OA 6-1-92

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IN THE SUPREME COURT OF FLORIDA

THE NEW YORK TIMES COMPANY d/b/a THE LEDGER, and LAKELAND LEDGER PUBLISHING CORP., a Florida corporation, d/b/a THE LEDGER

**Petitioners,**

**vs.**

PHH MENTAL HEALTH SERVICES, INC., a Florida nonprofit corporation, and CARL STRANG, as the Records Custodian of PHH Mental Health Services, Inc.

Respondents.
_____/

CASE NO.: **78,559**

DISTRICT COURT OF APPEAL
SECOND DISTRICT NOS.:
**89-02892**
**90-00405**
**90-01489**

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ON REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

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# PETITIONERS' INITIAL BRIEF


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## PRELIMINARY STATEMENT

Petitioners, THE NEW YORK TIMES COMPANY and LAKELAND LEDGER PUBLISHING CORPORATION, will be collectively referred to herein as "The Ledger," The Respondents, PHH MENTAL HEALTH SERVICES, INC., and CARL STRANG, as records custodian of PHH Mental Health Services, Inc., will be collectively referred to as "PHH".

The appeal below consolidated an appeal of an action on the merits of the applicability of the Public Records Act with an appeal of an action for attorney's fees and costs. References to the papers and pleadings in the original record of the case on the merits will be denoted by the letter "R" followed by the appropriate page number. References to the papers and pleadings in the original record of the case on attorney's fees and costs will be denoted by "RF" followed by the appropriate page number.[1] References to the court exhibits which are part of the Record on Appeal will be designated by the letters "PX" for Plaintiffs' exhibits and "DX" for Defendant's exhibits, followed by exhibit number.[2] References to the transcript of the trial proceedings in the case on the merits will be by the letter "T" followed by the

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[1] The index to the record indicates two separate listings of Appeal Volume I, Original Record (Papers and Pleadings). The Appeal Volume 1 beginning with an entry dated September 15, 1988 is the record of the case on the merits. The Appeal Volume I beginning with an entry dated January 31, 1989 is the record of the case on fees.

[2] The parties' trial exhibits were not assigned page numbers in the record, although the index to the supplement to the original record reflects that they are contained in the record.

appropriate page number.[3] References to the transcript of the Attorney's Fee hearing on February 14, 1990 will be denoted by "TF" followed by the appropriate page number.

## STATEMENT OF THE CASE

This case involves the authority of the courts to refuse to award attorneys' fees following successful Public Records Act litigation, when they are otherwise required by 5119.12, Fla. Stat. (1987). Both the trial court and Second District determined that the Public Records Act applies to the Respondents, PHH Mental Health Services, Inc. and its records custodian Carl Strang, because they were "acting on behalf" of a government agency within the meaning of §119.011(2) Fla. Stat. (1987). This is an appeal from the ruling of the Second District Court of Appeal absolving PHH of liability for attorney's fees under the Public Records Act on the ground that PHH's status as an entity subject to the disclosure requirements of the Public Records Act "was not so readily apparent" as to render "unlawful" PHH's refusal to permit public inspection of its records. PHH Mental Health Service v. New York Times Co., 582 So.2d 1191 (Fla. 2d DCA 1991). Upon The Ledger's petition, this court granted review of that decision on February 4, 1992.

On or about July 28, 1988, Chuck Murphy, a staff writer for

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[3] The transcripts of the trial proceedings are contained in two volumes and are not numbered as part of the record. Rather, according to the index to the record, the transcripts dated December 19, 1989, are in the record according to their own page numbers, pp.1-192 for Volume I, pp.193-326 for Volume II.

The Ledger made a demand upon PHH to inspect certain of its records. Specifically, the Ledger asked to inspect and copy: 1) PHH's tax returns for the years 1974 to 1987; 2) a list of the board of directors; 3) minutes of PHH's Board of Directors meetings; and, 4) all correspondence between PHH and state funding agencies. (R-20) PHH refused to comply with the request, sending a letter to The Ledger's publisher claiming that PHH never received funds from any state agency. (R-21,22) Despite indications from PHH that it would comply with this request, it never produced any records to The Ledger. (R-23) In a letter dated September 2, 1988, The Ledger's general counsel indicated that unless PHB complied with its request, The Ledger would have "no choice but to go to court to obtain the public documents it seeks." (R-24) On September 15, 1988, PHH filed a declaratory judgment action, seeking a determination whether it was subject to the Act's disclosure requirements. On September 30, 1988, The Ledger filed a second suit seeking court-ordered compliance with Chapter 119 through a Complaint for Injunction and Writ of Mandamus, which also sought an award of attorneys' fees and costs, pursuant to §119.12, Fla. Stat. (1987).

The trial court determined that PHH was an entity acting on behalf of Tri-County Mental Health, Inc., a public agency of the State of Florida, and accordingly ordered PHH to make its records accessible to the public in accordance with Chapter 119. (R-208) Specifically, the court found that: "The purpose and operation of PHH in the mental health field was inextricably intertwined with

the operation of Tri-County Mental Health Inc., and its successors, and therefore was its agent." (R-208) The trial court also awarded the Ledger its attorneys' fees and costs pursuant to **5119.12** **Fla.** Stat. (RF-76) PHH appealed both orders.

In an opinion issued May 24, 1991, the Second District Court of Appeal affirmed the trial court's determination that PHH was an entity subject to the Public Records Act but reversed the order requiring PHH to pay the Ledger's attorneys' fees. As the Second District noted, Chapter 119's attorneys fees section provides:

> If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected, examined or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

PHH Mental Health Service v. New York Times Co., supra, 582 So.2d at 1192, citing § 119.12(1), Fla. Stat. (1987).

The Second District held that "[a]lthough, the trial judge correctly determined that PHH was, indeed, acting on behalf of Tri-County Mental Health, Inc.,...that conclusion was not so readily apparent that we can say with any degree of certainty that PHH's initial refusal to hand over its records was unlawful." Id. at 1193. Thus, the court created a "good faith" or "reasonable doubt" exception to an agency's liability for attorneys' fees in a Public Records Act case.

On August 6, 1991, the Second District denied The Ledger's June 10, 1991 Motion For Rehearing, Rehearing En Banc and for Certification. The Ledger petitioned this Court for review,

citing conflict among the district courts of appeal on the issue of fees in Public Records Act cases and conflict with this Court's decision in Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979). This Court granted review on February 4, 1992.

## STATEMENT OF THE FACTS

PHH's roots go back more than twenty years, originating in the Tri-County Mental Health Board, Inc. (hereinafter "Tri-County"). Tri-County and its successors were created by the Florida Legislature pursuant to the Community Mental Health Act of 1971. Tri-County received its funding from allocations by federal and state government (T-30) pursuant to the Baker Act (T-222), the Myers Act (T-210) and received significant local funds from the Polk, Highlands and Hardee County commissions. (T-59) The non-local funds generally came through the Florida Department of Health and Rehabilitative Services from state and federal sources. Tri-County performed its services pursuant to a state contract. (T-30) Prior to 1977, Tri-County performed public service in the areas of mental health and drug and alcohol abuse rehabilitation. (T-57,58)

Subsequently, because of changes in legislation, Tri-County became an administrator and conduit of public funds channeled to subcontractors or service providers (T-30, 61) such as Tri-County Alcohol and Rehabilitative Services, Inc. ("TCARS") (T-92, 164), Peace River Center for Personal Development (T-142) and Winter Haven Hospital. (T-222) The Petitioners conceded at trial that Tri-County is a Chapter 119 public agency (T-18).

**PHH'S Creation**

During its stewardship of public funds, Tri-County created an arbitrage whereby it invested these grants in interest-bearing accounts, issued funds to service providers thereafter, and utilized this interest income to create a fund balance and purchase a substantive parcel of real estate. (T-169, 170) Tri-County created PHH to avoid escheat to the state of funds accumulated from local governments and interest earned on federal, state and local government funds. (T-150, 172, **254, DX 15, 17, 19/28 52(B); PX 19** at p. **3)**. At PHH's inception, Tri-County, a Chapter **119** "public agency," infused over $150,000 in cash into the new PHH corporation. (T-64, **65, 115; DX 15** at **p. 2,** DX **17** at **p. 2)** PHH's objective was to hold and invest this money and, ultimately, to use it to fund public mental health services. **(DX 28** at **p.** 2)

Accompanying the cash contribution from Tri-County to PHH was an 11,000 square foot building. (T-65) The evidence showed this building was purchased with local government money. (T-168-170; DX 15 at **p.** 2, DX **17** at **p. 2, DX 28** at **p.** 1) The evidence further demonstrated that the building was transferred to PHH pursuant to Tri-County's agreement with the Chairman of the Polk County Commission not to reclaim the property for Polk County. (T-260, 261; DX 15 at **p.** 2, DX **17** at **p.** 2)

This building along with furniture, fixtures and equipment purchased with local government money, flowed from Tri-County through PHH (T-69, 74) to TCARS (T-103), a provider of public mental health services. (T-92; DX 15 at p. 2, DX 17 at **p.** 2, and

DX 28 at p. 1 and 2) TCARS leased the building rent-free from PHH. (T-104, 163, 305, DX 28 at p. 2) Improvements on PHH's building were made with government funds. **(T-40,** 213, 312)

In later years, the parties assigned a substantial value to the use of PHH property, utilizing this value to constitute local "match" for state funding of mental health needs, thus obviating the need for pertinent county commissions to make cash contributions to this extent. (T-305, **306, T-37, 38)**

The initial infusion of capital from Tri-County to PHH is reflected in the Tri-County Board minutes of January 25, 1977 (DX 15) and the corresponding PHH Board minutes from a meeting conducted that same day. (DX 17)[4] During the January 25, 1977 Tri-County Board meeting, Mr. Carl Strang, Chairman of both Tri-County and PHH (T-56, 57, 58 72), indicated that "the following disposition of assets as per the [Tri-County] board's previous instructions, were complete." (DX 15 at p. 2) The minutes reflect those dispositions as follows:

> a. Furniture and fixtures procured with local funds had been transferred to PHH Mental Health Services, Inc.
>
> b. The property on Highway 60, Bartow, Florida, i.e., 11,000 square feet primary care facility which was procured by Tri-County Mental Health Board, Inc. with local funds, had been deeded to PHH Mental Health Services, Inc. in accordance with asreement between the Board and the

[4]The first page of the Tri-County minutes is exactly the same as the first page of the PHH minutes except for the name of the corporation. The board members, board staff, and visitors at the meetings are identical.

Chairman of the **Polk** County Commission.

c. $159,000 of local funds balance (source: Polk County Commission and accumulated interest) had been paid over to PHH Mental Health Services, Inc....

d. $60,800 cash advance had been given to Tri-County Alcoholism Rehabilitative Services, Inc. to enable the new corporation to initiate operations. This advance was made on the basis that it is subject to audit determination as to the alcoholism program operations balance of the Tri-County Mental Health Board which should be paid over to the new alcoholism program board of directors.

(DX 15 at p. 2) (emphasis added).

As the Tri-County Board was conveying funds to PHH, the PHH Board (which consisted of the same members) (T-70, 84, 167) was approving the acceptance of the funds. (DX 17 at p. 2) The minutes of the **PHH** board meeting of January 25, 1977, in pertinent part, provided as follows:

> The board noted and acknowledged receipt and possession of the following assets:
>
> a. Furniture and fixtures as per inventory filed at the corporate offices which formerly belonged to Tri-County Mental Health Board, Inc. and were procured by that corporation with funds from sources other than the State of Florida.
>
> **b.** 11,000 sq. ft. air-conditioned concrete block structure located on Highway 60 with accompanying acreage which was procured by Tri-County Mental Health Board, Inc. with funds, the source of which was either accumulated interest or local monies provided

through an arrangement with the Polk County Commission. Property has been deeded to PHH Mental Health services, Inc. by Tri-County Mental Health Board, Inc. as part of the dissolution of its assets and in accordance with the agreement between that board and the chairman of the Polk County Commission.

c. $159,330.43 in cash accumulated by Tri-County Mental Health Board, Inc. either local funds provided through an arransement with the Polk County Commission or accumulated interest monies. The funds have been provided as a result of the dissolution of the Tri-County Mental Health Board, Inc. and the disposition of the assets in accordance with the agreement between the board and the chairman of the Polk County Commission.

(DX 17 at p. 2) (emphasis added).

Further, the minutes show that:

The board considered the requirement to establish a policy concerning the future equipment of the Tri-County Alcoholism Rehabilitative Services, Inc. During discussion, it was noted that most of the current equipment in the possession of Tri-County Alcoholism Rehabilitative Services, Inc. is property of PHH Mental Health Services, Inc. After discussion, it was decided that future equipment requirements by the new alcoholism corporation should be acquired by that corporation from their own resources.

(DX 17 at p. 2) (emphasis added).

Thus, the Tri-County minutes show that PHH was established to perform essentially governmental functions in holding public assets and financially supporting local public mental health services. Assets, furniture and fixtures transferred to PHH were procured with "local funds." Additionally, the minutes demonstrate that the 11,000 square foot building was procured with "local funds" and deeded to PHH in accordance with an agreement with the chairman of

the Polk County Commission, and that cash of more than $159,000 together with the accumulated interest -- the source of which was the Polk County Commission, and arbitrage interest on other public monies -- was paid directly to PHH. (T-117, 118) The minutes' reference to "local funds" was in connection with Tri-County/PHH's effort to avoid characterizing the assets of PHH as property which the state "had a claim to." (T-161) However, all of these assets coming into the possession of PHH during this time period can be traced back to a governmental, as opposed to a private, source. (T-175, 176)

Also pertinent to the instant appeal was a presentation made during the PHH board meeting by Mr. John Simmonds, Executive Director of both PHH and Tri-County, concerning the disposition of monies to TCARS. The relevant portion of Mr. Simmonds' presentation showed that PHH anticipated the eventual recovery of its cash advanced to TCARS from the latter's receipt of government grant-in-aid funds. (DX 17 at pp. 2 and 3) Government funds flowed from Tri-County to PHH, (T-64, 278) and from PHH to TCARS. (T-93, 102) PHH also anticipated the flow of government funds back to it from TCARS. (DX 17 at pp. 2 and 3)

After the January 25, 1977 meetings, Tri-County Mental Health Board, Inc. filed a Petition for Dissolution in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida. (DX 19) The petition represents that the dissolution of Tri-County and the transfer of its assets was necessary because of a change in Florida law necessitating a "complete dismantling and

reconstruction" of mental health programs in Polk, Hardee and Highlands Counties. (See DX 19 at paragraph 5) In paragraph 6 of the Petition, Tri-County stated the assets to be distributed were assets "accumulated by Tri-County Mental Health Board, Inc. since its inception under the Community Mental Health Act of 1970." (DX 19 at p. 3) The Petition requested the Court to order and adjudge "all matters concerning winding up the affairs of Tri-County Mental Health Board, Inc. including the distribution and allocation of its general assets among its creditors and successors in interest." (See DX 19 at p. 3)

In its Order entered May 2, 1977, the trial court, Judge Dewell presiding, acknowledged the restructuring of the mental health delivery systems in the Tri-County area. (DX 20) The court granted the petition for dissolution and ordered as follows:

> The transfer of assets, including cash accounts, real, and personal property, from Tri-County Mental Health Board, Inc. to its successors in interest, Tri-County Mental Health Services, Inc. and Tri-County Alcoholism Rehabilitative Services, Inc. is approved.

(See DX 20 at pp. 2 and 3)

PHH Mental Health Services, Inc. was then formed as a tax exempt corporation pursuant to the requirements of section 501(c)(3) of the Internal Revenue Code. (T-273, 279) Part 2, line 1 of PHH's IRS Form 1023, Application for Recognition of Exemption Under 501(c)(3) of the Internal Revenue Code, asks the applicant to identify its sources of financial support. (DX 28) PHH stated on this application that local government, below the state level,

would provide ninety percent or more of its finances. **(T-279;** DX **28** at **p.** 1) According to the form, private, corporate and personal contributions would constitute only ten percent, or less, of PHH's incoming assets. (Ibid.) Line 2 of part 3 of the IRS form **1023** asks the applicant to describe the organization's fund-raising activities. PHH's responded as follows:

> This organization will receive ninety percent (90%) or more of its funding from various government sources. This organization has been established to handle contributions from local sources in excess of the state's requirement for local funding of mental health services. This corporation also holds title to fixed assets purchased with local mental health funds in excess of state funding requirements. Any contributions from the general public will be accepted but will not be generated by any active fund raising.

(Ibid.) In paragraph **3,** line **3 of** the IRS form 1023, PHH acknowledged that it "purchases **and** holds title to all facilities, furniture, fixtures and equipment purchased with local funds for use in mental health programs." (DX **28** at **p. 2)**

In part 3, line 5 of the IRS form **1023,** PHH represented that it is "an outgrowth of Tri-County Mental Health Board, Inc. proceedings for dissolution of this organization and a transfer of a portion of its assets to PBH Mental Health Services, Inc. have taken place. The present board interlocks with Tri-County Mental Health Board District VIII-A, Inc." (DX **28** at **p. 3;** see also T-70, **84,** 277, 278)[5]

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[5] A second IRS Form **1023** filed by PHH is also contained in DX **28,** and it **is** identical to the first Form **1023** with respect to the specific portions extracted above. PHH never amended its Form 1023 to represent to the IRS a different source of funding. (T-68, 69)

**The Purpose of PHH.**

The fundamental purpose of Tri-County, as stated in its corporate articles, was in pertinent part, as follows:

> To establish, obtain financial aid for and carry on in Board District 13 (Polk, Highlands and Hardee Counties) ... Community Mental Health Programs to service diagnosis [sic] and treat emotional disorders of any citizen of Polk, Highlands and Hardee Counties and to do such other things as said corporation deems necessary in connection therewith of promotion to health and well-being of the citizens of these counties.
>
> * * *
>
> To contract with any established local mental health agencies for services and to assist in establishing any new agencies to provide services deemed necessary or advisable by the corporation and to contract therewith for services.

(DX 12(A) at p. 2)

In comparison, the PHH Articles of Incorporation state PHH's purpose, in pertinent part, as follows:

> To promote the delivery of health care services, particularly in the field of mental health and alcohol rehabilitation; to provide funds, services, equipment and property of every kind and nature located within the area to be services as herein defined, and to apply for and receive public funding and financial assistance as well as private contributions and donations in furtherance of mental health care in the Counties of Polk, Hardee and Highlands in the State of Florida.
>
> * * *

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Respondent Strang, on behalf of PHH, signed the Form 1023 under a declaration "to the best of my knowledge it is true, correct and complete." (T-67, 68, DX 28)

> To contract with any established local mental health agencies for services and to assist in establishing any new agencies to provide services deemed necessary or advisable by the corporation and to contract therewith for services.

(DX 13(A)) (emphasis added) See also T-77, 78.

Tri-County's Articles of Incorporation (DX 12) are similar to PHH's articles (DX **13)** in many respects. For example, the corporate address and registered agent of Tri-County Mental Health **Board** District **VIII-A**, Inc., as set forth in Article V of its corporate articles, is identical to the corporate address and agent **of PHH, as** set forth in Article V of its corporate registered articles. The articles also show that the officers and directors of both corporations were the same persons "by and large." **(T-71, 84)** PHH employees performed services "gratis" for Tri-County (T-71, 167-168) and PHH and Tri-County shared office space. (T-71, 203, 167)

The Articles of Incorporation for Tri-County VI-B and **VIII-A** and PHH's articles are identical in other respects, including the following provision:

> [A]ppointments to the Board shall be made by the County Commissioners of Polk, Hardee, and Highland Counties, Florida, as is further provided for and set forth in the By-laws of this corporation.

**(DX 12(A)** and 13(A)).

Section **4** of the By-laws of PHH and Tri-County VI-B also contain the identical provision regarding the filling of vacancies in the **boards by** the appropriate county commission. (DX 14(A) and (B))

Mr. Hal Connor served as counsel for both Tri-County (T-129)

and PHH (T-132), and he drafted the Articles and By-laws for both entities. **(T-132)** Although PHH amended its By-laws, no change was made to the Section 4 language set forth above. PHH does not dispute that the respective county commissions appointed board members to Tri-County in accordance with Tri-County's By-laws. (DX 18, DX 52(C) at p. 5) The membership of the Tri-County board, appointed by the county commissions, and the membership of the PHH Board were substantially identical from PHH's inception. (T-154, 155, 167)

Finally, Section 2 of Article III and Section 5 of Article IV of both the PHH and Tri-County By-laws show that the annual meeting of PHH was scheduled to be conducted at the exact time and place as the Tri-County annual board meeting. (T-79) Article IV, Section 5 of the Articles shows that Tri-County's and PHH's regular meetings also were held at the same time and place.

PHH's report on examination of financial statements for the six months ended June 30, 1977, **prepared** by PHH/Tri-County private auditor Donald R. Harrison, describes the make-up of PHH's assets at the time. (DX 23) Under the heading of "public support and revenue" are listed assets totaling **$211,095.00**. (DX **23** at **p. 3)** The sum of $27,168.67 is expressly attributed to "fees and grants from local government agencies." (T-296; DX 23 at p. 3) The accountant's analysis does not show any money in PHH's account that is attributable to a purely private source. The report additionally provides as follows:

> The Corporation's purpose is to promote the delivery of health care services particularly in the field of mental health and alcoholic rehabilitation; to provide funding, services, equipment and property of every kind and nature located within the area to be serviced and to apply for and receive public funding and financial assistance as well as private contributions and donations in furtherance of mental health care in Polk, Hardee and Highlands Counties, Florida. The Corporation was formed in December 1976 and began operating on January 1, 1977. All fixed assets owned by the corporation are being provided rent-free to Tri-County Alcoholism Rehabilitative Services, Inc.

(DX 23 at p. 5) (emphasis added).

Tri-County's special financial report and accountant's report for the year ended June 30, 1976, also prepared by Donald R. Harrison, was appended to the HRS audit report for the years ending June 30, 1975 and 1976. (DX 25(B)) That report shows the make-up of Tri-County's assets shortly before they were conveyed to PHH. (DX 25(B) at p. 3) The assets of Tri-County at year end June 30, 1976 totalled $2,364,642.57. Of this total amount, $1,321,929.62 came from the State of Florida. (T-221, 222) An additional $678,000.00 of "taxpayers' money" came as reimbursement under the Baker Act and from Polk County. (T-222, 223) In addition, Polk County "passed through" to Tri-County fees paid by patients and third parties for services of the psychiatric unit of Polk General Hospital. (T-224) Less than $50,000.00 came from Tri-County substance and alcohol abuse counseling fees. An unspecified part of that amount was generated by court-ordered participation in the anti-abuse program. (T-317, 318) Interest on government dollars totalled less than $25,000.00. The large amount of public funds

received and the small amount of private funds received were commingled in Tri-County's interest bearing accounts. (T-63, 64, 177, 207)

The IRS Form 990's filed by PHH acknowledge that PHH "normally receives a substantial part of its support from a governmental unit or the general public." (DX 29 at p. 2)[6]

**Changes At PHH After Its Creation**

On June 28, 1984, the PHH and Tri-County Boards conducted a joint meeting. (T-228, 229) The purpose of the joint meeting, as described in the minutes (DX 16 at p. 3) was as follows:

> [t]he board needed to decide what should be done with both PHH Mental Health Services, Inc. and Tri-County Mental Health Board District VI-B, Inc. Considerable discussion followed, after which it was decided to keep PHH Mental Health Services, Inc. intact and to consider changing its Charter and By-laws to accommodate a broader purpose in the special services field. It was further decided that Tri-County Mental Health Board VI-B, Inc. should eventually be liquidated.

The minutes reflect that the PHH and Tri-County Boards discussed the business of PHH and Tri-County without providing any clear distinction between the two entities. For example, the boards discussed Tri-County vacating its leased office space with the implicit anticipation that PHH would be vacating the very same space. (DX 16 at p. 3) In tandem, the boards discussed the shredding of certain confidential records and the storage of other

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[6] The 1979 Form 990 shows $7,343.18 as a contribution received as a government grant. (T-75, DX 29, 1979 IRS Form 990, Part I, Line 1(d)) Also, PHH's 1980 IRS Form 990, Part I, Line 1(d), shows $631.71 received as a government grant (DX 29, T-76) (T-76)

records required to be maintained by the state. (DX 16 at p. 4) Other business matters, discussed generically by the boards without any distinction as to which board the matters applied, included severance pay for employees; plaques for board members; disposition of certain office supplies; cancellation of certain insurance coverage; delegation of authority to the president; and, the scheduling of the next meeting of the combined board. (DX 16 at p. 3-6)

According to the minutes, the board(s) additionally "discussed which corporation should expend funds first" with PHH paying certain bills and obligations which were Tri-County's. (T-232; DX 16 at p. 4) The minutes reflect that the boards decided to use Tri-County funds to pay all obligations possible before using any PHH funds to do so. (DX 16 at p. 5)

Finally, in a letter dated June 13, 1984 from John G. Simmonds, Executive Director of PHH and Tri-County, to Charles C. Stophel, Jr., Director of HRS Audit & Quality Control Services, Mr. Simmonds responds to Mr. Stophel's inquiries concerning "related party transactions.'' (DX 58) In the first paragraph of the letter, Mr. Simmonds states that PHH provides "services and support for our subcontract programs" and acknowledges the parallels between PHH and its counterpart, West Polk and Hardee County Mental Health Services, Inc. (West Polk) as well as parallels between Tri-County and its counterpart Peace River Center for Personal Development (Peace River). (DX 58)

In the third paragraph of the letter, Mr. Simmonds

acknowledges that PHH provides support to local mental health and social services providers and that the 11,000 square foot building and some equipment are provided to TCARS free of charge "on the basis that they [TCARS] will use the value of the rent as 'in kind' purposes" --that is, to defray local match requirements which would otherwise have to be met with county dollars. (T-305, 306; T-37, **38**, **DX** 58)[7]

In the last paragraph of the letter, Mr. Simmonds states (DX **58**):

> We consider all the corporations involved "in the sunshine" and the books are open to anyone having an interest in the related party transactions.

**PHH Refuses To Disclose Its Records**

Despite its close relationship with other admittedly governmental agencies and, in fact, the ultimate reliance on governmental financial support for its continued existence, PHH maintained that its status under the Public Records Act was uncertain and refused to comply with The Ledger's request for records pursuant to the Act. Instead, PHH filed a declaratory action, beating The Ledger to the courthouse. This action was filed within two weeks of a letter sent by The Ledger's general counsel indicating that The Ledger would seek to farce compliance through legal action if PHH did not comply with its records

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[7] "In-kind purposes" relates to the receipt of state funding. A dollar value could be placed on the no-cost lease to render it part of the 25% local funding required to obtain a "matching" 75% grant of state funds. (T-37, **38**; T-305-306)

request. (R-24) The Ledger then filed its petition for writ of mandamus,

## SUMMARY OF THE ARGUMENT

This court must decide, first, whether PHH's claimed uncertainty is a legally sufficient basis to deny fees to The Ledger pursuant to § 119.12(1), Fla. Stat., and second, assuming an entity may escape a fees award on that basis, whether PHH properly did so here, given its particular factual history.

In this case, and in its progenitor Fox v. News-Press Publishins Co., 546 So.2d (Fla. 2d DCA 1989), the Second District in effect enacted an exception to §119.12 Fla. Stat., contrary to the rule established by this Court that "([p]ublic policy) argument[s] should be addressed to the legislature. Courts deal with the construction and constitutionality of legislative determinations, not with their wisdom." Wait v. Florida Power & Light, supra, 327 So.2d at 424; See Also News-Press Publishinq Co. v. Wisher, 345 So.2d 646 (Fla. 1977).

The statutory scheme of Chapter 119 prohibits a holding like the one on appeal -- in essence, finding a violation of the Act, but creating an exemption for this unlawful refusal to comply with a records request because the party resisting disclosure exercised "good faith." This judicially-created exemption to §119.12 is a departure from Public Records Act case law that rejects such a judicially-legislated result as being inconsistent with the statute. Second, the decision below guts the Act of its

enforcement mechanism, creating a safe-harbor that contravenes the intent of the statute -- to open up governmental and quasi-governmental actions to scrutiny by the people of the state of Florida. The ruling below encourages a rush to court rather than self-imposed compliance with the Act in the first instance. This effect is contrary to the central purpose of the Public Records Act -- to promptly inform the citizens concerning stewardship of public power and resources.

Even if such a "good faith" exemption does exist under the Public Records Act, PHH cannot claim that it should be exempt in this case. PHH, a non-profit corporation that received 90 percent of its funding from public sources, cannot claim the level of uncertainty that once allowed a towing company contracting with a city to avoid liability for attorneys' fees in a Chapter 119 case. Fox v. News-Press Publishing Co., 546 So.2d 941 (Fla. 2d DCA 1989). PHH knew its background, history and source of funding prior to filing its declaratory action. PHH engaged in a pattern of delay in response to The Ledger's request for records, effectively utilizing the courts for this purpose. PHH only filed the declaratory action when it became clear The Ledger was about to file suit if PHH did not comply with its requests. PHH is not the type of innocent contractor, genuinely uncertain about its status under Chapter 119, to which any judicially derived exemption for fees liability in Public Record Act cases can apply.

## ARGUMENT

### I.

**THE DISTRICT COURT OF APPEAL ERRED IN OVERTURNING THE TRIAL COURT'S AWARD OF FEES TO THE LEDGER INASMUCH AS PHH WAS PROPERLY FOUND BY BOTH COURTS TO BE *AN* AGENCY WITHIN THE MEANING OF CHAPTER 119.**

a) The Language of The Statute Mandates That Attorney's Fees be Granted for Any Violation of the Public Records Law.

The Second District's decision in this case erred in both its factual determination of PHH's good faith, and erred as a matter of law in reversing the trial court's award of attorneys' fees, reasoning that because PHH filed a declaratory action when presented with the public records request, it was acting in good faith. PHH Mental Health Service supra, 582 So.2d at 1193. The ruling creates a new non-statutory exemption fromthe provisions of the Public Records Act, contrary to this Court's explicit prohibition. Wait v. Florida Power & Light *Co.*, 372 So.2d 420 (Fla. 1979) (courts should not consider public policy exemptions to Act and should only consider structure and constitutionality of legislation, not its wisdom). Moreover, the Second District made its ruling despite its acknowledgment that other courts deciding Chapter 119 cases had previously refused to impose a good faith standard.

> We recognize that there are cases from this court and others which hold that attorney's fees under Chapter 119 are awardable even if the agency's refusal to allow inspection was the result of a good faith belief that it was not required to do so. Times Publishing Co. v. City

of St. Petersburg, 558 So.2d 487 (Fla. 2d DCA 1990); News and Sun Sentinel Co. v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987).

PHH Mental Health Service, supra, 582 So.2d at 1193. The Second District's decision in this case is an incorrect interpretation of the language and the underlying policies of Florida's Public Records Act.

Chapter 119's provision for attorneys' fees was significantly revised in 1984. In amending $119.12 that year, the Legislature changed the standard for fee recovery from an "unreasonable" withholding of records to an "unlawful" withholding of records. Thus, the amendment closed a loophole through which officials were violating the law without any meaningful consequences. As the Fourth District Court of Appeal noted, "The purpose of this and other amendments made in 1984 was to broaden and simplify access to public records." News & Sun-Sentinel Company v. Palm Beach County, 517 So.2d at 743, 744 (Fla. 4th DCA 1987).

The 1984 change in the language of the statute is simple. Whether an agency's refusal to produce documents was reasonable may have been the subject of legitimate debate about good faith and bad faith in some instances prior to the 1984 amendment, given the pre-1984 statutory language. Under the statute since 1984, it is not even theoretically possible, however, that such refusal could be lawful once a claim to inspect records has been vindicated by a court. The Second District's ruling in the instant case creates a contradiction: PHH's refusal to produce records violated Florida law, specifically Chapter 119 of the Florida Statutes, yet PHH's

conduct did not constitute "unlawful" conduct for purposes of attorney fee liability pursuant to 5119.12.

Other courts which have previously faced this question have squarely ruled contrary to the Second District in this case. In News and Sun-Sentinel v. Palm Beach County, supra, the court awarded attorneys' fees despite the claim by Palm Beach County that its refusal to produce the documents was in good faith. In Sun-Sentinel the Palm Beach County Fire-Rescue Department refused to comply with the newspaper's public records request. The request concerned documentation of the presence of toxic substances and other hazardous materials that employers were required to deliver to the fire department. The department argued that it need not produce the records, relying on a statute that appeared to authorize disclosure of these records only to certain individuals, not including the news media. The court held that the statute was not an exemption to the Public Records Act and ordered the production of the documents.

Considering the award of fees, the Fourth District Court of **Appeal** in Sun-Sentinel addressed in detail whether 5119.12 allows courts to engraft a "good faith" exception to the statute, which awards fees when documents were "unlawfully" withheld. The court disagreed with the portion of the trial court's decision stating that the language "'unlawfully' indicates an intention to engraft a 'good faith' or 'honestmistake' exception." Id. at 744. Using simple logic, the court held:

> The court having found that the newspaper was entitled under the law to disclosure of the

> documents which it requested, it follows that disclosure was unlawfully refused and the newspaper is entitled to its reasonable attorney's fees.

Sun-Sentinel, supra, 517 So.2d at 744.

The court based its rationale on the role of attorneys' fee awards in the structure of the statute:

> The attorney's fees provision may be viewed by the records keeper as a penalty for noncompliance. In one sense this is accurate and thus it may have a tendency to motivate the records holder to be more responsive and careful when a request for disclosure is made. It is at the same time a means of compensating members of the public where a request for disclosure is frustrated when no specific exemption is involved. Clarification of particular applications of the public records law accrues to the benefit of the agency and the public. It is appropriate that a member of the public commencing litigation to enforce disclosure and whose right to disclosure is ultimately vindicated by the court order at least have his attorney's fees reimbursed for that endeavor. The public should not be required to underwrite clarification of a law passed for its special benefit. Should we engraft onto the term "unlawfully refused" either a good faith or an honest mistake exception, the salutary effect of the 1984 amendment would be seriously diluted.

Ibid. (emphasis added).

After Sun-Sentinel, other courts applied similar reasoning in refusing to imply a "good faith" or analogous standard to the fees provision of the Act. In Brunson v. Dade County School Board, 525 So.2d 933 (Fla. 3d DCA 1988), the trial court ordered the School Board to produce the records in question, but denied an award of attorneys' fees because the refusal was not "unreasonable." Citing the intent of Chapter 119 (to prevent agencies subject to chapter

119 from restricting access to public records), the Third District reversed the trial court and awarded fees because the agency's unjustified delay in compliance with chapter 119 "amounted to an 'unlawful refusal' under §119.12." Brunson, 525 So.2d at 934.

In Times Publishing Co. v. City of St. Petersburg, 558 So.2d 487 (Fla. 2d DCA 1990), the Second District Court of Appeal itself ruled that §119.12 applied regardless of the intent or good faith of the party refusing to grant access to records. In that case, the city and a major league baseball team were negotiating a lease for the use of the city's stadium. The court held that the lease documents were, in fact, public records. As to fees, the court stated:

> We think the intent of the statute is to reimburse a party who incurs legal expenses when seeking permission to view records wrongfully withheld, even if access is denied based on a good faith but mistaken belief that the documents are exempt.

Id. at 495.

The decision below contravenes the 1984 amendment to §119.12 by creating a new "good faith" exemption to the statute, in direct opposition to amendment's intent to take the subjective element out of the fees award analysis. This judicially created exception, in addition to defeating the express intent of the Legislature, is contrary to the direction of this court in Wait: courts can not create exemptions to the Public Records Act, but must defer to the Legislature in this area of the law. For these reasons, the mandate of the Act to grant fees to successful chapter 119 plaintiffs -- plain on the face of the statute -- cannot be

ignored.

b) Excluding Fees Eliminates the Principal Statutory Incentive For Public Agencies to Voluntarily Comply With the Public Records Act, and Undermines the Articulated Public Policy Behind The Act.

In addition to the argument that §119.12 on its face prevents a ruling like the Second District's here, the public policy rationale behind judicial refusal to create exceptions to the Act also supports The Ledger's position.

The Legislature has succinctly stated:

> (1) It is the policy of this state that all state, county and municipal records shall at all times be open for a personal inspection by any person.

§119.01 Fla. Stat. The purpose of the Public records Act and its open meetings counterpart, the "Government in the Sunshine Law," §286.011 et. seq., Fla. Stat., is to "promote open government and citizen awareness of its working" and, therefore, "enhance and preserve democratic processes." Byron, Harless, Schaffer, Reid & Associates, Inc. v. State ex rel. Schellenberg, 360 So.2d 83, 97 (Fla. 1st DCA 1978), quashed on other grounds, 379 So.2d 633 (Fla. 1980). The people of this state have a right to an open government so that citizens can know and adequately evaluate the decisions of their elected and appointed officials. Coleman v. Austin, 521 So.2d 247 (Fla. 1st DCA 1985); Browning v. Walton, 351 So.2d 380, 381 (Fla. 4th DCA 1977) (access to public records is substantive right that Legislature has power to confer). Without access to public documents, citizens are uninformed and less able to guide public officials according to the democratic process.

Recognizing the importance of public oversight, the Legislature made the open records requirements applicable even to private entities acting on behalf of the government. See §119.011(2).

Also recognizing the importance of this fundamental principle of open government, courts in this state have liberally construed chapter 119. Downs v. Austin, 559 So.2d 246, 247 (Fla. 1st DCA), rev. denied 594 So.2d 140 (1990). See also Tribune Company v. In re Public Records, 493 So.2d 480, 483 (Fla. 2d DCA 1986); Bludworth v. Palm Beach Newspapers, Inc., 476 So.2d 775, 778 (Fla. 4th DCA 1985). The "breadth of such right is virtually unfettered, save for the statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." Lorei v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA 1985).

To aid the public in its efforts to obtain access to its government, the Legislature enacted §119.12 as an enforcement mechanism, a private Attorney General-type funding mechanism. Any open records statute would be ineffective if not equipped with some reason for its putative offenders to comply, and courts recognize the importance of this policy rationale in their decisions. In Downs v. Austin, supra, the court cited the fees provision as an important part of the Public Records Act's statutory scheme. In Downs, the trial court granted fees to an enforcer of the Act despite the fact that the party requesting disclosure of records initially lost in the trial court on the merits, then won an

appeal. Speaking to the intent of the Act, the First District stated: "We agree with appellant that [§119.12] was simply intended, consistently with the purpose of the Act, to serve as a disincentive for an agency to further delay access to public records by pursuing an appeal which is without merit." Downs v. Austin, supra, 559 So.2d at 247.

PHH's "meritless" action in this case was originally the declaratory action, followed by the appeal, all consistent with its plan of delay. The Second District's decision below upsets this statutory scheme, and leaves no "disincentive" for subject agencies to try to avoid the disclosure requirements of the Public Records Act.

If upheld, the Second District's decision will provide a safe harbor for any agency wishing to avoid the negative effects of non-compliance -- the initiation of a declaratory action. The encouragement of declaratory actions without the sanction of fees would also enable reluctant agencies to achieve significant delay of their obligation to produce records, for example, several years in this instant case. In addition to delaying records disclosures, the rule announced below will needlessly burden the courts with declaratory actions filed by entities like PHH who simply wish to avoid attorneys' fee liability. The decision is a disincentive to amicable resolution of such controversies. An agency that wins the footrace to the courthouse is rewarded for its rush. The Act does not contemplate such a reward.

Without the teeth of attorneys' fees as a "disincentive,"

any agency that claims doubt as to the statute's applicability to it and then files a declaratory action is free of this sanction. Moreover, the increasing privatization of government means that suits of this nature will grow in number, and the judicially created exemption for "doubtful" quasi-governmental agencies will become an effective means by which such agencies can withhold public records from the public. The Second District's decision actually creates disincentive for citizens to seek public records from non-governmental agencies subject to the Act. Such citizens risk being sued, with no hope of recompense even if they win the case.

c) The Second District's Ruling Subverts the Statutory Scheme of Open Records by Placing a New Risk of Being Sued Upon the Requester.

Generally under the Public Records Act, the person requesting access to public records has the sole power to decide whether to seek judicial assistance in enforcing his claim to inspect the records in question. Department of Revenue v. Markham, 396 So.2d 1120, 1121 (Fla. 1981); Graham v. Swift, 480 So.2d 124, 125 (Fla. 3d DCA 1986). The Second District's ruling now exposes those who seek public records to the risk of being sued for such efforts, and having to bear the cost of that suit.

The Public Records Act provides, in mandatory language, that every records custodian "shall permit the record to be inspected and examined by any person desiring to do so" § 119.07(1)(a), Fla. Stat. If the custodian believes some information is exempt from the Act's disclosure requirements, he or she "shall delete or

excise from the record only that portion of the record with respect to which an exemption has been asserted and validly applies and ... shall produce the remainder of such records for inspection and examination," and furthermore, "shall state the basis of the exemption which he contends is applicable." §119.07(2)(a) Fla. Stat.

Upon receiving the custodian's response, the requester may decide to take the custodian to court, if the custodian appears to be wrongfully withholding information or records. In this event, he or she is entitled to an "immediate" hearing, See § 119.11, Fla. Stat., and if the court agrees with the requester, the records are released and the requester is reimbursed for his or her costs and attorneys' fees. § 119.12, Fla. Stat. Thus, any member of the public has the power and the means to enforce compliance with the Act.

Alternatively, upon receiving the records custodian's response, the requester may choose to accept the asserted basis for withholding the record and decide not to go to court. The response of the records custodian may be persuasive that the records are exempt from the Public Records Act; or, the requestor may decide that the need or desire for the documents has diminished or does not justify the expense of litigation. In either event, under the Public Records Act, the requester has the right simply not to pursue the matter any further. This statutory scheme clearly serves the purpose of minimizing litigation as a means of securing public information.

The Second District's ruling in this case and in Fox vitiates this statutory scheme. As discussed above, supra p. 27, the records custodian is financially encouraged under these rulings to initiate a declaratory judgment action against the person seeking access merely far having made the public records request. In this event, the requester becomes an involuntary defendant and must bear the cost of litigating the case regardless of whether he or she otherwise would have sought to pursue the matter in court, and, indeed, under the Second District's reasoning, even if the records custodian is ultimately determined to have been in error in withholding the documents. The disincentive to agency non-compliance is thus converted into a disincentive against members of the public exercising their Chapter 119 rights.

The authority for enacting so fundamental a change in the structure of the Public Records Act rests solely with the legislature. In remaking the presumptions, incentives, and purposes of the Public Records Act, the Second District has displaced the legislature's basic structure of the Act.

## II.

## THE DISTRICT COURT ERRED BECAUSE IT MADE *AN* IMPLICIT FACTUAL DETERMINATION OF THE INTENT OF PHH IN BRINGING THE DECLARATORY JUDGMENT LAWSUIT

Implicit in the Second District's opinion is the finding that PHH acted in good faith when it refused to comply with The Ledger's public records request. The trial court found PHH's failure to comply unlawful, which would amount to a failure to find good faith if that fact question is judicially imported into $119.12.

Therefore, to the extent that the Second District's opinion rests on the belief that PHH acted in good faith, it is a reversible failure to accord the trial court's factual findings the great difference required on review.

It is the contention of The Ledger that fees liability under §119 is mandated as a matter of law, so that good faith should never be a consideration in fee award determinations. See Section I, supra. In the alternative, to the extent that this issue is a mixed question of law and fact under Fox v. Fort Myers News-Press, supra, the Second District's decision substitutes findings of fact not made by the trial court. In neither the trial court's order on the merits (R-203) nor the order on fees (RF-76) is a finding made that could lead an appellate court to believe that PHH did not act "unlawfully" in this case. PHH Mental Health Service, supra, 582 So.2d at 1193. The findings of the trial judge in the order on the merits specifically spell out 14 findings of fact. Only finding "O" could possibly be construed as a basis for the Second District's ruling that PHH's behavior was not unlawful.

> o) The fact that this Court has found that PHH Mental is a public agency subject to the Florida Public Records Act is not to be construed in anyway as any indication of wrongdoing on the part of any individual or corporation.

(R-208).

The Ledger argues that the trial court's finding in letter "O" of the order is properly construed as absolving PHH of criminal wrongdoing under §119.10(2), as opposed to civil liability. This analysis is reinforced by the fact that shortly after the ruling on the merits, the trial court held PHH liable for fees. Implicit in

that order is the finding that PHH acted contrary to the statute, i.e., unlawfully and as such was properly liable for The Ledger's fees. The test created by the Second District in applying the fees provision of §119.12 implicitly made determinations of fact contrary to those upon which the trial court order is based. This is contrary to the presumption of correctness and great deference granted to determinations of facts by trial courts. Herzog v. Herzog, 346 So.2d 56 (Fla. 1977); Malver v. Sheffield Industries, Inc., 502 So.2d 75 (Fla. 3d DCA 1987); Plaza Builders, Inc. v. Reds, 502 So.2d 918 (Fla. 2d DCA 1986). On these grounds, The Ledger argues that the reversal of the trial court's decision granting fees is reversible error.

**III.**

**THE DISTRICT COURT'S HOLDING ERRED IN ITS FACTUAL DETERMINATION THAT PHH WAS EXCUSED FROM FEES UNDER FOX BECAUSE PHH WAS CREATED, AND EXISTED ONLY AS A GOVERNMENTAL AGENCY, WITHOUT A NON-PUBLIC FUNCTION, AND PHH COULD NOT HAVE HAD REASONABLE DOUBTS OVER ITS STATUS UNDER THE PUBLIC RECORDS ACT WHEN IT FILED THE DECLARATORY ACTION.**

Even if this Court departs from Wait v. Florida Power & Light and finds that a judicially-legislated exemption to the attorneys' fees section can exist under the Public Records Act, the facts of this case make PHH ineligible for such an exemption under the test of Fox v. News-Press Publishins Co., 546 So.2d 941 (Fla. 2d DCA 1989). In Fox, the City of Fort Myers entered into an agreement with a towing company owned by Fox. After an assignment of the contract to a second towing company, Alligator Towing, the Fort-Myers News Press requested permission to inspect certain documents

in the towing companies' "custody or control." Two days after the request for the documents, the towing companies filed a declaratory action seeking determination as to whether they had become Chapter 119 agencies by contracting with the City. The News-Press responded by filing a counterclaim for a writ of mandamus to force disclosure of the records pursuant to Chapter 119.

The Second District held that Alligator Towing's business records maintained in connection with its agreement with the City were public records open to **inspection** by the public. The court applied a "totality of factors test" to reach this conclusion. Factors indicating "significant level of involvement [between public agencies and private entities]...can lead to the conclusion that the [private entities] records are subject to the **Public** Records Act." Fox, 545 So.2d at 943. The Fox court denied fees to the newspaper, however, on the grounds that Alligator Towing's uncertain status meant its refusal to produce the records, although incorrect, was not unlawful.

> Because Alligator Towing's obligation under the act is not as clearly delineated as that of a true public agency, and in the absence of a previous judicial determination regarding that obligation, Alligator Towing by seeking a judicial declaration before turning over its records did not, **in** our **opinion**, unlawfully refuse to permit inspection of the records.

Id. at 944.

Fox is an anomaly. As stated in Part I, such a "good faith" exception **is** at odds with the rest of the established case law and the statute itself. Even assuming, arguendo, that such a narrow judicial exception applies, such an exception does not apply to

PHH under the facts of this case.

PHH's status is distinguishable from that of Alligator Towing in **Fox**. Alligator Towing was a privately-owned concern that existed prior to, and independent of, its modest governmental affiliation. PHH, by contrast, was created by a governmental agency, Tri-County, and, by its own representation to the federal government was to be, at a minimum, 90 percent funded by governmental entities. (DX 28 at p.1) In fact, as the evidence showed, PHH could not stand alone without the support of the various contributing governmental agencies. Alligator Towing, on the other hand, could and did exist and function, in fact, as a towing company without governmental support. This distinction is crucial when applying the **Fox** test for good faith in determining whether the refusal was "unlawful." The **Fox** court specifically noted that the towing company's status was not "clearly delineated" under the statute, and allowed a narrow exemption from fees liability by presuming that Alligator Towing was in good faith, confused.

PHH, on the other hand, cannot make such a showing of good faith confusion concerning whether it was acting on behalf of a public agency under the Act. On its own application for tax-exempt status with the Internal Revenue Service, PHH stated: "The organization will receive ninety percent (90%) or more of its funding from various government sources." (DX 28 at p. 1) Later, on the same application, it indicated that PHH is "an outgrowth of Tri-County Mental Health Board, Inc." (DX 28 at p. 3) PHH cannot

have it both ways: being a tax-exempt, governmentally related organization for IRS purposes, while ignoring Florida law obligations under the Public Records Act.

Petitioners do not imply that all tax-exempt organizations are automatically subject to chapter 119. To the extent that such private entities perform governmental functions with taxpayer dollars, they come within the purview of the Public Records Act. Schwartzman v. Merritt Island Volunteer Fire Department, 352 So.2d 1230 (Fla. 4th DCA) cert. denied. 358 So.2d 132 (Fla. 1978); Fritz v. Norflor, 386 So.2d 899, 901 (Fla. 5th DCA 1980). Since PHH's claimed uncertainty in 1988, the case law has become even more clear on this point, further demonstrating that PHH's claim is, and has been, without merit. In Locke v. Hawkes, Case No. 76,090 (Fla. Feb. 27, 1992), this Court stated: "[T]he definition (of agency in §119.011) applies particularly to those entities over which the legislature has some means of legislative control, including counties, municipalities, and school boards, and state agencies, bureaus, and commissions, and private business entities working for any of these public entities and officials." Locke v. Hawkes, supra, slip op. at 9. See Also News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Case No. 77,131 (Fla. March 5, 1992) (including performance of governmental function as factor in court's adoption of "totality of factors" test determining agency status). PHH knew of its own funding sources and its functions, and as such, this should have put PHH on notice that the Act applied its operations given a clear reading of the statute and

statute and under the standards of Schwartzman. The facts simply do not support the contention that PHH, like Alligator Towing, was a contracting agency unaware of, and subject to the requirements the requirements of the Public Records Act.

Furthermore, PHH was estopped from asserting an exemption from disclosure. In PHH's own words of assurance to HRS, PHH is "in the sunshine," its books open. (DX 58) That assurance was given, of course, before The Ledger asked to inspect the records and before The Ledger learned the assurance was hollow, indeed.

On a spectrum with a legislatively created "pure" governmental agency on one end, and a private company contracting with a governmental agency at the other end, PHH is significantly closer to the former, the "pure" agency, than to the latter. Given PHH's admissions and conduct as outlined in the statement of facts, it is certain that PHH's records custodian, Carl Strang[8], whose role in PHH goes back to its origins and who chaired a meeting describing the transfer of funds and fixtures from Tri-County to PHH, knew of the PHH corporate structure when he refused comply with The Ledger's document request.

Fox and the Second District's decision in this case are the only cases which hold that fees liability under the Act is subject to a good-faith exception, departing from the rule of other 5119.12 cases granting fees regardless of the state of mind of the party objecting to disclosure. Even if this court does engraft the "good

[8] Mr. Strang was a former mayor of Winter Haven, Florida. (R-20, DX 57)

faith" exemption of Fox onto the Public Records Act, PHH cannot meet this standard because it is not the type of borderline agency that can qualify for this exemption. A not-for-profit corporation that received virtually all of its funding from governmental sources, that was created by a governmental agency itself created by the Florida Legislature, in which the principals knew of the corporation's role as financial conduit for governmental funds for other health care programs is not the kind of "doubtful" agency that qualifies for any judicially-legislated exemption.

PHH was a corporation created with local government monies providedthrough an arrangement with the Polk County Commission and by accumulated interest on public grants. (DX 17 at p. 2) Its mission, according to corporate minutes at its creation, was to hold public assets and financially support local mental health services. (DX 17 at p. 2) PHH's office space was bought by government funds before being deeded to PHH. (T-117) Its function was quite simple -- to act as a conduit for government funds, and assets, making them available to mental health care providers in Polk, Highlands and Hardee Counties, and relieving these counties, in part, from their local match money obligations. Specifically, PHH's Articles of Incorporation state that PHH's purpose included "to apply for and receive public funding and financial assistance" as PHH carried out its stated objective of delivering health care, especially in the field of mental health and alcohol rehabilitation. (DX 13(A)) PHH should not be allowed to use the narrow exception of Fox, created for a private corporation which

merely entered into a contract and acted on behalf of a public agency to some limited extent, to allow it to keep its practices out of the watchful public gaze. An organization which evolves from a legislatively created entity, that runs almost exclusively on government assets and performs the governmental function of delivering health care with taxpayer dollars, is not deserving of an exemption from the Act. The public richly deserves to know, for example, whether PHH's fund balance was expended on mental health care, or for professional fees paid to the attorneys and accountants who had a hand in the formation and control of PHH. Under these circumstances, no "good faith" doubt could have existed in the minds of PHH's directors or its records custodian as to PHH's obligation under the Public Records Act.

## CONCLUSION

The Public Records Act, provides for the award of legal fees for any "unlawful" withholding of public records. Upon any ruling vindicating the public's rights to public records, 5119.12 mandates that the member of the public requesting disclosure recover his attorneys' fees. There is no statutory exemption to 5119.12 that allows a court to consider the intent or the "good faith" of a resisting agency before it awards fees. Therefore, the decision below should be overturned. In the alternative, should the court accept the Second District's reasoning creating an exemption, the facts of this case show PHH is not the type of agency that can qualify for it.

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## CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the office of David A. Maney, Esquire, and Nancy Hutcheson, Esquire, P.O. Box 172009, Tampa, Florida 33672-0009, and to J. Hal Connor, Jr., Esquire, P.O. Drawer 798, Winter Haven, Florida 33882, by U.S. Mail this 12 day of March, 1992.

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