Records, city hosting fesitival with nonprofit corp.

Number: INFORMAL

Date: January 05, 2007

Subject:
Records, city hosting fesitival with nonprofit corp.

Ms. Sally A. Maio
City Clerk
City of Sebastian
1225 Main Street
Sebastian, Florida 32958

Dear Ms. Maio:

This is in response to your request for assistance in determining whether the records of the Sebastian Clambake Foundation are public records subject to disclosure under Chapter 119, Florida Statutes. A public records request has been made for documents relating to the foundation which are not held by the city.

You state that the Sebastian Clambake Foundation (foundation) is a non-profit corporation that organizes an annual festival known as the Sebastian Clambake Lagoon Festival. The foundation has full financial responsibility for the festival and controls the disbursement of all proceeds which are dedicated to local charitable and non-profit capital projects. The foundation approached the city about entering into a sponsorship and hosting agreement, which the city agreed to do in 2002. The city assumed several responsibilities, including: hosting the festival from 2002 through 2011; aiding the foundation with necessary city personnel; dedicating exclusive use of the city's Riverview Park & Yacht Club facilities to the foundation during the festival; providing off-site parking and transportation to and from the event; providing power and water for the event; and reimbursing the foundation for promotional advertising. The city is a corporate member of the foundation and has agreed to indemnify the foundation for any claims brought by city employees performing the city's obligations. You do not indicate that the foundation has made itself subject to the Public Records Law by the terms of the hosting agreement. You state that the city has provided all of the documents in its possession, but some requested records are foundation business records not in the possession of the city.

Florida has a policy that all state, county and municipal records are open for inspection and copying by any person, unless such records are made confidential or exempt by law.[1] It is the duty of each agency to provide such access.[2] Chapter 119, Florida Statutes, defines "agency" for purposes of the Public Records Law to include private corporations acting on behalf of any public agency.[3] Courts have emphasized in analyzing Chapter 119, Florida Statutes, however, that the mere receipt of public funds by a private corporation under contract with a governmental entity is not, standing alone, sufficient to bring the organization within the ambit of the open government requirements.[4]

The Supreme Court of Florida, in *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*,[5] set forth various criteria to be considered in determining whether a private entity is subject to the Public Records Law. The *Schwab* Court included such factors as: the level of public funding; commingling of funds; whether the activity was conducted on publicly-owned property; whether services contracted for are an integral part of the public agency's chosen decision-making process; whether the private entity is performing a governmental function; the extent of the public agency's involvement with, regulation of, or control over the private entity; whether the private entity was created by the public agency; whether the public agency has a substantial financial interest in the private entity; and for whose benefit the private entity is functioning.[6]

Fund-raising by the foundation in and of itself does not appear to be a governmental function. In this instance, however, activities of the foundation are conducted on city property and the commingling of the city's resources with those of the foundation in producing and carrying out the festival, apparently the sole function of the foundation, is so pervasive that the distinction between any private activities of the foundation and the public nature of the city's involvement have been blurred. The fact that specific records have not been provided to the city and are maintained solely by the foundation does not preclude their inspection or copying.[7] Should there be activities of the foundation that are not related to the festival and do not involve the city's participation, then records relating to such activities would not be public records.

In light of the broad purpose of the Public Records Law to have transparency in government, it may be advisable to ensure that all records relating to the clambake festival be open. Foundation records unrelated to the festival not involving the city's participation, however, would not be subject to disclosure.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See* s. 119.01, Fla. Stat.

[2] Section 119.01(1), Fla. Stat.

[3] Section 119.011(2), Fla. Stat., defining "agency" to include "any other public or private agency, person, partnership, corporation or business entity acting on behalf of any public agency."

[4] *See Parsons & Whittenmore, Inc. v. Metropolitan Dade County*, 429 So.2d 343 (Fla. 3rd DCA 1983); *and New and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 570 So.2d 1095 (Fla. 4th DCA 1990), in which the court ruled that an architectural firm hired by a school board to perform professional services related to the construction of school was not

an agency because "the architects did not participate in the school district's process to decide whether schools should be built."

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

[6] *Id. at* 1031.

[7] *See Times Publishing Co. v. City of St. Petersburg,* 558 So. 2d 487, 492-493 (Fla. 2d DCA 1990), in which the court found that the city and the private entity violated the Public Records Act when the city avoided taking possession of negotiation documents reviewed and discussed by both parties, but left in the possession of the private entity's attorney. *See also Wisner v. City of Tampa Police Department,* 601 So. 2d 296, 298 (Fla. 2d DCA 1992) (city may not allow private entity to maintain physical custody of polygraph chart used in an internal investigation to circumvent the public records law).