. 2. *And see* Letter from Senator Don Gaetz, dated December 1, 2009, p. 3.

[21] *Id.*

[22] According to the information provided to this office, the grant from the U.S. Department of Agriculture is in the amount of $234,643 for the 2008/2009 year, with oversight and funding of the grant vested solely in the Department of Agriculture. The grant from Enterprise Florida, Inc., for the 2008/2009 year is in the amount of $150,000. You have advised that the grant money is not commingled. Presumably, however, membership funds, whether from private or public members, are commingled.

[23] This office recognizes that in an informal opinion to Scott Knox, dated January 6, 2005, this office stated that the St. Johns River Alliance, Inc., a non-profit corporation, which was funded primarily by federal funds, should consider itself subject to the Sunshine Law. The alliance, however, which appeared to consist primarily of governmental entities, was formed to help carry out the federal American Heritage Rivers Initiative and the associated intergovernmental Partnership Agreement among state, local and federal governmental entities which required that meetings would be open to the public, notice provided and minutes taken.

[24] Florida's Great Northwest Strategic Plan, p. 18, Revised December 1, 2008, available at: /files/pdf/page/9FCB14946923BD198525768F00686F5A/FGNW_SP.pdf.

[25] 2009 Program of Work, p. 23, available online at: /files/pdf/page/9FCB14946923BD198525768F00686F5A/FGNW_PW.pdf.

[26] Report of the Office of the State Attorney, First Judicial Circuit of Florida, issued October 6, 2009, based upon a review by Chief Assistant Greg Marcille and Chief Investigator Barry Brooke.