IN THE SUPREME COURT
STATE OF FLORIDA

MEMORIAL HOSPITAL-WEST
VOLUSIA, INC.,

Petitioner,

vs. CASE NO.: 90, 835

NEWS-JOURNAL CORPORATION
a Florida Corporation,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT
COURT OF APPEAL

BRIEF OF AMICUS CURIAE FLORIDA HEALTH SCIENCES CENTER, INC. d/b/a TAMPA GENERAL HOSPITAL

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STATEMENT OF AMICUS CURIAE

Florida Health Sciences Center, Inc. (hereinafter referred to as "FHSC") is a Florida not-for-profit corporation that is exempt from federal taxation under §501(c)(3) of the Internal Revenue Code. FHSC entered into a Lease Agreement dated June 20, 1997, with the Hillsborough County Hospital Authority, a public body corporate created and existing pursuant to Chapter 96-449, Laws of Florida (hereinafter referred to as the "Authority"). Pursuant to the Lease Agreement FHSC became the lessee of the real property and improvements comprising Tampa General Hospital ("TGH"), a nine hundred seventy-six (976) bed regional acute care facility located in Tampa, Florida. In addition, the Lease Agreement transfers to FHSC substantially all of the operating assets of the Authority as well as all of the Authority's bond indebtedness and substantially all of its existing operating debt. As of October 1, 1997, the effective date of the Lease Agreement, FHSC controls and operates TGH.

The Lease Agreement between FHSC and the Authority was entered into pursuant to Florida Statutes §155.40 (Supp. 1996). That section expressly requires, as a condition of any such agreement, that the governing board of the public hospital must find that the lease or contract is in the best interests of the public and must state the basis of that finding. In its resolution dated June 20, 1997, the Authority found that the Lease Agreement was in the best interests of the public within the meaning of the statute based, among other things, upon the following factual findings:

> (A) The Hospital Authority has no ad valorem or other taxing authority and receives no direct tax funding or subsidy. The Hospital Authority instead relies for its income solely upon revenues generated by its operations as a healthcare provider. Thus, the Hospital Authority competes directly with other for-profit and not-for-profit

hospitals in Hillsborough County and the surrounding area, and competes directly with other healthcare providers who may offer the same or similar healthcare services as the Hospital Authority. Hillsborough County and the surrounding areas have experienced and will continue to experience the growing influence of managed care, declining utilization of inpatient hospital services, increasing price competition and other competitive forces.

(B) The Hospital Authority is at a significant competitive disadvantage, as compared to its for-profit and not-for-profit competitors, as a result of its status as a governmental entity. Among other things, the Hospital Authority's statutory obligations with respect to public records and open meetings require it to disclose to its competitors information which its competitors are permitted to treat as confidential and proprietary information, thus giving those competitors an unfair advantage over the Hospital Authority in a healthcare marketplace that is highly and increasingly competitive. Constitutional limitations on the Hospital Authority's ability to enter into partnerships, joint ventures and other such arrangements with for profit partners in the healthcare industry similarly restrict its ability to compete on a level playing field with its private competitors. Further, the Hospital Authority's public status perpetuates a cumbersome and inflexible governance structure that is ill-suited to the rapidly evolving and highly competitive healthcare market, which requires the ability to respond quickly and decisively to changing market trends and forces.

(C) The Hospital Authority faces a significant financial crisis in the near term if it remains unable to compete. Given the industry and local trends, the Hospital Authority will continue to experience declining utilization, declining revenue and a deterioration of its fiscal position. It is projected that within three (3) to four (4) years, the Hospital Authority's financial position will deteriorate to the point that it will face significant financial losses, a critical shortage of capital and potential default of its legal and financial obligations.

* * *

(F) The transaction authorized and approved herein is the best available option to enable the Hospital Authority to avoid a serious financial crisis, to provide for the continued care and treatment of indigent citizens in the community and to continue the provision of the highest level of medical care and treatment in Hillsborough County and the surrounding area.

> (G) For all of the foregoing reasons and based upon the Hospital Authority's due and careful consideration of the information presented to it by the President/CEO, administration and staff, the Hospital Authority's consultants, accountants, legal counsel, other competent professionals, the public and other interested and qualified persons in the aforementioned Community Forums, Public Hearings, Workshops and otherwise, the Lease Agreement between the Hospital Authority and Florida Health Sciences Center, Inc., as authorized and approved herein, is in the best interests of the public within the meaning of Fla. Stat. §155.40 (Supp. 1996).

Although the transaction involved in this case was entered into under an earlier version of §155.40, the Fifth District Court of Appeal's sweeping opinion may well affect transactions entered into under the 1996 version of the statute. FHSC clearly has a compelling interest in the resolution of this matter so that its status under the Lease Agreement will be clear and any uncertainty as to the application of the Sunshine Law and the Public Records Law to FHSC will be removed.

On October 9, 1997, FHSC, with the consent of counsel for Memorial Hospital, filed its Motion for Leave to Appear and File Brief as Amicus Curiae in this case. On November 7, 1997, Publisher News-Journal Corporation served its Notice of Consent to the appearance of FHSC as amicus curiae. By order dated November 13, 1997, the Court granted FHSC's motion to appear as amicus curiae and file a brief .

STATEMENT OF THE CASE AND OF THE FACTS

This case presents for review the decision of the Fifth District Court of Appeal in News-Journal Corp. v. Memorial Hospital-West Volusia, Inc., 695 So. 2d 418 (5th DCA 1997). FHSC hereby adopts and incorporates by reference the Statement of the Case and of the Facts contained in Petitioner's Brief on the Merits, including the designation of the parties. Petitioner is hereinafter referred to as "Hospital Corporation."

SUMMARY OF THE ARGUMENT

Although this Court has recently stated that the standard of review in cases such as this, where a private entity is alleged to be subject to the open government laws, is one of competent substantial evidence, the district court went far beyond the appropriate standard of review and substituted its own factual determinations for those of the trial court. Publisher devotes a substantial proportion of its brief to the argument that Trepal v. State, 1997 WL 136416 (Fla. March 27, 1997), means something other than what it so clearly says. FHSC submits that Publisher is merely attempting to obfuscate that which this Court stated so clearly in Trepal. The district court should be reversed because rather than merely reviewing the trial court's opinion for competent substantial evidence, which the record amply demonstrates, it substituted its own factual findings and interpretations for those of the trial court.

The district court also virtually ignored the underlying legislative policy behind Florida Statute §155.40, the basis for the lease agreement at issue in this case. FHSC submits that one cannot consider the "totality of factors" without considering the legislative intent behind the very statute that authorizes this transaction. The purpose of §155.40 was to assist public hospitals in

competing with the private sector by allowing outside management and corporate structure, which would presumably be more efficient in operating the hospital. Not only does the district court's decision fail to take into account the legislative intent behind §155.40, its implication that all lease transactions entered into under the statute will result in application of the open government laws to the private lessee poses a grave threat to the delivery of health care in the State of Florida.

The district court also applied the now familiar "totality of factors" test, which determines whether a private entity is subject to the Public Records Law, to find that the private lessee in this case is subject to the Sunshine Law. The State of Florida as amicus curiae, argues vigorously in support of the position that the same test governs application of the Public Records Law and the Sunshine Law to a private entity. No reported decision has ever applied the "totality of factors" test to detemine whether a private entity is subject to the Sunshine Law, however, and the proposition that the same test governs the application of both statutes is completely contrary to the position taken by the Attorney General expressly in 1983 and implicitly on numerous occassions since then. This Court should clarify that the "totality of factors" test does not determine whether a private entity is subject to the Sunshine Law.

Finally, the district court failed to even mention, much less consider, the decision of the First District Court of Appeal relating to Shands Teaching Hospitals and Clinics. The Shands transaction is legally indistinguishable from the lease transaction involved in this case and, in fact, was the model for many of the leases of public hospitals across the state. Publisher disingenuously argues that Shands is distinguishable because the Legislature intended the private corporation leasing Shands to be autonomous, while at the same time contending that such autonomy in a lease of public property would violate the constitution. Similarly, Publisher attempts to distinguish the Shands

transaction based on the Legislature's finding that Shands was "unique and different" from other state institutions, but contends at the same time that the law does not permit such "judicial exemptions" from the open government laws, irrespective of any alleged uniqueness.

The district court's sweeping opinion in this case is not only wrong, but it jeopardizes the financial and competitive viability of critical institutions such as Shands and Tampa General Hospital, as well as the numerous other formerly public hospitals across the state that are now operated and managed by private entities. This Court should reverse the decision of the Fifth District Court of Appeal and reinstate the opinion of the trial court.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED THE PROPER SCOPE OF APPELLATE REVIEW IN THIS CASE BY REWEIGHING THE EVIDENCE AND SUBSTITUTING ITS OWN FACTUAL DETERMINATIONS FOR THOSE OF THE TRIAL COURT.

> *The court's application of the Schwab 'totality of factors' test to the present case turned primarily on a series of factual determinations. Our review of the record shows that competent substantial evidence supports those findings. Accordingly, we are precluded from substituting our judgment for that of the trial court on this matter.*
>
> [Trepal v. State, 1997 WL 136416 (Fla. March 27, 1997)]

In a mere three sentences written less than one year ago, this Court succinctly set out the appropriate standard or review for cases in which a private entity is alleged to be subject to the open government laws. FHSC and the other hospital amici are quite certain that this Court understood what it meant and meant what it said. Publisher, on the other hand, devotes nearly eight pages of its brief to the proposition that this Court did not understand what it meant or meant to say something else. See Publisher's Brief on the Merits at 23-30. We will leave it to Publisher to convince the Court of that.

FHSC would merely point out that Trepal is consistent with this Court's traditional view of the role of an appellate court. For example, it is a well-settled principle of appellate law that a trial court's decision comes before an appellate court cloaked with a presumption of correctness. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979). An appellate court's function is not to reweigh evidence or substitute its judgment for that of the trial court, but rather to uphold the decision of the trial court if it is supported by competent substantial evidence. See Delgado v. Strong, 360 So. 2d 73, 73 (Fla. 1978); Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976);

Crain & Crouse, Inc. v. Palm Bay Towers Corp., 326 So. 2d 182, 182 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So. 2d 43 (Fla. 1972). Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or] . . . such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). In this case, there is more than sufficient evidence to allow a reasonable person to reach the same conclusion as the trial court; therefore, the trial court should have been affirmed.

FHSC will resist the temptation to review yet again the trial court's well-reasoned application of News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992) and the "totality of factors" test. Suffice to say that the trial court should be commended for its articulate, comprehensive and sound opinion. We will also not unduly burden this brief by going through the district court's "analysis" of each of the Schwab factors. Both opinions have been critiqued by the parties to the point that there is little left to be said about either of them. We join Hospital Corporation in inviting this Court to compare the two opinions for thoroughness, strength of legal reasoning and logical integrity.

Two points in the district court's decision must be discussed briefly, however, because they demonstrate the extreme lengths to which the district court was determined to go to reach the desired result. First, the trial court determined that there was no commingling of funds between Hospital Corporation and the public lessor. The district court could only agree with this finding, because those entities do not share a single common bank account. The combining of funds in a single account is, of course, the precise legal definition of "commingling of funds." Black's Law Dictionary (5th ed.) at 246. Since the district court could not disagree with the trial court's finding that no funds

were commingled, its simply decided that "commingling of funds" means something else. Memorial Hospital, 695 So. 2d at 421.

The second aspect of the district court's decision that cannot go without comment is its analysis of the Schwab factor that asks whether the private entity plays an integral part in the public agency's decision-making process. See Schwab, 596 So. 2d at 1032. Again, the district court does not disagree with any of the trial court's findings in this point.. Yet, despite its express admission that it was "***not certain exactly what this factor means***," the district court reversed the trial court and found that this factor weighed in favor of applicability of the Public Records Law. To our knowledge there is no standard of review that permits an appellate court to reverse a trial court's findings where the reviewing court doesn't disagree with the factual determinations and, by its own admission, doesn't even understand the nature of the inquiry. The "reasoning" in the balance of the district court's opinion is equally bizarre and suggests that the district court was not going to let the appropriate standard of review or anything else preclude it from reaching the result that it reached in this case.

Under this Court's decision in Trepal, the district court was neither required nor permitted to do anything but review the trial court's opinion to determine whether it was supported by competent substantial evidence. It clearly would have found that competent substantial evidence had it bothered to look for it. This Court need not reach some of the broader and perhaps more difficult questions raised in this case, which might best be put off for another day. Instead, this Court can and should find that the trial court's opinion was supported by competent substantial evidence and should reverse the district court with instructions to reinstate the trial court's opinion.

II. THE DISTRICT COURT'S DECISION IS CONTRARY TO THE PUBLIC POLICY OF THE STATE, AS EXPRESSED IN FLORIDA STATUTE §155.40, THAT PERMITS PUBLIC HOSPITALS TO LEASE OR SELL THEIR FACILITIES TO PRIVATE ENTITIES IN AN EFFORT TO COMPETE ON A LEVEL PLAYING FIELD IN THE HIGHLY COMPETITIVE MODERN HEALTHCARE INDUSTRY.

The Fifth District's decision in this case was based in part upon certain sweeping pronouncements of constitutional law that were far broader than necessary to decide the case before it. Such pronouncements may have been the result of mere inattention to drafting, or perhaps they were the deliberate expression of the district court's particular philosophical bent. Whatever the case, the district court completely ignored the strong public policy behind §155.40 and made no attempt to further the public policy of the State in that regard. The district court's suggestion that merely entering into a lease under §155.40 renders ipso facto the private lessee subject to the Public Records Law and the Sunshine Law completely undermines the clear legislative intent behind §155.40.

As recounted in A Study of Hospital Districts,[1] a trend began in Florida in late 1970's that saw counties begin to shed their medical facilities and dissolve their hospital districts. This trend away from publicly owned hospital facilities was in response to, among other things, increasing costs and competition. Hospital Study at 7.

In 1980, the Halifax Hospital Medical Center, an independent special district, requested an Attorney General's Opinion as to its authority to lease its assets to a not-for-profit corporation. The Attorney General rendered a formal opinion stating that such a transaction was not authorized under

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[1] Florida House of Representatives Committee on Health Care, A Study of Hospital Districts, Doc. No. HC 002. 0296 (Feb. 1996) (hereinafter referred to as "Hospital Study"). A copy of the Hospital Study is included in the Appendix at Tab 1.

Halifax's enabling legislation or otherwise. Op. Att'y Gen. 80-18; See also, Op. Att'y Gen. 82-44 (advising against the lease of Holmes County Hospital to a private corporation).

Chapter 82-147, Laws of Florida, which was later codified at § 155.40, Florida Statutes, was enacted by the 1982 Legislature in direct response to these Attorney General's opinions. Hospital Study at 8. Thus, the Legislature understood in 1982 that such a measure was necessary in order to enable public hospitals to compete with their private counterparts. Publisher's suggestion that the Legislature's original intent in enacting §155.40 is unclear is simply wrong. "Transferring control or ownership of public assets to not-for-profit entities or leasing facilities to a not-for-profit corporation was a means for competing with private hospitals." Hospital Study at 11.

We should also observe that §155.40 was not enacted as a means to evade the open government requirements, and neither Hospital Corporation nor any of the hospitals involved in this case have ever suggested that §155.40 creates an exemption from the open government laws. No such exemption is necessary, because depending upon how the transaction is structured under §155.40, the open government laws may not apply to the private lessee at all. The Legislature certainly recognizes this, and has never suggested that it intended any other result. In describing the benefits of privatization under §155.40, the House Committee on Health Care has recognized that:

> It [§155.40] gave the board of the hospital authority the ability to escape the cumbersome regulatory obligations of government entities and instead enter into flexible corporate organizational arrangements. For example, a corporation may engage in such non-governmental activities as building a parking garage or medical offices. It doesn't have to engage in competitive binding. Subsidiaries may be able to avoid public records and public meetings requirements. Not-for-profit corporations are free to enter in modern business arrangements such as entering into third party contracts, joint ventures, fiduciary arrangements, and other profit-making enterprises without having to worry about constitutional prohibition (see Art. VII, §10, Fla. Const.

> discussion below), or participate in self-examinations concerning the proper role of governmental entities.

Hospital Study at 11. The Hospital Study details the numerous public hospitals in Florida that have chosen to lease their facilities to private entities, and we commend this report to the Court for consideration.

If there is any remaining doubt that §155.40 was and is intended by the Legislature to enhance the competitive ability of public hospitals, the Court need consider only how the Legislature responded to Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc., 658 So. 2d. 577 (Fla. 4th DCA 1995), in which the district court found that the lease in that case, entered into pursuant to §155.40, was constitutionally invalid. In Ch. 96-304, Laws of Florida, the Legislature amended §155.40 by adding a new requirement relating to the expenditure of tax revenues, presumably in response to the Fourth District's criticism that "There is not even provision for effective review . . . notwithstanding that the funds used to make up any hospital deficit for derived for ad valorem taxation." Everglades Memorial, 658 So. 2d. at 580.

At the same time, however, the Legislature significantly broadened the scope of §155.40 in two respects. First, it amended the statute to permit the outright *sale* of public hospital facilities, whereas the original statute provided merely for the lease of such facilities. In addition, the Legislature amended the statute to allow the sale or lease of such facilities to a for-profit corporation. Originally, of course, such transfers were restricted to not-for-profit corporations. See Ops. Att'y Gen. 84-97, 85-31 and 92-54 (all rejecting the sale or lease of public hospital to a for profit entity.) The Legislature recognized again in 1996 that "The purpose of the statute was to assist public hospitals in competing with the private sector by allowing outside management and corporate

structure which would presumably be more efficient in operating the hospital." Florida House of Representatives Committee on Health Care, Final Bill Analysis & Economic Impact Statement, CS/HB 965, Ch. 96-304, Laws of Florida (May 17, 1996).[2]

Although the district court reluctantly acknowledged that the underlying purpose of §155.40 was "to foster competition," Memorial Hospital, 695 So. 2d at 421 n.2, it seemingly ignored this critical factor even while purporting to consider the "totality of factors." The district court's discussion of §155.40 is limited to the observation that the statute does not expressly waive the requirements of the open government laws. Id. Since the purpose of the statute was not to create a blanket exemption from the open government laws, there would naturally be no such "waiver" set forth in the statute. Instead, each lease under the statute must be examined on a case by case basis, applying the proper legal test to determine whether the lessee is or is not subject to the Public Records Law or the Sunshine Law.

This is the approach taken by the Attorney General in two fairly recent opinions that deal expressly with leases of public hospitals entered into pursuant to §155.40. In Op. Att'y Gen. 89-52 (issued to the Hillsborough County Hospital Authority) the Attorney General analyzed §155.40 in some detail, because the requesting public agency specifically asked whether it was eligible to enter into a lease agreement under that statute. The opinion concludes that such a lease was authorized under §155.40. In discussing the potential application of the Public Records Law and Sunshine Law to the private lessee, the Attorney General stated that the application of the open government laws to the private not-for-profit organization leasing the facilities pursuant to §155.40, F.S., "would

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[2] A copy of the Final Bill Analysis & Economic Impact Statement for Ch. 96-304 is included in the Appendix to this brief at Tab 2.

appear to depend upon the powers and duties imposed on the not-for-profit corporation under the terms of the lease agreement." In the later opinion, the Attorney General again discussed §155.40 as the basis for the lease of a public hospital to a private entity, but determined that the private company was subject to the Sunshine Law because the public agency's board of trustees still exercised "substantial control over the corporation . . . by virtue of their membership and the membership of their appointees on the corporation governing body." Op. Att'y Gen., 95-60. In neither case did the Attorney General suggest, much less opine, that a lease entered into under §155.40 would necessarily result in the application of the Public Records Law or the Sunshine Law to the private lessee. Indeed, if anything, the Attorney General's opinions refute the argument that application of the open government laws is a necessary result of a transaction under §155.40. Rather, the State of Florida has previously taken the position, through the office of the Attorney General, that application of the open government laws must be determined on a case by case basis, even where the lease of a public hospital is entered into pursuant to §155.40. This is precisely the position advocated by the Hospital Corporation and its amici in this case.[3]

Unfortunately, the district court's opinion implies that a private lessee under §155.40 cannot under any circumstances be determined not to be subject to the open government laws.[4] These

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[3]Remarkably, neither Publisher nor the Attorney General even cites to either of these opinions, the relevance if which is abundantly apparent.

[4] "We recognize that both parties to this lease and transfer arrangement intended that Lessee not face the glare of the Sunshine Law or be saddled by the requirements of the Public Records Law. The agreement was carefully drafted in order to accomplish this end. The issue before us is whether the parties were successful. We think not. This is not a reflection on the abilities of the very capable lawyers employed by the parties. The did the best they could. But they were burdened by the circumstances of the case and the constitutional and statutory law of the state." Memorial Hospital, 695 So. 2d at 420.

gratuitous remarks, coupled with the district court's unorthodox application of the law, will result in a media driven feeding frenzy of litigation against private hospital corporations if that opinion is not corrected. Whatever else this Court might or might not choose to say about this case, we urge the Court to make it abundantly clear that the application of the open government laws to any private lessee under §155.40, Florida Statutes, must be determined on a case by case basis.

III. THE TEST FOR DETERMINING THE APPLICATION OF THE SUNSHINE LAW TO A PRIVATE ENTITY IS NOT AND HAS NEVER BEEN THE SAME AS THE TEST FOR DETERMINING THE APPLICATION OF THE PUBLIC RECORDS LAW TO THAT ENTITY.

> *"However, the test for determining the applicability of ch. 119 differs from that of s. 286.011."*
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> [Op. Att'y Gen. 83-1]

This case raises a seemingly simple question: does the "totality of factors" test used to determine whether a private entity is subject to the Public Records Law also apply to determine whether a public entity is subject to the Sunshine Law? The district court found that the "totality of factors" test would apply with equal force and be dispositive of the question of the applicability of the Sunshine Law. Publisher and the Attorney General now argue vigorously in support of this position. Until the district court's decision in this case, however, no reported decision had ever applied the "totality of factors" test to determine the applicability of the Sunshine Law to a private entity. And despite issuing numerous opinions on the subject, the Attorney General has never taken in any formal opinion on the position that it now advances in this case.

Indeed, as noted above, the Attorney General has expressly stated that the test is not the same under the two statutes. The Attorney General's simple, direct, unequivocal statement, extracted from

a 1983 formal opinion, stands in irreconcilable conflict with the position now advanced by Publisher and the State. This opinion was issued by the Attorney General in response to an inquiry as to whether a volunteer fire department, a private non-profit corporation, was subject to the Sunshine Law. The Attorney General's response is remarkable not only because of the opinion ultimately rendered, but also because of the reasoning and analysis employed. The starting point of the Attorney General's analysis in Opinion 83-1 was the following statement concerning the proper scope of the Sunshine Law:

> In Times Publishing Company v. Williams, 222 So. 2d 470 (2 DCA Fla., 1969), the court expressed the view that the Legislature intended the Sunshine Law to apply to "every board or commission . . . over which [the Legislature] has dominion and control." *See also* City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971). Thus s. 286.011, F.S., is not applicable to private organizations which are not state or local governmental agencies or subject to the control of the Legislature or which do not serve in an advisory capacity to such state or local governmental agencies.

The Attorney General then went on to analyze whether there had been any delegation of duties by any public body to the non-profit volunteer fire department. Finding that there had not been, the Attorney General concluded that the volunteer fire department was not subject to the Sunshine Law.

The opinion notes the seemingly contradictory result that had been reached in Schwartzman v. Merritt Island Volunteer Fire Department, 352 So. 2d 1230 (4th DCA 1978), in which a volunteer fire department was found to be subject to the Public Records Law, but discounts that decision for the simple reason that the legal test to be applied under the Sunshine Law is different from the test under the Public Records Law. The State's position on this issue could hardly have been more clearly expressed:

> *"However, the test for determining the applicability of ch. 119 differs from that of s.286.011. The records of any entity, public or private, acting on behalf of a public agency are subject to ch. 119. Section 286.011 is applicable only to those collegial bodies which are subject to the 'dominion and control' of the Legislature.*

It matters not that the Attorney General's 1983 opinion predates this Court's decision in Schwab. As Publisher correctly observes, Schwab crystallized the "totality of factors" test and gave it a name, but the district courts had been applying essentially the same test in the public records context since as early as 1978. See Publisher's Brief on the Merits at 11 n.3. Publisher's position is all the more remarkable because it contends that the scope of the Sunshine Law and the Public Records Law have been the same since 1975, when an amendment to the Public Records Law "conformed the two statutes." Publisher's Brief on the Merits at 45. If Publisher is correct and the scope and reach of the two statutes has been coextensive since 1975, why would the Attorney General state unequivocally -- in 1983, a full eight years later -- that the test to be applied under the two statutes is different?

Were this issue not so critical, FHSC would not belabor the point. But if the State of Florida truly now wishes to embrace the position that the same test -- the "totality of factors" test -- is the proper test to determine whether a private entity is subject to the Sunshine Law, then the Attorney General will have to disavow virtually every formal opinion it has rendered on this question over the past twenty years. "Upon this point," to quote Justice Holmes, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1941).

Before turning to a few specific examples to illustrate that the Attorney General has not adhered to or applied the "totality of factors" test when determining if a private entity is subject to the Sunshine Law, it would be helpful to see how this matter is treated more broadly in the

Government-in-the-Sunshine-Manual (1997 ed.) (hereinafter referred to as the "Manual"), which is published by the First Amendment Foundation and prepared by the Office of the Attorney General. The Manual addresses the question of when private entities are subject to the Public Records Law at pages 62-67. In part II., section B(2)(b), the Manual discusses the "totality of factors" test and its application generally. In section B(2)(c), the Manual discusses the "totality of factors" test as it is applied to non-profit private entities performing functions for public agencies. Finally, section B(2)(e), discusses the "totality of factors" test as it is applied to private for profit businesses dealing with public agencies.

In the section of the Manual dealing with the application of the Sunshine Law, however, there is not a single reference to the "totality of factors" test. See Manual at 16-22. Instead, when the private entity is created pursuant to law or by a public agency, the Attorney General has typically applied the "dominion and control" test first applied by the Second District in Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969) and reiterated by this Court in City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971). See Manual at 20. Despite the obvious relevance of Times Publishing Company v. Williams and City of Miami Beach v. Berns, Publisher dismisses those cases out of hand, see Publisher's Brief on the Merits at 46, and the Attorney General now fails to even mention them. In the case of purely private entities providing services to public agencies generally, the Attorney General has most often focused on the question of whether the public agency has delegated any of its legislative or governmental powers to the private entity. Manual at I(B)(3)(b). This Court has also focused on whether there has been any delegation of governmental functions to the private entity. McCoy Restaurants, Inc. v. City of Orlando, 392 So. 2d 252 (Fla. 1980). See also, Op. Att'y Gen. 95-60 ("The courts have generally considered whether there has been a delegation

of the public agency's governmental or legislative function or whether the private organization plays an integral part in the public agency's decision-making process.")

Even the specific opinions cited in the Amicus Brief of the Attorney General fail to support the position that the "totality of factors" test is the proper test to determine application of the Sunshine Law to a private entity. Opinion 97-49 was issued following the district court's decision now on review and relies almost entirely on that decision. Thus, it adds little to the analysis. Opinions 94-32, 94-34 and 94-35 each apply the "totality of factors" test in analyzing the application of the Public Records Law to the private not-for-profit corporations involved, but each then expressly apply the "dominion and control" test in analyzing whether those corporations are subject to the Sunshine Law. See also, Op. Att'y Gen. 92-80 (expressly applying the "dominion and control" test to determine the application of the Sunshine Law, while applying the "totality of factors" test to determine application of the Public Records Law). The Attorney General's citation to Opinion 95-17 is completely mystifying, since that opinion deals only with the question of whether a private corporation is subject to the Public Records Law and does not address or discuss the Sunshine Law at all.

Finally, Attorney General cites Opinions 92-53 and 97-27 for the proposition that it reviews "all factors relating to the responsibility to the private entity and its relationship with the public agency" in determining whether the open governments requirements apply to the private party. Brief of Amicus Curiae State of Florida at 11,12. While the Attorney General may "review all the factors," that is not the same thing as applying the "totality of factors" test. Careful review of the Attorney General's opinions reveals that indeed it does review "all the factors" relating to the responsibilities of the private entity and its relationship to the public agency, but it does so in order

to determine whether the private entity is either under the dominion and control of the public agency, or plays an integral role in the decision in the public agencies decisionmaking process, or has been delegated some governmental function. These are the standards that both the courts and the Attorney General has alternatively applied to determine whether a private entity is subject to the Sunshine Law. The "surrogate public bodies" test, newly coined by the district court in this case and referred to in the State's Amicus Brief, has no apparent basis in any reported appellate decision or in any previously published opinion of the Attorney General.

The simple fact of the matter is this: the State of Florida, through the office of the Attorney General, has rendered numerous opinions in which it was asked whether a particular private entity is subject to the Public Records Law, the Sunshine Law, or both laws. The Attorney General's response as to the Public Records Law, at least since Schwab, has been customary discussion of the "totality of factors" test. But in the opinions that predate Schwab, the same test has been applied even if under a different name. In no instance -- never -- has the Attorney General applied the "totality of factors" test to determine whether a private entity is subject to the Sunshine Law.

The fact that distinct tests apply under the different statutes becomes crystal clear in those opinions in which the Attorney General addresses both issues. In virtually every instance where the Attorney General has been asked to render an opinion as to the application of both statutes, the discussion of the Sunshine Law is a separate and distinct discussion that almost always ends up referring to "dominion and control," "delegation of duty" or "decisionmaking." If the "totality of factors" test truly determines whether the Sunshine Law applies to a private entity, why hasn't the Attorney General ever just said so? The only logical answer, of course, is that the applicability of

the two statutes is governed by different tests. The Attorney General said so in 1983 and has never said otherwise since.

In the context of hospital leases specifically, the Attorney General has previously opined that in determining the applicability of the Sunshine Law to a private lessee of a public hospital, "the key questions are whether there has been a delegation of the public agency's governmental or legislative functions or whether the private organization plays an integral part in the public agency's decision-making process." Op. Att'y Gen. 89-52. As recently as 1995, the Attorney General reiterated the same two factors as the determinative issues on the applicability of the Sunshine Law to a private lessee of a public hospital. Op. Att'y Gen. 95-60. Whether there has been any such delegation of governmental functions or private involvement in the public agency's decision-making process is determined not by application of the "totality of factors" test, but "would appear to depend upon the powers and duties imposed upon the not-for-profit corporation under the terms of the lease agreement." Op. Att'y Gen. 89-52, 95-60.

Until the district court's decision in this case, interested parties (both public and private) understood that different legal standards governed the application of these distinct statutory provisions. Unfortunately, this Court has never expressly addressed the question. It should do so now to clarify that the applicability of the Sunshine Law to private entities is determined not by the "totality of factors" test, but by other principles of law, including the test of "dominion and control."

IV. THE SHANDS TEACHING HOSPITAL CASE IS INDISTINGUISHABLE FROM THE HOSPITAL LEASE AT ISSUE HERE AND FROM THE MANY OTHER LEASES BETWEEN PUBLIC HOSPITALS AND PRIVATE LESSEES ACROSS THE STATE

"In any event, a legislative policy that granted public property to autonomous self-perpetuating private groups would violate the Constitution."

[Publisher's Brief on the Merits at 15]

"Shands II relied on . . . the judicial finding . . . that the legislature intended Shands Teaching Hospital to be autonomous."

[Publisher's Brief on the Merits at 42]

Well, which is it? If, as Publisher so vehemently argues, "There is no room within the narrow constitutional guidelines allowing for transfer of public property to a private actor for such autonomy as Corporation claims," then how can Publisher seriously attempt to distinguish the Shands case[5] on the basis that the Legislature intended for the not-for-profit corporation leasing Shands to be autonomous? See Publisher's Brief on the Merits at 22. And if, as publisher further contends, the minimal level of public control necessary to save such a transaction from constitutional invalidity is at the same time sufficient to make the lessee subject to the open government laws, then how can Shands have it both ways?

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[5] In Shands Teaching Hospital and Clinics, Inc. v. Lee, 478 So. 2d 77 (Fla. 1st DCA 1985) ("Shands I"), the court held that Shands was not a state agency or a corporation "primarily acting as an instrumentality or agency of the state" within the meaning of Florida Statute §768.28. In so doing, the court found that the Legislature's intent in authorizing the lease of the Shands facilities to a private non-profit corporation was "to treat Shands as an autonomous and self-sufficient entity." Id. at 79. In the subsequent case of Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc., 512 So. 2d. 999 (Fla. 1st DCA 1987)("Shands II"), the court relied at least in part on the Shands I decision and held that Shands' private lessee was not subject to the Public Records Law or the Sunshine Law. Id. at 1000. The cases are referred to collectively herein as the "Shands" case.

Interestingly, the Attorney General appeared as amicus curiae in Shands II on behalf of the State of Florida, presumably to defend the lower courts' finding that Shands was not subject to the open government laws. In its amicus brief in this case, the Attorney General has not attempted to distinguish, reconcile or explain Shands or the result therein, which is wholly inconsistent with the district court opinion now on review.

Even a cursory review of Chapter 79-248, Laws of Florida, the special act authorizing the lease of the Shands Teaching Hospital to a private not-for-profit corporation,[6] demonstrates that the lease arrangement in Shands is virtually indistinguishable from the transaction involved in this case. For example, Publisher argues and the district court found it sufficient that the public agency played a role in the formation of the not-for-profit corporation because it required its formation in order to transact the venture. How is that any different than the Legislature mandating by law that the State Board of Education lease the Shands Teaching Hospital and Clinics "to a private non-profit corporation organized solely for the purpose of operating the hospital . . . ."? Chapter 79-248, §1(3), Laws of Florida.

Publisher insists that the public agency in this case provided "substantial capitalization" to the private corporation and, like the district court, completely discounts the lessee's assumption and satisfaction of more than eight million dollars in bond debt. The assumption of this enormous liability, Publisher contends, "was grossly inadequate in relation to the substantial value of the capitalization provided." Publisher's Brief on the Merits at 34. But in the case of Shands, the special act provides that "The rental for the hospital facility shall be in an amount equal to the debt service on the bonds or revenue certificates issued solely for capital improvements to the hospital facilities or as otherwise provided by law." Chapter 79-248, § 1(3), Laws of Florida. Surely, the capital facilities comprising the Shands Teaching Hospital and Clinics, "consisting of Building 446 and parts of Buildings 204 and 205 on the campus of the University of Florida and all furnishings, equipment, and other chattels or choices of action used in the operation of the hospital," Ch. 79-248,

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[6]A copy of Ch. 79-248, Laws of Florida, is included in the Appendix to this brief at Tab 3.

31(3), Laws of Florida, would under Publisher's analysis constitute the provision of "substantial capitalization" to the private not-for-profit corporation.

Publisher argues the obvious point that Hospital Corporation is on public property, and of course so is Shands. This "argument" is nothing more than a truism; by definition a private lessee of a public hospital is operating on public property -- but it is public property that has been lawfully leased to a private entity. Publisher scoffs at the hospitals' explanation of the need to be able to compete against other private and proprietary players in the health care industry, but the *sole* stated purpose of the Shands transaction was "[T]o provide for more effective and efficient management and administration of the Shands Teaching Hospital in fulfilling its role as a health-care provider." Chapter 79-248, Laws of Florida.

Finally, there is the issue of control. The district court dismissed the fact that the public agency had no voting member on the not-for-profit corporation board of directors. Instead, it found "considerable control" by virtue of the performance standards contained in the lease and "real control" by virtue of what is nothing more than a standard lease provision concerning default and termination. In the case of Shands Teaching Hospital, Chapter 79-248 *requires* that the board of directors of the not-for-profit corporation leasing and operating Shands be appointed by the President of the University of Florida and chaired by the Vice President for Health Affairs of the University of Florida. How, one might wonder, could the government retain any *greater* control over a not-for-profit corporation than by reserving unto itself the full power to appoint the board of directors and having one of its own serve as chairman? Not surprisingly, the lease agreement between the State Board of Education and Shands Teaching Hospital and Clinics, Inc., contains a variety of

performance covenants and provisions for remedies upon default.[7] Most notably, in the event of default, the State retains the right to direct the President of the University of Florida to replace any one or more members of the lessee's board of directors or, in the alternative, to immediately terminate the lease. Shands Lease Agreement, § 7.2(b) and (c). This, not a simple default clause, is "real control."

The Shands lease is fundamentally indistinguishable from the transaction now on review. Indeed, the Shands lease served as a model for many of the public hospital leases that followed. According to Publisher, the "diacritical distinctions" between Shands and the present case are the Legislature's intention that Shands be autonomous and its finding that Shands is "unique." Publisher's Brief on the Merits at 42. As already discussed, however, Shands' "autonomy" cannot save it from application of the open government laws because, according to Publisher, autonomy is a Catch-22: If a lessee is so autonomous as to be beyond public control, then the transaction is unconstitutional; but if the government retains even the minimal amount of control necessary to make the transaction constitutional, then the lessee is subject to the open government laws.[8] That leaves only the vacuous notion that Shands can avoid application of the open government laws

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[7] The Lease Agreement (Restated and Amended) dated September 1, 1985, between Shands Teaching Hospital and Clinics, Inc. and the State Board of Education is included in the Appendix to this brief at Tab 4.

[8] "There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions . . . . If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to . . . . 'That's some catch, that Catch-22' [Yossarian] observed." Joseph Heller, Catch-22, ch. 5 (1961).

because it is "unique and different" from other state institutions.[9] Once again Publisher's hypocrisy is apparent. In a desperate effort to distinguish Shands, Publisher concedes that the Shands Teaching Hospital is perfectly entitled to a judicial exemption from the open government laws because it is "unique and different" from other public hospitals. Yet at the same time, Publisher passionately argues that the public policy of the State does not permit such judicial exemptions, irrespective of whether hospital services are "unique and different" from other governmental functions. Publisher's Brief on the Merits at 16-18. Publisher, it would seem, is hoist on its own petard.

Shands simply cannot be distinguished from the transaction now before this Court. That simple fact demonstrates the disastrous effect the district court's sweeping decision could have on dozens of hospitals, including Shands Teaching Hospital and Tampa General Hospital, two of the largest teaching hospitals in the State of Florida. The district court's creative interpretation of the law and unnecessarily broad opinion place in jeopardy nearly 40 hospitals that thought they had achieved the equal footing necessary to compete with healthcare giants like Columbia, Tenet and others. For many of these hospitals successful privatization was literally a matter of survival. If the district court's decision goes uncorrected, these hospitals will be thrown into immediate turmoil and may face financial and competitive extinction. Neither the law nor the policy of this State warrants such a result, and this Court must not condone it.

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[9] Publisher also mischaracterizes the legislature's finding of "uniqueness" by suggesting that the Legislature determined Shands to be "unique and different" from *other public hospitals*. See Publisher's Brief in the Merits at 42. The Legislature made no such comparison as between Shands and other public hospitals; it found only that Shands was "unique and different from other state institutions." Ch. 79-248, Laws of Florida.

CONCLUSION

For all the foregoing reasons, this court should reverse the decision of the Fifth District Court of Appeal and should reinstate the opinion of the trial court.

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