O/A 2-3-98

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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REPLY BRIEF OF PETITIONER
MEMORIAL HOSPITAL-WEST VOLUSIA, INC.

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

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ARGUMENT

I. AS THE TRIAL COURT CORRECTLY FOUND, THE HOSPITAL CORPORATION IS NOT SUBJECT TO FLORIDA'S PUBLIC RECORDS OR SUNSHINE LAWS BECAUSE IT IS SIMPLY A PRIVATE CORPORATION IN THE BUSINESS OF PROVIDING HEALTH CARE SERVICES.

Seeking to sensationalize, the Respondent's brief by the News-Journal newspaper and the amicus briefs assert an overriding theme that the Hospital Corporation is being evasive and acting with bad motives. Veiled accusations of secretiveness and deal-making abound. Amicus St. Petersburg Times accuses the Hospital Corporation of secrecy "right up until the moment of the next malaria epidemic". Such non-record accusations are frankly ridiculous, even for a newspaper amicus. No one, least of all the hospital, is trying to keep a malaria outbreak secret. Amicus News-Leader quotes its own articles about unrelated union disputes which it attaches to its brief. Another amicus quotes the Internet. None of this improper and sensationalized brief writing has the slightest relationship to the truth nor to the record of this case and should simply be disregarded by this Court.

Thus, this Reply Brief by the Hospital Corporation will be primarily directed to the merits brief by the respondent News-Journal Corporation. Only minimal comment will be made as to the amicus arguments, except for the brief by the Attorney General which is strikingly inconsistent. (See AGO 83-1 and AGO 89-52). The Attorney General previously opined that an almost identical not-for-profit corporation operating a leased Hillsborough County hospital would or would not be subject to open records and sunshine

laws depending on the particular powers and duties transferred to the lessee and the presence or "lack of governmental control over the day-to-day operation of the nonprofit corporation". See AGO 89-52, p. 1817. This previous opinion by Attorney General Butterworth was correct and was precisely the position of the trial court herein. Public records scrutiny did not apply because the governmental Authority had no day-to-day operational control of the hospital. Under the "totality of factors" and AGO 89-52, which the contracting parties scrupulously followed, the Hospital Corporation was not acting on behalf of the government. The parties to this lease followed the existing law and should not now be penalized by having the rules changed.

The newspaper begins its argument by relying on Section 395.3035, Florida Statutes, as enacted in 1991. This statute exempted from Chapters 119 and 286 certain records and meetings of "public hospitals". As to "public hospitals", the exemption was necessary. However, as to <u>private</u> corporations, operating a previously public hospital under Section 155.40, such an exemption is simply unnecessary unless control is retained by the governmental entity and the private company acts on behalf of the government. In short, no exemption from the open records/meetings laws is necessary for such private entities. There was no reason for the Legislature to grant an exemption in Section 395.3035 by including Section 155.40 private corporations.

No Implied Exemption Is Sought

The newspaper repeatedly argues that Section 155.40 does not create an implied records or meetings exemption. The newspaper is erecting a strawman in that the Hospital Corporation has never urged that Section 155.40 created an implied exemption. An exemption, implied or express is simply unnecessary, because as a matter of law, this not-for-profit private corporation is not a "public hospital" nor is it controlled as an agent or functionary of the public Authority. While not asserting an implied exemption, the Hospital Corporation does assert that Section 155.40 was an important factor which had to have been properly considered by the Fifth District.

The chronology of the relevant statutes makes clear that the News-Journal's argument is false. Section 155.40 was originally enacted in 1982 making no mention of Chapters 119 or 286. Some nine years later in 1991, Section 395.3035 was enacted exempting certain limited records and meetings of "public hospitals" from both Chapters 119 and 286. The Legislature presumptively knows the state of the law. If private (§ 155.40) corporations leasing hospitals were already agents of the government, then the Legislature certainly would have also exempted the same records and meeting of private (§ 155.40) corporations when they exempted those records in 1991 as to "public hospitals". The Legislature obviously did not view such private corporate lessees as public agents already bound by the open records and sunshine laws. In 1996, Section 155.40 was amended to legislatively overrule the

Fourth District's construction[1] of the statute and to expressly approve the total divestiture by lease or sale of public hospitals to private corporations including profit making corporations.

The 1996 amendment to Section 155.40 also affirmatively required compliance with Section 286.0105 of the public meetings law which requires particular language in certain notices. Thus, the Legislature specifically made the open meetings law (Chapter 286) applicable in only limited circumstances concerning the lease or sale of a public hospital. Again, the Legislature knows the law and would not have affirmatively required compliance with only a limited aspect of the sunshine law (Chapter 286) if that entire law was already fully applicable.

No Privatization of An "Essential Governmental Function"

News-Journal has one fundamental position--that hospital care is "an essential governmental function" and that this function must remain public and may not be privatized if it is to result in private records or meetings.

The newspaper simply disregards the petitioner's brief and its overwhelming proof that hospital care was never purely a governmental function or obligation. Hospital care is provided by numerous private corporations and medical care is provided by private corporations and private physicians, all of whom are in the

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[1] Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc., 658 So. 2d 577 (Fla. 4th DCA 1995) rev. dism'd. 670 So. 2d 938 (Fla. 1996), invalidated a § 155.40 lease which had the effect of dissolving the hospital authority. In reaction, the Legislature chose to greatly broaden the statute.

business of caring for the sick and doing so at a profit when patients are able to pay. The fact that such medical providers receive governmental funding does not turn them into public agencies nor the agents of public agencies. Doctors and hospitals receive Medicare and Medicaid payments along with tax dollars in numerous forms every day of the week and they remain private practitioners and hospitals not subject to open records or meeting laws. The Fifth District's opinion wrongly held that hospital care was a function that cannot be truly privatized. This erroneous ruling blindly ignores reality.

The newspaper briefs do not even suggest what the intent of the statute (§ 155.40, enacted in 1982 and amended in 1996) might have been other than to allow privatization. Population data clearly demonstrates the fallacy in the mindset that only government can provide hospital care. In 1970 the population of Florida was 6,791,418 and there were 57 public hospitals. By 1997 the population had more than doubled to 14,300,000, but the number of public hospitals had not doubled and had instead fallen to a mere 14 hospitals.[2] Realistically, hospital and other health care is being largely provided by the private sector in Florida and not by public hospitals. This Court must recognize this medical reality.

Privatization is the direction of the recent past and the future. Examples are plentiful. Just outside counsel's office

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[2]A Study of Hospital Districts, 1996. Florida House of Representatives, Committee on Health Care.

window sits a multi-story parking garage built by the City of Tallahassee. Certainly "public parking" is a governmental purpose, but it is not a governmental purpose which cannot be privatized. In fact, the parking garage can be leased or sold to a private operator and that private operator is not subject to open records and meetings laws. Further, there is no specific statute on parking garages and there is a specific statute governing public hospitals and authorizing their divestiture from public operation and control.

Clearly, the Legislature sees this as proper in view of modern health-care competition. The newspaper says this allows "public boards to contrive transactional schemes to evade . . .". (Br.p.19). This is again both false and sensationalized. A private not-for-profit corporation leasing and totally operating a hospital under Section 155.40 is not subject to the sunshine laws at all. Of course, all events leading up to the lease were completely public as will be all required reports from the operating entity. All documents placed in the hands of the Authority become public.

Schwab And The Factors Test[3]

The Fifth District has done nothing more than simulate compliance with this Court's Schwab decision and has actually conflicted with it. It has directly held at p.420 that any "public obligation" performed by a private entity using facilities

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[3]News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992).

initially acquired with public funds, will always and forever, as a matter of law, be within Chapters 119 and 286. This "once public, always public" view is contrary to Schwab and simply not the law of Florida. Further, as previously pointed out, hospital care is a "public obligation" only if the private sector does not provide a sufficient and adequate alternative, which is manifestly the situation here.

The Fifth District opinion states the factors test thusly: "Let's analyze the Schwab factors . . . to see if Lessee was providing hospital services in place of the [public] Authority". This is not the content or purpose of the Schwab test. Schwab summarizes its own holding at p.1031:

> The majority of district courts to address the issue of when a private entity under the contract with a public agency falls within the purview of the Public Records Act has looked to a number of factors which indicate a significant level of involvement by the public agency. (numerous citations omitted)

The trial court correctly analyzed the lack of involvement by the Authority and the District Court misapplied this part of the test. If there was no significant level of control retained by the Authority, then, as the parties expressly intended, Chapters 119 and 286 did not apply.

When the Legislature enacted Section 155.40, it thereby amended every existing special act which created a hospital district to allow each public hospital to totally alter its basic purpose and functions. In short, Section 155.40 allows a hospital district to stop running a public hospital and to go out of the day-to-day hospital business completely. That is exactly what

happened here. The old public hospital could not make it financially; the new hospital must be financially competitive.

Asserted Unconstitutionality Under Everglades Case

News-Journal argues that if complete control was turned over to the private Hospital Corporation then the lease would be unconstitutional under O'Neill v. Burns, 198 So. 2d 1 (Fla. 1967) and the Fourth District's Everglades Hospital decision. It asserts therefore that control must have been retained and not released. Before the District Court, the News-Journal conceded the control issue and never suggested that this 40 year lease was unconstitutional. (See Petitioner's Merits Br.p.37).

Initially, Section 155.40 does allow for total transfer of day-to-day control and the 1996 amendment authorizing a complete sale renders the Everglades opinion moot. Further, Everglades is completely inapplicable because the two leases were totally different and under Schwab, the "unique circumstances" of each case must govern. The Everglades lease effectively abolished the District and granted its taxing power to the lessee. The present lease does neither. O'Neill states a control test as to public property and is totally distinguishable from the Schwab control over operations factor. In any event, this constitutional issue is not before this Court for decision. No party with proper standing has sued to declare all Section 155.40 leases unconstitutional.

The Schwab Factors Continuum

As pointed out in petitioner's initial brief, Section 155.40 in combination with the Schwab "totality of factors" test produces

a continuum. The parties, the elected board and the lessee, structure the lease and transfer of functions accordingly. On one hand the elected board can retain significant control of day-to-day operations over the leased hospital and that hospital will remain subject to the public records/meetings laws.[4] On the other hand, as was the situation here, the public Authority and the Hospital Corporation may choose to closely follow the Schwab factors test and remove all significant day-to-day control from the Authority and vest it instead with the private hospital management and operational corporation which functions independently. Without question, control, defined as a "significant level of involvement" in Schwab, is the important factor.

The trial court expressly found on uncontested evidence that there was no control vested in the Authority over the Hospital Corporation. The District Court of Appeal rejected this finding and instead concluded that since the Authority retained the right to terminate the lease based on a default by Hospital Corporation, that this constituted "real control" as a matter of law. This was error and similar to saying that an independent contractor hired to accomplish a particular result is subject to day-to-day control and becomes an employee, merely because the principal can fire the contractor if he defaults on the contract. Such a right to terminate for default is implicit in every contract. Overwhelming law in the decided cases concerning independent contractors is

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[4]Sarasota Herald-Tribune Co. v. Community Health Corp., Inc., 582 So. 2d 730 (Fla. 2d DCA 1991) is a strong example of such a case.

directly contrary to the Fifth District's rational. Van Ness v. Independent Construction Company, 392 So. 2d 1017 (Fla. 5th DCA 1981) and Coudry v. City of Titusville, 438 So. 2d 197 (Fla. 5th DCA 1983).

The Attorney General's Prior Position

The whole question of whether the open records and meetings laws apply to a not-for-profit corporation leasing a public hospital was addressed by Honorable Attorney General Robert Butterworth in AGO 89-52. There, the Attorney General answered the precise question and concluded that the sunshine laws might or might not apply depending upon the particular powers and duties transferred or not transferred to the not-for-profit corporation.

In 1989 the Hillsborough County Hospital Authority asked the Attorney General various questions regarding its proposed Section 155.40 lease to a not-for-profit corporation. Question four was: "Is the private not-for-profit corporation leasing the hospital facilities required to operate under the Government in the Sunshine Law and the Public Records Act?" Contrary to his present position, the Attorney General opined:

> The applicability of the Government in the Sunshine Law or the Public Records Law . . . will depend upon the powers and duties imposed upon the not-for-profit corporation under the lease agreement.

The opinion relies primarily on Campus Communications, Inc. v. Shands Teaching Hospitals and Clinics, Inc., 512 So. 2d 999 (Fla. 1st DCA 1987). The Attorney General noted that this District Court relied on the lack of governmental control over the day-to-day operations of Shands by the state for its holding that the private

corporation organized solely for the purpose of operating this public hospital and ancillary public educational facility was not a public agency for purposes of the open records and meetings laws. If the Shands medical center on the University of Florida campus is not bound by the sunshine laws then neither is the petitioner hospital herein.

The Attorney General twice stated in AGO 89-52 that a lease to a non-profit corporation under Section 155.40 would or would not implicate the sunshine laws depending upon what particular obligations were retained or imposed on the corporate lessee. The key important element was stated to be day-to-day operation and supervision being retained by government. Clearly, under the Attorney General's view, if this element is absent then public scrutiny is not mandated under Chapter 119 or 286. Surprisingly, the Attorney General's amicus brief has not mentioned his own prior opinion (AGO 89-52) nor the Shands Teaching Hospitals case which the opinion so heavily relied upon. A copy of AGO 89-52 is attached to this brief.

News-Journal's brief attempts to distinguish Shands Teaching Hospitals at p.42 by arguing that the Legislature said in its enacting statute (79-248) that the Shands medical/educational facility was "unique and different from other state institutions" and that these words produced an exemption from the public records/meetings laws. We are frankly amazed at this argument. If applying the label "unique and different" is all that is necessary

to avoid the public records laws then implied exemptions are indeed available.

Neither News-Journal nor the Attorney General are being consistent before this Court. News-Journal suggests giving complete control to a not-for-profit corporation would be unconstitutional while at the same time arguing that Shands Teaching Hospital is "autonomous" and therefore exempt. The Attorney General omits any mention of Shands or AGO 89-52, the very similar Hillsborough County situation. (Br.p.42).

Indistinguishable from the present Memorial Hospital situation, Shands has served as a model for many other hospital leases. Shands is operated by a not-for-profit corporation on state owned land as are all leased public hospitals. Shands was leased "to provide for more effective and efficient management and administration . . . in fulfilling its role as a health care provider". Chapter 79-248 Laws of Florida. Further, the Board of Directors of the lessee corporation is appointed by the President of the University of Florida and chaired by its Vice President for Health Affairs. The rental fee for the facility is an amount equal to the debt service on the bonds or revenue certificates. The Shands lease and the present lease are legally the same. In fact, Shands is a situation where there is a great deal more state participation in the functioning of the hospital than in the present case.

If space permitted, we would comment on all of the several Schwab factors, but must be content with pointing out that the

newspaper misrepresents the rent paid on this lease. They scoff at the $8 million in bond debt. They also omit to mention that the Hospital Corporation is also obligated to repeatedly replace all medical equipment in the facility. The old equipment was obsolete and the new equipment is extremely expensive as modern science progresses. All of this equipment costing many millions of dollars plus a minimum of $30 million in construction and renovation will become the property of the Authority at the conclusion of the lease. We rely on the prior brief as to all other Schwab factors.

II. THE SUNSHINE LAW DOES NOT APPLY TO THE HOSPITAL CORPORATION BECAUSE IT IS NOT SUBJECT TO THE DOMINION AND CONTROL OF THE AUTHORITY.

The Attorney General has again disregarded his own prior opinions stating: [h]owever, the test for determining the applicability of Ch. 119 differs from that of s. 286.011". AGO 83-1. The Newspaper responds in 6 pages to the one page argument in the Petitioner's brief on this point. The Newspaper attempts to dodge the issue suggesting that no court has actually decided the precise question. The standard for application for the public records law and the open meetings law is not the same as AGO 83-1 clearly states. We again call attention to City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971) and Times Publishing Co. v. Williams, 222 So. 2d 473 (Fla. 2d DCA 1969) which have indeed answered the question in favor of the Hospital Corporation's position. Again, the District Court erred in rejecting the trial court's ruling on this issue.

In closing, we make reference to the Everglades Hospital case which News-Journal and all of its amicus so heavily rely upon and quote:

> Certainly if the Legislature intended to authorize such a radical and complete divestiture of public assets, control, oversight, and authority, it would be clearly stated.

This is precisely what the Florida Legislature intended. Public Hospitals may be privatized. The Fifth District's view, "once public always public" is not supported by the law and certainly can have no application when a public hospital is sold to a private corporation under Section 155.40. The 40 year lease here is tantamount to a total divestiture, and under these circumstances, the public records laws and open meeting requirements simply have no application.

CONCLUSION

The Fifth District's opinion should be reversed and the final judgment of the trial court reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy has been furnished by Mail to **NEIL H. BUTLER,** P.O. Box 839, Tallahassee, Florida 32302; **LARRY R. STOUT**, P.O. Box 15200, Daytona Beach, Florida 32115; **JONATHAN D. KANEY, JR.**, P.O. Box 2491, Daytona Beach, Florida 32115-2491; **WILLIAM A. BELL**, P.O. Drawer 469, Tallahassee, Florida 32302; **TERESA CLEMMONS NUGENT**, 315 South Calhoun Street, Suite 808, Tallahassee, Florida 32301; **RICHARD A. HARRISON**, P.O. Box 1110, Tampa, Florida 33601; **EMELINE C. ACTON**, P.O. Box 1110, Tampa, Florida 33601-1110;

FREDERICK B. KARL, P.O. Box 3433, Tampa, Florida 33601; this 12th day of January, 1998.

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CASE NO. 90,835

APPENDIX TO REPLY BRIEF OF PETITIONER MEMORIAL HOSPITAL-WEST VOLUSIA, INC.

1. Florida Attorney General Opinion 89-52.

CERTIFICATE OF SERVICE

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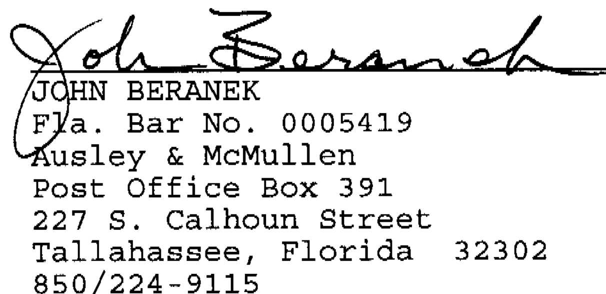

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*1816 Fla. AGO 89-52
Office of the Attorney General
State of Florida

AGO 89-52
August 24, 1989

Mr. Ralph C. Dell
Attorney for the Hillsborough County Hospital Authority
Post Office Box 2111
Tampa, Florida 33601

Dear Mr. Dell:

You ask on behalf of the Hillsborough County Hospital Authority substantially the following questions:

1. Is the Hillsborough County Hospital Authority, created by special act, authorized to lease the facilities of the authority to a not-for-profit Florida corporation for the purpose of operating and managing such facilities upon such terms and conditions as are determined by the hospital authority within the requirements of s. 155.40(2), F.S.?

2. Do the provisions of the hospital authority's enabling legislation empower the hospital authority to enter into such a lease or is it necessary that such authorization be provided by enactment of another special act?

3. Does such a lease need to be competitively bid or can a private not-for-profit corporation be created solely for the transaction pursuant to s. 155.40(2), F.S.?

4. Is the private not-for-profit corporation leasing the hospital facilities required to operate under the Government in the Sunshine Law and the Public Records Act?

5. May the hospital authority include in the terms of the operational lease that the private not-for-profit corporation fulfill all or part of the duties of the hospital authority?

6. May the employees of the private not-for-profit corporation operating the hospital facilities remain in the Florida Retirement System?

In sum, I am of the opinion that:

1. The Hillsborough County Hospital Authority is authorized to lease the facilities of the authority to a not-for-profit Florida corporation for the purpose of operating and managing such facilities upon such terms and conditions as are determined by the hospital authority within the requirements of s. 155.40(2), F.S.

2. Although created by special act, the Hillsborough County Hospital Authority is authorized by the provisions of s. 155.40(2), F.S., to enter into such a lease; the enactment of a special act authorizing the authority to enter into such a lease is not required.

3. Section 155.40(2), F.S., does not require a county hospital authority to competitively bid prior to entering into such a lease.

4. The applicability of the Government in the Sunshine Law or the Public Records Law to a not-for-profit Florida corporation will depend upon the powers and duties imposed upon the not-for-profit corporation under the lease agreement.

5. The hospital authority may transfer such duties and responsibilities related to the management and operation of the hospital facilities as authorized by s. 155.40, F.S.

6. The determination as to whether employees of the not-for-profit corporation may participate in the Florida Retirement System is one which must be made by the Department of Administration which is charged with the administration of the state retirement system.

Questions One and Two

As your first and second questions are interrelated, they will be answered together.

The Hillsborough County Hospital Authority was created by special act (FN1) with all the powers of a body corporate. (FN2) In addition, the authority's enabling legislation grants the authority "all powers authorized by law to Hospital Facilities, or Hospital Districts, or Hospital Authorities, including those established or created under Chapters 154 and 155, Florida Statutes, as amended...." (FN3)

Section 155.40(1), F.S., provides:

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In order that citizens and residents of the state may receive quality health care, any county, district, or municipal hospital organized and existing under the laws of this state, acting by and through its governing board, shall have the authority to reorganize such hospital as a not-for-profit Florida corporation, and enter into contracts with not-for-profit Florida corporations for the purpose of operating and managing such hospital and any or all of its facilities of whatsoever kind and nature; to enter into leases with a not-for-profit Florida corporation for the operating of such facilities so existing. The term of any such lease, contract, or agreement and the conditions, covenants, and agreements to be contained therein shall be determined by the governing board of such county, district, or municipal hospital. (e.s.)

As a county hospital authority created by special act, the Hillsborough County Hospital Authority clearly would appear to fall within s. 155.40(1), F.S., which by its own terms applies to any county, municipal or district hospitals "organized and existing under the laws of this state." Such a conclusion is consistent with previous opinions of this office which applied s. 155.40, F.S., to hospital districts and authorities created pursuant to special act.

***1817** For example, in AGO 84-87, this office concluded that the provisions of s. 155.40, F.S., authorized the Highlands County Hospital District, created by special act as a special district, to lease the district's facilities to a private not-for-profit Florida corporation. Similarly, in AGO 85-31, this office stated that the provisions of s. 155.40, F.S., were applicable to the Santa Rosa Hospital, Inc., created by special act as a separate county facility.

Pursuant to s. 155.40(2), F.S., any such lease, contract or agreement made pursuant to the statute must:

(a) Provide that the articles of incorporation of such not-for-profit corporation be subject to the approval of the board of directors or board of trustees of such hospital;

(b) Require that the not-for-profit corporation become qualified under s. 501(c)(3) of the United States Internal Revenue Code;

(c) Provide for the orderly transition of such facilities to not-for-profit corporation status;

(d) Provide for the return of such facility to the county, municipality, or district upon the termination of such agreement or the dissolution of such not-for-profit corporation; and

(e) Provide for the continued treatment of indigent patients pursuant to the Florida Health Care Responsibility Act and pursuant to chapter 87-92, Laws of Florida.

Accordingly, I am of the opinion that the Hillsborough County Hospital District, although created by special act, is authorized by s. 155.40(1), F.S., to lease the facilities of the authority to a not-for-profit Florida corporation for the purpose of operating, and managing such facilities upon such terms and conditions as are determined by the hospital authority within the requirements of s. 155.40(2), F.S.

Question Three

Section 155.40, F.S., in authorizing county, municipal or district hospitals to enter leases with not-for-profit Florida corporations, does not provide for or require the hospital to take competitive bids for the lease of its facilities. Moreover, I am not aware of, nor have you have brought to this office's attention, any other provision of state law which would require the hospital authority to take competitive bids. (FN4)

This office has previously stated that in the absence of a statutory requirement, a public body has no legal obligation to let a contract under competitive bidding or to award a contract to the lowest bidder. (FN5) I am, therefore, of the opinion that the Hillsborough County Hospital Authority is not required by s. 155.40, F.S., to competitively bid prior to entering into a lease pursuant to that section. Moreover, in the absence of a statute so requiring, the hospital authority is not required to competitively bid such a lease.

Question Four

The Government in the Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision...." (FN6) In interpreting s. 286.011, F.S., the courts have stated that it was the intent of the Legislature to bind "every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control." (FN7)

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A private organization, however, which performs services for a public agency and receives compensation for such services is not by virtue of this relationship alone subject to the Sunshine Law. (FN8) In determining applicability, 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.

In Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc. 512 So.2d 999 (1 D.C.A.Fla., 1987), the court relied on the lack of governmental control over the day-to-day operation of the nonprofit corporation in holding that a private nonprofit corporation organized solely for the purpose of operating a public hospital and ancillary public health care facilities was not a public agency for purposes of s. 286.011, F.S.

Chapter 119, F.S., defines "agency" for purposes of the Florida Public Records Law, to include private corporations acting on behalf of any public agency. (FN9) As with the Sunshine Law, merely contracting with a public agency does not subject a private corporation to the Public Records Law. (FN10) Instead, it is necessary to review the factors relating to the responsibilities, organization and funding of the private entity in their totality and not in isolation. (FN11) Among the most significant considerations in determining the applicability of Ch. 119, F.S., to a private organization is whether the private entity has been delegated any governmental responsibilities and functions or is participating in the decisional process.

***1818** For example, a volunteer fire department entrusted with the sole responsibility for fire fighting, funded in part with public funds, and authorized to conduct its activities on public property was found by one court to be subject to the terms of Ch. 119, F.S. (FN12) In Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc., supra, however, the district court concluded that due to the lack of day-to-day control exercised by the public agency, the private non-profit corporation operating the hospital was not "a unit of government or private entity acting on behalf of any public agency for purposes of the Public Records Law." (FN13)

Accordingly, the applicability of the Government in the Sunshine Law and the Public Records Law to the private not-for-profit organization leasing the facilities of a county hospital pursuant to s. 155.40, F.S., would appear to depend upon the powers and duties imposed upon the not-for-profit corporation under the terms of the lease agreement.

Question Five

You have not directed this office's attention to any particular duty of the Hillsborough County Hospital Authority which might be performed by the not-for-profit Florida corporation under the terms of the lease. Therefore, my comments must be general in nature.

Section 155.40(1), F.S., authorizes a county, municipal or district hospital to reorganize as a not-for-profit Florida corporation and to enter into contracts with other not-for-profit Florida corporations for the purpose of operating and managing such hospital. Alternatively, the public hospital is authorized to enter into a lease with a not-for-profit Florida corporation for the operation of such facilities so existing. As set forth in Questions One and Two, s. 155.40(2), F.S., requires that any such lease, contract or agreement contain certain provisions.

This office has previously stated that a hospital district as a creature of statute, possesses only such powers as have been expressly granted or necessarily implied therefrom. (FN14) Moreover, an express direction as to how a thing should be done is an implied prohibition of its being done in any other manner. (FN15)

Accordingly, if the hospital authority reorganizes as a not-for-profit Florida corporation, it may enter into a contract with a not-for-profit Florida corporation for the operation and management of the hospital facilities. Alternatively, the hospital authority is empowered to enter into a lease with a not-for-profit Florida corporation for the operation of existing facilities. Any such lease, contract or agreement, however, must comply with the provisions of s. 155.40, F.S., and in particular, the requirements of s. 155.40(2), F.S. (FN16)

Thus, to the extent that the hospital authority's duties specified in its enabling legislation relate to the operation and/or management of such facilities, it appears that such duties and responsibilities may be delegated to the not-for-profit corporation in accordance with the provisions of s. 155.40, F.S.

Question Six

In light of the responsibilities of the Division of

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Retirement, Department of Administration regarding the administration of Ch. 121, F.S., the Florida Retirement Systems Act, any question regarding its application should be addressed to that department. (FN17)

Sincerely,

Robert A. Butterworth

Attorney General

FN1 See, Ch. 80-510, Laws of Florida, as amended by Chs. 82-299, 82-300, 84-439, 84-441 and 84-449, Laws of Florida.

FN2 See, s. 6, Ch. 80-510, Laws of Florida.

FN3 Id.

FN4 Compare, s. 125.35, F.S., authorizing the board of county commissioners to lease real property belonging to the county, whenever the board determines it to be in the best interest of the county, to the highest and best bidder for the particular use the board deems to be the highest and best.

FN5 See, e.g., AGO 78-39 (airport authority possesses authority to lease its facilities but in the absence of a statute so requiring, is not required to submit the proposed lease to competitive bidding), and AGO 78-122 (sheriff, in absence of statutory requirement for competitive bidding, is not required to enter into competitive bidding). And see, William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550 (2 D.C.A.Fla., 1960).

FN6 Section 286.011(1), F.S.

FN7 Times Publishing Company v. Williams, 222 So.2d 470, 473 (2 D.C.A.Fla., 1969).

FN8 See, e.g., McCoy Restaurants, Inc. v. City of Orlando, 392 So.2d 252 (Fla.1980). Accord, AGO 78-161 stating that the existence of a contract between a private nonprofit corporation and a district mental health board to provide mental health services does not, in itself, constitute a delegation of the district board's governmental or legislative powers to the nonprofit corporation. And see, AGO 78-24 (meetings of a nonprofit hospital corporation are not subject to s. 286.011 by virtue of lease agreement between private corporations and public agency).

*1819 FN9 See, s. 119.011(2), F.S., defining "agency" as:

[A]ny state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation or business entity acting on behalf of any public agency.

FN10 See, Parsons & Whittemore, Inc. v. Metropolitan Dade County, 429 So.2d 343 (3 D.C.A.Fla., 1983).

FN11 See, Schwartzman v. Merritt Island Volunteer Fire Department, 352 So.2d 1230 (4 D.C.A.Fla., 1977), cert. denied, 358 So.2d 132 (Fla.1978).

FN12 Id. And see, Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633 (Fla.1980) (consultant conducting employment search of applicants for position of managing director of municipal electric authority); Fritz v. Norflor Construction Company, 386 So.2d 899 (5 D.C.A.Fla., 1980) (engineering corporation performing services for the city as city engineer relating to the water treatment plant).

FN13 512 So.2d at 1000. The court in Campus Communications relied on an earlier decision, Shands Teaching Hospital and Clinics, Inc. v. Lee, 478 So.2d 77 (1 D.C.A.Fla., 1985), which had used the public agency's lack of control over Shands' day-to-day operations to hold that Shands was not a corporation primarily acting as an instrumentality or agency of the state.

FN14 See, e.g., AGO 84-87 and authorities cited therein.

FN15 See, Alsop v. Pierce, 19 So.2d 799 (Fla.1944). And see, Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla.1973) (express mention of one thing implies the exclusion of those not mentioned).

FN16 See, Jess Parrish Memorial Hospital, Inc. v. City of Titusville, 506 So.2d 22, 24 (5 D.C.A.Fla., 1987), in which the court held that the divestment of title to the district's land by the hospital district to the not-for-profit corporation was a voidable act: "[T]he statute does not permit divestment of the title to the land by the district." And see, AGO 84-87

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concluding that s. 155.40 did not authorize the hospital district to lease district facilities to a private for profit corporation.

FN17 See, s. 121.031, F.S. And see, Department of Legal Affairs Statement of Policy Concerning Attorney General Opinions stating that "when an opinion request is received on a question falling within statutory jurisdiction of some other state agency, the request will either be transferred to that agency or the requesting party will be advised to contact the other agency."

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