IN THE SUPREME COURT
STATE OF FLORIDA

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

Petitioner,

vs.

NEWS-JOURNAL CORPORATION, a Florida corporation,

Respondent.

_____/

CASE NO. 90,835

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RESPONDENT NEWS-JOURNAL CORPORATION'S BRIEF ON THE MERITS

On Review of a Decision of the
Fifth District Court of Appeal

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PRELIMINARY STATEMENT

In this brief, the record on appeal will be referred to by the abbreviation: "R. #", where the # refers to the page of the record to which reference is made. References to the appendix will be made by using the abbreviation: "A-#", where the # refers to the tab number corresponding to the document in the appendix to which reference is made. References to the Petitioner's Initial Brief will be made by using the abbreviation: "*Pet. Br.*, at #"; references to the amicus brief of Florida Hospital Association will be made by using the abbreviation: "*FHA Br.*, at #"; and references to the amicus brief of The Association of Community Hospitals and Health Systems of Florida, Inc., *et al.*, will be made by using the abbreviation: "*ACH Br.*, at #". In the references to these briefs, the "#" refers to the page number of the brief to which reference is made.

STATEMENT OF THE CASE AND OF THE FACTS

The Nature of the Case

The plaintiff, NEWS-JOURNAL CORPORATION ("Publisher"), sued for a declaration under the open government laws,[1] that the public has a right of access to the records and meetings of the defendant, MEMORIAL HOSPITAL--WEST VOLUSIA, INC., (the "Corporation"), as the lessee and operator of West Volusia Memorial Hospital in DeLand acting under a certain Lease and Transfer Agreement (the "Agreement") with the West Volusia Hospital Authority (the "Authority"). The trial court rendered summary judgment for Corporation; the district court reversed and remanded with instructions in favor of Publisher; and this Court granted Corporation's petition for review. Because of significant omissions and differences of emphasis, Publisher chooses to restate and amplify the facts of the case.

Summary of the Relevant Facts and Circumstances

The Authority

The Authority is a state agency created in 1957 by a special act establishing a tax district in DeLand and the western region of

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[1]*See* FLA. CONST., art. I, § 24 (self-executing public rights of access to records and meetings of public agencies); FLA. STAT. § 286.011 (public access to meetings of "any board or commission" of the state); and FLA. STAT., §§ 119.011(2); 119.07 (public access to records of private entities "acting on behalf of" agencies). In this brief the phrase "open government laws" refers to the relevant provisions of the constitution and both statutes collectively. The relevant provisions of FLA. CONST., art. I, § 24(a) are called the "public records clause," and the relevant provisions of FLA. CONST., art. I, § 24(b) are called the "public meetings clause." The relevant provisions of Chapter 119 are called the "public records law" or "Public Records Act," and the relevant provisions of Section 286.011 are called the "public meetings law," "Sunshine Law," or "Government-in-the-Sunshine Law."

Volusia County (the "act" or "enabling act"). R. 607, (Appendix A-1). Under the governance of five commissioners elected by the voters in the district, the Authority was empowered to levy taxes and exercise other governmental powers for the purpose of developing and operating hospitals and health care facilities in the district. R. 607-616; A-1.

The Authority received a broad legislative mandate to provide healthcare within the district. Its governmental function is "to establish, construct, operate, and maintain such . . . hospitals as in [its] opinion shall be necessary for the use of the people of the district . . . for preservation of the public health, for the public good, and for the use of the public. [M]aintenance of such hospital or hospitals within [the] district is . . . for a public purpose." R. 610 (Act, § 5); A-1. Each hospital or clinic established by the Authority must provide care for the indigent without charge. Though the Authority also may provide and charge for treatment to the non-indigent, the indigent have "first claim to admission." R. 615 (Act, § 19); A-1.

Pursuant to this mandate and using its taxing and other governmental powers, the Authority developed West Volusia Memorial Hospital (the "hospital"). For more than thirty years, the Authority operated and expanded this facility until, by December 1, 1994, the hospital had grown into a fully licensed and accredited acute care general hospital with 156 beds, 850 full time equivalent staff, 60 physicians on medical staff, and approximately $36.5 million in assets. R. depo Raines 3-24. R. 1339, 1193, 1171.

Selection of MHS and Negotiation of the Agreement

During 1993, the Authority resolved to effect a certain reorganization. After considering various alternatives, it determined to solicit proposals to lease or manage its hospital. R. 1008-1009. R. depo Gardner 10-19. The Authority selected a proposal submitted by Memorial Health Systems, Inc. ("MHS") (R. 1014-1026), a private not-for-profit corporation which then owned Memorial Hospital in Ormond Beach and managed a hospital in Bunnell, both of which are located outside the taxing district. R. 651.

MHS did not propose to acquire the hospital nor even to operate the hospital. Rather, MHS said, "We are proposing a community-based partnership, not a takeover." R. 639. MHS proposed that the Authority contract with it to "establish a separate tax-exempt 501(c)(3) subsidiary corporation . . . for the express purpose of leasing the [h]ospital assets and facility from the Authority and operating it for the benefit of the residents of the [district]." R. 673.

The Authority's acceptance of this proposal led to the creation of the Corporation. After MHS and the Authority had signed a letter of intent on June 6, 1994, the Corporation was chartered on June 16, 1994. R. 770. Its corporate purpose is solely "to operate one or more hospitals and other health care facilities situated within the jurisdictional boundaries of [the Authority]." R. 1106. Reflecting terms negotiated between the Authority and MHS, the charter requires that a majority of the directors of the Corporation must reside within the boundaries of

the district, that two more members must be drawn from the hospital staff, and that another nonvoting director may be delegated by the Authority from its membership. R. 1109-1110.

A short while after the Corporation was chartered, the parties executed a 53 page definitive agreement entitled Lease and Transfer Agreement (the "Agreement"). R. 863, (Appendix A-2). Although the Corporation executed the Agreement along with the Authority and MHS, it was then merely an empty shell with no assets or business of its own. Its charter and provisions for its control were made a part of the Agreement, which provides that the charter not be changed without consent of the Authority.

Summary of the Transaction

The Agreement is styled Lease and Transfer Agreement. It is that and more. It not only demises and conveys the hospital assets but also vests the Corporation with the exclusive right and franchise to perform the Authority's public health duties, including the exclusive right to treat the indigent and be compensated out of taxes levied by the Authority. It imposes extensive duties upon the Corporation regarding the operation and maintenance of the hospital and reserves substantial powers to oversee and enforce these duties. It conveys substantial assets without equivalent consideration but retains the ultimate financial interest in these assets. R. 863-982.

The Agreement places all of the assets of the hospital as a going concern in the hands of the Corporation for a term of forty years. Although the Corporation assumed the existing liabilities associated with the transferred assets, the value of the

transferred public assets exceeds these liabilities by approximately $20 million.[2] The Agreement further contemplates the Authority will grant up to $10 million in operating subsidies to the Corporation over the first four years of the term. R. 900-901.

Among the liabilities assumed by the Corporation was a bond issue in the amount of approximately $8 million less a debt service reserve of $.5 million. R. depo Raines, p. 24. When Corporation learned that the assumption of these bonds would trigger loss of their tax exempt status, it defeased the bonds even though not required by the lease. *Id.* Corporation considers the amount of the defeasance to be rent for the property, and the trial court and district court have treated it as such. Corporation has not disputed that this defeased liability is taken into account in determining the net value of the transferred assets. R. depo Raines, p. 17; A-3; *Pet. Br.*, at 35.

Other than assumption of these liabilities, which are more than offset by assets, the Corporation gave no other consideration

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[2]The opening and closing balance sheets of the Corporation and Authority as of the closing date are summarized in a report entitled "Commencement Date Report" attached as Appendix A-3. This report is in the record as Plaintiff's Exhibit 1 to the deposition of David L. Raines, Senior Vice President/CFO, of MHS. Explaining this report, he said "the best picture of the leased assets would be . . . 7.8 million dollars in net working capital and the 19.5 million dollars in property assets." R. depo Raines, p. 17. He also testified that the Corporation assumed and defeased approximately $8 million in bond debt less a debt service reserve of $.5 million. *Id.* at 24. Based on Raines' calculations, the *net* value of the transferred assets is $19.8 million ($7.8 million plus $19.5 million = $27.3 million less $7.5 million = $19.8 million). On brief below, Publisher used the figure of $18.3 million which was based on preliminary balance sheets attached to the Agreement. R. 1339; R. 347-349. Raines' figure is current to post closing adjustments as of May 26, 1995.

for the transfer and pays no other rent or interest in consideration of the use of the property transferred. R. 880; R. depo Hopkins, 68; R. depo Raines, 42-43. Thus, the only genuine consideration received by the Authority for this transfer is the undertaking by the Corporation to operate and maintain the hospital and perform the Authority's statutory function concerning public health and indigent care under the comprehensive provisions of the Agreement. The Agreement carefully spells out the terms of this undertaking.

It obligates Corporation to "faithfully and efficiently administer, maintain and operate the [hospital facilities] as charitable facilities open to the general public." R. 889; A-2 (Agreement, § 6.02). In particular, the Corporation must operate the hospital "consistent with all obligations currently existing under the Act which are applicable to the [hospital]." R. 878; A-2 (Agreement, § 2.01(b)). These include the obligation to maintain the hospital for the preservation of the public health and for the use of the people within the district as provided in Section 5 of the Act and the obligation to keep the facility open to the indigent sick who shall be treated without charge and shall have first claim to admission. R. 610, 614; A-1 (Act, § 19).

The Agreement forbids the Authority from competing with the Corporation. R. 899-900. It denies to the Authority the right in the future to "construct, fund, own, manage or operate any acute-care hospital facility, ambulatory surgical center, or any similar facility in Volusia County, Florida" and provides that the Authority will not hereafter "provide or fund any health care

services in the [district] that are not presently offered by the Hospital" without giving the Corporation first refusal on providing the service. R. 899-900. Thus the Authority may not subsequently discharge its governmental functions of creating healthcare facilities or providing healthcare services within the district unless the Corporation expressly allows it or declines to exercise its preemptive right to do so.

The Agreement also grants to the Corporation the *exclusive* right to provide indigent care on behalf of the Authority and guarantees the Corporation a profit on this service under a forty year cost-plus obligation. R. 897; A-2. It transfers the statutory obligation to treat the indigent from the Authority to the Corporation, obliging the Corporation to "provide health care services to indigent patients at [the hospital] on the same basis as provided on the date of execution . . . by [the Authority]." R. 897; A-2 (Agreement § 6.18). After a transition period, the Authority is obligated to continue to pay the Corporation at a fixed rate of 105% of the cost of such care. R. 898; A-2. The cost-plus price structure passes through to the Authority a pro-rata share of the general overhead of the hospital based on the ratio of indigent care to total care. While the Authority may audit the accuracy of the accounting, the Authority has no right to approve or disapprove of the overhead expenditures which determine the cost, and its duty to pay these costs is contractual and not subject to the discretion to appropriate. R. depo Raines, p. 61 (statement on the record by counsel for Corporation); R. depo Hopkins, pp 59-61 (explaining effect of cost-plus clause). Thus

decisions by Corporation's board concerning the cost of operations (e.g. administrative salaries) will determine the costs which pass through to the Authority and ultimately the taxpayers. The Authority must levy taxes to raise the funds to discharge this liability. R. 715-732; R. depo Gardner, 41; R. 353-354. This continues for the full forty year term of the Agreement.

The Corporation made certain undertakings regarding the assumption of liabilities and the making of capital improvements over the term of the Agreement (R. 901; A-2), but the Corporation has no assets other than what it obtained from the Authority. R. 347-349; R. depo Raines, 21-22. The Corporation, but not MHS, is liable on the basic covenants to maintain and operate the hospital as well as on the assumption of current liabilities associated with the assets transferred. *See* R. 889-903.

The only financial covenant for which MHS is liable is the undertaking to cause the Corporation to invest not less than $26.4 million in capital improvements over the first ten years of the lease. R. 901; A-2 (Agreement §6.23). This was offset by various assumed assets. R. depo Raines, 22. MHS will finance the capital improvements with a bond issue which will be repaid out of future revenues of the hospital. R. depo Raines 28-37; R. 1327 (capital improvement plan). MHS expects the hospital to generate revenues sufficient to discharge all such liabilities and make a profit. R. 715; R. depo Raines 38-42. The expectation that the Corporation will meet these liabilities is justified partly because it will pay no rents to the Authority. All of the cash flow of the property is available to satisfy these commitments. R. depo Lind 29.

The Agreement includes substantial provisions governing the manner in which the Corporation is required to operate the hospital. According to the president of the Corporation, the lease is "laced with requirements of the lessee to maintain and upgrade the physical facilities, comply with applicable federal and state laws, not take any action [discontinuing] health care service provided . . . medicare certification, maintaining medical staff, [controlling] our treatment of employees and employee benefits." R. depo Lind 29. This understanding is consistent with that of the Authority's former chairman, who believes "the quality of health care in West Volusia is still controllable by the Authority." R. depo Gardner 56.

The core covenants are the covenants to "operate the [hospital] consistent with all obligations currently existing under the Act" and to "faithfully and efficiently administer, maintain and operate the [hospital] as charitable facilities open to the general public." R. 889-890; A-2 (Agreement, § § 2.1(b) & 6.02). The Agreement establishes an objective and enforceable standard of performance by requiring the Corporation to "cause the Hospital to have JCAHO [Joint Commission on Accreditation of Hospital Organizations] (or comparable) accreditation throughout the Term of this Agreement." R. 894; A-2 (Agreement, § 6.10). These covenants impose specific and detailed standards of operation on the Corporation, and the provisions for remedy in the event of default allow the Authority to enforce these standards. In the event the Authority had reason to believe that standards were not being met, it could invoke an inspection by the JCAHO, establish whether a

default existed, and if necessary, enforce the covenants. R. depo Hopkins 31.

There is little likelihood the Authority would be unaware of potential deviations from the standards and practices required by the Agreement. The Agreement provides that Corporation "shall install and maintain proper books of record and account of all business and affairs of [Corporation], in which full and correct entries shall be made in accordance with GAAP." R. 898; A-2. It further provides that Authority "is granted access at any reasonable time, upon reasonable conditions and notice, to the books and records of [Corporation] insofar as necessary to verify or review accounting records for the purpose of determining compliance with the terms and conditions of this Agreement only." R. 918; A-2. The MHS proposal emphasized that the Corporation would be accountable, and in addition to the right to enter and inspect records of all business and affairs of the Corporation, the Agreement contains extensive provisions for detailed and specific reports that are traceable to negotiated concessions agreed to by MHS. R. 759; R. 764.

Memorial Health Systems, Inc.

Although MHS is a party to the Agreement, it is not a party to this suit. MHS assumed only a limited responsibility under the Agreement, and its records and meetings are not implicated in this controversy.

The Course of Proceedings in the Trial Court

The Publisher sought two declaratory judgments. R. 54. Count I alleged that under the terms of the Agreement and the totality of the facts and circumstances, the Authority had delegated to the Corporation its essential governmental function. Therefore, Publisher contended the Corporation was accountable to the public under the Public Records Law as a "private . . . corporation . . . acting on behalf of [a] public agency" within the meaning of FLA. STAT., § 119.011(2) ("the *acting-on-behalf* clause") as construed and applied in a body of case law establishing a totality of the factors test which was synthesized and approved in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hauser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992) ("*Schwab*").[3]

Count II alleged that the cases construing the Sunshine Law establish a parallel principle. *See Wood v. Marston*, 442 So. 2d 934, 939 (Fla. 1983); *Town of Palm Beach v. Gradison*, 296 So. 2d

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[3]*Schwab* approved four district court of appeals decisions which had developed and applied the totality of factors test. *See Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991) (not-for profit corporation organized to support public hospital was acting on behalf of hospital authority); *Fox v. News-Press Publishing Co., Inc.*, 545 So. 2d 941 (Fla. 2d DCA 1989) (for-profit towing company acting on behalf of city under towing contract); *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343, (Fla. 3d DCA 1983) (contractors building public facility were not acting on behalf of county); *Schwartzman v. Merritt Island*, 352 So. 2d 1230 (Fla. 4th DCA 1977), *rev. den.*, 358 So. 2d 132 (Fla. 1978) (not-for-profit corporation serving as volunteer fire department was acting on behalf of county) (collectively, this brief sometimes calls *Schwab* and its antecedents the "*Schwab* cases").

473 (Fla. 1974).[4] Under these cases, a private delegate to which a public agency has delegated an essential governmental function stands in the shoes of the agency and is accountable to the public under the Sunshine Law when its board meets to discharge its delegated function. Publisher contended that under the same circumstances that show a private entity is "acting on behalf of a public agency" for purposes of the Public Record Law, it is also a delegate for purposes of the Sunshine Law.

Though it agreed that *Schwab* controlled the public records issue, Corporation denied it was acting on behalf of the Authority. Corporation further contended that the Sunshine Law would apply only if the Corporation were a subordinate body under the dominion and control of the Authority. It contended that it was not thus subordinate and thus not subject to the Sunshine Law. R. 245-249.

After the case was at issue and discovery had been completed, the parties submitted cross motions for summary judgment on the merits. R. 326; R. 399; R. 445. These motions were based on the record consisting of principally of legal documentation, sworn evidence, admitted pleadings, and responses to requests for admission.

Disposition in the Trial Court

The Circuit Judge below, the Honorable Patrick G. Kennedy, denied the motion of Publisher, granted the motion of Corporation, and entered Summary Final Judgment for the Corporation. The Court

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[4]*Wood* reaffirmed *Gradison* and approved and synthesized *News-Press Pub. Co. v. Carlson*, 410 So. 2d 546 (Fla. 2d DCA 1982) and *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d DCA 1979).

initially issued a memorandum of its decision, stating in part that "it is quite significant that the parties intentionally deleted all reference to the Public Records Law and the Sunshine Law. This Court is unwilling to insert new obligations in their agreement without clear authority." R. 495. (Memorandum by Court). The Court further stated that it found the Sunshine law inapplicable because "the Court declines to insert 'acting on behalf of' where the Legislature has chosen not to do so." *Id.* Subsequently, the Court entered the summary final judgment as prepared and submitted (with appropriate notice) by counsel for the Corporation.

The Decision of the District Court of Appeal

The district court concluded that the public meetings clause applied to the Corporation. It reviewed each of the nine factors identified in *Schwab* and concluded that each factor counted in favor of public access. It determined that the Authority played a major role in the creation of the Corporation, provided substantial capitalization, allowed the Corporation to use public funds in conjunction with funds of the Corporation in payment of hospital expenses, exercised substantial control over the Corporation through the Agreement, assigned to the Corporation the performance of its governmental function which it performed for the benefit of the Authority by providing hospital services to the inhabitants of the district in lieu of the Authority. *News-Journal Corporation v. Memorial Hospital--West Volusia, Inc*, 695 So. 2d 418, 421-2 (Fla. 5th DCA 1997).

The district court further held that the open meetings clause applies to the meetings of the board of the Corporation. It held

that this clause "does require that all meetings of public bodies in which 'public business is 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 . . . the meetings of such surrogate bodies come under the constitutional open meetings requirement." *Id.* at 422.

SUMMARY OF ARGUMENT

The Florida right of public access to governmental meetings and records may not be frustrated by evasive devices. From the beginning, the courts and legislature of Florida have held that a public body may not evade the right of access by delegation of public functions to ostensibly private actors. This anti-evasion doctrine animates both the public meetings law and the public records law.

The present transaction is readily seen to be a delegation of governmental function. The Authority collaborated with MHS to create a corporate surrogate and effected a gross transfer of assets, functions, and obligations to the surrogate. Whether viewed as a whole or factor-by-factor, the evasive effect of the arrangement is readily apparent. Thus the public right of access to both records and meetings of the Corporation should be affirmed.

Against the public right of access, Corporation appears to make four arguments which Publisher identifies and answers in the four points of this brief.

Public Policy. Corporation argues that the public policy of the state impels the conclusion that Section 155.40 was intended to create a pathway to avoidance of the open government laws. On the

contrary, the public policy of the state is specific that all public hospitals are subject to open government laws except as expressly exempted by legislative act. Neither public policy nor implication of the statute authorizing this transaction supports the conclusion that Corporation should be excused from accountability under the *acting-on-behalf* clause for its stewardship of public resources entrusted to it for a public purpose. In any event, a legislative policy that granted public property to autonomous self-perpetuating private groups would violate the Constitution.

Standard of Review. Corporation argues that the district court should have applied a deferential standard of review to the trial court's application of law to the facts. On the contrary, all cases in the *Schwab* line have exercised plenary review over this question. Corporation misunderstands the case upon which it relies for this argument.

Application of Schwab. Corporation disputes the district court's application of the totality of the factors test, but the factors clearly show the essential truth of the transaction. The Authority instigated the creation of Corporation, negotiated the terms of its charter, and transferred to it substantial public assets solely in exchange for its promise to improve and use these assets in the place and stead of the Authority to carry out the public purpose of the Authority. It assigned to the Corporation the exclusive rights to perform the functions of the Authority within the district and retained power to assure these functions are performed through strict and enforceable covenants in the

Agreement. Corporation is a surrogate whose meetings and records should be open to the public except as specifically provided by law.

Sunshine. Corporation argues that the Sunshine law should be applied only to entities that are under the control of the delegating agency. Such a test is inconsistent with the vigorous judicial doctrine that the Sunshine law cannot be evaded through delegation to private actors. This doctrine is the source of the statutory clause in the public records law. Even before the public records act was amended to include the *acting-on-behalf* clause, this Court had construed the Sunshine Law to apply to a private group to which the power to act on behalf of a public body had been delegated. Both laws should be construed in harmony to prevent evasion through private delegation.

ARGUMENT

I. THE PUBLIC POLICY OF FLORIDA REQUIRES MEETINGS AND RECORDS OF PUBLIC HOSPITALS TO BE OPEN TO THE PUBLIC EXCEPT AS EXEMPTED BY LAW.

Corporation argues that Section 155.40 articulates a policy that public hospitals should be immune to open government laws and permits such hospitals to avoid these laws through transactions with not-for-profit surrogates.[5] Thus it pleads for a special rule

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[5]See *Pet. Br.*, at 24-30 (argument loosely based on policy for implied exemption because "had the Legislature intended [public scrutiny], it could and would have expressed the intent in the law"); Pet. Br. at 32-33 (argument that the statute is a factor "which should have been viewed as equal to or more important than [*Schwab* factors]"); *FHA Br.*, at 6-10 (public scrutiny "would impair the express legislative intent of Section 155.40"); *ACH Br.*, at 17 ("[I]f the Legislature had intended for Chapter 119 to apply to a Section 155.40 transaction it could have said so").

for hospitals because "hospital services are not the same [as other governmental functions]." *Pet. Br.*, at 27. The Court should reject this plea.

A. Florida public policy requires all meetings and records of public hospitals to be open unless specifically exempted by law.

The public policy of Florida is directly against the plea for a special judicial exemption. In 1991, when the legislature specifically considered and dealt with the public policy issue, it reaffirmed:

> All meetings of a governing board of a public hospital, as well as all records, books, documents, and papers, shall be open and available to the public . . . unless made confidential or exempt by law.

LAWS OF FLORIDA (1991), Chapter 91-219, § 3 (codified at Section 395.3035(1), Florida Statutes).

In 1991, the legislature was aware of the concern for competitive secrecy. To address this concern, it adopted exemptions to shield marketing plans, trade secrets, and competitively sensitive contracts. *Id.* In 1995, the legislature reconsidered, readopted, and expanded this policy and these exemptions. LAWS OF FLORIDA (1991), Chapter 95-199. Therefore the state has no public policy favoring the privatization of records and meetings of public hospitals. However much public hospitals may dislike public scrutiny, that dislike is patently not the policy of the state.[6]

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[6]Corporation speculates that the need for competitive parity (i.e. the "level playing field") motivated the legislature in 1982 to immunize Section 155.40 lessees, but the hospital briefs show this need arose only later as a result of more recent economic

Thus there is no basis for the argument that Section 155.40 was enacted for the purpose of solving the "problem" created by the public right of access to records and meetings of public hospitals. At the same time, there is no cause for concern because the legislature has now addressed the issue with specific exemptions.[7]

B. It is improper to imply exemptions and unreasonable to construe Section 155.40 as if the legislature intended to immunize from public scrutiny a private entity acting thereunder on behalf of a public agency.

The argument for an implied exemption relies solely on speculation concerning extra-textual legislative intent in the absence of any public record of legislative history.[8] Based on its flawed "public policy" theory, the Corporation argues that "it simply was not the intent of the Legislature" that the open government laws would apply to corporations acting under Section 155.40. *Pet. Br.*, at 28.

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developments. Thus FHA is reduced to arguing that the legislature in 1982 was "sufficiently foresighted" to solve this problem before it arose. *FHA Br.*, at 7.

[7]Although the legislature could have exempted all records and meetings of public hospitals in 1991 (or repealed Chapter 119, for that matter), it is now constrained by FLA. CONST., art. I, §24(c). As Corporation notes, a clause of the 1995 amendment allowing closure of discussions of "strategic plans" was held unconstitutional as broader than necessary to accomplish the stated purpose of the exemption. *See Halifax Hospital Medical Center v. News-Journal Corporation*, 22 Fla. L. Weekly D2587, 1997 WL 713567 (Fla. 5th DCA 1997). The ruling does not question the public necessity of providing exemptions to protect the competitive parity of exemptions.

[8]*See Pet. Br.*, at 28 (enumerating "three reasons behind its passage" but citing no public record of legislative history). No hospital brief cites any public record evidencing legislative history or "reasons behind" this statute, which was adopted as a rider on a bill pertaining to nonprofit corporations. LAWS OF FLORIDA (1982), Chapter 82-147, § 1.

This argument is deeply flawed. To reach the conclusion that the legislature intended Section 155.40 entities to be exempt, it is first necessary to concede that the legislature understood that such a corporation otherwise would be covered by the law. But if it is conceded that the legislature understood that a corporation acting under Section 155.40 could be subject to the *acting-on-behalf* clause, then the argument for exemption is reduced to a bare claim of exemption by implication from silence. Because chapter 119 clearly states the strong public policy that all records are public, silence implies inclusion and not exclusion. *Cf., e.g., Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775 (Fla. 4th DCA), *rev. den.*, 488 So. 2d 67 (Fla. 1986). The Court will not infer an exemption from legislative silence nor out of concern for public policy issues. *Douglas v. Michel*, 410 So. 2d 936 (Fla. 5th DCA 1982), *certified questions answered*, 464 So. 2d 545 (Fla. 1985). Exemptions may be created only by the legislature and may not be implied or created by the courts. *Wait v. Florida Power & Light Company*, 372 So. 2d 420, 425 (Fla. 1979).

The deep flaw in the Corporation's attempt to tease an exemption out of Section 155.40 is that it ascribes to the legislature the intent to allow public boards to contrive transactional schemes to evade otherwise applicable open government laws. If the legislature had been persuaded of the need, it could have adopted a categorical exemption in 1991 when it was studying this issue. Since it clearly declined such a direct and all-encompassing approach in 1991, it is unreasonable to infer that it had intended to achieve this result indirectly in 1982.

It is more reasonable to infer that the legislature intended that the public records law would apply to a corporation acting under Section 155.40 if the totality of the factors so indicated. When this statute was adopted in 1982, the *acting-on-behalf* clause was part of chapter 119, and it had been construed in the landmark "totality of the factors" case of *Schwartzman*. A statute must be construed in light of the presumption that the legislature knows the law. *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977).

Indeed, the argument that the legislature intended to create a blanket exemption for all Section 155.40 lessees proves too much. This statute allows a hospital board to fashion any relationship with the corporation that it wishes. Even Corporation must concede that not every Section 155.40 lessee should be immune to the public right of access. *Pet. Br.*, at 26 (conceding statute grants "wide discretion on the degree of involvement").

Plain reason thus shows that the statute does not afford immunity to an entity otherwise acting on behalf of the public agency. On the contrary, when it is remembered that the statute requires that the lessor approve the charter, retain the reversion, and secure the assumption of indigent care, it is apparent that the lessee begins the factorial analysis with significant connections to its governmental sponsor. Thus there is no basis in reason, law, or policy to infer that the legislature thought it was opening a pathway to evasion of the public right of access when it adopted this statute. For the same reason, there is no justification for the hospitals to argue that the present case has changed the rules

of the game or that any party should be granted exemption solely on the basis of contractual expectations.[9]

C. The public accountability of a corporation acting under Section 155.40 is essential to the constitutional validity of the transfer of public property.

The most serious flaw in the "public policy" argument is that the constitution would not allow the legislature to make such a policy. Corporation argues that Section 155.40 articulates a public policy to "remove government from the rendition of hospital services and shift that activity exclusively to the private sector." *Pet. Br.*, at 28. Thus it contends the present lease "is tantamount to a total divestiture of authority and control by the Authority during the term of the lease." *Pet. Br.*, at 27. If this were the policy, it would be unconstitutional.

All hospitals to which this statute applies are public property, and every transaction pursuant to its authority entails the transfer of such property to a private entity. Such a transaction can be sustained under the Constitution "only when there is some clearly defined and concrete public purpose and reasonable expectation that such purpose will be substantially and

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[9] *Compare Pet. Br.*, at 31 (decision would impair "preexisting contract rights"); *FHA Br.*, at 13 ("impermissible and unfair changing of the rules in the middle of the game"); and *ACH Br.*, at 16 (decision would "impair those pre-existing contract rights") *with Palm Beach County Classroom Teacher's Assn v. School Bd of Palm Beach County*, 411 So. 2d 1375, 1376 (Fla. 4th DCA 1982), *quoting Mills v. Doyle*, 407 So. 2d 348 (Fla. 4th DCA 1981) ("to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act"). *Cf. Cook v. Navy Point, Inc.*, 88 So. 2d 532 (Fla. 1956) (contract with government body that does not comport with legal requirements is void).

effectively accomplished. [A]bsent a measure of public control and a primary public purpose to be served, [such a transaction] is not authorized by Constitution of Florida." *O'Neil v. Burns*, 198 So. 2d 1, 4 (Fla. 1967). *See* FLA. CONST., art. VII, § 10. The statute does not allow public hospitals to be transferred beyond effective public control because such a transaction would be void as "an unconstitutional application of Section 155.40 by placing the hospital effectively beyond public control." *Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc.*, 658 So. 2d 577, 580 (Fla. 4th DCA 1995) *rev. dism'd* 670 So. 2d 938 (Fla. 1996) (applying FLA. CONST., art VII, § 10).

Corporation can justify this transfer only if it shows the Authority took the pains to assure that it will perform the public purpose for which these assets were accumulated and that it retained controls sufficient to protect the public interest. Ultimately, the transaction can be justified but only because the Authority took those pains in the Agreement. The Agreement regulates Corporation in the manner that the district court aptly described as "real control." *News-Journal Corporation*, at 421. Such a relationship is precisely that to which the *acting on behalf* and anti-evasion rules of the public records and public meetings laws are intended to apply. 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. Indeed, the same analysis which saves this Agreement from

invalidity under *Everglades* demands that open government laws apply to Corporation.[10]

II. THE APPLICATION OF THE LAW TO THE FACTS UNDER *SCHWAB* IS A MATTER OF LAW FOR THE TRIAL COURT SUBJECT TO PLENARY REVIEW BY THE APPELLATE COURT.

The Corporation relies heavily on the argument that the district court applied the wrong standard of review. It argues "[t]he trial court should have been affirmed because the very thoughtful and thorough judgment . . . was a matter within the trial court's proper judgment based on substantial and competent evidence." Br. 23.[11] This argument misconstrues *Trepal v. State*, 22 Fla.L. Weekly S737 (Fla. 1997), and it should be rejected because it would inappropriately accord deference to a trial court's legal analysis of undisputed facts.

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[10]Corporation argues that the legislature has overcome *Everglades* by amending Section 155.40 to allow "total and complete privatization of public hospitals." *Pet. Br.*, at 24. *See* LAWS OF FLORIDA (1996), Chapter 96-304. *See also* Corporation's Answer Brief in the DCA at pages 37-41 (suggesting the amendments were intended to "overturn *Everglades*"). On the contrary, the 1996 amendment addressed *Everglades* by increasing rather than decreasing the required public involvement. By requiring that a sale be at fair market value, the legislature plainly did not intend to approve a sale on "sweetheart" terms comparable to this lease.

[11]Corporation argues the district court lacked the power to disagree with the trial court. *See, e.g., Pet. Br.*, at 21 (court "should have . . . simply affirmed the trial court's legally well-supported final judgment")(sic); *Id.*, at 22 (district court was "precluded from substituting its judgment for that of the trial court"); *Id.*, at 35 (district court was wrong to "rely on an analysis of its own making"); *Id.*, at 23 (district court "simply disagreed and attempted to explain away the trial court analysis").

A. The issue under *Schwab* is a mixed question of law and fact for which the Court applies a mixed standard of review.

Schwab presents not merely a factual issue but a mixed question of law and fact. Deciding such a question involves the distinct steps of identifying the historical facts, selection of the applicable rule of law, and the application of the law to the facts.[12] In deciding the *Schwab* cases, the courts consistently have reviewed findings of fact under the substantial competent evidence standard, but they have reviewed the application of law to the facts under the plenary standard.

In *Sarasota Herald-Tribune*, 582 So.2d. at 732, the district court reversed even though the trial court had conducted a "thorough evidentiary hearing and prepared an extensive final judgment with findings of fact and conclusions of law." *Id.* at 732. The court stated that "[w]e find no fault with the trial court's findings of fact. We conclude, however, that the trial court misapplied our decision in [*Fox*]." *Id.* at 733. Thus, the

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[12] *See, e.g., Ornelas v. United States*, 116 S.Ct. 1657, 1662 (1996) *quoting Pullman-Standard v. Swint*, 456 U.S. 273, 289, n. 19 (1982) (In a mixed question, "[t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Cf. In re Adoption of Baby E.A.W.*, 647 So. 2d 918, 923 (Fla. 4th DCA) *approved* 658 So. 2d 961 (Fla. 1995) ("The issue is . . . do the facts constitute abandonment under the statute and case law. This requires a legal rather than a factual determination, although the entire equation is a mixed question of law and fact, as it so often is").

court deferred to the findings of fact but exercised plenary review of the application of law to these facts.[13]

This Court did the same thing in *Schwab*. It applied the plenary standard to the undisputed facts and modeled its factorial analysis after the plenary analysis in *Sarasota Herald-Tribune*. Moreover, the other three cases approved in *Schwab* had exercised plenary review of the legal question. *See Parsons & Whittemore* (reversing trial judge on legal grounds); *Fox* (exercising plenary review of record in affirming trial judge); *Schwartzman* (reversing trial judge based on plenary review of record and articulation of factors).

Corporation is wrong to suggest that *Trepal* signals a departure from this standard. In *Trepal*, the Court published and approved the factorial analysis of the trial court. It stated that

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[13]This is consistent with the usual approach to mixed questions. *E.g., Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1357 (Fla. 1994) ("When the facts relied on to show probable cause are in dispute, their existence is a question of fact for determination by the jury; but their legal effect, when found or admitted to be true, is for the court to decide as a question of law"); *Row v. United States Auto. Assn*, 474 So. 2d 348, 349 (Fla. 1st DCA 1985) ("[R]esidency of a party is a question of law and fact to be settled or determined from the facts of each particular case. When the facts are essentially undisputed, however, whether those facts fit within the [insurance] policy definition is a question of law that may be decided on appellate review). *See also State v. Seltzer*, 667 So. 2d 343, 346 (Fla. 1995) (denial of motion to suppress is mixed question of law and fact and reviewing court reviews facts deferentially but "we are to review the [trial] court's application of the law to the facts *de novo*"). When the application of law to fact is sufficiently fact-bound, however, the courts apply a deferential standard of review. *E.g., Mills v. State*, 462 So. 2d 1075, 1079 (Fla. 1985) (manifest error required to overturn trial court determination of mixed question of competency of juror challenged for cause because the personal assessment of the juror by the judge is intrinsic to the conclusion).

"the court's application of the *Schwab* 'totality of factors' test to the present case *turned* primarily on a series of factual determinations." *Trepal*, at S737 (e.s.). By approving the trial court conclusion that the case *turned* on these facts, the Court approved of the trial court's conclusion that "the facts satisfy the [relevant legal] standard." *Ornelas*, at 1662.

Trepal is not a departure but a consistent application of the factual prong of the same mixed standard of review that the Court always has applied to these cases. In fact, it is not even the first such instance. *Compare PHH Mental Health Services, Inc. v. New York Times Co.*, 582 So. 2d 1191 (Fla. 1993)(district court affirming trial court with deference to factual findings) *with New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 28, note 2 (Fla. 2d DCA 1991) (Supreme Court explaining factual grounds of trial court ruling).

Trepal arose out of post-conviction proceedings in a death case, and the trial court had "the record of the entire trial before it." *Id.* at S737, note 1. Because the Court applied the substantial competent evidence standard, it necessarily was reviewing the factual element of the mixed question. This standard applies strictly to the review of factual determinations. *E.g.*, *Shaw v. Shaw*, 334 So. 2d 13, 16 (Fla. 1976). *See also Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 148-9 (Fla. 4th DCA 1994) (explaining standard) ("When reviewing the facts, the appellate court must disregard conflicting evidence and accept the facts in evidence which are most favorable to the party who prevailed below"). This standard cannot guide the review of legal

determinations because it is oxymoronic to suggest that a trial court's legal analysis should be accepted because it is a "substantial, competent" legal theory or because a legal theory is supported by evidence.[14]

B. Plenary review of the application of law to facts under *Schwab* is essential to the Court's role in the exposition of the law.

For substantial reasons, the Court would not have intended in *Trepal* to abandon its practice of reviewing the application of law to facts in a principled manner under *Schwab*. The Court originally approved the totality of the factors test because it "provides guidance for making [the] determination, yet recognizes the unique circumstances present in each case." *Schwab*, at 1031. Plenary review is essential to this guidance.

The application of the test requires a court to exercise judgment on legal issues. The broad purpose of the statute is "to ensure that a public agency cannot avoid disclosure under the act by contractually delegating to a private entity that which would

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[14]The standard of review is a false issue upon any analysis. If Corporation were correct that the issue under *Schwab* is factual, the issue would not be the propriety of the standard of appellate review but the propriety of summary judgment. *Moore v. Morris*, 475 So. 2d 666, 668 (Fla. 1985)("A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law"); *Jones v. Stoutenburgh*, 91 So. 2d 299, 302 (Fla. 1956) (trial court may not try or weigh facts on summary judgment); *Aloff v. Neff-Harmon, Inc.*, 463 So. 2d 291, 293 (Fla. 1st DCA 1984) (same rule when evidence is stipulated); *Bloempoort v. Regency Bank of Florida, Inc.*, 567 So. 2d 923, 924-5 (Fla. 2d DCA 1990) (even on cross motions on the merits, a trial court may not try the facts). Conversely, if the facts properly were tried on this record, plenary review of fact findings would be appropriate in any event. *West Shore Restaurant Corp. v. Turk*, 101 So. 2d 123, 126 (Fla. 1958); *Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956).

otherwise be a public responsibility." *Id.* Under *Schwab*, any fact or circumstance that shows a "significant level of involvement" of the public agency with the private entity is pertinent to the issue of whether a public agency has delegated its governmental function to a private entity. Therefore, the application of the law under *Schwab* should be treated as a matter of law because it requires a court to "consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles. . ." *United States v. McConney*, 728 F. 2d 1195, 1202 (9th Cir.) (en banc) *cert. den.* 469 U.S. 824 (1984) (adopting standard of plenary review of mixed question whether exigent circumstances justify failure to comply with "knock-notice" requirement upon entering a dwelling).

The legal force of the *Schwab* test depends on the ability of government and the private sector to understand the relational factors that trigger public scrutiny. The role of the appellate courts in expounding the law is critical. *See, e.g., Ornelas*, at 116 S.Ct. at 1662-1663 (plenary review of reasonable suspicion and probable cause issues is a mixed question to be reviewed *de novo* on direct appeal). In *Ornelas*, the federal Court reasoned that plenary review was most consistent with the Court's "primary function as an expositor of law." The same concern is present under the *Schwab* cases. As with *Ornelas*, "[a] policy of sweeping deference would permit in the absence of significant difference in the facts [the *Schwab* test] to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient [to meet the test]." *Id.* at 1662 (citations and

internal punctuation omitted). Such indeterminacy is wholly inconsistent with the Court's desire to provide guidance in this area. Thus as with *Ornelas*, the legal rules concerning the *Schwab* test "acquire content through application [and] independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles." *Id.*

This Court is sensitive to the concern for maintaining uniformity and predictability in the law. In *Brin v. State*, 1997 WL 18239 (Fla. 1997), the Court held that "the determination of general acceptance in the scientific community should not be left to the discretion of the trial court [primarily because the] issue transcends any particular dispute. . . . Application of less than a *de novo* standard of review to an issue which transcends individual cases invariably leads to inconsistent treatment of similarly situated claims." *Id.* at *6, *quoting People v. Miller*, 670 N.E. 2d 721, 739 (Ill. 1996) (McMorrow, J. specially concurring).

Under the deferential standard for which Corporation advocates, no *Schwab* case would be precedent for any other. As this Court noted in *Brin*, two trial courts could reach opposing conclusions on substantially identical records, and each judgment would be affirmed. Therefore, for example, the hospitals represented by the amici could derive no useful guidance from the decision of this case.

Trepal was not intended to undermine the foundation of the law. Because the Court carefully set forth the full analysis of the factors in *Trepal*, it is easily seen to be consistent with

previous cases and serves as precedent for analogy in future cases. If the radically deferential standard for which Corporation argues were the law, there would have been no purpose to set forth the findings and conclusions in *Trepal* because they could no more serve as precedent than could a jury verdict. *Forman v. Florida Land Holding Corp.*, 102 So. 2d 596, 598 (Fla. 1958) (stare decisis relates only to determinations of law and has no relation to determinations of fact).

III. THE TOTALITY OF THE FACTORS SHOWS THE CORPORATION IS ACTING ON BEHALF OF THE AUTHORITY.

Corporation wholly misconstrues the district court's analysis of *Schwab* when it argues that the court misapplied this test. *Pet. Br.*, at 30-32. The district court correctly applied the factors and usefully explained how the test operates.

A. The district court correctly explained the coherent operation of the *Schwab* test.

The purpose of the *Schwab* test is to improve predictability in this area of the law. The Court adopted the *Schwab* test because it "provides guidance for [the decision], yet recognizes the unique circumstances present in each case." *Id.* at 1031. Relying on this predictability, the Court stated that "private entities should look to the factors announced in *Schwab* to determine their possible agency status under chapter 119." *PHH*, 616 So. 2d at 30.

Predictability increases as the operation of the factors test over time yields a body of analogies that matures into guiding generalizations. Judge Letts expressed the factors test first in the form of a generalization when he observed that "[i]nevitably the present Act covers an organization entrusted with the sole

stewardship over firefighting and funded in part by public moneys." *Schwartzman*, at 1232. Similarly, this Court's holding in *Schwab* settled far more than the immediate case before the Court. Though it results from a factorial analysis, it readily translates into the generalized statement: A private entity is not acting on behalf of a public body merely because it contracts "to provide services--such as legal services, accounting services, or other professional services--for the public body to use in performing its obligations." *News-Journal Corporation*, at 420.

By parity of reasoning, the decisions in *Schwartzman*, *Sarasota Herald-Tribune*, and *PHH* yield a comparable generalization: A private entity which "contracts to relieve a public body from operation of a public obligation--such as operating a jail or providing fire protection--and uses the same facilities or equipment acquired by public funds previously used by the public body" is substantially likely to come within the *acting-on-behalf* clause. *News-Journal Corp.*, at 420.

Although Corporation says this statement is not faithful to the factors analysis, the contrary is true. The district court explained the operation of the factors test. In such an "in place of" transaction as the transfer of a jail, the facts necessarily would be laden with pro-disclosure factors. These could include: use of public capital; use of public property; performance of a governmental function; significant involvement, regulation, or control; substantial financial stake; and functioning for public benefit. Such explanatory guidance shows the coherence of the test and furthers its development as a set of guidelines.

B. The district court correctly assessed the *Schwab* factors as shown by the undisputed facts.

The relationship between the Authority and the Corporation is rich with factors showing the essential truth of this transaction. The Authority collaborated with MHS to create a corporate entity solely for the purpose of acting as a surrogate to perform the statutory function of the Authority.

The Authority Played a Major Role in the Creation of the Corporation

The district court concluded that the fact that the corporation was "formed at the behest of the Authority [was] sufficient under this factor." *News-Journal Corporation*, at 420. Against this substantial conclusion, the Corporation argues only formality. The district court correctly understood that "the Authority played a role in [corporation's] formation because it *required* its formation in order to transact the venture." *Id.*

The cases have established that the extent to which the public agency participates in the creation of the private entity is relevant to the factors analysis. The factors test asks whether the public agency is significantly involved with the private entity, and in *Sarasota Herald-Tribune* the fact that the agency "played a major role in the creation of the corporation" was a factor indicative of such involvement. *Id.* at 734. The trial court erroneously applied this legal standard by ignoring the substantial participation of the Authority in the inception of the Corporation and concentrating solely on the formalistic acts taken by MHS.

The Authority Provided Substantial Public Capitalization and Funding to the Corporation

The district court concluded that the Authority had provided to the Hospital Corporation a "high level of public funding indeed." This is the only possible conclusion to be drawn from the undisputed facts. The Authority transferred the hospital as a going concern to the new shell corporation in return for nothing more than the promise to improve the property and use it for the same public purpose as the Authority had used it. Corporation complains that the district court disregarded the financial findings of the trial court and suggests that the court did not understand the facts. On the contrary, the district court has the superior grasp of the finances.

Although Corporation pretends to be "simply a private corporation in the business of providing healthcare," (*Pet. Br.*, at 21), it is actually a corporate bucket into which all of the assets essential to its "business" were poured from the spout of a public agency. All of the assets and liabilities of Corporation were acquired from the Authority under the Agreement. Although Corporation assumed certain liabilities, the net value of the assets transferred exceeded these assumptions by approximately $20 million.

The relevant issue for purposes of the *Schwab* test is whether the public agency provided substantial capitalization as opposed to merely paying fees for services. This capitalization is substantial because it comprises the entirety of the capitalization of the Corporation and comprises all of the hospital assets of the

Authority. The amount involved is also substantial by any absolute measure.

The trial court erred because it took no measure of the public resources. It concluded only that the Corporation had paid rent in the form of the defeasance of the $8 million bond issue. The district court accurately pointed out that this rent was grossly inadequate in relation to the substantial value of the capitalization provided.[15]

In testing whether the public agency maintains a significant involvement in the private entity, the legal issue is whether the agency provided substantial capitalization to enable the private entity to perform its function. This factor is critical to distinguishing a genuine business transaction from the devolution of an agency responsibility. A key distinction between the contract for services and a delegation of function is that the public agency has provided the resources with which the private entity operates. In *Schwartzman*, the court considered the fact that substantial public monies were used by the volunteer fire department, and this was the critical factor notwithstanding that

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[15]The district court pointed out that Corporation was arguing that it paid $8 million as "rent" for the use of $20 million in assets. It rounded this from the $19.5 million in property assets which Raines had testified the Agreement requires the Corporation to maintain at all times. See depo Raines, p. 14. Since $8 million divided by 40 years equals $200,000 and since $200,000 is 1% of $20,000,000, the district court correctly reasoned that the so-called rent amounted to no more than 1% of the value of the property per annum. Publisher accepts the logic of this analogy because it illustrates the fallacy of the contention that this is a genuine business transaction. Yet, even this understates the "sweetheart terms" because it takes no account of the interest free use of the $7.8 million net working capital account also transferred to Corporation.

the group had "sav[ed] the taxpayers vast sums of money." *Id.* at 1231. The volunteers' use of the county fire department counted as a public factor "even if the department did raise $65,000 to help construct the building." *Id.* at 1232. In *Sarasota-Herald Tribune*, the court measured and considered the contribution of public resources to the private entity.

The trial court erred by considering only the private consideration without balancing it against the public contribution. The public interest would be ill-served by a test which attached no significance to the transfer of public property into private hands.

The public funds transferred to the Corporation, including but not limited to the Net Working Capital, are held by the Corporation without segregation.

The argument that there is no co-mingling of funds is an erroneous conclusion of law. The district court concluded, "There is no evidence of a single bank account in which the Authority and Lessee deposit their funds, but it seems more significant to us that the funds of the Authority and the funds of Lessee are in fact 'commingled' in that both are used in the payment of the hospital expenses." *News-Journal Corporation*, at 421.

Public funds have been placed in the accounts of Corporation without segregation and distinction from funds of the Corporation. This includes $7.8 million in net working capital transferred at closing, and up to $10 million to be transferred in the form of annual subsidies. These subsidies correspond directly to the county funds that were transferred to the fire department in *Schwartzman*, the only case in which the so-called "commingling" of funds was held to be relevant. Judge Letts wrote that the deposit

of the county subsidy and the private funding contributed by the volunteer fire department into a single account was considered to be commingling and a factor indicating agency status.

The district court correctly concluded the Agreement gave the Authority "real control" for purposes of the factorial analysis.

In great part, the Corporation's argument rests on the undisputed fact that Corporation and the Authority are separate legal entities, and the Authority does not have the power to elect a majority of Corporation's governing board. This fact forms the basis for nearly one-third of the conclusions in the final judgment, which restates a variation of this fact in at least six enumerated paragraphs.[16] No matter how many different ways this fact is restated, it is the beginning not the end of the analysis. The separateness of the two entities is a constant in *Schwab* analysis.

The issue under *Schwab* is whether the public agency is significantly involved with the private entity. *See Schwab*, at 1031; *Sarasota Herald-Tribune*, at 733; *Fox*, at 943. This is quite a different question than whether the public entity controls the private entity. The purpose of inquiring into "the extent of the public agency's involvement with, regulation of, or control over the private entity", *Schwab*, at 1031, is to measure the involvement.

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[16]*See Final Judgment*, ¶ III. A. (parties not related); III. B. (no oversight role); III. C. (board elected by Memorial); III. D, (Authority cannot change charter); and ¶ IV. A (parties cannot bind each other); IV. B. (Authority may not approve or disapprove of decisions of Corporation).

If the public agency elects a majority of the governing board of the private entity, of course, it is easy to find significant involvement. Although this could occur under Section 155.40, no court has been troubled to decide such an easy question. In *Schwartzman* and *Sarasota Herald-Tribune*, the entities under scrutiny were not-for-profit corporations whose governing boards were not under the control of the public agency. Yet, in both cases the corporations were held to be acting on behalf of public bodies. Likewise, in *Fox* the private entity was a commercial enterprise completely independent of government. Yet it was held to be acting on behalf of the city because the detailed terms of a written contract imposed a duty on the private party to carry out a statutory function of the city, and retained a degree of contractual control over the services to be provided. *Sarasota Herald-Tribune*, at 733, *explaining Schwartzman*.

The case most closely analogous to the present case is *Sarasota Herald-Tribune*. There, the court scored the trial court for placing undue emphasis on the fact that the public body "did not control day-to-day activities within the corporation" and that it did not "control, as compared to influence, the corporation's board of directors." Although these factors weighed in favor of nondisclosure, the court said these factors did not outweigh other factors. *Id.* at 733. The present case is closely analogous.

Thus the district court rightly observed that despite its lack of voting control over the board, the Authority "can and does exert considerable control by virtue of the requirements of the lease and the performance standards established therein." *News-Journal*

Corporation, at 421. The Authority exacted a set of promises the effect of which is to shift from the Authority to the Corporation an essential governmental function and impose a continuing and enforceable duty on the Corporation to carry out this function according to pre-determined standards set by the Authority and expressed in the Agreement. The Authority may exercise substantial control over the Corporation by enforcing these covenants.

The district court rightly concluded the conditions and covenants in the lease backed by the ultimate sanction of termination for default give the Authority "real control." This conclusion is fully consistent with the facts of this case and the analogous holdings in *Sarasota Herald-Tribune* and *Fox*.[17]

The Corporation is performing a governmental function

The district court concluded that the Corporation was clearly "performing a service that would otherwise be provided by the Authority." *News-Journal Corporation*, at 421. In *Fox*, the private party who assumed the function of towing wrecked and abandoned vehicles was "clearly performing what is essentially a governmental function." *Id.* at 943. In *Sarasota Herald-Tribune*, the court explained that the issue is not whether it is necessary that the government perform the function but "whether the government could perform the function itself." *Id.* at 733. Since the Agreement transferred from the Authority to the Corporation its entire

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[17]The Corporation hints that the district court went off on its own on this point, as if that were something a district court is not allowed to do. However the "real control" point was strongly urged by the Publisher below. See Publisher's Initial Brief in the DCA at 7, 27-28 and Reply Brief in the DCA at 4-6.

function and expressly required the Corporation to operate the hospital as a public hospital in accordance with all of the provisions of the Authority's enabling act, there is no basis to dispute this conclusion.

Corporation misses the point of this holding when it argues that health care is not necessarily or exclusively a governmental function. This Agreement did not transfer health care in a generic sense. In this particular case, the Authority delegated to the Corporation the specific governmental function of performing and carrying out the governmental responsibilities assigned to it by the enabling act, and it essentially gratuitously conveyed substantial public resources to be used for that specific and concrete purpose.

The Authority retains a substantial financial interest in the property.

The district court concluded that the Corporation retains a significant financial interest in the property. In *Sarasota Herald-Tribune*, the court held that the reversionary interest in the assets of the corporation upon dissolution was a significant financial stake. This factor is even more strongly present in this case. The assets of the Corporation revert to the Authority upon the dissolution of the Corporation or upon the termination of the lease. In the meantime, the charter guarantees that the assets must be used solely for the purpose of carrying out the governmental function of the Authority.

The Corporation is using public property to perform its governmental function.

The district court concluded that the activities in question are being conducted on public property, and Corporation argues that is erroneous because it is paying rents for the use of the property. The rent is far from commensurate with the value of the property, and the true consideration for the use of the property is the covenant to use it to carry out the specific statutory purpose of the Authority.

In fact, the public continues to own the property and the right to enjoy it as a public asset just as before. The terms of the Agreement dictate that the public has a keen interest in the property because it is dedicated to the same public purpose--to be operated in accordance with the enabling act for the benefit of the public, to be maintained and kept up at high standards, and to be returned to the public upon termination by expiration or default. R. depo Raines, pp. 14-15.

C. Section 155.40 is not a "factor" but the source of factors contributing to the *Schwab* analysis.

Corporation argues that the district court failed to consider Section 155.40 as a "factor." This argument has no merit. The *Schwab* test refers to the relationship between the public and private entities. The existence of a statute authorizing the creation of the relationship is not in itself a factor indicating that the relationship is, or is not, subject to the *acting-on-behalf* clause. Even Corporation concedes that this statute

authorizes the creation of relationships that are clearly within the public records law. *Pet. Br.*, at 26.

D. *Sarasota Herald-Tribune* is closely analogous to the present case and strongly supports the decision under review.

Corporation attempts to distinguish *Sarasota Herald-Tribune* because Section 155.40 was not involved. However, that case involved a special act specifically authorizing creation of the private entity for which there was indication that the legislative delegation intended the entity to be immune to open records laws. Thus the facts of *Sarasota Herald-Tribune* are comparable.

Corporation also seeks to distinguish *Sarasota Herald-Tribune* on the ground that there the hospital board members formed a stronger presence on the board. This overlooks a key fact that Corporation has consistently ignored throughout the course of these proceedings. The *Sarasota Herald-Tribune* court did not enumerate the factor of control as counting in favor of the public right of access but against it. In that respect, this case forms the most powerful support for holding in favor of the public right of access here. It clearly stands for the proposition that control of the not-for-profit is not a determinative factor.

Moreover, in the larger sense in which the district court considered control ("real control"), *Sarasota Herald-Tribune* supports the decision because it recognized that even though "the board cannot guarantee control of the corporation, it is assured that the corporation will not compete with it by virtue of the bylaws." It characterized the two entities as interdependent and counted that as a factor in favor of the public right of access.

E. *Shands II* is a unique case wholly distinct from the present case.

Corporation contends that the decision conflicts with *Campus Communications, Inc. v. Shands Teaching Hospital*, 512 So. 2d 999 (Fla. 1st DCA 1987) (*Shands II*).[18] However, *Shands II* stands alone on unique facts. In a special act pertaining solely to Shands Teaching Hospital and authorizing its transfer to a private entity, the legislature found that this hospital "is unique and different from other state institutions." Chapter 79-248, LAWS OF FLORIDA (1979). In *Shands Teaching Hospital v. Lee*, 478 So. 2d 77, 79 (Fla. 1st DCA 1985) (*Shands I*), the court looked deeply into the particular legislative history of this act and found that "the intent of the legislature was to treat Shands as an autonomous and self-sufficient entity, not one primarily acting as instrumentality on behalf of the state."

In concluding that the Public Records Law did not apply, *Shands II* relied on the legislative finding that Shands Teaching Hospital is unique and different from such other state institutions as the public hospital now operated by Corporation and on the judicial finding in *Shands I* that the legislature intended Shands Teaching Hospital to be autonomous. These findings are diacritical distinctions between the present decision and *Shands II*. Thus *Shands II* provides no authority for the present decision.

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[18]Neither Corporation nor the amici found this case significant in the proceedings below. Though one amicus cited it on a tangential point, none of these parties offered this case as authority for the position taken by the trial court.

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE MEETINGS OF THE CORPORATION ARE SUBJECT TO THE SUNSHINE CLAUSE

The district court concluded that a private entity which is acting on behalf of a public body for purposes of the public records clause is subject to the Sunshine clause. It reasoned that "[s]ince someone 'acting on behalf of' a public body is authorized to transact or discuss public business, . . . the meetings of such surrogate bodies come under the constitutional open meetings requirement." *News-Journal Corporation*, at 422 (*citing Gradison* and *Wood*). The court rightly applied the vigorous judicial doctrine against evasion of the public right of access through private delegations. The doctrine, which first arose under the Sunshine law in *Gradison*, carries the same force as the statutory phrase in the public records clause.

No court appears to have considered the precise question whether the tests for applying the two laws to private entities should differ. Though their different language initially suggests the two acts have different scope, the history shows that the *acting-on-behalf* clause derives from the judicial gloss first applied to the Sunshine law. Thus, the two laws should be applied according to the same standard.[19]

The *acting-on-behalf* clause was not a part of the Public Records Act when it was originally adopted. In fact, the law seemed to negate any inference that it might apply to a nonofficial

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[19]The limitations of space do not permit this brief to cover this novel issue as thoroughly as was done below, and therefore Publisher respectfully suggests that the Court might wish to refer to the Publisher's Initial Brief in the district court at pages 30 through 49.

entity because it defined agencies to which it applied as those "created or established by law." A focus on this phrase led the First District Court of Appeals to conclude that private entities could not be subjected to the public records law. *Tindell v. Sharp*, 300 So. 2d 750 (Fla. 1st DCA 1974) (records of private consultant screening applicants for school superintendent not disclosable because consultant was not agency *created or established by law*).

To overcome *Tindell* and ensure the law covered such private entities, the legislature promptly added to the definition of covered agencies any "private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." See Ch. 75-225, § 3, LAWS OF FLORIDA (1975). When the same issue again arose in the First District a few years later, that court agreed that the legislature intended to overturn *Tindell* by adding the *acting-on-behalf* clause. *Byron, Harless, Schaffer, Reid & Assoc., Inc. v. State ex rel. Schellenberg*, 360 So. 2d 83, 97 (Fla. 1st DCA 1978), *quashed on other grounds* 379 So. 2d 633 (Fla. 1980) (records of executive search consultant were public records).

The district court construed the new clause as follows:

> [T]he text of the 1975 amendment and its legislative history made clear that the . . . legislative purpose was to extend the reach of Chapter 119 to those whom *Tindell* held were not reached by the law as it existed in 1974. A business entity such as the [executive search] consultant must be regarded as "acting on behalf of" the public agency if the services contracted for are an integral part of the agency's chosen process for a decision on the question at hand. *See Town of Palm Beach v. Gradison*, 296 So. 2d 473, 476-477 (Fla. 1974).

Byron, at 93.

When this Court construed this clause in the definitive *Schwab* opinion, it approved this construction by citing the district court with approval for the proposition that the clause assures the public records act may not be avoided by delegation of a governmental function to a private actor. *Schwab*, at 1031 (*citing Byron*).

The *acting-on-behalf* phrase was imported into the public records law from the judicial gloss on the Sunshine Law. At almost the same time that the district court in *Tindell* held the public records law was limited to official government agencies, this Court had affirmed a holding that "the Sunshine Law does not provide for any 'government by delegation' exception . . . ." and applied the law to a "committee . . . established by the town council and *acting on behalf of* the council in an advisory capacity." *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353, 356 & 360 (Fla. 4th DCA 1973) *aff'd sub nom. Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (e.s.) ("*Gradison*"). Less than one year later the legislature amended the Public Records Act by inserting the *acting-on-behalf* clause. When the district court subsequently acknowledged that the purpose of the amendment was to overturn *Tindell*, it cited *Gradison* on the meaning of the phrase. *Byron*, at 97. *Gradison* is therefore the common source of both the phrase and its anti-evasion principle, and the 1975 amendment adding this clause to the public records did not differentiate the public records law from the Sunshine law. Rather it conformed it.

Because the phrase derives from this common doctrinal heritage, the cases which subsequently have construed the phrase in

the public records law have great relevance to the construction of *Gradison's* gloss on the public meetings law.

The central holding of *Gradison* is that a public agency may not avoid the Sunshine law by delegating its powers to ostensibly private actors. The Court expressly rejected a dissent by Justice Dekle which took the position that the Sunshine Law was limited "officially elected or appointed boards." *Id.* at 481. The *acting-on-behalf* clause injected this same anti-evasion doctrine into the Public Records Act and thereby cured the defect in its drafting which had led the outcome in *Tindell*. This Court recognized the common thread of the anti-evasion doctrine in *Schwab* when it cited *Byron* (which cited *Gradison*) in support of the core proposition that the *acting-on-behalf* clause "serves to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility." *Schwab*, at 1031.

Gradison was reaffirmed by this Court in *Wood*, 442 So. 2d, at 939, which considered the delegation issue at length and held that the test for application of the Sunshine Law should "focus on the nature of the act performed, not on the make-up of the committee or the proximity of the act to the final decision."

The "test" for which Corporation argues is unfaithful to the cases on which it relies, *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971) and *Times Pub. Co. v. Williams*, 222 So. 2d 473 (Fla. 2d DCA 1969). These cases said the law extended to all bodies within the dominion and control of the *legislature*, but Corporation says the test is whether the private entity is within the dominion

and control of the *Authority*. That is quite different than *Berns* and *Williams*. Under a test which said the Sunshine law should apply to any entity within the dominion of the *legislature*, it would readily follow that any entity subject to the public records law is also subject to the Sunshine Law. An entity subject to the public records act obviously is within the "dominion and control" of the *legislature*.

The test proposed by Corporation should not be adopted for the same reason that the *Schwab* test should not determined solely by the control factor. The purpose of the *Gradison* doctrine is to frustrate evasion of the public right of access through delegation to an ostensibly private surrogate. That it is not necessary for the agency to retain corporate control over an entity in order to effect a delegation which is clear under *Sarasota Herald-Tribune, Fox, and Schwartzman*. The same contextual analysis should apply in Sunshine cases.

Those same factors which indicate that an agency has retained significant involvement through a contractual or other relationship with a private party for purpose of the *acting-on-behalf* clause also signal that a delegation of governmental function has occurred for purposes of the *Gradison* doctrine under the Sunshine clause. Under each body of law, the issue is the same--whether an agency has sought to avoid disclosure through delegation of that which otherwise would be its responsibility to perform in public. *Schwab*, at 1031; *Wood*, at 939; *Gradison*, at 474. It is reasonable and appropriate to apply the same test and reach the same conclusion.

The Court should give the Sunshine law the same scope as the public records law. In light of history, the judicial doctrine against evasion of the Sunshine law by private delegation is equally as vigorous as the textual standard in the public records law. There is no practical reason not to apply the laws *in pari materia*. Just as a private entity may have public and nonpublic records, so would it have public and nonpublic segments of its meetings. If the laws are not applied in harmony, great dissonance will result. An agency will be able to circumvent the Sunshine law through a relationship with a private party that is acting on behalf of the agency and keeping public records. It seems almost unthinkable that a meeting could be held in Florida under circumstances where the agenda, minutes, transcripts, tape recordings, and other records of the meeting are public, but the doors will be closed to the public. Here, when it is remembered that a delegate of the public agency will be sitting behind the closed doors, the propriety of closing the door to the public is all the more dubious. *Compare, e.g., AGO* 85-54, 1984 *Op. Fla. Atty Gen.* 130 (meetings on the part of a single member of a board acting as a delegate of the board subject to Sunshine law).

Therefore, in order to give effect to the judicial doctrine against evasion of the Sunshine law by private delegation under a standard that is harmonious with the correlative textual standard under the public records law, the Court should hold that the Sunshine law will be applied on the basis of the totality of the factors according to the same standards as the statutory clause. Thus a private entity that is subject to the public records law

would also be subject to the Sunshine law when and as its board discusses or transacts public business.

CONCLUSION

For the foregoing reasons, Publisher respectfully requests that this Court affirm the decision of the district court of appeal in all respects and remand the case to the trial court with instructions to grant Publisher's motion for summary final judgment and enter summary final judgment in favor of Publisher.

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I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the attached service list this 11th day of December, 1997.

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