

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

SCOTT ELLIS, in his official capacity as
Brevard County Clerk of the Circuit Court,

CASE NO.: 05-2013-CA-069095

Petitioner,

v.

ECONOMIC DEVELOPMENT
COMMISSION OF FLORIDA'S SPACE
COAST, INC., a Florida non-profit
corporation,

Respondent.

RESPONDENT'S WRITTEN CLOSING ARGUMENT

Respondent, ECONOMIC DEVELOPMENT COMMISSION OF FLORIDA'S SPACE COAST, INC., (the "EDC" or "Respondent"), by and through its undersigned counsel, files this written closing argument to summarize the testimony of the two-day hearing held January 29 and 31, 2014, and to apply to memorandum's of law previously submitted to the Court. Petitioner, SCOTT ELLIS, will be referred to as "ELLIS" or "Petitioner". References to the two-day transcript will stated as (T. ___, ln. ___).

The general purpose of the Public Records Act is to "open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1977). The evidence clearly revealed that the EDC is truly a private organization merely providing services to the County, with extremely limited involvement by the County. The evidence failed to show that the EDC undertook "actions of the government" in relation to the activities the EDC performed on behalf of BlueWare, Inc. ("BlueWare") also known as Project Fates. Furthermore, the EDC does not resemble a governmental agency. It is a private 501(c)(6) organization, run by a private Board of

Directors. *See* EDC's Articles of Incorporation, *Petitioner's Exhibit #7*. The Bylaws of the EDC provide the Purposes and Powers of the EDC, and provide for an unlimited number of members of the Board or Directors. *See* Bylaws of EDC, *Respondent's Exhibit #1*. The EDC has asserted that it is a private organization that can do what it wants with its files. (T.96, ln.5-9).

During the two-day hearing, there was a great deal of discussion about the Agreement between the EDC and the Board of County Commissioners of Brevard County, Florida (the "County"), dated August 21, 2012 (the "County Service Contract" or "Service Contract"). *Petitioner's Exhibit #8*. There is no dispute that the EDC is under Contract with the County to provide services, and the Service Contract sets forth a variety of tasks that the EDC is to perform. The Service Contract is very general with no objective standards, and allows the EDC total discretion on how it is to perform the tasks. Most importantly, the Service Contract does require the EDC to perform any essential governmental function such as fire suppression services, management of county jail, misdemeanor probation services or public education.

Therefore, the analysis left to the Court is the totality of the factors test under *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d. 1029 (Fla. 1992). Drilling down even further, the EDC asserts that the Court's analysis is limited to the EDC's involvement with BlueWare, as that is the issue framed by Petitioner's Second Amended Complaint. Most of the hearing testimony and evidence focused on the EDC's actions with BlueWare, the incentives sought by BlueWare and with the formation of the non-profit EDC. If the Court determines that the EDC is an agency subject to Chapter 119 for its actions related to BlueWare, the Court should identify the tasks performed by the EDC under the County Service Contract that make the EDC an "entity acting on behalf of any public agency." Sec. 119.011(2), Fla. Stat.

If the Court defines the actions that show the EDC acted on behalf of the County, then the Court must determine what records in possession of EDC were “made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency”. Sec. 119.011(1), Fla. Stat. Without waiving the argument that the EDC is not subject to Chapter 119, the EDC asserts that if it is subject, then only BlueWare’s applications for incentives and correspondence between the EDC and County and/or Enterprise Florida/Department of Economic Opportunity would fit the definition of “public record”. Those documents would then be subject to exemptions, including but not limited to those identified in Sec. 288.075, Fla. Stat.

In this case, the burden was with the Petitioner to prove that what it seeks meets the definition of public record. *See Times Publishing Company v. City of Clearwater*, 830 So. 2d 844 (Fla. 2d DCA 2002). In that case, the Court explained that the City employees’ emails requested by the Times fell outside the current definition of Public Records because it was not “made or received pursuant to law or ordinance.” *Id.* at 847. Likewise, the email was not created or received “in connection with the official business” or “in connection with the transaction of official business” by the City. *Id.* The Petitioner has failed to meet its burden that the documents it seeks regarding BlueWare are public records because Petitioner failed to satisfy the nine factors of *Schwab*.

The Alleged Public Records Requests

To begin, the background information on the alleged public records requests from the Petitioner to the EDC must be reviewed. On January 10, 2013, the Petitioner sent an employee to the EDC to request documents. (T.40, ln. 9-11). The employee spoke with Trudy McCarthy (“McCarthy”), the Senior Director of Operations for the EDC. (T.276, ln. 3). McCarthy’s duties include human resources, accounting, reporting, contracts and marketing responsibilities.

(T.276, ln. 4-6). No documents were provided to the Petitioner's employee from the January 10, 2013 trip to the EDC. According to McCarthy, she was not sure what the employee wanted and asked that the request be put in writing. (T.309-310, ln.18-4).

On January 17, 2013, McCarthy received an email from Petitioner's employee requesting, "all documents and other information that the Space Coast EDC has related to the project Fates, Blue Gem, Blue Ware, Rose Harr and related companies." *Petitioner's Exhibit #1*. In response, Lynda Weatherman ("Weatherman"), President and CEO of the EDC sent a letter to ELLIS dated January 24, 2013 which advised Ellis that the "EDC legal counsel had advised the information held by the EDC is currently both confidential and exempt from disclosure." *Petitioner's Exhibit #3*. That letter attached a legal memorandum from EDC's legal counsel R. Mason Blake. The legal memorandum from EDC's legal counsel indicated that the documents requested by Petitioner were "confidential and exempt from the disclosure requirements in Chapter 119 (assuming there was other subject to disclosure under Chapter 219 (sic))." Further, the memorandum provided that BlueWare had delivered a confidentiality request pursuant to Section 288.075 on or about January 31, 2012 and that exemption was in effect and did not expire until January 31, 2013.

According to testimony of ELLIS, Petitioner decided to return to the EDC on February 1, 2013 because it was believed that was when the confidentiality agreement expired. (T.48, ln. 15-18). On February 1, 2013, ELLIS himself went to the EDC's office and requested from the receptionist the "BlueWare file". (T.48, ln. 19-25). The receptionist advised that she could not provide anything because of the "confidentiality request", causing ELLIS to request a copy of the confidentiality request. (T.49, ln. 2-6). Ultimately, on February 1, 2013, ELLIS was provided copies of initial confidentiality request and the request for extension. (T.49, ln. 14-16).

On February 1, 2013, ELLIS also delivered a letter to the EDC, specifically making a public records request pursuant to Chapter 119, and requesting three specific items in “Exhibit A” to the letter. *Petitioner’s Exhibit #2*. ELLIS received the items number 1 and 2 that were requested in “Exhibit A” . However, ELLIS was advised that there were no documents relative to item number 3. (T.69, ln. 7-12; T.70, ln. 2-4). The documents that were provided to ELLIS on February 1, 2013 were the confidentiality request signed by President of BlueWare, Rose Harr on January 31, 2012 (*Petitioner’s Exhibit #5*) and letter dated January 27, 2013 from Rose Harr to Weatherman requesting an extension of confidentiality for twelve months. (*Petitioner’s Exhibit #6*). (T.68, ln. 6-17). There were no documents provided that included the “EDC’s findings” that BlueWare was still actively considering locating, relocating or expanding because the EDC “had nothing to provide.” (T.141, ln.1-4). Weiner did not make a written finding. (T.171, ln.11).

On August 27, 2013 Kevin McBride (“McBride”) of Petitioner’s office went to the EDC to make a “public records request”. (T.23, ln. 1-9). McBride requested the same documents originally requested “in February”. (T.12-13). McBride spent the better part of the day at the EDC and was ultimately provided a sealed envelope with the January 24 letter from Weatherman with the legal counsel memorandum attached. (T.25, ln. 3-4; T. 31, ln. 15-16). Ultimately, the Petitioner did receive documents related to BlueWare in late October, 2013. (T.73, ln. 5-10). During the testimony at the hearing, ELLIS agreed that client lists of the company are confidential, and proposed that financial statements of a company should be checked in camera to allow the court to determine if they should be produced. (T.81, ln. 3-15).

In summary, even with the the lack of clarity in the January 17, 2013 email from Petitioner, the EDC provided a response as to why it could not provide documents. The EDC

fully complied with the February 1, 2013 “public records request”. The verbal request of August 27, 2013 was ambiguous as to whether it was related to the January or February records request, but the EDC has responded to both. Therefore, the EDC asserts that, if it is subject to Chapter 119, it complied with Petitioner’s requests.

No Delegation of a Statutory Governmental Obligation

The EDC, in its First Affirmative Defense, stated that the County has not delegated a governmental obligation or responsibility to the EDC. Such a delegation requires clear and compelling evidence of that delegation. There is no fundamental public mandate, no duty of government to provide economic development activities. The County has chosen to contract with the EDC for economic development services. However, it is without dispute that the County has no statutory obligation to provide or conduct an “economic development program”. Sec. 125.045(3), Fla. Stat., does not create a fundamental public mandate that Brevard County expend funds or undertake economic development activities.

Deputy County Manager Stockton Whitten (“Whitten”), the official representative for Brevard County, testified regarding his role as the liaison between the County and all County economic development functions. (T.348, ln.14-23; T.39,ln.12-16; T.350,ln.14-17). He identified the County employees and agencies responsible for economic development, including Troy Post (the Economic Development Director for North Brevard Economic Development Zone), Greg Lugar (the Economic and Financial Programs Director), the Transit Department, the Tourist Development Office and the Merritt Island Redevelopment Agency. (T.349,ln.9-25; T.350,ln.1-15; T.352,ln.13-20). Other County Economic Development Programs including Industrial Revenue Bonds, Tax Abatement, and Community Redevelopment. (T.350,ln.18-25; T.351,ln.7-17).

Clearly, the EDC does not have “sole stewardship” over economic development activities. Economic Development is a broad topic that includes many things that are done by the County and for the County by others, that the EDC should not be considered the primary marketer of Brevard County. The EDC is involved in so many economic development activities and investor activities that the County Service Contract only a portion of what it does.

Obviously, the Service Contract states, “acting on behalf”, but it is introductory language and non-binding.¹ More importantly, just stating that phrase does not make it so. When asked if the EDC “acted on behalf of the County”, Weatherman stated, “no, we don’t.” (T.108,ln.9-12). There is no definition of the type of conduct which is essential for a private business to become an agency acting “on behalf of” a public agency. The Court must examine the *Schwab* factors. The EDC provides professional services; it is a conduit from which economic information is provided to others. Not every economic development activity is performed by EDC for County. The County performs some economic development activities and County has other contracts for some activities. Furthermore, County still retains approval of Industrial Revenue Bonds, Ad Valorem Tax Abatements, zoning, infrastructure, CRA’s, Enterprise Zones,

¹ Two cases which discuss the legal implication of language in a whereas clause are *Johnson v. Johnson*, 725 So.2d 1209 (1999) and *Orlando Lake Forest Joint Venture v. Lake Forest Master Community*, 105 So.3d 646 (2013) (Fla. 5th DCA 2013). In the *Johnson* case, the Court stated that prefatory recitations contained in “whereas” clauses are not binding and are not an essential part of the operative portions of a contract. *Id.* at 1212. Similarly in *Orlando Lake Forest Joint Venture*, the Court concluded that the unambiguous, operative portion of the agreement controlled over the prefatory language and the recitals. *Id.* at 647. This was due in part to the fact that the agreement was clearly arranged and it managed to separate the recitals from the operative portions of the agreement which were expressed in detailed numbered articles. *Id.* at 648. Because the specific articles in the operative portion of the agreement was comprehensive and unambiguous, the prefatory language was non-binding. *Id.*

and has county employees Greg Lugar and Troy Post and nine employees of the Tourist Development Agency. (T. 352, ln.9-16).

The County Service Contract

The County Service Contract between the EDC and the County is the key to whether the EDC is a private organization or a private organization acting on behalf of Brevard County and therefore subjecting it to Chapter 119. *Petitioner's Exhibit #8*. The Scope of Services, the "tasks" on behalf of the County, have remained nearly the same since the first agreement dated May 2, 1989. *Petitioner's Exhibit #20*. The current County Service Contract lists eighteen (18) tasks for which the EDC is to accomplish. *Petitioner's Exhibit #8*, pp. 2-3. The tasks are replete with lofty and non-specific goals, allow substantial discretion to the EDC as to how it is to complete the tasks and provide for a performance measure standard of "goals and priorities set forth in Exhibit "A"." *Petitioner's Exhibit #8*, para.2, 6. Unfortunately, no Exhibit A exists for the current County Service Contract. (T.353-354, ln.11-1).

Weatherman testified regarding the County Service Contract, defining tasks (a) through (r) as "fundamental operations for an Economic Development Organization defined like ours." (T.107, ln.4-7). Weatherman explained that the EDC collected information to show competitive advantage of locating to one site or expanding to one site so that the EDC could explain the competitive advantage information to the clients. (T.108, ln.1-6). Weatherman confirmed that there is no Exhibit A to the current County Service Contract. (T.219-220, ln.21-3).

Also important in the Court's analysis is what activities the EDC performed with or for BlueWare. The EDC's interaction with BlueWare and the activities it performed on behalf of BlueWare were revealed by Greg Weiner ("Weiner") during his testimony on both days of the

hearing. Weiner is the Senior Director of Business Development for the EDC.² (T.163, ln. 12-13). He was the primary EDC representative who worked with BlueWare. (T.19-20). According to Weiner, he began dealing with BlueWare in March, 2010, on a preliminary basis. (T. 165, ln. 10-25). BlueWare was referred to the EDC from a real estate owner in town. (T.189, ln. 9-12). BlueWare was interested in a relocation. (T.164, ln. 1). Initially, BlueWare inquired about the availability of workforce, workforce costs, corporate tax action, payroll taxes and general information about Brevard County. (T.165, ln. 18-22). To assist BlueWare, the EDC learned about the project needs, the competitive offers, and the challenges to “successfully close the project.” (T.185, ln. 21-25; T.186, ln. 1). The EDC advised BlueWare about potential incentives that would be available, whether local or state, and explained the statutory requirements for qualifications. (T.186, ln. 1-5). According to Weiner, very few incentives are negotiable; either you qualify or you don’t. (T.186, ln. 5-6).

The Operation and Scope of the EDC

The global operation of the EDC is also an important consideration by the Court when determining if the EDC’s activities on behalf of BlueWare equate to “the transaction of official government business.” Weatherman testified regarding how the EDC functions and operates. Weatherman was hired in late 1994 by the Chairman of the EDC, Dan Johnson. (T.207, ln.20-22). As President and CEO, she oversees staff and management of the EDC, strategic plans, developing tactical plans, developing new programs of work, interfacing with the EDC Board of Directors, Executive Board and Officers, and help them oversee the EDC’s program of work. (T.208, ln.2-14).

² Weiner’s experience in economic development included that he was Director of Business Attraction for the Arizona Department of Commerce for over six years, has been with the EDC since 2010, and has obtained the industry certification of Certified Economic Developer from the International Economic Development Counsel. (T.193-194).

The EDC's activities include developing a strategy and the tactics to go along with that strategy, by Weatherman and her staff. (T.130, ln.8-10). The strategy is reviewed by the EDC Board of Directors, and Brevard County is not involved in the development of the strategy. (T.130, ln.8-17; T.138, ln.3-8). The Bylaws of the EDC define the purpose and powers of the EDC, the membership classifications, the composition and function of the Board of Directors, the Executive Committee of the EDC, the counsels of the EDC, the quorum for all Boards of the EDC, the provision for inspection by the public of books and records subject to Chapter 119, the requirement of the EDC that is to be presented to the Board of Directors of the EDC, and the process of the dissolution of the EDC. *Respondent's Exhibit #1*.

The EDC has numerous investors which represent the business community of Brevard County. (T.224, ln. 7-10). The investors make up the Board of Directors, and take part in the numerous committees of the EDC. (T.224, ln.9-17). The financial contribution of each investor determines how many votes they obtain on the Board of Directors and whether they sit on the Executive Board. (T.224-225, ln.19-11). According to Weatherman, the Board of Directors has 123 members, and Executive Board has 34 members. The Board of County Commissioners has a seat on the Executive Board, and the right to appoint six members to the Board of Directors. (T.209, ln.11-25).

The EDC publishes an investor directory twice a year to promote the members of the EDC, and it is not something required under the County Services Contract. (T.225-226, ln.14-4; *Respondent's Exhibit #2*). In addition to gathering of fundamental marketing data, required by the County Service Contract, the business development activities, marketing activities, and investor activities, the EDC is involved in several campaigns including Made In Campaign, Go Contracts program and Contracts With Other Entities including the Florida Manufacturing

Extension Partnerships and other grant programs. (T.232, ln.17; T.235, ln.7). All the funds received from all sources, including investors funds, are put into the same bank account of the EDC (T.235, ln.19-24; T.275, ln.15-17).

Regarding the number of companies, “clients”, of the EDC, Weiner testified that since he had worked with the EDC, from early 2010 through the end of 2013, the EDC had over 500 leads, which translated into approximately 300 projects. (T.194, ln. 15-22). The time spent by Weiner with the BlueWare project was “weeks of work if you added it all up” from 2010 through 2012. (T.185, ln. 23-25; T. 196, ln. 1-7). Weatherman also testified that obtaining leads was outside of the County Service Contract, and that the EDC has its own methods of developing leads (as leads don’t come from the County Commission), which includes its marketing efforts, trade shows, website and industrial interface. (T.213-214).

Weatherman also defined all of the Economic Development activities that the EDC does not engage in. (T.217, ln.11-20). The EDC is not involved in neighborhood revitalization, urban renewal, tax increment financing, CRAs, downtown developments, retail development, and redevelopment agencies. (T.217, ln.14-20). Weatherman further explained that many other entities engage in Economic Development activities such as the Chambers of Commerce, the Port, airport, downtown and neighborhood revitalization programs, road development projects, and tourist development commission. (T.218, ln.6-20). Brevard Workforce also engaged in economic development activities because they provide assistance for finding a job, and funding for training. (T.219, ln.14-19).

***Schwab* Totality of the Factors Test**

The Schwab factors are utilized to determine whether there is *a significant level of involvement* by the public agency, here the County. The County is not involved in the EDC. The

County has determined it desires to have economic development services, but there no public duty to do so.

The scope of economic development activities is extremely broad, and the EDC has only a small role in the development activities undertaken for, by and on behalf of the County. Weatherman, an economic development professional with many years of experience, testified as to the range of activities the EDC undertakes. (T.203-237). Weatherman’s testimony, as detailed below, shows that the tasks identified under the County Service Contract are only a small part of the EDC’s activities. While Sec. 125.045, Fla. Stat. discusses economic development activities that have a “public purpose”, the EDC is not involved in most of those types of activities. Sec. 125.045 (3) does provide guidance as to what are economic development activities: “including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance of cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion or businesses existing in the community or the attraction of new businesses to the community.”

Factor One: Level of Public Funding

At the time that the EDC was working with Blueware, County funding of the EDC was only 49% per audit, Petitioner’s Exhibit #9, p.13. (T.119, ln. 4-5; T.281, ln. 2-3). Per McCarthy, the EDC’s fiscal year 2012-2013 audit indicated that 35% of the EDC’s income revenue was from County funds. (T.283-284, ln.21-1). The federal and state funds are not an issue as those funds are not related to the services provided to the County; federal government is not an entity subject to Florida’s open government laws. Nor is the federal government a party to the County Service Contract.

Petitioner claims that all public funds, whether received from Brevard County or another government agency, should be reviewed by the Court under factor number one of the *Schwab* factors. However, since the issue is whether it is a public agency conducting public activities on behalf of Brevard County, the funding the EDC receives from other governmental sources should be considered irrelevant. The Florida Attorney General, in an informal opinion dated December 17, 2009 to Senator Gaetz and Representative Coley, opined that the AGO office could not state that “a grant from the Federal Government, an entity not subject to this State’s open government laws, subjects an otherwise private entity to such laws.”

More importantly, the nature of the funding, like in *Schwab*, is a payment for services. Even the *Sarasota Herald v. Community Health Corp.* case, another hospital case, examines this as a “funding and capitalization” issue, stating that merely providing money, especially for good and services, is not an important factor. 582 So. 2d 730, 734 (Fla. 2d DCA 1991)(provided and analyzed in Respondent’s initial Memorandum of Law, p. 9-10). However, providing a substantial share of capitalization of the corporation is important. In that case, the Public Hospital Board had provided a favorable lease, hundreds of thousands of dollars in grants, and a three-million dollar non-collateralized loan. Also in *Sarasota Herald*, if the corporation dissolved, its assets would transfer to the Hospital Board. The Board had a substantial financial interest in the corporation.

Should the EDC dissolve, none of the assets, including the funds of the EDC, would revert back to the County. (T.143, ln.9-17). Further, if the County did not fund the EDC, Weatherman testified that the EDC would still exist. (T.143, ln.6-8).

Factor Two: Commingling of Funds

The funds received from the County Service Contract are “comingled” only because the funds received from the County Service Contract are no different than the funds received from other contracts (including investors). This issue is explained in *Schwab*, a Florida Supreme Court case from 1992. The case from which the comingling issue came is the *Schwartzman* fire department case, an earlier, 1977 case. *Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230 (Fla. 4th DCA 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978). Of distinction, the *Schwartzman* case dealt with “an essential government function”.

Similarly, in the *Mem'l Hospital-West Volusia, Inc. v. News-Journal Corporation*, 927 So. 2d 961, 967 (Fla. 5th DCA 2006), it was not the single account that was the issue, but the character of the funding that was an issue. Since the hospital was sold, instead of being leased to the Hospital corporation, the Authority was no longer reimbursing the Hospital for operation and maintenance, but was merely paying the Hospital for the provisions of indigent care service.

As to the comingling of funds into one bank account, Weatherman stated that both public and private funds are in one account, but they are allocated separately. (T.124, ln.11-16). Although all funds are in one account, the activities of the EDC are allocated in part to the monies from County funding so that the quarterly financials outline the funds that have been used as pertaining to County money only. (T.124,ln. 17-24).

Factor three: whether the activity was conducted on public property

The activities of the EDC taken on behalf of BlueWare were conducted at the EDC offices in Rockledge, property that is owned by a private company, CIA Developers. (T.142, ln.10-18). The EDC's offices are not located on public property. In the lease between EDC and CIA Developers, there is a provision that allows the EDC to terminate the lease if County

funding is diminished. Per Weatherman, that lease provision was included because the EDC is a “very good negotiator.” (T. 142, ln.22-14). The lease has absolutely no relevance to whether the activity was conducted on public property as County is not a party to the lease. (T.142-143, ln.25-2).

Factor four: whether the services contracted for are an integral part of the County's chosen decision-making process

The County Service Contract identifies the tasks to be provided by the EDC. However, it is questionable as to whether those tasks were completed by EDC, on behalf of the County, in relation to BlueWare or Project Fates. The only task accomplished by the EDC that can be identified under the County Service Contract is the supplying of information to BlueWare. In addition, the EDC assisted BlueWare with completing its applications to Enterprise Florida (*Respondent's Exhibit #3*) and provided the County with information regarding Project Fates and Fates' need for matching funds from the County (*Respondent's Exhibit #4*). There was no testimony as to whether these activities were “integral” to the County's decision to award incentives to Blueware.

Weiner explained the EDC's role as understanding the “eligibility of the state's toolbox, the economic development toolbox, and the local toolbox” and explaining those eligibilities to companies. (T.191, ln. 18-22). Additionally, the EDC assessed the competitive nature of the project and finds out what competitors are offering to the company intending to relocate. (T.191-192, ln. 23-2). In BlueWare's case, the EDC was shown documents regarding the offer from the State of Michigan, which Weiner relayed to the State of Florida. (T.192, ln. 1-5).

Even if the act of the EDC requesting support of the County for incentives for BlueWare (*Respondent's Exhibit #4*) could somehow be interpreted as the “performance of a governmental function”, the case law does not support this illogical conclusion. In *McDougall v. Culver*, 3 So.

3d 391 (Fla. 2d DCA 2009), the Court examined whether a memorandum prepared by Internal Affairs Officials (Officials) that were investigating deputies of the Lee County Sheriff's Office violated the Florida Sunshine Law, Sec. 286.011, Fla. Stat. (1999). The Officials made findings and recommendations concerning the deputies and incorporated those findings and recommendations into written memoranda. *Id. at 392*. The memoranda were given to the Deputies commanding officers, who then forwarded the memoranda to senior officials in the Sheriff's office for their review and comments. *Id.* The memoranda were then given to the Sheriff and the Sheriff made the final decision regarding the appropriate disciplinary proceedings. *Id.* Because the senior officials provided only a recommendation to the Sheriff, and did not deliberate with him or have any decision making authority, the use of the memorandum did not violate the Sunshine law. *Id. at 393*.

By analogy, the EDC only assisted with the applications to Enterprise Florida. The EDC did provide a request for support to the County, but the EDC did not deliberate nor have any decision making authority. Therefore, the EDC should not be subject to the Public Records Act for its involvement with Blueware.

Factor five: whether the EDC is performing a governmental function or a function which the public agency otherwise would perform

The government function regarding BlueWare was the awarding of incentives; the EDC did not do that. According to Weiner, the EDC did not disburse incentives to BlueWare nor did it have the authority to approve any incentives. (T.190, ln. 14-17; T.191, ln. 14-17). The County Representative Whitten agreed that the EDC did not have authority to approve incentive packages on behalf of the County, but acknowledged that the EDC usually did brief the County Manager on all proposed incentive packages. (T.356,ln.15-21).

As to the County's approval of incentives for BlueWare, Whitten stated that the Board of County Commissioners did approve incentives, but that none were actually received.

(T.361,ln.16-19). Whitten concluded under direct exam with the admission that the County did not consider what the EDC does under its Service Contract a government obligation by law.

(T.363,ln.3-6). Under cross-examination, Whitten stated that it was not the position of the County that the EDC is an arm of the County. (T.368,ln.15-17).

However, there are certain tasks under the Service Contract for which the EDC would be acting on behalf of the County. Whitten stated that the contract called for the EDC to participate in the review of industrial revenue bonds, but that he could not remember the EDC participating in those bonds during his 20 year tenure with the County. (T.354-355,ln.23-5). Weatherman agreed and explained that the EDC does work with the County in regards to industrial revenue bonds, by means of calling a TEFRA hearing, but has not done so in the past five years. That is actually an item in the County Service Contract. (T.215, ln.12-25). EDC also has an Ad Valorem Tax Abatement Committee that is subject to Florida's Sunshine Laws. (T.216, ln.3-24). The records related to the Ad Valorem Tax Abatement Committee are all believed by the EDC to be public records. (T.217, ln.4-10). Neither industrial revenue bonds nor tax abatements were incentives awarded to BlueWare by the County.

Factor six: the extent of the County's involvement with, regulation of, or control over the private entity

The County does not regulate or control the activities or judgment of EDC. The EDC is controlled by its Officers, Executive Board and Board of Directors. The EDC acted as a provider of information to BlueWare and assisted with its application to Enterprise Florida and the County. The County did not tell EDC how to assist BlueWare.

Also important is the fact that the County is not involved in the business activities of the EDC. The County has no control of any activities that may be considered business activities, including but not limited to, personnel and compensation issues, hours of operation, method of operation, expenditure of funds, how it handles companies either outside or within the County. As Weatherman summarized, the County does not tell the EDC how to “close the deal with the clients.” (T.108,ln.6-8).

Weatherman testified that the County also does not tell the EDC how to perform a task identified in the County Service Contract and that the EDC has sole discretion in the performance of those tasks. (T.222, ln.11-16). The EDC has no authority to provide incentive packages. (T.222, ln.17-19). The County has no involvement in the EDC operations. (T.222, ln.20-22). Weatherman is responsible for hiring the staff, the staff reports to her or the Senior Directors, but none of her staff reports to the County Commission or to any County Agency. (T.223, ln.1-22). Finally, the EDC is not regulated by any State statute or local ordinance regarding economic development activities. (T.224, ln.3-6).

When asked if the County measured the work performance of the EDC, Weatherman responded, “No. I have a Board of Directors that I provide our statistical and tactical plan to, and they are the ones that oversee.” (T.109,ln.2-6). Weatherman advised that the EDC did provide quarterly activity and financial reports to the County, pursuant to the County Service Contract. (T.109-110, ln.20-6). Additionally, the EDC does provide its annual financial audit to the County. (T.110, ln.7-9). Regarding the County’s measurement of the EDC’s work performance, Weatherman explained that while the County evaluates the EDC’s goals and priorities, the goals and priorities are actually determined by the EDC’s Board of Directors, the Executive Board and the Officers. (T.110, ln.17-24). When questioned regarding the reporting requirements under

the County Service Contract as related to paragraph 5(b), Weatherman explained that the EDC's interpretation of that provision of the contract was that the EDC was to provide its audit to the County. (T.116, ln.12-17).

Furthermore, the EDC does not have any authority to enter into contracts on behalf of the County, the County does not have authority to enter into contract that bind the EDC, and the EDC is an independent contractor of the County, per the Service Contract. (T. 357, ln.4-12). Whitten also acknowledged that the EDC employees are not employees of the County, that the County does not have any direct control over the employees of the EDC, that the EDC does not have their offices on County owned property. (T.355,ln.6-13).

There is one area of "involvement" between the EDC and Brevard County, unrelated to the Service Contract: the EDC's participation in the County's Self-Insured Group Health Plan. No one at trial could explain why the EDC, clearly a private 501(c)(3) company, was permitted to be in the Health Plan. Whitten, the County Representative, when asked about the EDC's participation in the County Group Health Self Insured Plan, stated that he did not know why the EDC was part of the plan. (T.359,ln.23-25). Whitten testified that while the County did contribute to the cost of health care for County employees, it did not contribute to the cost of the health care for the employees of the EDC. (T.360,ln.5-10). Weatherman and McCarthy both testified that the County does not pay any money for the EDC employees participation. (T.143, ln.3-5; T.284-285, ln.24-1). The EDC has stayed in the Self-Insured Plan because it is a less expensive plan. (T.285, ln.5-8).

Regardless, the mere fact that the EDC's participates in the Health Plan does not makes the EDC subject to Chapter 119. Sec. 112.08(2)(a), Fla. Stat., merely authorizes the County to enter into contracts of insurance and to pay for insurance for its employees. The statute also

requires that the Health Plan be approved by the Office of Insurance Regulation. Sec. 112.08(2)(b), Fla. Stat. This cited statute does not prohibit the County from entering into contracts with the EDC pursuant to Sec. 125.01, Fla. Stat., or to otherwise act in exercise of home rule power. *See Palm Beach County v. Hudspeth*, 540 So. 2d 147, 152 (Fla. 4th DCA 1989). Moreover, former Sec. 408.001, Fla. Stat. (1991) allowed that “service providers under contract with governmental entities” could voluntarily become members of the Florida Health Care Purchasing Cooperative formed by the State of Florida. Finally, the County has determined that the EDC is permitted in the self-insured plan.

As to control, the sheer number of members on the Board of Directors (123 members), and Executive Board (34 members), makes it impossible for the County to control the EDC. Recognizing that the County has a seat on the Executive Board, and the right to appoint six members to the Board of Directors, it could never achieve a quorum. Because a quorum of the Board of Directors is 25% of the Board of Directors, and 30% for the Executive Committee, there is no way the County Commission or its appointees can direct any activities of the EDC.

One overriding theme in the two-day hearing was that confidentiality is paramount to companies looking to relocate or expand. Because the County is subject to Chapter 119, the need for a private organization was apparent back in 1989 and today. Therefore, the need for very limited involvement by the County is also apparent. Weatherman was asked why it is important that companies or projects that come to the EDC have confidentiality. (T.210, ln.23-25). In summary, confidentiality is important because companies “don’t want to give any corporate intelligence away”, “they don’t want their competitors to know they are thinking about going for this grant because...that is going to give a lot of proprietary information away”, and “they would rather the employees where they are currently not know because the decision may

never happen for the company to relocate.” (T.210-212). Weatherman also testified that it was important that the EDC be a private organization not subject to the Public Records Act because companies need to know that the EDC will respect its private requirements, because companies are not comfortable with working with government organizations, and that they want to work with private companies that have expertise. (T.212, ln.9-21).

Factor seven: whether the EDC was created by the County

The EDC was formed by private citizens, as shown from the EDC’s Articles of Incorporation dated April 26, 1989. *Petitioner’s Exh. #7*. ELLIS’s contention that the EDC was formed as a “public corporation” cannot be considered as true.³ The law of “public corporation” does not support this. Even a “quasi-public corporation” must provide a service necessary to the general welfare of the public, “essential to the health and well-being of the citizens of the state”. *McClung-Gagne v. Harbour City Volunteer Ambulance Squad*, 721 So. 2d 799, 801 (Fla. 1st DCA 1998).

ELLIS has attempted to show that since the County “approved” the non-profit now known as the EDC, it therefore “created” the EDC. Other than agreeing to provide funds through the Service Contract, the County had no direct role in its formation. This was explained by the witnesses Lawrence Wuensch and William Potter. Not only did they testify as to the transition from the Brevard Economic Development Council to the current EDC, they revealed that the EDC of 1989 is not the EDC of 2013 and 2014. It was also shown that the EDC would have likely have formed regardless of the County’s blessing, unlike the entity in *Community Health Corp.*, 582 So. 2d at 734. Also, the EDC will continue to exist without County funding.

³ According to Black’s Law Dictionary, a “public corporation” is defined as, “an instrumentality of the State, founded and owned in the public interest, supported by public funds and governed by those deriving their authority from the State. Clearly, the EDC does not fit the definition of a public corporation.

Lawrence Wuensch (“Wuensch”), the retired Director of Land Development for the Melbourne International Airport and the first permanent President and Chief Executive Officer of the EDC, testified as to the role and function of the EDC in 1989 through 1992. (T.372-378). Wuensch detailed his experience with Economic Development and acknowledged his designation as a Certified Economic Developer. (T.373-376). Wuensch was hired in July, 1989 by the Board of Directors of the EDC and was directed by the Board of Directors to market Brevard County for new economic endeavors as well trying to strengthen and retain local industry. (T.376,ln.20-T.378,ln.2). Back in July of 1989, the EDC set up a program to work with local companies to find out if they were having problems and to correct them before they made a decision to leave, and they also conducted a great deal of economic development research for companies interested in relocating to Brevard County. (T.378,ln.3-11).

One of Wuensch’s first tasks when he got to Brevard County was to seek funding from the private sector. (T.379,ln.14-17). During cross-examination, Wuensch admitted that back in 1989, the EDC could not have survived without the money it received from Brevard County. (T.394,ln.2-7). Another one Wuensch’s charges from the EDC Board of Directors was to try to get the three Chambers of Commerce in Brevard County to work together instead of working against each other to promote Brevard County. (T.380,ln.9-20). During his tenure as President and CEO of the EDC, there was only one “real economic incentive”, that being industrial revenue bonds, and the EDC was charged with making recommendations to the County Commission. (T.381-382,ln.14-3). He had three staff members that reported to him, that were not County employees, that were not part of the Florida retirement plan, and which did not have any Civil Service Protections. (T.382-383,ln.21-6).

Wuensch would hold weekly meetings with the other Economic Development persons and entities in Brevard County, including the Chambers, the Port, the airport and a representative from the County. (T.383,ln.13-18). The weekly meetings were breakfast meetings at a restaurant in Suntree called Nikki's. (T.384,ln.14-19). Occasionally, the County Economic Development Liaison, Greg Lugar, or the County Manager, Tom Jenkins would come to the breakfast meetings. (T.384-385,ln.22-6). Wuensch would also meet with County Commissioners, and recalled meetings with Commissioner Scarborough regarding the County-owned industrial park. (T.384-385,ln.22-2). During Wuensch's tenure, minutes of the Board of Directors meetings of the EDC were submitted to the County Commission, but the County did not direct the EDC's activities. (T.384,ln.3-8; T.385,ln.18-20).

After leaving the EDC as its CEO in 1992, there were approximately 20 members of the Board of Directors. (T.386,ln.2-11). Then, in approximately 2005, Wuensch served on the EDC Board as a representative from the Melbourne International Airport. (T.386,ln.16-25; T.399,ln.15-17). The Airport had a role on the Board because they contributed a substantial amount of funds and membership came with that contribution. (T.387,ln.5-9). Not was the Airport an investor with the EDC, it had a contract for services with the EDC wherein the EDC would help promote the airport industrial park. (T.387,ln.10-20).

Last to testify was William Potter ("Potter") who was a member of both the Brevard Economic Development Council (the "Council") and the first Chairman of the EDC. Potter became involved with the Council in 1970 and there were only five members on that Council. (T.403,ln.1-15). The Council's role was to advertise the County to industry looking to relocate and to deal with the local industries that were looking for expansion. (T.404,ln.14-18). The

Council had three staff members that were County employees. (T.404-405,ln.19-3). The Council was terminated in 1989. (T.405,ln.14-16).

Potter testified that the Council terminated and the non-profit corporation, the EDC, was formed because a number of local businessmen were dissatisfied with the way the Council was operating. (T.407,ln.18-21). The businessmen felt that a private corporation could be more effective because it would not be encumbered by County procedural regulations and because it could obtain more private funding if it were a private organization into which more private individuals had input. (T.407-408,ln.23-8). As a member of the Council, Potter had to file a Financial Disclosure form; however, as a Director of the EDC, he was not required to file such a Financial Disclosure. (T.408-409,ln.22-2). The decision to change from the County-controlled Council to a private non-profit was made by the existing members of the Council along with representatives of the Chambers of Commerce; the County Commission did not request the Council to evaluate the privatization option. (T.409,ln.9-24).

Potter was asked how the current EDC was different from when he was Chairman of the EDC back in 1989. His response was, "I think the incentives are a lot more significant than they were in those days, tax abatements, the other grants from the State, those kinds of things. The competition is a lot different. You didn't have to give those things in order to be competitive 25 years ago. So I think a lot of the activities now of the EDC are structuring incentive packages." (T.413,ln.9-18).

During cross-exam, Potter was asked numerous questions regarding Petitioner's Exhibits from 1989, including the Agenda Report discussing "reorganization of Brevard Economic Development Council" (*Petitioners Exhibit #18*), the Agenda Report requesting approval of the EDC's Contractual Agreement with the County (*Petitioner's Exhibit #19*), the May 2, 1989

Service Contract between the EDC and the County (*Petitioner's Exhibit #20*), and the May 12, 1989 letter from Deputy Clerk of the County Commissioners to the State of Florida Commission on Ethics requesting advisement on whether the new non-profit organizations members were required to file Financial Disclosures (*Petitioner's Exhibit #17*). Of the initial 15 Board of Directors to the EDC back in 1989, none of those were County Commissioners or County employees. (T.423,ln.12-23). Despite the fact that five of the 15 members of the new non-profit Board were appointed by the County Commissioners, including Potter, Potter testified that he did not believe he had to vote any particular way that a County Commissioner would want him to vote. (T.423-424,ln.19-2.)

Even back in 1989, the County could not control the newly created private EDC by its appointees, and the divergent interests of the County and EDC are sufficiently apparent to show that the County and the EDC were not and are not “interdependent”. In contract, the non-profit formed to further the interests of the Sarasota County Public Health Board was found to be “interdependent.” *Community Health Corp.* In that case, the court state, “the ad hoc committee described the proposed corporation as a “side by side” corporation. Indeed, the two entities are sufficiently aligned that one law firm can ethically represent both.” 582 So. 2d at 734.

Turning to those four Exhibits shown to Potter, the documents that were only located by the Petitioner on January 30, 2014 by searching through boxes in archives, there is nothing to show that the County actually formed the non-profit. Perhaps there was a transfer of functions, but the Brevard Economic Development Council had been seen as “ineffective”. The private organization, now known as the EDC, was required to obtain additional private investors and funding, and to allow the confidentiality needed by companies looking to relocate or expand in Brevard County. The Ad Hoc Committee, “composed of North, Central, and South Brevard

business leaders”, that recommended a private non-profit, was not appointed by the County Commission. (T.425,ln.3-5). Even the March 21, 1989 Agenda Report stated that the EDC would work with the County under a Contractual Agreement. *Petitioner’s Exhibit #18*, p.2.

The final report of the Ad Hoc Steering Committee, dated January 12, 1989, revealed that the private sector in Brevard County had expressed that it would “be very reluctant to contribute to a government organization for fear that the business community would have little or no control over the direction of the group.” *Petitioner’s Exhibit #18*, p.7 of the final report. The final report details the other reasons that a private non-profit entity was deemed necessary, such as confidentiality, the ability to respond quickly to opportunities and better coordination of economic development work. The final report stressed that the EDC would not be incorporated as a membership organization. *Petitioner’s Exhibit #18*, p.10 of the final report. Clearly, the EDC has become a membership organization driven by contributions from the investors.

Comparing the testimony of Weatherman, Weiner and Whitten to that of Wuensch and Potter, there is no question that the EDC of 1989 is substantially different from the EDC of 2013 and 2014. While the gathering of information function may have remained the same, the manner in which the present-day EDC conducts business does not resemble the workings of the EDC in 1989 through 1992.

Factor eight: whether the public agency has a substantial financial interest in the private entity

The County has no financial interest or ownership interests in the assets of the EDC. An example of an “ownership interest” is found in *Community Health Corporation, Inc.* In that case, the Hospital Board gave the new non-profit the business of operating the MRI inside the hospital, as well as other capital and credit. 582 So. 2d at 734.

Nor does the County have any rights to assets of EDC as stated in the Articles of Incorporation and Bylaws. *Petitioner's Exhibit #7; Respondent's Exhibit #1*. The Articles provide that, upon dissolution, assets shall be distributed by the EDC's Board of Directors to a qualified non-profit organization. *See* Art. VI, Articles. The Bylaws have a similar provision in Art. 12.

Factor nine: for who's benefit the EDC is functioning

As explained by Weiner, the EDC functions for the benefit of its Board of Directors and for the companies seeking to locate or expand in Brevard County. Weatherman testified that the ultimate beneficiary of the work of the EDC is the company with whom the EDC provides assistance. (T.138, ln.14-19). The company benefits because they found a place they can do business in a cost effective manner. (T.138, ln.20-22). Additionally, the people that get the jobs benefit, construction activity may increase, impact, and the citizens of Brevard County benefit indirectly. (T.138-139, ln.23-9). Weatherman testified that she believed the reason the County was interested in having an economic development program is to “enhance the wealth of the community.” (T.139, ln.10-17).

When asked who it appeared to the County that the EDC was representing in regards to briefings on incentive package requests, Whitten stated, “I think they are brokering. I don't know that there is an appearance that they are representing the County. I think they are brokering the deal between the County...”. (T.356-357,ln.22-3). Even ELLIS provided his opinion that the EDC acts as a proponent for the company that is seeking incentives. (T.80, ln. 21-22).

In fact, the EDC did not have any authority to enter into a contract on behalf of the County nor did the County have any authority to enter into contracts that bind the EDC.

(T.357,ln.4-9). Whitten admitted that the EDC did not act as a custodian as any public records for the County, and that the County had its own process and system for handling a public records request. (T.357-358,ln.22-7).

To harken back to the argument made in Respondent's initial Memorandum of Law, pp. 11-12, the facts of this case are extremely similar to those in Florida AGO 98-47 involving Hollywood Economic Growth Corporation ("HEGC"). In that advisory opinion reviewing the *Schwab* factors as applied to an EDO, then Attorney General opined that HEGC was not subject to the requirements of the Government in the Sunshine Law.

In AGO 98-47, HEGC existed to "plan, foster, encourage, support and promote economic development and growth" in Hollywood. It solicited and received funds from persons, entities and government agencies and was charged with "collecting and disseminating economic data and research" in cooperation with governments to promote economic development. The management of HEGC's affairs was vested in a Board of Directors comprised of private and public sector directors. HEGC was to make companies aware of the availability of incentive and financial programs for which businesses may be eligible, including economic incentives, grant programs, loan programs and bond financing. HEGC provided services to the applicants for these programs. The City of Hollywood retained the sole discretion to determine whether an applicant would be awarded or accepted into these programs. These facts mirror the manner of operation of the EDC. Like HEGC, the EDC for its actions with BlueWare, should not be held to be a public agency.

To summarize the evidence before the court related to the Schwab factors: (1) the EDC received 49% of its funding from the County in 2012 and 35% in 2013; (2) the EDC only "comingles funds" because all funds it receives are in the nature of a payment for services and

the EDC treats income from all its contracts as other businesses treat contract income; (3) no activity of the EDC undertaken on behalf of BlueWare was conducted on County property; (4) the County Service Contract does not require the EDC to conduct any activities that were integral to the County's decision to award incentives to BlueWare; (5) the EDC was not performing a government function when it assisted BlueWare by providing economic data and incentive information and assisted with BlueWare's completion of applications to Enterprise Florida; (6) the County has no involvement with, regulation of or control over the EDC, other than its small number of appointees to the EDC's Executive Board and Board of Directors and certainly had none of these things relative to the EDC's BlueWare activities; (7) the EDC was not created by the County but by private citizens that were dissatisfied with the functioning of the County Economic Development Council; (8) the County does not have a current, substantial financial interest in the EDC and it has no entitlement to repayment of funds or any EDC assets should the EDC dissolve; and (9) the EDC benefits the companies that are looking to relocate or expand. Even the evidence before that Court that could sway one or two of these factors in favor of Petitioner's position is not sufficient to tilt the balance of the factors in favor of a ruling that the EDC is an agency subject to Chapter 119.

Public Records Issues

If the Court determines that the EDC was acting as a "public agency", only records related to Blueware and EDC's obligations under the County Service Contract should be deemed to be "public records". The County incentives were not Industrial Revenue Bonds or an Ad Valorem Tax Abatement, both of which the EDC admits are programs subject to government in the Sunshine and Chapter 119.

Most all documents related to the EDC's assistance of Blueware were provided to ELLIS with permission of Blueware. Still, these documents were not created or maintained because of an "agency obligation". Nor were the documents created or maintained "in connection with transaction of official business" of government.

The Petitioner has introduced a new statute, Sec. 119.0701, Fla. Stat. (2013) (effective July 1, 2013), to argue that this law should be considered part of the service contract between the EDC and Brevard County. Clearly, the provisions of 119.0701 were not included in the contract that is Petitioner's Exhibit 8. Sec. 119.0701 should not be considered part of the contract, because only laws that were in existence at the time of making of a contract form a part of the contract as if it were expressly referred to in its terms. *National Merchandising Co., Inc. v. USAA*, 400 So.2d 526, 531 (Fla. 1st DCA 1981).

Three types of documents were withheld. First, Blueware requested that financial documents and client/prospect lists be withheld. These would also be exempt under Sec. 288.075(4). Second, one email was withheld that contained attorney-client information. Third, internal communications of the EDC related to press releases, news letters, and internal staff reports and agenda reports were withheld, as these documents were determined by McCarthy to be unrelated to the County Service Contract or any services that the EDC provided to BlueWare. (T.298, ln. 11; T.308-309, ln.6-17).

Prior to February 1, 2014, all documents related to expansion or relocation of Blueware were exempt from disclosure under Sec. 288.075(2). This exemption provides a global protection to all documents related to Blueware, and said documents are not subject to redaction. That exemption has now expired, but all documents, except those stated above, have been provided.

The EDC asserts that it is a private organization that can do what it wants with its files, that there is “no inherent protection” for clients.” (T.96, ln.5-9). The use of Sec. 288.075(2), Fla. Stat. “gives the client the surety that we (the EDC) will not release these files and that they are protected under statute from the public and from the EDC also.” (T. 96, ln.9-12). The EDC accepted a confidentiality request from BlueWare, Inc. pursuant to Sec. 288.075(2), Fla. Stat. *Petitioner’s Exhibit #5*. That request, and the later extension request (*Petitioner’s Exhibit #6*) allowed by that statute, are for the protection of BlueWare and any other company that deems it necessary to ask for confidentiality. (T.92, ln.16-17; T.96, ln.22-25).

The Court has been provided with a sealed envelope containing documents which the EDC believes are confidential and exempt from disclosure. If the court determines that the EDC was an agency subject to the public records law for the purposes of its actions with BlueWare, it may wish to review the documents *in camera*. Because the EDC has maintained that none of its records were subject to disclosure, or alternatively, were exempt from disclosure under Sec. 288.075 Fla. Stat., the EDC has not provided any specific exemption basis other than citation to Sec. 288.075. Because the two year exemption has run under Sec. 288.075(2), the Court may require the EDC to state in writing and with particularity the reasons that the sealed documents should remain exempt. *See Weeks v. Golden*, 674 So.2d 633, 634-35(Fla. 1st DCA 2000).

If ELLIS seeks, and the Court requires, additional documents to be produced by the EDC, the Court may also require written reasons for exemptions. During the hearing, ELLIS presented a spreadsheet of emails that were provided that did not include the attachments. *Petitioner’s Exhibit #15*. If the Court finds that the EDC was an agency subject to the public records act, the EDC will need to review those attachments and advise whether it believes those attachments are also subject to Sec. 288.075(4) exemptions or any other exemptions under Chapter 119.

Further, the Court may need to review not only the list of documents not produced, as testified to by McCarthy, the Court should conduct an *in camera* inspection of all of those various internal documents. *See Fritz v. N Norflor Construction Company*, 386 So. 2d 899 (Fla. 5th DCA 1980).

BlueWare's Requests for Confidentiality

Confidentiality to businesses seeking to locate, relocate or expand is extremely important. *See Att'y Gen Op. 2004-19*. It is a protection to the company, not an exemption demanded or thought to be necessary by the EDC. Furthermore, should a court, at any time, require the EDC to produce documents found to be "public records", BlueWare would still be entitled to rely upon Sec. 288.075(4), Fla. Stat. as well as any other applicable exemptions from Chapter 119.

ELLIS has attempted to claim that the extension of the request for confidentiality was not made upon a proper finding by the EDC. Weiner testified that he was the person that made the finding on behalf of the EDC that BlueWare was still actively considering locating, relocating, expanding its business activities back in January, 2013.⁴ (T.171, ln.3-8). Weiner did not make a written finding to that effect. (T.171, ln.9-11). Weiner explained how he made that finding regarding BlueWare's continued consideration of locating, relocating or expanding, based upon a discussion of Weiner's extensive experience in "running projects". (T.171, ln.13-25). Because the EDC's "end goal" is the creation of employment, the project is not actually complete until that occurs. (T.172, ln.6-9). Until employment is created, Weiner believes that the EDC has an obligation to keep the project moving, but in BlueWare's case, in January 2013, "there were reasons to believe that the project was in jeopardy." (T.172, ln.9-12).

Weiner, putting himself in the position of BlueWare, believed that BlueWare was being "harassed" because of all the negative press it was receiving. (T.172-173, ln.16-2). Because of

⁴ Of note, Weiner testified that he did not believe, at the time he agreed to extend confidentiality, that the EDC was subject to the Public Records Act. (T.189-190, ln.20-7).

the harassment, and the significant problems BlueWare had in finding a building, Weiner was concerned that BlueWare would pack up and go back to Michigan, and the project was “genuinely in jeopardy.” (T.173-174). In Weiner’s professional judgment, it did not appear to him that BlueWare had completed the transition of the move from Michigan to Florida and that relocation was not complete. (T.174-175, ln.19-3). Because employees had not come from Michigan, BlueWare had not purchased a building, the relocation project was not complete and continued to be a relocation project. (T.175, ln.1-9). The fact that BlueWare may or may not have been a dissolved corporation had no bearing on whether or not the company would be able to obtain incentives in Florida, as there is no requirement that the company be a Florida corporation. (T.179, ln.14-18).

As a matter of public policy, the EDC not set up like a government, has no protocol for maintaining or providing public records. The County has not designated it as a custodian of public records. (T.257, ln.22-25). If the Court finds the EDC subject to the public records act for every lead or project (over 800 in 3 years), the EDC employee could have a full time job responding to public records requests.

Attorneys Fees and Costs

ELLIS has demanded attorney’s fees pursuant to Sec. 119.12, Fla. Stat. However, the EDC did not “unlawfully” refuse to permit a public record to be inspected or copied. First, the EDC adamantly asserts that it is not subject to Chapter 119, Fla. Stat., so attorneys fees are not an appropriate assessment. If the court disagrees, then the EDC’s position is that it properly replied to the records request of January 17, 2013, *Petitioner’s Exhibit #1*, and to the public records request letter dated February 1, 2013, *Petitioner’s Exhibit #2*. Further, the exemption

under Sec. 288.075(2), Fla. Stat., only expired February 1, 2014, long after the Petitioner instituted this action.

However, if the Court determines that the EDC did not properly reply or that no exemption applied, then, based upon the testimony at trial, it is clear that the EDC's refusal to produce the BLUEWARE documents and information was based upon a "reasonable or good faith belief in the soundness of its position in refusing production." *See The New York Times Co. v. P.H.H. Mental Health Services, Inc.*, 616 So. 2d 27, 28 (Fla. 1993). That court stated that, because "statutory vagueness and lack of judicial guidance", PHH's uncertainty as to its status as an agency within the meaning of Chapter 119 was both reasonable and understandable. *Id.* at 30. Like the EDC, PHH was a private entity. *Id.* at 28. Unlike the EDC, PHH was created in response to a Florida statute which required that mental health care be coordinated by a separate agency from that providing mental health care services, that its purpose was to further mental health care in several counties, that it used public property and that it coordinated its actions with those of Tri-County Mental Health, Inc., a public agency. *Id.* at 29.

A second case, *B&S Utilities, Inc. v. Baskervill-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008), relying on *P.H.H. Mental Health Services, Inc.*, similarly held that private engineering company under contract with the City of Apalachicola was not required to pay attorneys fees in a public records action. The engineering company, Baskervill-Donovan, Inc. ("BDI") genuinely believed it was exempt from producing records. In *B&S Utilities, Inc.*, even the trial judge "confess[ed] . . . to a bit of frustration in attempting to apply the case law that has developed in this area." 988 So. 2d at 23. Because the engineering company, Baskervill-Donovan, Inc., acted in good faith in failing to produce the records sought by B&S, it was appropriate for the court to refuse to award attorney's fees. *Id.* at 23. In the instant case, the

EDC genuinely believed it was exempt from producing records to ELLIS for the EDC's actions involving BlueWare. Should the Court determine that the EDC is subject to Chapter 119 under the *Schwab* factors, an award of attorneys fees to ELLIS is not appropriate under the facts of this case.

Respondent's Requested Findings

Based upon the law and the testimony and evidence before the Court, the EDC requests the Court to make the following findings:

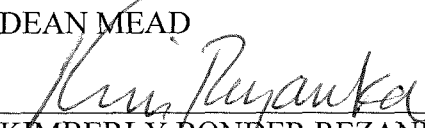
1. That the County did not delegate any government obligation for economic development activities to the EDC because there is no such governmental obligation.
2. That the EDC is not an agency under Sec. 119.011(2), Fla. Stat., under the *Schwab* totality of the factors test and that the EDC does not hold any "public records" related to BlueWare, as defined by Sec. 119.011(1), Fla. Stat.
3. That the EDC properly responded to the public records requests of January 17, 2013, February 1, 2013 and August 27, 2013.
4. That if the Court finds that the EDC was acting as an agency subject to Chapter 119, then the EDC is an economic development agency as defined in Sec. 288.075(1), Fla. Stat.
5. If the EDC is an economic development agency, then it acted properly in withholding all documents related to "plan, intentions, and interests" as defined in Sec. 288.075(2) and "proprietary confidential business information" as defined in Sec. 288.075(4).
6. Further, that BlueWare's Request for Confidentiality and the extension request were properly granted by the EDC, such extension ending on February 1, 2014.

7. That the EDC has provided all documents relative to the incentive programs sought and awarded by any government agency, except for the documents submitted under seal to the Court on January 29, 2014.

8. Because the EDC acted properly, reasonably and in good faith in response to the Petitioner's records requests, ELLIS is not entitled to an award of attorney's fees, nor is it the prevailing party for purposes of awarding court costs.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-service to: Kevin C. McBride, Esq. Staff Counsel to the Clerk, P.O. Box 999, Titusville, Florida 32781-0999, kevin.mcbride@brevardclerk.us and legal.assistant@brevardclerk.us; Curt Jacobus, Esq., Gray, Robinson, P.A., P.O. Box 1870, Melbourne, Florida 32901 curt.jacobus@gray-robinson.com and kelly.farris@gray-robinson.com on February 24, 2014.

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