IN THE SUPREME COURT
STATE OF FLORIDA

MEMORIAL HOSPITAL-WEST
VOLUSIA, INC.,

Petitioner,

vs. Case No. 90,835

NEWS-JOURNAL CORPORATION,

Respondent.
_____/

AMICUS CURIAE BRIEF WITH APPENDIX
ON BEHALF OF

The Association of Community Hospitals
and Health Systems of Florida, Inc.

Bethesda Memorial Hospital
Baptist/St. Vincent's Health System
Cape Canaveral Hospital
Citrus Memorial Hospital
Ed Fraser Memorial Hospital
Indian River Memorial Hospital
Lower Florida Keys Health System
Munroe Regional Health System, Inc.

JOHN E. THRASHER
TIMOTHY W. VOLPE
LESLIE A. WICKES
Florida Bar No. 158757
SMITH, HULSEY & BUSEY
1800 First Union Bank Tower
225 Water Street
Jacksonville, Florida 32202
(904) 359-7700

NEIL H. BUTLER
Florida Bar No. 191130
BUTLER & LONG
322 Beard Street
Tallahassee, Florida 32303
(850) 222-6969

KAREN PETERSON
Florida Bar No. 989320
315 South Calhoun, Ste. 808
Tallahassee, FL 32301
(850) 222-9800

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND THE FACTS

The Association of Community Hospitals and Health Systems of Florida, Inc. (CHHS) and the individual hospitals and health systems who have joined in this Amicus Curiae Brief adopt by reference the Statement of the Case and the Facts in the Initial Brief of the Petitioner, Memorial Hospital-West Volusia, Inc. (West Volusia Hospital).

SUMMARY OF THE ARGUMENT

The Association of Community Hospitals and Health Systems of Florida, Inc. (CHHS) is a not-for-profit association composed of most of the public hospitals and private, not-for-profit hospitals in Florida. The eight individual hospitals are all private, not-for-profit hospitals that lease public facilities as part of their operations.

The controlling Supreme Court precedent for the public records issue in this case is News & Sun-Sentinel v. Schwab, Twitty & Hauser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992). The trial court took the undisputed facts and carefully applied those facts to each of the factors identified in the Schwab decision. Based on that analysis, the trial court correctly concluded that the "totality of the factors" supported the conclusion that the public records law did not apply to Memorial Hospital-West Volusia.

By contrast, the District Court of Appeal failed to apply the correct standard for review or to follow the controlling Supreme Court precedent. Rather, the District Court created a new standard for determining the application of the public records laws to private companies. In effect, the 5th DCA concluded that if a facility is owned by a public entity, the public records laws will

always apply, even if it is being operated by a totally independent private company.

The District Court's analysis of the Schwab factors (i) sought to pick and choose what facts are important, (ii) sought to replace its judgement for the judgment of the Circuit Court on the application of those factors and (iii) used a system of reasoning that would make it impossible for any public facility to ever be operated outside of the public records law, regardless of how the transaction was structured.

The decision by the District Court seems to ignore the fact that the overwhelming majority of all conversion of public hospitals to private operations were expressly authorized by the Florida Legislature. Those acts of the Legislature do not support the conclusion that the public records laws should apply to those private entities. Indeed, if the public records laws do apply regardless of the independance of the private operator, public hospitals will lose their most important tool to compete in the modern health care arena.

Finally, the District Court opinion failed to apply the correct legal standard for determining the application of the open government meeting laws of our state. The 5th DCA incorrectly concluded that the same standard should apply for both public

records and public meeting issues, even though the constitutional language for those two provisions is quite different.

For all of these reasons, we respectfully request that this Court reverse the District Court of Appeal and affirm the decision of the Circuit Court in this case.

ARGUMENT

PRELIMINARY STATEMENT

The Association of Community Hospitals and Health Systems of Florida, Inc. (CHHS) is a not-for-profit association composed of most of the public hospitals and private, not-for-profit hospitals in Florida. All of the members of CHHS are qualified as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. The members of CHHS are located in every area of the state and provide more than 85% of all of the indigent and charity care in this state.

The eight individual hospitals and health systems who have joined CHHS in this Amicus Brief are all private, not-for-profit corporations that, like West Volusia Hospital, lease one or more public facilities as part of their operations.[1]

---

[1] There are a total of 37 hospitals that began as publicly owned and operated hospitals that are now operated by private corporations. See, Tab 1, of the Appendix to this Brief. Of these 37 hospitals, there are a total of 18 hospitals in Florida which continue to be owned by public entities (municipalities, counties or special districts) and are operated by private, not-for-profit corporations under long term leases.

The mission of CHHS is to preserve, protect, and enhance the public and private, not-for-profit health care system in Florida. That mission is carried out, in part, by participating in court cases and administrative proceedings that have an impact on that segment of the health care industry in Florida. The case of Memorial Hospital-West Volusia v. News-Journal Corporation is such a case.

The Amicus Brief is filed in support of the Petitioner, West Volusia Hospital and its sole member, Memorial Health Systems. CHHS and the participating hospitals and health systems appreciate the opportunity to present our position on the legal standards that should be applied in deciding this case as well as the implications that this Court's decision may have beyond the parties to this case.

POINT I: THE TRIAL COURT PROPERLY APPLIED THE SCHWAB TEST TO THE FACTS OF THIS CASE

In 1967, the Florida Legislature passed the first public records law. Chapter 67-125, Laws of Florida. Although the original law applied to all executive branch agencies and local governments, this law did not extend to persons "acting on behalf of" the governmental agencies covered by the public records laws.

The extension of the law to "persons acting on behalf of" government was adopted in 1975 in response to the decision in State ex rel. Tindel v. Sharp, 300 So.2d 750 (Fla. 1st DCA 1974), in which the First District held that a consultant engaged by the Duval County School Board to find a new superintendent was not acting on behalf of the state and therefore his records were not subject to disclosure. The 1975 amendment was meant to ensure that a public agency could not avoid disclosure by delegating its governmental decision-making responsibility to a private entity. See News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992).

Since the 1975 amendment, there have been a number of cases which have interpreted and applied the "acting on behalf of" standard. The District Courts of Appeal began to develop a "totality of the factors" test by which to determine whether an entity was acting on behalf of a public agency.

In Schwartzman v. Merritt Island Volunteer Fire Dept., 352 So.2d 1230 (Fla. 4th DCA 1978), the court, in determining whether to allow public inspection of volunteer fire department records, considered whether there was (1) public funding, (2) requirements for membership, (3) commingling of funds and (4) activities conducted on public property. See also Byron, Harless, Schoffer,

Reid & Associates v. State ex rel Schellenberg, 360 So.2d 83 (Fla. 1st DCA 1978).

The court in Parson & Whittenmore, Inc. v. Metropolitan Dade County, 429 So.2d 343 (Fla. 3d DCA 1983), cited Schwartzman, supra, with approval and the federal court standard in determining an entities relationship to governmental activities which includes (1) whether the entity performs a governmental function, (2) level of governmental funding, (3) the extent of regulation and (4) whether the entity was created by the government. The court held that engineering and construction firms that contract with public agencies are not subject to the public records law, because they "did not perform an essentially governmental function or participate in any decisional process."

In 1989, the Second District Court of Appeal in Fox v. News-Press Publishing Co., 545 So.2d 941 (Fla. 2d DCA 1989), cited Schwartzman with approval and recognized that there was no one factor that determined when records of a private business are subject to the public records law, but the courts must look to "a totality of factors which indicate a significant level of involvement by the public entity." See also PHH Mental Health Services, Inc. v. The New York Times Co. d/b/a The Ledger, 582

So.2d 1191 (Fla. 3d DCA 1991), and Sarasota Herald Tribune v. Community Health Corp., 582 So.2d 730 (Fla. 2d DCA 1991).

In 1992, this Court recognized that the majority of district courts have looked to a number of factors to determine the scope of the public records law and adopted the "totality of factors" test originally enunciated in Schwartzman, supra. News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992). In that case, a newspaper sought access to the records of an architectural firm that had contracted with the Palm Beach County School Board in connection with the construction of public school buildings. Although indicating that its list was not exhaustive, the Court applied the following factors to determine whether a private corporation was "acting on behalf of" a public entity: (i) creation, (ii) funding, (iii) regulation, (iv) decision-making process, (v) governmental function, and (vi) goals. This Court carefully defined what each of those factors meant and concluded that the architectural firm did not act on behalf of the school board because the board did not create, capitalize or control the firm.

In the instant case, the trial court below thoroughly analyzed each of the Schwab factors in its Summary Final Judgment dated August 16, 1996. See, Tab 2 of the Appendix to this Brief.

Outlining its findings of fact, the trial court concluded that the evidence was undisputed that:

> 1. Creation. West Volusia Hospital was formed and incorporated by Memorial Health Systems, not by the Authority.
>
> 2. Funding. West Volusia Hospital paid off the Authority's bonded debt and agreed to spend millions on capital improvements on the hospital. The only public monies which the Authority is obligated to pay West Volusia Hospital are payments for indigent care provided on a fee for service basis. Further, West Volusia Hospital and the Board do not commingle their funds.
>
> 3. Regulation. The Authority has no role in the operation of the hospital, and the hospital's board is elected by Memorial Health Systems with the exception of one non-voting member nominated by the Authority. The Authority has no power to compel changes to the hospital's articles or bylaws.
>
> 4. Decision Making Process. The hospital and the Authority cannot bind each other. The Authority has no control or influence over the way the hospital is operated.
>
> 5. Function. West Volusia Hospital performs the same function its sole member, Memorial Health Systems, performs - it operates a hospital. The Authority has chosen to fulfill its function - to ensure adequate health care for the residents of the District - by leasing its publicly-owned hospital to a private corporation.
>
> 6. Goals. The hospital acts for the benefit of its sole member, Memorial Health Systems, and deals at arms length with the Authority.

Based on these facts, the trial court concluded that West Volusia Hospital did not act on behalf of the Board. The trial court's conclusion is completely consistent with Schwab and Sarasota. Like the architectural firm in Schwab, West Volusia Hospital was not created by a public agency and further, is not controlled by one. In contrast, the not-for-profit corporation analyzed in Sarasota was created by the Sarasota County Hospital Board and received substantial funds, capital and credit from the Board. Further, unlike West Volusia Hospital, the not-for-profit corporation at issue in Sarasota was prohibited from competing with the Board and described itself as an "outgrowth" of the Board and a "side-by-side" corporation. Sarasota, 582 So.2d at 734.

In the instant action, the District Court had the duty to review the record in the light most favorable to West Volusia Hospital and to sustain the trial court's theory if supported by competent substantial evidence. See Orme v. State, 677 So.2d 258, 262 (Fla. 1996). Instead, the District Court replaced its judgment for the judgment of the trial court on the application of the factors when the trial court's analysis was plainly supported by the evidence. See Trepal v. State of Florida, 22 Fla. L. Weekly S170a (March 27, 1997).

Moreover, the District Court emasculated this Court's decision in Schwab. In effect, the District Court rejected the Schwab "totality of the factors" test and found that the "true" test for applying the public records law was whether the private company was working "for the public body" or "in place of the public body." News-Journal Corp., 695 So.2d 418 (Fla. 5th DCA 1997). Once the District Court decided that West Volusia Hospital was performing the functions of the Hospital District on property owned by the District, the District Court's analysis in this case was over. The District Court stated:

> In a broad, general sense, Lessee was "acting on behalf of" the Authority in continuing to fulfill the Authority's responsibility to provide hospital services to its constituents.

Id.

Basically, the District Court held that, "once a facility is public, it must always be public" for purposes of the public records requirements of Article I, Section 24(a) of the Florida Constitution. At best, this newly created analysis ignores the judicial precedents of this Court. At worst, the District Court's decision has attempted to reverse the controlling decisions of the Supreme Court of Florida.

A close reading of the District Court's decision reveals that seven of the factors identified in the Schwab decision supported that West Volusia Hospital does not "act on behalf of" the Authority. The District Court was able to conclude that the "totality of the factors" supported the application of the public records laws only by using the "NO, BUT..." test. Let us illustrate the reasoning employed by the Court:

> 1. **DID THE AUTHORITY CREATE THE LESSEE?** The District Court said **"NO, BUT..."** the Authority selected s. 155.40, Florida Statutes for this transaction and therefore, the private corporation was formed at the direction of the public entity.
>
> 2. **DOES THE AUTHORITY PROVIDE PUBLIC FUNDING TO THE LESSEE? "NO, BUT..."** the Authority is indirectly subsidizing the private corporation through the rental rate charged under the lease.
>
> 3. **DO THE AUTHORITY AND THE LESSEE COMMINGLE FUNDS? "NO, BUT..."** both the Authority and the private corporation pay expenses associated with the operations of the hospital and therefore, there is apparent commingling.
>
> 4. **ARE THE SERVICES PROVIDED BY THE LESSEE AN INTEGRAL PART OF THE AUTHORITY'S DECISION-MAKING PROCESS? "NO, BUT..."** the Authority's sole reason for existing is to provide access to health care and this lease arrangement fulfills that goal.
>
> 5. **DOES THE AUTHORITY CONTROL THE PRIVATE COMPANY? "NO, BUT..."** if the Lessee defaults, then the lease can be cancelled.

6. **DOES THE AUTHORITY HAVE A FINANCIAL INTEREST IN THE LESSEE? "NO, BUT..."** because of the financial subsidy provided through the lease rate, the Authority does have a financial interest in the Lessee.

7. **DOES THE LESSEE EXIST FOR THE BENEFIT OF THE AUTHORITY? "NO, BUT..."** if the Lessee did not exist, the Authority would have to run the hospital.

It is obvious that the "NO, BUT..." test can find that any factor used to determine whether the public records laws apply is present in any factual situation. That is precisely why the District Court concluded that the very competent lawyers who handled the West Volusia transaction and the express intent of the parties would not, in the opinion of the Fifth District, change the result.

POINT II: THE DECISION BELOW UNFAIRLY CHANGES THE RULES "AFTER THE FACT"

The not-for-profit hospitals which acquired facilities from public agencies have relied on the terms of their agreements for a substantial number of years. That reliance includes reliance on the precedent of this Court which applied the "totality of the factors" test. If this Court affirms the District Court decision, it will remove one of the three principal reasons many of these conversions occurred, possible causing far-reaching adverse consequences to some of these public facilities.

Just as in this case, many of the private companies that lease public hospitals would not have entered into the lease arrangements "but for" the understanding that the public records and public meetings laws do not apply. Just as in this case, many of the private companies that lease public hospitals addressed the applicability of the public records law as a specifically negotiated term of the lease.

The Memorial decision involves a relatively new lease arrangement. However, it is clear in the record that the parties to that lease relied on the reasonable interpretation of existing Supreme Court precedents when the decision was made to execute the lease.

In New York Times Company v. PHH Mental Health Services, Inc., 616 So.2d 27, 30 (Fla. 1993), the District Court affirmed the trial court's decision that PHH, a medical provider, "acted on behalf of" Tri-County Mental Health, Inc., a public agency of the state. In that case, this Court had the opportunity to put this issue to rest by holding that all private non-profit medical providers in lease agreements with public agencies are "acting on behalf of" those agencies and, therefore, are subject to the public records laws of this state. However, not only did this Court refrain from that

ruling, but issued a clear directive for private entities entering into these types of agreements.

By stating that "private entities should look to the factors announced in Schwab to determine their possible agency status under chapter 119", it is clear that the Court intended for parties to be able to set up an agreement that does not fail under chapter 119, based on a true "totality of the factors" evaluation as required by Schwab. The District Court in this case confirmed that both parties to this lease employed "very capable lawyers" who structured a transaction that followed the advice of this Court in the PHH case. In reversing the trial court's decision, the Fifth District not only disregarded Schwab but also failed to follow this very clear Supreme Court directive as announced in the PHH case.

Most of the public hospital reorganizations under Section 155.40 pre-date the enactment of the state constitutional provisions relating to public records and public meetings. Many of the other conversions were done by special acts of the Legislature that were also passed before the adoption of Article I, Section 24 of the Florida Constitution. See Tab 1 of the Appendix. Fairness demands that Article I, Section 24 should not be applied retroactively in a manner that will impair those pre-existing contract rights. Indeed, such a retroactive application may result

in the state constitutional provision being invalid to the extent it significantly impairs pre-existing contract rights. United States Const. Art. I, §10; Pomponio v. Claridge of Pompano Condominium, 378 So.2d 774 (Fla. 1979).

In its decision below, the District Court concluded that if the Legislature had intended for the public records and public meetings laws not to apply to a private company which leases a public hospital, it would have said so in Section 155.40. See News Journal Corp., 695 So.2d 421, at fn. 2. We disagree. At the time Section 155.40 was enacted in 1982, the language in Article I, Section 24 of the Florida Constitution did not exist. The public records statute (Chapter 119, Florida Statutes) was of equal dignity with the public hospital reorganization statute. Accordingly, if the Legislature had intended for Chapter 119 to apply to a Section 155.40 transaction it could have said so. The omission is evidence that the Legislature did not intend such a result.

The Florida Legislature enacted Section 155.40 to allow public hospitals to sell or lease their facilities to private, not-for-profit corporations. As the delivery of health care has become more competitive and the pressures of containing health care costs have increased, the Legislature has recognized that public

hospitals face circumstances unique to their status as public bodies which put them at a competitive disadvantage with their private counterparts. See Shands Teaching Hospital and Clinics, Inc. v. Lee, 478 So.2d 77, 79 (Fla. 1st DCA 1985).

Compliance with the public records and public meeting laws results in a competitive disadvantage for public hospitals that must disclose virtually all of their financial records and open their governing board meetings to private competitors in the same service area. Public hospitals are further disadvantaged by an evolving health care delivery system in which hospitals must "network" with other health care providers to survive. If special districts that own hospitals do not have a mechanism by which the hospital operations may be provided by a private corporation, they may be precluded from taking advantage of these networking opportunities by the constitutional restriction on public entities becoming partners with private companies. Article VII, Section 10, Florida Constitution.

In deciding the public records issues in this case, the Court should consider three additional factors regarding hospitals in this state. First, the hospital industry is already the most heavily regulated business organizations in Florida. The federal, state and local regulations together with the requirements imposed

by the Joint Commission on Accreditation of Healthcare Organizations control virtually every phase of the operations. The addition of the public records laws adds little to protect the public in a hospital setting.

Second, hospital records and physician activities are, by their very nature, the most confidential activities of any type of business. In most instances, it is virtually impossible to separate the confidential information from information that the public would be entitled to review under the public records laws.

Finally, unlike most other private businesses, virtually all relevant financial information relating to a hospital's operations is already a matter of public record through the cost reports required to be provided to the state of Florida. The public's need to know that its assets are being managed in a fiscally responsible manner, is available without imposing the public records laws of our state on the private companies that operate these public facilities.

If this Court allows the District Court opinion to stand, a principal reason for making the conversion from a public to private hospital operation will be lost and local governmental bodies that own public hospitals may be faced with a Hobson's choice for providing health care services to the community. Public agencies

can continue operating health care facilities which have become--and will remain--a substantial drain on public tax dollars. Or, these facilities can be sold. In many cases, neither of these choices are in the best interest of the public.

Lease arrangements, like the one at issue in the instant case, provide local governments with the ability to leverage private dollars to upgrade and maintain capital facilities. In effect, these arrangements can help preserve and increase the value of the asset on which tax revenues have been spent. If the incentive for local governments to enter into these types of privatization contracts is eliminated, then the public stands to lose.

POINT III: THE OPEN MEETING REQUIREMENTS OF THE FLORIDA CONSTITUTION DO NOT APPLY TO PRIVATE ENTITIES ACTING ON BEHALF OF A PUBLIC AGENCY

In an effort to extend the error in its public records analysis to the "Government in the Sunshine" requirements in Article I, Section 24(b) of the Florida Constitution, the Fifth District Court of Appeal states:

> Even though the constitutional provision referred to above [Art. I, Sec. 24(b)] in our discussions of the open meeting requirement does not use the "acting on behalf of" terminology, it does require that all meetings of public bodies in which "public business of such body is to be transacted or discussed" shall be open to the public. Since someone

> "acting on behalf of" a public body is authorized to transact or discuss public business, we believe that such language is implicit in this provision and that the meetings of such surrogate public bodies come under the constitutional open meeting requirements. (emphasis supplied)

News-Journal Corp., 695 So.2d at 422.

In a relatively short opinion, the Fifth District has departed from binding Florida Supreme Court precedent for the second time. As first developed in Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 2d DCA 1969), requirements to meet in the sunshine apply only to the State, or to any "board or commission of the state, or of any county or political subdivision over which it has dominion and control." Id. at 473. This standard was reiterated in City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). In the intervening 26 years, there have not been any decisions by this Court to change that standard for applying the open meetings laws of this state.

Notwithstanding this clear Florida Supreme Court precedent, the Fifth District seeks to add words to Article I, Section 24(b) of the Florida Constitution which the Legislature did not include when the amendment was proposed and which the voters did not approve when that Section was added to the State Constitution in 1992.

Article I, Section 24(b) applies to expressly enumerated governmental entities. In contrast to Article I, Section 24(a), Section 24(b) does not contain the words "or persons acting on their behalf." Under these circumstances, it is reasonable to conclude that the Legislature was aware of the differences in these two subsections and we should "presume that the language differentiation was intentional." Myers v. Hawkins, 362 So.2d 926, 929 (Fla. 1978).

Indeed, if all persons "acting on behalf of" a public agency are subject to the open meetings laws of this state, then two employees of the state or any body of local government could not meet to make a final decision on behalf of the government without prior notice to the public. Clearly, the Legislature could not have intended a situation so impractical as that.

Petitioner is a private not-for-profit corporation and can in no sense be a board or commission of the state, a county or a political subdivision over which the state has dominion and control. The open meetings laws therefore do not apply. Accordingly, this Court should reverse the Fifth District Court of Appeal on that issue.

CONCLUSION

The Association of Community Hospitals and Health Systems of Florida, Inc. (CHHS) together with Bethesda Memorial Hospital, Baptist/St. Vincent's Health System, Cape Canaveral Hospital, Citrus Memorial Hospital, Ed Fraser Memorial Hospital, Indian River Memorial Hospital, Lower Florida Keys Health System and Munroe Regional Health System, Inc., respectfully request that this Court enter its Order reversing the decision of the District Court of Appeal, Fifth District and affirm the decision of the Circuit Court in this case.

Respectfully submitted,

NEIL H. BUTLER
Florida Bar No. 191130
BUTLER & LONG
322 Beard Street
Tallahassee, Florida 32303
(850) 222-6969

JOHN E. THRASHER
Florida Bar No. 158757
SMITH, HULSEY & BUSEY
1800 First Union Bank Tower
(904) 359-7700

KAREN PETERSON
Florida Bar No. 989320
315 South Calhoun, Ste. 808
225 Water Street
Jacksonville, Florida 32202
(850) 222-9800

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail to the following:

John Beranek
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32302

Larry R. Stout
Post Office Box 15200
Daytona Beach, FL 32115

Jonathan D. Kaney, Jr.
Jonathan D. Kaney, III
Cobb, Cole & Bell
P.O. Box 2491
Daytona Beach, FL 32115-2491

Richard A. Harrison
Allen, Dell, Frank & Trinkle
Post Office Box 2111
Tampa, FL 33601

William A. Bell
P.O. Drawer 469
Tallahassee, FL 32302

Emeline C. Acton
Post Office Box 1110
Tampa, FL 33601-1110

Frederick B. Karl
Annis, Mitchell, Cockey, et al.
Post Office Box 3433
Tampa, FL 33601

this 21st day of November, 1997.

Attorney

APPENDIX

Name of Hospital/City	Method for Converting	Sale or Lease	Parties to Sale or Lease
Alachua General Hospital/Gainesville	Special Act 77-497	Lease/Sale	Alachua General Hospital leased to Alachua General Hospital, Inc.; sold to SantaFe HealthCare, Inc. in 1983; sold to University of Florida Health Services, Inc. in 1996
Baptist Medical Center-Nassau/Fernandina Beach	Special Act 94-446	Sale	Nassau General Hospital sold to Baptist Health System
Baptist Medical Center-Beaches/Jacksonville	Special Act 82-291	Lease/Sale	Duval County Beaches Public Hospital Special Taxing District leased to Baptist Medical Center of the Beaches, Inc.; 1994 sold to Baptist Medical Center
Bayfront Medical Center/St. Petersburg	Lease Agreement	Lease	City of St. Petersburg and Bayfront Life Services, Inc.
Bethesda Memorial Hospital/Boynton Beach	155.40		(trying to obtain information)
Bradford Hospital/Starke	Special Act 82-262	Sale	Bradford County Hospital Corporation sold to SantaFe HealthCare, Inc. in 1982; sold to University of Florida Health Services, Inc. in 1996
Brooksville Regional Hospital/Brooksville	155.40	Lease	Hernando County leased Brooksville Regional Hospital to Hernando Healthcare, Inc., which is a subsidiary of Regional Healthcare, Inc.
Calhoun Liberty Hospital/Blountstown	Lease Agreement	Lease/Sale	Liberty County leased to Calhoun Liberty Hospital Association, Inc. with option to purchase. Calhoun Liberty Hospital Association purchased Calhoun Liberty Hospital in 1993.
Cape Canaveral Hospital/Cocoa Beach	155.40	Lease	Cape Canaveral Hospital District leased Cape Canaveral Hospital to Cape Canaveral Hospital, Inc.
Citrus Memorial Hospital/Inverness	155.40	Lease	Citrus County Hospital Board leased Citrus Memorial Hospital to Citrus Memorial Health Foundation.

Name of Hospital/City	Method for Converting	Sale or Lease	Parties to Sale or Lease
DeSoto Memorial Hospital/Arcadia	155.40	Transferred title/not a sale or a lease	DeSoto County Hospital District transferred title of DeSoto Memorial Hospital to DeSoto Memorial Hospital, Inc.
Doctor's Medical Center/Perry	155.40	Lease	Taylor County leased Taylor County Hospital to Doctor's Memorial Hospital, Inc.
East Pasco Medical Center/Zephyrhills	Special Act 82-363	Sale	Pasco County Commissioners sold Jackson Memorial Hospital to Adventist Health System/Sunbelt, Inc.
Ed Fraser Memorial Hospital/MacClenny	155.40	Lease	Baker County Hospital Authority leased to Baker County Medical Services, Inc.
Everglades Memorial Hospital/Pahokee	155.40	Lease	Northwest Health Care District formed Everglades Memorial Hospital and entered into lease. Transferred to Palm Beach County Health Care District and North West District was dissolved in 1992. 4th DCA opinion invalidated the reorganization and the hospital and assets revert to Palm Beach District.
Florida Hospital Apopka/Apopka	Purchase Agreement	Sale	North Orange Memorial Tax District sold to Florida Hospital.
Florida Hospital Wauchula/Wauchula	Special Act 87-472	Sale	Hospital District of Hardee County sold Hardee Memorial Hospital to Walker Memorial Medical Center, a subsidiary of Adventist Health System/Sunbelt, Inc.
Gadsden Memorial Hospital/Quincy	Lease Agreement	Lease	Gadsden County leased to Healthmark.
Hamilton County Memorial Hospital/Jasper	155	Sale	Hamilton County Board sold to Columbia HCA/Healthcare Corporation.
Highlands Regional Medical Center/Sebring	Special Act 85-420	Lease	Highlands County Hospital District leased to Sebring Hospital Management Associates.

Name of Hospital/City	Method for Converting	Sale or Lease	Parties to Sale or Lease
Indian River Memorial Hospital/Vero Beach	155.40	Lease	Indian River Memorial Hospital, Inc. leased to Indian River County Hospital District.
Jay Hospital/Jay	Lease Agreement (trying to verify)	Lease	Santa Rosa County leased to Baptist Health Affiliates.
Lake Shore Hospital/Lake City	155.40	Lease/Sale	Lake Shore Hospital, Inc., a subsidiary of SantaFe HealthCare, Inc. leased from Lake Shore Hospital Authority; SantaFe HealthCare, Inc. sold it interest in Lake Shore Hospital to University of Florida Health Services in 1996.
Lakeland Regional Medical Center/Lakeland	Special Act 84-462	Lease	City of Lakeland leased to Lakeland Regional Medical Center, Inc.
Leesburg Regional Medical Center/Leesburg			(trying to verify)
Lower Keys Health System/Key West	Special Act 89-551	Lease	Lower Keys Hospital District leases Florida Memorial Hospital and dePoo Hospital to Lower Florida Keys Health System .
Madison County Memorial Hospital/Madison	Special Act 82-320	Lease	Madison County Health and Hospital Board leases to Madison County Hospital Health Systems, Inc.
Manatee Memorial Hospital/Bradenton	Special Act 83-463	Sale	Manatee County sold to Manatee Hospitals & Health Systems, Inc.
Munroe Regional Medical Center/Ocala	155.40	Lease	Marion County leased to Big Sun Healthcare Systems, Inc.
Nature Coast Hospital/Williston	Special Act 93-390	Lease/Sale	City of Williston leased to Nature Coast Health System, Inc.; Nature Coast Health System, Inc. sold to Willison Medical Center, Inc.
Santa Rosa Medical Center/Milton	Special Act 85-496	Lease	Santa Rosa County Commissioners leased to Medical Center of Santa Rosa, Inc., a subsidiary of Columbia/HCA Healthcare Corporation.

Name of Hospital/City	Method for Converting	Sale or Lease	Parties to Sale or Lease
Shands Hospital/Gainesville	Special Act 240.513	Lease	State Board of Education leased to Shands Teaching Hospital and Clinics, Inc.
SMH Homestead/Homestead	(trying to verify)	Sale	City of Homestead sold James Archer Smith Hospital to South Miami Health Systems, Inc.
Suwannee Hospital/Live Oak	Purchase Agreement	Sale	Suwannee Hospital, Inc., a subsidiary of SantaFe HealthCare, Inc. purchased from Suwannee County; SantaFe's interest purchased by University of Florida Health Services, Inc. in 1996.
Tallahassee Memorial Regional Medical Center/Tallahassee	Special Act 79-569	Lease	City of Tallahassee leased to Tallahassee Memorial Regional Medical Center, Inc.
University Hospital of Jacksonville/Jacksonville	Special Act 81-373	Lease	City of Jacksonville leased to University Medical Center, Inc.; Chapter 90-451 terminated the authority and transferred back to City of Jacksonville.
Volusia Medical Center/Orange City	155.40	Sale pending	Joint venture between West Volusia Hospital Authority and Adventist Health System/Sunbelt, Inc.; Adventist owns 50%; sale for remaining 50% is pending.
Walton Regional Hospital/DeFuniak Springs	Special Act 87-44	Lease	Walton County leased to Healthmark of Walton, Inc.
West Volusia/Deland	155.40	Lease	West Volusia Hospital Authority leased to Memorial Hospital-West Volusia, Inc.

IN THE CIRCUIT COURT IN AND
FOR VOLUSIA COUNTY, FLORIDA

CASE NO.: 94-32828-CICI
DIVISION: 31
HON. PATRICK G. KENNEDY

NEWS-JOURNAL CORPORATION, a
Florida corporation,

Plaintiff,

vs.

**MEMORIAL HOSPITAL-WEST
VOLUSIA, INC.**, a
Florida not for profit corporation,

Defendant.
_____/

SUMMARY FINAL JUDGMENT

This cause came on for hearing on the cross motions for summary judgment of the plaintiff, **NEWS-JOURNAL CORPORATION** (the "Publisher"), and of the defendant, **MEMORIAL HOSPITAL-WEST VOLUSIA, INC.** (the "Hospital Corporation"). The Court, having considered the motions of each party, the pleading, affidavits and discovery filed herein, and the extensive briefs and oral arguments of each party, grants the motion for summary judgment of the defendant, Hospital Corporation, and denies motion for summary judgment of the plaintiff, Publisher.

The Court has determined that there are no material facts in dispute. The controversy over the application of the Public Records Act (Chapter 119, *Florida Statutes*), and the Government-in-the-Sunshine Law (§286.011, *Florida Statutes*), springs from the following circumstances:

Publisher publishes The *News-Journal*, a daily newspaper published in Volusia County, Florida. Defendant, Hospital Corporation, is a Florida not-for-profit corporation that operates a hospital in DeLand, Florida, under lease from the West Volusia Hospital Authority (the "Authority"). The basis for the lease is found in §155.40, *Florida Statutes*.

The complaint in this cause seeks two declaratory judgments on behalf of the Publisher. Count I seeks a declaratory judgment that Public Records Law applies to activities of the Hospital Corporation, while Count II seeks a declaration that the Sunshine Law applies to the Hospital Corporation.

Prior to 1994, the Authority operated a public acute care general hospital in DeLand, Florida. It determined, however, that the hospital was not being properly operated, and feared for its future existence and financial viability. The Authority accordingly examined the options available to it under the law.

After receiving the advice of counsel the Authority decided after receiving public input that the best option available to it was to enter into a long term lease of the hospital facility, pursuant to §155.40, *Florida Statutes*, with a private not-for-profit organization. It then published a request for proposals and reviewed the several proposals submitted to it.

In 1994, in response to the request for proposals, Memorial Health Systems, Inc. ("Memorial"), a Florida not-for-profit corporation, submitted a proposal and was elected by the Authority to lease and operate the hospital. Memorial thereafter entered into negotiations with the Authority for a long term lease involving a part of the Authority's hospital facilities to allow the Authority to lease the hospital facilities to a not-for-profit corporation to be formed by Memorial in accordance with the provisions of §155.40, *Florida Statutes*. Defendant, Hospital Corporation, was formed by Memorial, as the sole member of that not-for-profit entity, as a result of the successful negotiations between

the Authority and Memorial. On July 28, 1994, the Authority entered into the Lease Agreement that is attached to the Complaint as Exhibit D with the Hospital Corporation (the "Lease Agreement").

In its complaint Publisher postulated that the Authority delegated to the Hospital Corporation its governmental function of providing health care. It postulated further that because Hospital Corporation is an "agency" of the Authority, it is, therefore, subject to both the Public Records Law and the Government-in-the-Sunshine Law. Publisher then demanded access to the corporate records and minutes of the corporate meetings of Hospital Corporation. Hospital Corporation has responded that it has retained its private character, and that neither the Public Records Act, nor the Sunshine Law apply to it.

Public Records Law

In determining whether a private entity under contract with a public agency falls within the purview of the Public Records Law, the courts have generally looked to a number of factors indicating the level of involvement by the public agency, rather than looking at a single factor. A determination regarding the applicability of the laws to a particular fact situation depends, therefore, on a review of the "totality of factors." *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029, 1031 (Fla. 1992); *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc*, 582 So.2d 730, 733 (Fla. 2d DCA 1991); *Fox v. News-Press Publishing Co., Inc.*, 545 So.2d 941, 943 (Fla. 2d DCA 1989); *Schwartzman v. Merlit Island*, 352 So.2d 1230, 1232 (Fla. 4th DCA 1977).

Among the factors considered by the Court in arriving at its conclusions, and consistent with the teachings of the Supreme Court in *News and Sun-*

Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029, 1031 (Fla. 1992), and the Second District Court of Appeal in *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc*, 582 So.2d 730, 733 (Fla. 2d DCA 1991), were the creation of the Hospital Corporation, its funding, the degree of regulation exercised over it by the Authority, the decision making process, whether a governmental function was involved, and the goals of Hospital Corporation. The deposition testimony, affidavit and other discovery and documents filed with the Court reflect the following:

I. *Creation.*

A. The Hospital Corporation was not formed by or incorporated by the Authority, but instead was formed by and incorporated by Memorial.

B. The negotiations for the Lease Agreement were conducted completely at arm's length, with each side being separately represented by counsel of its choice.

C. The request for proposals by the Authority, the selection process, and the negotiation of the Lease Agreement and associated documents were conducted and completed under full public scrutiny and were lawful.

D. The Authority and Hospital Corporation specifically intentionally deleted all reference to the Public Records Law and Sunshine Law from the Lease Agreement in order to enhance the ability of Hospital Corporation to compete in today's health care environment.

II. *Funding.*

A. Hospital Corporation caused the Authority's bonded debt of $8,181,382 to be *paid* as a component of Hospital Corporation's rent, and Hospital Corporation likewise assumed another $654,322 in debt of the Authority as a component of rent. Hospital Corporation must spend millions of dollars over the term of the Lease Agreement for capital improvements. In

addition to normal maintenance and upkeep, to assure that the Authority will eventually have the return of its leased property, *plus* the capital improvements.

B. The Authority has reserved and maintained control over all tax revenues that it receives. To the extent subsidies are received by Hospital Corporation, those subsidies are within the discretion of the Authority and are limited in time and amount. To the extent public monies are received by Hospital Corporation for indigent care, those monies result from a fee for services arrangement and are governed by carefully designed accounting criteria. The Lease meets the §155.40 requirement to provide for indigent care.

C. There is no co-mingling of funds of the Hospital Corporation and the Authority, and the Authority does not have a substantial financial interest in the Hospital Corporation.

III. *Regulation and Interdependence of the Bodies.*

A. The Hospital Corporation is not a related agency to, nor a joint venturer or partner of, the Authority, and is not subject to the dominion or control of the Authority.

B. The Authority under the Lease Agreement with Hospital Corporation has no ancillary, secondary or oversight role in the operation of the leased facilities or in the operation of the hospital itself. Operational control of the leased facility resides specifically with Hospital Corporation, and all employees of the hospital, including the administrator, are employees of Hospital Corporation.

C. The board of Hospital Corporation is elected by Memorial, and the Authority is permitted by the Lease Agreement to nominate only a single non-voting member of Hospital Corporation's board. The Authority, thus, has no direct or exercisable control or influence on or over the Hospital

Corporation's board of directors, or in the operation of the facilities leased to Hospital Corporation.

D. The Authority cannot compel changes in the articles of incorporation or the by-laws of the Hospital Corporation, or the amendment of the same, but in accordance with §155.40, *Florida Statutes*, is given the right to approve changes to those documents.

IV. *Decision Making Process.*

A. Hospital Corporation cannot bind the Authority, and the Authority cannot bind Hospital Corporation, as the two are independent entities. The two bodies act apart from each other. The Authority has no direct or exercisable control or influence on or over Hospital Corporation's board of directors, or in the operation of the facilities leased to Hospital Corporation. Its representation is limited by a single non-voting, liaison member on the board of Hospital Corporation, and it cannot compel changes in the articles of incorporation or the by-laws of Hospital Corporation, or the amendment of the same.

B. So long as Hospital Corporation does not breach the Lease, the Authority has no right or power to approve or disapprove decisions made by the board of directors of Hospital Corporation concerning operations of the Hospital, including decisions setting salaries and fees to be paid to hospital staff, or expenditures for maintenance and replacement of fixed assets, or other costs or expense that comprise overhead and general administrative expenses of Hospital Corporation.

V. *Function.*

A. Hospital Corporation is not performing a public function or a function that the Authority would otherwise perform because the Authority chose to divest itself of the operation of the functions performed by its facilities

by leasing the same to the Hospital Corporation in accordance with §155.40, *Florida Statutes*.

B. Hospital Corporation is doing exactly the same thing that its "sole member," Memorial Health Systems does -- it operates a not-for-profit hospital. The Authority chose to divest itself of the operation of a public governmental hospital by leasing these assets to Hospital Corporation in accordance with §155.40, *Florida Statutes*. The Authority is no longer in the hospital business. Its governmental function now is to see to it that certain levels of health care are delivered to residents within its jurisdiction by contracting with others to provide those services. Functionally, therefore, Hospital Corporation is not fulfilling a "governmental" role.

VI. *Goals.*

A. Hospital Corporation, as noted above, is functioning for the benefit of Memorial, and deals at arm's length with the Authority.

B. The Florida Legislature in §155.40, *Florida Statutes*, did not mandate or mention that either the Government-in-the-Sunshine Law, or the Public Records Law would apply to the Hospital Corporation, or to bodies similarly formed, even though the document has been amended on several occasions.

The Court, having considered the factors presented to it, therefore concludes that under the "totality of factors" test, Hospital Corporation is not "acting on behalf of" the Authority. Hospital Corporation is, accordingly, entitled to a judgment on Count I of the complaint dealing with the Public Records Act as a matter of law.

Sunshine Law

Despite Publisher's argument to the contrary, neither the Constitution nor the Sunshine Law contain an "acting on behalf of" provision similar to that found in the Public Records Act. If the Legislature wished to include that provision, it certainly could have done so. The Court declines to insert "acting on behalf of" where the Legislature has chosen not to do so.

The Court concludes that the proper test for applicability of the Sunshine Law in the present case is whether Hospital Corporation is subject to the dominion and control of the Authority. *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971); *Times Publishing Company v. Williams*, 222 So.2d 473 (Fla. 2d DCA 1969). The Court concludes that Hospital Corporation is not subject to the dominion and control of the Authority, and that the Sunshine Law is therefore not applicable to meetings of its board. The Court notes, however, that even if the correct test were whether the Hospital Corporation was "acting on behalf of" the Authority, the Court would find that it is not for the reasons set forth in the analysis of the Public Records Act.

It is accordingly, **ORDERED, DECLARED AND ADJUDGED**, as follows:

1. The motion for summary final judgment of the defendant, Hospital Corporation, is granted, and the motion for summary judgment of the plaintiff, Publisher, is denied.

2. The Public Records Act is determined not to apply to records of Hospital Corporation.

3. The Sunshine Law does not apply to meetings of the board of directors of Hospital Corporation, and to meetings of other bodies within Hospital Corporation.

4. Plaintiff shall take nothing by this action and defendant shall go hence without day.

DONE AND ORDERED in Daytona Beach, Volusia County, Florida, this 16 day of August, 1996.

/s/ PATRICK G. KENNEDY

Hon. Patrick G. Kennedy, Circuit Judge

Copies furnished to:

Jonathan D. Kancy, Jr., Esq.
David A. Monaco, Esq.