IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

Case No. 90,835

v.

NEWS-JOURNAL CORPORATION, a Florida corporation,

Respondent.
_____/

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General

PATRICIA R. GLEASON
General Counsel
Florida Bar No. 218758

Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 488-9853

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page No.**

CONSTITUTION:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF AMICUS CURIAE

Since the enactment of the open government laws, the Office of the Attorney General has sought to provide guidance to state and local government on the proper interpretation and application of the law. The chief means of doing so has been the provision of numerous Attorney General Opinions, both formal and informal, to government officials, as well as frequent telephone consultations. Like the courts, this Office has liberally construed the Sunshine Law and the Public Records Act in favor of its intended beneficiaries, the people of the State of Florida.

This case presents the significant issue of whether a public hospital authority and a private corporation may evade the requirements of the public access laws by contending that a legislative grant of authority to lease hospital facilities to a private corporation constitutes an implied exception to the open government laws and to the open government mandates found at Article I, section 24, of the Florida Constitution. The Attorney General believes that the Fifth District Court of Appeal correctly found that the hospital corporation was acting on behalf of a public agency and that it is therefore subject to public records and meetings requirements.

STATEMENT OF THE CASE AND FACTS

The State adopts the Statement of the Case and of the Facts as set forth in the Respondent's brief on the merits.

SUMMARY OF THE ARGUMENT

The District Court correctly ruled that Petitioner Memorial Hospital-West Volusia, Inc., is subject to open government requirements because the private corporation is "acting on behalf of" a public agency in providing hospital services.

Petitioner's attempt to extricate itself from open records and meetings mandates by asserting an implied exemption from disclosure derived from a statute[1] permitting public hospital authorities to lease their facilities to private corporations, must fail. While the hospitals may be able to articulate many reasons why, in their judgment, confidentiality is consistent with the purpose of the legislation, these arguments should be addressed to the Legislature rather than this Court.

As this Court recognized in Wait v. Florida Power and Light Company, 372 So. 2d 420 (Fla. 1979), the Legislature is the appropriate agency to evaluate the competing interests to determine whether Petitioner's perceived need for secrecy outweighs the public's constitutional and statutory right of access.

Florida's commitment to open government has been secured by numerous decisions by this Court. These cases share a common theme

---

[1] Section 155.40, Florida Statutes.

-- the open government laws are to be liberally construed and no exceptions to the right of access may be recognized unless expressly provided by law.

Increasingly, many public agencies are interested in privatization as an option for providing services. The trend toward public/private partnerships, however, should not form the basis of a new "government by alter ego" exemption to the open government laws.

ARGUMENT

The Fifth District correctly declined to create an exemption from public access requirements in response to Petitioner's asserted need for confidentiality.

Petitioner and amici hospital associations contend that the Legislature's enactment of section 155.40, Florida Statutes, simultaneously created an implied exemption to the open government requirements. The argument is that the Legislature allowed public hospital authorities to lease facilities to private corporations in order to enhance the ability of the authorities to compete with private hospitals. However, Petitioner and amici maintain that the ability to compete would be lost if they must abide by Florida's open government laws while private hospitals do not. Therefore, Petitioner concludes that it should be exempt from the public access laws.

This type of policy-based argument has been made on many previous occasions and it has been uniformly rejected.

In Florida, "disclosure of public records is not a discretionary act; it is mandatory act." Mills v. Doyle, 407 So. 2d 348, 350 (Fla. 4th DCA 1981). Only the Florida Legislature has the authority to create exemptions to mandatory disclosure. Forsberg v. The Housing Authority of the City of Miami Beach, 455 So. 2d 373, 374 (Fla. 1984); see, e.g., Gadd v. News-Press Publishing Co., 412 So. 2d 894, 896 (Fla. 2d DCA), review denied,

419 So. 2d 1197 (Fla. 1982) ("any exemption or confidentiality must be 'provided by law,'" court is "bound by the decision of the legislature"). Courts, agencies and individuals do not have the power to create exemptions, "for to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act." Mills v. Doyle, supra, at 349.

For example, in Southern Bell Telephone & Telegraph Company v. Beard, 597 So. 2d 873 (Fla. 1st DCA 1992), the First District approved an agency's refusal to afford proprietary confidential business status to a report prepared by company employees as part of a management review. A statute provided for confidentiality of "internal auditing contracts and reports of internal auditors." The document in question, however, was not prepared by an internal auditor. Therefore, the agency construed the exemption narrowly and held that confidentiality was not warranted.

On appeal, the company (Bell) asserted that the agency should have taken into account the damage disclosure would do to the company:

> As to Document D, Bell contended that the Benchmark Reports contain "critical self-analysis" and therefore fall within the general classification of internal audits. Appellant reasoned that since the reports were created to obtain an understanding of the internal workings of the company, much like internal audits, it should not matter whether they were created by an internal auditor or an outside consultant. Even if the document did not fit within any specific category set out in section 364.183(3), Bell argued that it

> should be afforded confidential treatment because the disclosure of critical self-analysis would stifle the gathering of similar information in the future, and thereby have a chilling effect on the preparation of any such analyses in the future, in that those who supply the analyst with this information would be less likely to provide frank, critical, honest, confidential information, and the analysts would be discouraged from investigating thoroughly and frankly. Because of such potential harm, Bell argued that the Commission had discretion under section 364.183 to consider such material confidential, because they are similar to internal audits.

597 So. 2d 875

The district court, however, rejected the company's attempt to articulate an implied exemption from disclosure based on the company's theory that if the Legislature intended to exempt an internal audit from disclosure, it must also have meant to exclude documents which are similar to internal audits and are prepared for similar purposes.

Similarly, in State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194, 1195 (Fla. 4th DCA 1977), cert. denied, 360 So. 2d 1247 (Fla. 1978), the appellate court was faced with competing policy arguments as to whether a city attorney's investigative report should be open to public inspection. The court emphasized that the balancing of these interests was not a proper judicial function:

> The burden of the parties', and particularly the appellees' argument to us in support of

> their respective positions is concerned with weighty and significant questions of public policy concerning the relative significance of the "public's right to know," on the one hand, and the damage to the proper administration of governmental affairs should allegedly confidential information be publicly revealed, on the other. Perhaps thankfully, we consider that it is neither necessary nor proper for us to resolve this debate and that, to the contrary, the case may be properly decided merely upon an application of well-accepted and prosaic rules of statutory interpretation and *stare decisis*. We think that the Legislature has told us -- and prior decisions have said that it told us -- that the document in question may not be shielded from disclosure.

This Court expressly approved the Fourth District's analysis in Wait v. Florida and Light Company, 372 So. 2d 420 (Fla. 1979). In rejecting a city's claim that its litigation work product should be protected from disclosure, this Court held:

> [I]n enacting section 119.07(2), Florida Statutes (1975), the legislature intended to exempt those public records made confidential by statutory law and not those documents which are confidential or privileged only as a result of the judicially created privileges of attorney-client and work product. If the common law privileges are to be included as exemptions, it is up to the legislature, and not this Court, to amend the statute.
>
> New Symrna next argues that even if the common law privileges are 'provided by law' and therefore were not incorporated in section 119.07(2), Florida Statutes (1975), public policy considerations compel recognition of these litigation-related privileges as exemptions to the act. This argument should be addressed to the legislature.

Like the city in the Wait decision, Petitioner argues that another statute enacted by the Legislature -- Section 155.40, Florida Statutes -- creates an implied exemption to the open government laws. According to Petitioner, the Legislature must be assumed to have created an exemption from the public access laws for corporations that operate hospitals for a public authority because the law's purpose (to enhance the competitive posture of the public authorities) would be thwarted if the corporations were subject to public access laws.

However, the courts have soundly rejected the "implied exemption" theory and have deferred policy considerations to the Legislature. See, Forsberg v. The Housing Authority of the City of Miami Beach, 455 So. 2d 373, 374 (Fla. 1984) (only the Legislature can determine whether to exempt housing authority tenant information from public inspection); Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633, 638 (Fla. 1980) (records ordered disclosed even though they contained "information concerning an official act of government that is allegedly damaging to those seeking to prohibit disclosure"); News-Press Publishing Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) (absent statutory exemption "court is not free to consider public policy questions" or potential damage to institution resulting from disclosure; records must be disclosed); Morgan v. State, 383 So. 2d 744, 746 (Fla. 4th DCA 1980) (courts are not free

to create exemptions from public records law "by implication"). And see, Wallace v. Guzman, 687 So. 2d 1351, 1354 (Fla. 3d DCA 1997), in which the court rejected an attempt to shield personal financial information of housing officials from disclosure:

> The legislature has balanced the private/public rights by creating the various exemptions from public disclosure contained in Section 119.07, Florida Statutes (1995).... The people and legislature have balanced the competing interests. It is not within the scope of our authority to create new exemptions -- which is what we would be doing if we, in a balancing process, came down on the side of nondisclosure of nonexempt public documents.

As with the Public Records Law, courts have stated that the Sunshine Law should be liberally construed to give effect to its public purpose. See, e.g., Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969); Wood v. Marston, 442 So. 2d 934 (Fla. 1983) (statute should be broadly construed to effect its remedial and protective purposes). Moreover, government officials have been advised that if they are in doubt as to the applicability of the law, they should comply with the open meeting policy of the state. See, e.g., Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974) ("[t]he principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.")

The broad construction afforded the Sunshine Law is reflected

in court decisions applying the law to members-elect as well as current office holders (Hough v. Stembridge, 278 So. 2d 288 [Fla. 3d DCA 1973]); advisory bodies composed of private citizens (Town of Palm Beach v. Gradison, supra); staff committees charged with making recommendations in hiring matters to a University president (Wood v. Marston, 442 So. 2d 934 [Fla. 1983]); and a selection committee created by city manager to advise him on hiring a police chief (Krause v. Reno, 366 So. 2d 1244 [Fla. 3d DCA 1979]).

In each of these cases, the argument was made that section 286.011, Florida Statutes, should not be read to encompass the entity or group which wanted to meet in private. However, the court construed the law broadly and held that the entities were subject to the law. The courts refused to allow a narrow literal reading of the statute to erode the long-standing tradition that the Sunshine Law applied to the entire decision-making process. Instead, the focus was on the function of the particular entity. This is the same kind of analysis employed by the Fifth District in the decision below.

The concern that public agencies not attempt to avoid public access requirements through use of an alter ego (see, IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 [Fla. 4th DCA 1973], certified question answered sub nom., Town of Palm Beach v. Gradison, 296 So. 2d 473 [Fla. 1974]) is particularly relevant as governmental agencies explore privatization of governmental

functions.

The Attorney General's Office has issued advisory opinions finding the open government laws to be applicable to private organizations that are acting on behalf of governmental agencies. See, e.g., Op. Att'y Gen. Fla. 97-49 (1997) (Sunshine Law has been held applicable to private organizations when the private entity has been created by public agencies, when there has been delegation of the public agency's governmental functions, or when the private organization plays an integral part in the decision-making process of the public agency).

In analyzing whether the open government requirements apply to a private entity, this office reviews "all factors relating to the responsibilities of the private entity and its relationship with the public agency." Op. Att'y Gen. Fla. 97-27 (1997).

Petitioner contends, however, that the Fifth District's conclusion that the corporation is subject to open meeting requirements is wrong because the Public Records Act expressly defines "agency" to include a private entity acting "on behalf of" an agency but the Sunshine Law does not contain this language. However, this argument ignores both the liberal construction afforded to the Sunshine Law and the circumstances which led to the amendment of the term "agency" in the Public Records Act.

In 1974, the First District issued its opinion in State ex rel. Tindel v. Sharp, 300 So. 2d 750 (Fla. 1st DCA 1974). In that

case, the appellate court found that a consultant who retained job applications for a school superintendent position was not an "agency" and the applications -- though public records if the school board itself had conducted the search -- were the private property of the consultant. Such a narrow reading of the term "agency" and the obvious potential for circumvention of the Public Records Act required immediate legislative action. And, in the next legislative session, the definition of "agency" was amended to include private entities acting on behalf of public agencies.[2]

By contrast, the broad interpretation given the Sunshine Law has not required legislative action. Instead, the Attorney General concurs with the Fifth District that the Sunshine Law can and does apply to those private organizations like Petitioner that are "surrogate public bodies." See, e.g., Ops. Att'y Fla. 97-49, 95-17, 94-35, 94-34, 94-32, and 92-53. "To conclude otherwise would permit a significant exception to the Government in the Sunshine Law to exist." Op. Atty Gen. Fla. 83-95 (1983).

As with the Public Records Act, the courts have rejected attempts to create exemptions to the Sunshine Law, even though the public agency may have legitimate policy reasons which support its determination that the public interest in served by confidentiality.

A few years after the Sunshine Law was passed, this Court was

---

[2] Section 3, Chapter 75-225, Laws of Florida.

asked to create an exemption from the Sunshine Law for quasi-judicial hearings. In refusing to create such an exemption, this Court wrote:

> Various boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute. The benefit to the public far outweighs the inconvenience of the board or agency. If the board or agency feels aggrieved, then the remedy lies in the halls of the Legislature and not in the efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exception into the law.

Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260, 264 (Fla. 1973)

Later, in Neu v. Miami-Herald Publishing Company, 462 So. 2d 821, 825-826 (Fla. 1985), this Court refused to engraft an attorney-client exemption into the Sunshine Law:

> Petitioners' broadest argument, and the one most fervently pressed, is that this Court's decisions in [Board of Public Instruction v.] Doran and [City of Miami Beach v.] Berns have effectively strangled the political process in Florida and forced political bodies and officials to evade the Sunshine Law, as interpreted, in order to make the political process function. On this point, petitioners' arguments go beyond the issue here of consultations with attorneys on pending litigation to ask that we recede completely from Doran and Berns. Essentially, petitioners would have us read section 286.011 narrowly and hold that it applies only to the climatic meetings where official actions and acts are approved by the governing body. We have recently articulated why we will not

> adopt such a reading in Wood v. Marston, 442 So. 2d. 934 (Fla. 1983), and will not repeat the reasons here. One can argue and reargue whether the broad reading of the Sunshine Law in Doran and its progeny is politically wise. The fact remains that Doran was rendered fifteen years ago and placed the legislature and all concerned on notice of our broad reading of section 286.011. Doran has not been overruled by amendment to section 286.011 and petitioners have not presented a persuasive argument that we should overturn countless decisions broadly reading section 286.011.[3]

Thus, policy reasons cannot form a basis for secrecy or provide a rationale for circumvention of the open meetings requirement. As the court stated in Blackford v. School Board of Orange County, 375 So. 2d 578 (Fla. 5th DCA 1979):

> Both the memos of the school board attorney and the candid testimony of the superintendent lead us to the conclusion that what transpired here was not so much a willful violation of the Sunshine Law, but rather an attempt not to violate it, yet keep the various options secret. We can well believe that premature publication of what were only tentative solutions would have filled the air with vituperation from outraged parents, much of which would turn out in the end to be unjustified. However, that is not the point. School boards are not supposed to conduct their business in secret even though it may all be for the best at the end of the day and notwithstanding that the motives are as pure as driven snow.

The factual circumstances which resulted in the Second

---

[3] Several years later, the Legislature passed a law creating a limited exemption from the Sunshine Law for attorney-client discussions. See, sec. 286.011(8), Fla. Stat.

District Court of Appeal's decision in Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990), are similar to those of the case at bar. In Times Publishing, a professional baseball organization sought to maintain confidentiality in its negotiations with the city to relocate the team. The city agreed to accommodate the confidentiality request because the city felt that it would benefit economically and in other ways if the team were located there. Accordingly, the city attorney assisted in drafting documents which outlined a process for document review designed to avoid disclosure under the Public Records Act. Under the city's plan, the attorney for the private corporation would keep all documents in his custody out of the state and city officials would retain no documentation.

The court found:

> The City officials' actions were inconsistent with the purpose of the Public Records Act. Although City officials may have intended merely to avoid the law, the effect of their actions was evasive. City officials actively participated in the creation of the policy of non-retention, the effect of which was to evade the broad policy of open government.

558 So. 2d at 492-493

As in the instant case, the city believed that the public interest would be served if meetings and records were confidential. In both cases, the court found that attorneys for the public agency were enlisted in an unsuccessful effort to ensure that the public access laws would not apply. And, in both cases, the decision was

apparently made to sacrifice some fiscal accountability and oversight by the public agency, so as to avoid the application of the Public Records Act. In Times Publishing, for example, the city made the rather astonishing decision to refuse to keep any copies of the draft lease documents because if it did so, they would be considered public records. Similarly, the public agency in this case was apparently persuaded that the dangers from open government outweighed those of enhanced fiscal oversight and drafted lease documents with the predominant goal being that of ensuring secrecy.

The decision of the Fifth District recognizes that the application of the constitutional and statutory rights of access should not be dependent upon whether lawyers are skilled or fortunate enough to develop the precise mixture of ingredients which will allow a public agency to delegate an important governmental function to a private entity but avoid the application of the open government laws. Instead, the focus should be on whether the private entity is performing a service in place of the government. Under the reasoning of the Fifth District, public agencies looking into privatizing governmental functions will be able to enter into this relationship in a business-like manner -- with the agency's primary goal to enhance the public interest -- rather than expending many hours seeking to draft a document which will result in a green light for confidentiality under the "totality of factors" test established in News and Sun-Sentinal

Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992).

Another important feature of the Fifth District opinion is that it complements the public purpose analysis developed by the court in Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc., 658 So. 2d 577 (Fla. 4th DCA 1995), review dism'd, 670 So. 2d 938 (1996). In that case, the Fourth District ruled that a lease and financial support agreement entered into pursuant to section 155.40, Florida Statutes (1995) were invalid because they failed to reserve sufficient control in the public hospital authority and they placed the hospital effectively beyond public control.

Citing to this Court's decision in O'Neill v. Burns, 198 So. 2d 1 (Fla. 1967), Judge Stone wrote:

> Although section 155.40 provides that a district may reorganize a hospital entity for the purpose of operating and managing the hospital, it does not authorize relinquishing to an independent private board effective unfettered control over public property, powers, taxing authority, and money, including expenditure of ad valorem taxes without public oversight or accountability.

658 So. 2d at 580

In the case at bar, Petitioner and the hospital authority attorneys apparently attempted to craft a lease and other financial documents that would reserve enough control in the public authority to meet the Everglades standard, while at the same time represent

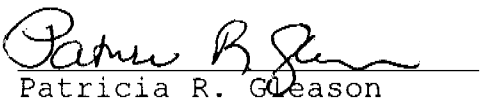
insufficient control for purposes of the "totality of factors" test in Schwab. As the Fifth District correctly found, these efforts were unsuccessful. Petitioner is an "agency" acting on behalf of a public agency and the open government requirements apply. Under the Fifth District's decision, public agencies and private corporations seeking to do business will be able to devote their legal talents toward developing documents which maximize the important fiscal policies set forth by the court in the Everglades decision rather than trying to circumvent the public access laws.

CONCLUSION

In light of the arguments made and authorities cited herein, the decision of the district court should be approved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



Patricia R. Gleason
General Counsel
Florida Bar No. 218758

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL - 01
Tallahassee, FL 32399-1050
(850) 488-9853

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Mr. Larry Stout, SMITH, HOOD, PERKINS, LOUCKS, STOUT, ORFINGER & SELIS, 444 Seabreeze Boulevard, Suite

900, Daytona Beach, Florida 32118; Mr. John Beranek, AUSLEY & MCMULLEN, 227 South Calhoun Street, Tallahassee, Florida 32302; Mr. Jonathan D. Kaney, Jr., Mr. Jonathan D. Kaney, III, COBB, COLE & BELL, P.O. Box 2491, Daytona Beach, Florida 32115-2491; Mr. William A. Bell, P.O. Drawer 469, Tallahassee, Florida 32302; Mr. Frederick B. Karl, ANNIS, MITCHELL, COCKEY, et al., Post Office Box 3433, Tampa, Florida 33601; Mr. Richard A. Harrison; ALLEN, DELL, FRANK & TRINKLE, Post Office Box 2111, Tampa, Florida 33601; Ms. Emeline C. Acton, Post Office Box 1110, Tampa, Florida 33601-1110; Mr. David A. Monaco, Post Office Box 15200, Daytona Beach, Florida 32115; Mr. Neil H. Butler, BUTLER & LONG, Post Office Box 839, Tallahassee, Florida 32302; Ms. Teresa Clemmons Nugent, 315 South Calhoun Street, Suite 808, Tallahassee, Florida 32301; Mr. John E. Thrasher, Mr. Timoth W. Volpe, Ms. Leslie A. Wickes, SMITH, HULSEY & BUSEY, 1800 First Union Bank Tower; 225 Water Street, Jacksonville, Florida 32202; Ms. Karen Peterson, 315 South Calhoun, Street 808, Tallahassee, Florida 32301; Mr. David Bralow, P.O. Box 1288, Tampa, Florida 33601; Ms. Susan Tillotson Mills, Esq., P.O. Box 1288, Tampa, Florida 33601; Ms. Kimberly A. Stott, P.O. Box 1288, Tampa, Florida 33601; this 11th day of December, 1997.

Patricia R. Gleason
Assistant Attorney General