	IN THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA
ECONOMIC DEVELOPMENT COMMISSION OF FLORIDA'S SPACE COAST, a Florida non-profit corporation, Appellant/Cross-Appellee, v. SCOTT ELLIS, in his official capacity as Brevard County Clerk of the Circuit Court, Appellee/Cross-Appellant.	CASE NO.: 5D14-1356 L.T.: 05-2013-CA-069095-XXXX-XX

On Appeal from a Final Judgment in the Eighteenth Judicial Circuit, in and for Brevard County, Florida

ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL OF SCOTT ELLIS, IN HIS OFFICIAL CAPACITY AS BREVARD COUNTY CLERK OF THE CIRCUIT COURT

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PRELIMINARY STATEMENT

In this Answer Brief and Initial Brief on the Cross-Appeal, Appellee/Cross-Appellant, Scott Ellis, in his official capacity as Brevard County Clerk of the Circuit Court, shall be referred to as the "Clerk." Appellant/Cross-Appellee, Economic Development Commission of Florida's Space Coast, Inc., shall be referred to as the "EDC." The Clerk shall collectively refer to Brevard County, Florida and the Brevard County Board of County Commissioners as the "County."

Citations to the trial transcript will be designated by "Tr." followed by the appropriate page numbers. Citations to the Clerk's trial exhibits will be designated as "Clerk Ex.," and citations to the EDC's trial exhibits will be designated by "EDC Ex.," followed by the exhibit numbers and, as appropriate, the page numbers thereof. All other record citations will be designated by "R." followed by the appropriate page numbers.

INTRODUCTION

This appeal arises from a Final Judgment entered by the Brevard County Circuit Court finding the EDC subject to Chapter 119 of the Florida Statutes (the "Public Records Act"), as the County delegated economic development functions to the EDC in place of the County's former public economic development agency. The cross-appeal arises from the trial court's denial of the Clerk's request for attorney's fees.

STATEMENT OF THE CASE AND FACTS

On August 29, 2013, the Clerk filed his initial Petition for Access to Public Records requesting the Circuit Court require the EDC to produce its records reference BlueWare, a company with which the former Clerk of Court had done business, pursuant to the Public Records Act.[1] R. 294. The same day, the EDC filed its own declaratory judgment action in the County Court seeking a determination as to what portions of the EDC's BlueWare file were temporarily-exempt from public records pursuant to section 288.075 of the Florida Statutes. R. 316-27.

After learning of the Clerk's filing, the EDC moved to dismiss the Clerk's action or, alternatively, to consolidate his action into the EDC's for jurisdictional purposes. R. 312-44, 345-47. The EDC did not assert any argument regarding the

[1] The Clerk sought the records because he was engaged in litigation with BlueWare affiliates.

purported inapplicability of the Public Records Act. Conversely, the EDC's defense lay squarely on its argument that its records were temporarily exempt from disclosure under section 288.075. *Id.* Before the trial court's first hearing in the Clerk's action, the Clerk amended his petition, seeking a writ of mandamus to force the EDC's compliance with the Public Records Act. R. 340. The only question before the trial court was what portions of the EDC's files, if any, were exempt under section 288.075, and which were available for release. To resolve the question, the Clerk set a hearing on his amended petition for November 1, 2013. R. 585-87, 588-89.

Prior to the November 1 hearing, the Clerk filed a Memorandum of Law providing a detailed analysis of the exemptions provided in section 288.075, and their applicability to the EDC's files. R. 377-98. The Clerk outlined the inconsistencies between the EDC's defense and its refusal to provide *any* documents (even redacted) responsive to the Clerk's records requests in the eight months leading up to litigation. *Id.* After reviewing the Clerk's Memorandum of Law, the EDC altered its defense, adopting the brand new position that the Public Records Act was altogether inapplicable. Tr. 9; R. 471-472.

This new defense was a complete change in course since the EDC had, for nearly a year, held its records *were* subject to statutory exemptions from the Public Records Act. Consequently, the Clerk's Amended Petition for Mandamus became

moot as the question presented the trial court had changed from which records were exempt to whether the EDC was even subject to the Public Records Act. As a result, the trial court granted the EDC's Motion to Dismiss, but denied its Motion to Consolidate, finding the trial court had jurisdiction to hear the case in Circuit Court.[2] R. 588-89. The Clerk was required to and did file a Second Amended Petition within five days. *Id.* Additionally, both parties were instructed to submit briefs on the issue of "whether the EDC is subject to Ch. 119" and to exchange the same simultaneously. *Id.*

On November 22, the Clerk and the EDC simultaneously exchanged briefs. The Clerk's brief detailed the two accepted tests in Florida law under which private entities may be found to be subject to the Public Records Act: the delegation test and the factors test. R. 465-566. After the exchange of briefs, the trial court held a two-day evidentiary hearing on January 29 and 31, 2014. R. 597-98. The following facts were adduced at hearing:

A. THE PUBLIC RECORDS REQUESTS AND NON-DISCLOSURE BY THE EDC.

On January 10, 2013, the Clerk made what would become the first of many public records requests to the EDC, asking for a copy of the EDC's file on BlueWare. Tr. 47. The initial encounter resulted in disclosure of nothing to the Clerk. Tr. 47. A January 17 e-mail from Clerk internal auditor Bart Carmichael

[2] Shortly thereafter, the EDC voluntarily dismissed its action in County Court.

acknowledged the January 10 request and informed Trudy McCarthy, the EDC's Senior Director of Operations, that Mr. Carmichael was "formally requesting all documents and other information . . . related to . . . Blue Ware [sic]." Clerk Ex. 1. Upon receipt of the e-mail, Ms. McCarthy forwarded the request to the EDC's legal counsel, Mason Blake, Esq. Tr. 286.

In response to Mr. Carmichael's e-mail, the EDC's President and CEO, Lynda Weatherman, sent the Clerk a letter attaching an opinion from Mr. Blake. Clerk Ex. 3. In his memo, Mr. Blake opined the EDC's records were "confidential and exempt from the disclosure requirements of chapter 119" because BlueWare had requested (and the EDC granted) a request for confidentiality under section 288.075(2)(a) of the Florida Statutes, for a period of one year.[3] Clerk Ex. 3 at 2.

On February 1, the Clerk personally visited the EDC to make another request for its BlueWare file. Tr. 48. The EDC again refused to furnish copies of the BlueWare file, citing an extension of the twelve-month confidentiality period provided for in section 288.075(2)(a)(2). Tr. 49. The Clerk was provided copies of BlueWare's initial request for confidentiality, and a request for an extension of the initial period for an additional year under section 288.075(2)(a)2. *Id.*; Tr. 66-

[3] Section 288.075 provides for a one-year period of confidentiality of records and an exemption from the Public Records Act if a company locating, relocating, or expanding its operations requests the same from an economic development agency.

71; Clerk Ex. 6. At no point did the EDC suggest it was not subject to the Public Records Act. Tr. 51.

On February 25, Ms. Weatherman informed the Clerk that the Florida Department of Law Enforcement ("FDLE") had begun an investigation into BlueWare and was seeking the EDC's records relating to the company. Clerk Ex. 4. She proffered "information provided to FDLE may become public record post-investigation providing you the opportunity to review at that time." *Id.*; Tr. 89. On August 20, Ms. Weatherman contacted County Attorney Scott Knox to request "a Board of County Commission/EDC joint letter be sent to the State Attorney's office requesting legal clarity" regarding the EDC's records. Clerk Ex. 13 at 2. The EDC continued to claim the entirety of its "client files [were] subject to Florida [S]tatute 288.075...." *Id.*

On August 15, BlueWare's CEO, the former Clerk of the Circuit Court, and their liaison were arrested by the FDLE on a series of felony charges stemming from official misconduct, bid tampering, bribery and conspiracy. Tr. 83-84; R. 911. Soon thereafter, the Clerk learned from the *Brevard Times* that the Florida Department of Economic Opportunity had "terminated all possibility of BlueWare getting money from the state" for economic development incentives. Tr. 84. As a result, on August 27, the Clerk sent Keith McBride, an internal auditor, to the EDC

to make requests for records reference BlueWare.[4] Tr. 23. The EDC refused to comply with the request, or to provide a written explanation for the denial. Tr. 25. As such, this action arose two days later. R. 294-311.

B. THE HISTORY OF THE COUNTY'S ECONOMIC DEVELOPMENT AND THE CREATION OF THE EDC.

Before 1989, and at least as far back as 1967, the County maintained its own public economic development agency: the Brevard Economic Development Council (the "Council"). Former Council chairman, William Potter, Esquire, testified concerning the Council's role as an economic development agency at the trial court's two-day hearing. Tr. 403-05. Mr. Potter described the Council's role in "advertis[ing] the county, to appeal to industry that was looking to relocate, and also to deal with the local industries that had issues or were looking for expansion possibilities." Tr. 404.

In 1989, a group of businessmen formed an *ad hoc* committee that developed a five-point plan in favor of privatizing the Council.[5] Clerk Ex. 10 at 37. Mr. Potter testified that the County approved the plan and, as a result, the Council "was in effect privatized." Tr. 405, 416; Clerk Ex. 10 at 38. The County approved the conversion of the Council to a private entity. *Id.*; Clerk Exs. 17, 18. The Council "shut down and the county actually took the remainder of [the

[4] The record reflects that two separate requests were made on August 27, 2013. Tr. 23.

[5] Mr. Potter served as a member of the *ad hoc* committee. Tr. 416.

Council's] budget for 1989" and appropriated the same to the new private entity. Tr. 417; Clerk Ex. 19 at 1; Clerk Ex. 20 at 3. Mr. Potter testified that the "new . . . non-profit corporation was formed and the functions previously conducted by the [Council] were assumed by that new private organization." Tr. 405 (emphasis added). The new private organization was initially known as the Brevard Economic Development Corporation and, after one or more name changes, became known as the Economic Development Commission of Florida's Space Coast (more commonly the "EDC").[6] Tr. 414; Clerk Exs. 7, 19.

Mr. Potter testified the EDC's initial agreement for services with the County and its articles of incorporation were drafted by himself and fellow attorney Hank Evans, Esquire. Tr. 406. Both gentlemen were members of the Council prior to its privatization and served as founding members of the private EDC. Tr. 407. The agreement contained a provision for the EDC to serve as "the county's chief marketing and recruitment agency for economic development . . . ." Tr. 420; Clerk Ex. 19 at 2. With the obligations and budget of the Council also came the equipment, furniture and office items that had previously belonged to the Council. Tr. 422. Even the Council's staff went to work for the private EDC after the privatization. *Id.*

[6] The Clerk will collectively refer to the Brevard Economic Development Corporation and the current EDC as the "EDC."

The EDC's former president and CEO, Lawrence Wuensch, also testified about his time at the EDC. He also testified, same as Mr. Potter, that the present-day EDC is the same organization as was established in 1989. Tr. 392-93, 414. Mr. Wuensch's role was to "market Brevard County for new economic endeavors from outside of Brevard as well as trying to strengthen and retain local industry . . . . Tr. 377-78. This was accomplished for the general welfare of the community and ultimately the betterment of the public. Tr. 395-96. He detailed the types of economic development agencies found across the country, those being a mix of public, private, and public-private partnerships. Tr. 378. The EDC's relationship with the County is a public-private partnership model. *Id.*; Tr. 396-97. Mr. Wuensch "took the role of the public-private partnership nature of the [EDC] very seriously and tried to keep the county informed . . . as to [its] activities." Tr. 383. While the EDC attempted to reach an operational budget that was 50 percent (50%) public and 50 percent (50%) private, it "never [was] able to approach that" level. Tr. 379. Without the County's money, Mr. Wuensch doubted the EDC could have fulfilled its function. Tr. 393-94.

C. THE EDC AND ITS ROLE AS THE COUNTY'S ECONOMIC DEVELOPMENT AGENCY.

On August 21, 2012, the EDC and the County entered into the agreement that was in place at the time of the instant action and during the entirety of the

Clerk's requests for records (the "Agreement").[7] Clerk Ex. 8. The County entered into the Agreement because of its "need for a professional, county-wide economic development program that fosters full participation by the private section." *Id.* at 2. The EDC was selected to "serv[e] as the County's primary marketing and recruitment agency for economic development" pursuant to the terms in the Agreement. *Id.* The 2012 Agreement is virtually identical to the original agreement the EDC entered into with the County in 1989. *Cf.* Clerk Exs. 8 and 19.

The Agreement requires the EDC, *inter alia*, to (1) use "means and materials" to "publicize and make known" information about the County that "would reasonably result in encouraging industry to locate" to the County; (2) "[s]erve as a clearinghouse for resources and programs to improve the industrial opportunities in [the County]"; (3) "plan and develop" services that would "directly assist County industry, and encourage industry outside of the County to use business facilities within the County"; (4) "[c]oordinate and cooperate" with the County and regional planning agencies regarding preparing plans and programs for economic development of the County; (5) review applications and make recommendations regarding the County's *ad valorem* tax abatement program; (6) review and make recommendations regarding the County's industrial revenue bonds; and (7) assist local chambers of commerce and economic development

[7] The Agreement expired on September 30, 2014.

councils in their efforts to expand the business and industrial base of Brevard County. Clerk Ex. 8 at 3-4. Most significantly, the Agreement requires that all of these tasks are to be conducted "on behalf of the County." *Id.* at 3. (emphasis added). Ms. Weatherman testified that "[t]hese tasks are fundamental operations for an economic development organization defined like [the EDC]." Tr. 107.

The County pays the EDC $1,400,050 annually to accomplish its contractual mandates. Clerk Ex. 8 at 4-5. This allocation amounts to nearly half of all the EDC's operational budget.[8,9] R. 688. The EDC comingles County funding and money from other public sources with private funding; funds are not separated to ensure expenditures for private projects do not utilize public funding. R. 94.

The EDC provides quarterly financial statements and activity reports to the County to enable the County to measure the EDC's performance. Clerk Ex. 8 at 5. The EDC also submits an annual report to the County with its audited financials. *Id.* Importantly to this appeal, the Agreement requires that the EDC's "records, books and accounts related to the performance of [the] Agreement [are to] be subject to the applicable provisions of the Florida Public Records Act, Chapter 119, Florida Statues [sic]." *Id.* The EDC's bylaws also provide for public inspection of its records. EDC Ex. 1 at 21. Ms. Weatherman even testified that the

[8] The EDC has never operated without an appropriation from the County. R. 692-93.

[9] The EDC's lease provides that the EDC may terminate early in the event of a significant reduction of funding from the County. R. 537, 693; Clerk Ex. 9.

portion of the Agreement regarding the EDC's *ad valorem* tax abatement and industrial revenue bond functions necessitate public meetings and records. Tr. 215-16.

County Manager Stockton Whitten believes where it is applicable, all of the EDC's records, books and activities, are public. Tr. 363. He testified that the EDC is a custodian of public records for items "outlined in the agreement." Tr. 357. The EDC briefs the County Manager on incentive packages related to companies looking to relocate or expand. Tr. 356. The EDC "broker[s] the deal between the county, the various other agencies, and the [private] company." Tr. 357.

Mr. Whitten also testified he did not believe the EDC was regulated by any local ordinance. Tr. 358. However, Brevard County Ordinance 2011-18 provides that that NBEDZ, one of the entities to which Mr. Whitten referred, is required to "work with . . . the [EDC] to prepare, adopt, implement and modify, as needed, the Economic Development Plan" for NBEDZ.[10] County's Mem. of Law at 18 (emphasis added).

Mr. Whitten also testified that the EDC participates in the County's health insurance plan. Clerk Ex. 12. The trial court commented that private entities could not be part of a public insurance plan unless they were performing "some kind of

[10] On August 19, 2014, *amicus curiae* County filed its motion requesting this Court take compulsory notice of three Brevard County Ordinances: 2011-16; 2011-18; and 2012-13. The Court granted the County's motion on September 2, 2014.

public function." Tr. 44. Mr. Whitten testified that, to his knowledge, no other private entities were a part of the County's insurance plan. Tr. 368.

D. THE FINAL JUDGMENT.

After a two-day evidentiary hearing on January 29 and 31, 2014, the trial court entered its Final Judgment,[11] ruling in relevant part that:

> The documents in the possession of the EDC as a private entity must be produced as public records because Brevard County has delegated a statutorily authorized function to the EDC and the records generated by the EDC's performance of that duty are public records.

The trial court carefully addressed the factors it considered in determining the County had delegated a public function to the EDC. The court made a detailed analysis concluding that "economic development and nurturing economic advances ... are appropriate governmental functions" before addressing the question of whether those functions had been delegated to the EDC. In concluding that a delegation had occurred, the trial court placed particular emphasis on the public function of attracting and retaining industry in the County that was previously performed by the Council, the Council's privatization into the EDC in 1989, and the EDC's continued performance of that same public function.

[11] A copy of the trial court's Final Judgment is attached as Appendix "A."

SUMMARY OF THE ARGUMENT

A. MAIN APPEAL.

In 1989, the County made a conscientious decision to privatize the Council, its economic development agency, and delegated the Council's functions, its budget, staff and equipment, to the newly-created private EDC. The County executed an Agreement with the EDC to memorialize its delegation of the economic development functions formerly performed by the Council. To this day, that arrangement has remained untouched—absent periodic extensions of the Agreement between the EDC and the County. When a public entity delegates a public function to a private entity, the records generated by the private entity's performance of that function become public records. As such, the trial court correctly decided that the EDC is in fact acting on the County's behalf and that its records related to the delegated functions are public.

The EDC argues that in order to implicate the requirements of the Public Records Act, the governmental function delegated to a private entity must have been an essential or mandatory function. To the contrary, Florida law holds that the issue is more a matter of whether the government *could* perform the function itself—not whether it is essential that the government perform the function.

The EDC next argues that only a complete delegation of every aspect of economic development from the County to the EDC, including the authority to

grant tax incentives to businesses, would amount to the delegation of a public function subjecting it to the Public Records Act. The EDC cites no authority to support such a sweeping proposition because no such authority exists. In fact, the cases cited by the EDC illustrate the fallacy of its argument.

Lastly, the EDC argues this Court should reverse the trial court's Final Judgment and remand this case for a determination and application of the factors test under *News & Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Incorporated*, 596 So. 2d 1029 (Fla. 1992). Reversal is unwarranted and, even if the trial court had committed error, remand would still be unnecessary. The record provides ample evidence for this Court to apply the *Schwab, Twitty* factors test without any need for remand, and applying the factors test will yield the same result: the EDC is subject to the Public Records Act.

B. CROSS-APPEAL.

The trial court abused its discretion in denying an award of attorney's fees to the Clerk. The trial court mistakenly concluded the EDC was in doubt as to its status as an agency under the Public Records Act. The test for determining whether a private entity is responsible for attorney's fees under the Public Records Act is whether the entity "unlawfully refused" public records to be inspected or copied. This Court has held that a private entity in doubt as to its status as an "agency" may not necessarily be responsible for attorney's fees if the entity had a

good faith belief that it was not subject to the Public Records Act. However, voluminous record evidence indicates the EDC was keenly aware of its status, voiding any good-faith argument. Further, the trial court abused its discretion in entering a written order that differed from its oral pronouncement, and in not holding a separate evidentiary hearing regarding the Clerk's entitlement to attorneys' fees.

STANDARD OF REVIEW

A. MAIN APPEAL.

The issues raised in the main appeal create mixed questions of law and fact. The "trial court's findings of fact come to this court clothed with the presumption of correctness and shall not be disturbed unless there was no competent evidence to sustain them." *Bimonte v. Martin-Bimonte*, 679 So. 2d 18, 20 (Fla. 4th DCA 1996). The legal effect of whether the facts of this case evidence the delegation of a governmental function from the County to the EDC is a question of law. *See Taylor v. State,* 140 So. 3d 526, 527 (Fla. 2014) ("A pure question of law [is] subject to de novo review.").

B. CROSS-APPEAL.

In determining whether the trial erred in concluding the EDC did not unlawfully refuse to produce its records under section 119.12 of the Florida Statutes, the standard of review is *de novo*. *See Hinkley v. Gould, Cooksey,*

Fennell, O'Neill, Marine, Carter & Hafner, P.A., 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (abuse of discretion standard is typically applied when reviewing award of attorney's fees; however, entitlement to attorney's fees is a matter of law and is therefore subject to *de novo* review). *See also Promenade D'Iberville, LLC v. Sundy*, 145 So. 3d 980, 983 (Fla. 1st DCA 2014) *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 901 (Fla. 4th DCA 2012).

ARGUMENT ON THE MAIN APPEAL

The "Public Records Act is construed liberally in favor of openness . . ." *Rameses, Incorporated v. Demmings,* 29 So. 3d 418, 421 (Fla. 5th DCA 2010); *see also WFTV, Incorporated v. School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987); *Chandler v. City of Sanford*, 121 So. 3d 657, 660 (Fla. 5th DCA 2013); and *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 153 (Fla. 2013). There are two circumstances under which a private entity is subject to the requirements of the Public Records Act.

First, when a public body delegates a governmental function to a private entity, the records created or maintained by that entity in connection with the delegated function are subject to production under the Public Records Act. *See Memorial Hospital-West Volusia, Incorporated v. News-Journal, Corporation,* 729 So. 2d 373, 381 (Fla. 1999) (holding that when an agreement transfers a public

function to a private entity, "public access follows."); *see also Harold v. Orange County, Fla.,* 668 So. 2d 1010, 1012 (Fla. 5th DCA 1996); *Putnam County Humane Society, Incorporated v. Woodward,* 740 So. 2d 1238, 1239 (Fla. 5th DCA 1999); *Stanfield v. Salvation Army,* 695 So. 2d 501, 503 (Fla. 5th DCA 1997). The delegation test established in *Memorial Hospital* ensures that "a public agency cannot avoid disclosure under the [Public Records Act] by contractually delegating to a private entity that which otherwise would be an agency responsibility." *Schwab, Twitty*, 596 So. 2d at 1031.

The second circumstance under which a private entity is subject to the Public Records Act occurs when the private entity has a significant level of involvement with a public agency. *See Id. Schwab, Twitty* lays out nine (9) factors for courts to balance in determining whether a private entity is subject to the Public Records Act, with or without the delegation of a public function. *Id.* at 1031. However, if a court finds that a governmental body clearly delegated a public function to a private entity, the court need not consider the *Schwab, Twitty* factors in determining that the private entity is subject to the Public Records Act. *See Stanfield*, 695 So. 2d at 503 (cited with approval in *Memorial Hospital*, 729 So. 2d at 381); *Harold*, 668 So. 2d at 1012; and *Woodward*, 740 So. 2d at 1239.

A. THE TRIAL COURT CORRECTLY CONCLUDED THE COUNTY DELEGATED A GOVERNMENTAL FUNCTION TO THE EDC UNDER THE *MEMORIAL HOSPITAL* DELEGATION TEST.

1. The Delegation Test.

This Court established the delegation test in *Memorial Hospital*, *supra*, which involved a hospital taxing authority (the "Authority") and its creation of a non-profit corporation to perform functions on the Authority's behalf. 729 So. 2d at 377. The Authority was created by special act of the legislature to establish hospitals or clinics to provide no-cost medical care to the indigent. *Id.* The Authority entered into a lease and operating agreement with Memorial Health Systems, Inc. ("MHS") to do just that. *Id.* at 377-78. Thereafter, the Authority and MHS entered into an agreement to create a separate non-profit, Memorial Hospital-West Volusia, Inc. ("MH-WV"). *Id.* at 378. The agreement transferred all of the Authority's right, title and interest in the working capital assets, operating assets, and existing facilities to MH-WV. *Id.*

The Florida Supreme Court affirmed this Court's finding that MH-WV was acting on behalf of the Authority and, therefore, a governmental function had been delegated to MH-WV which subjected MH-WV to the mandates of the Public Records Act. The Court stated:

> We likewise agree with the Fifth District in this case in noting the distinction between providing materials or services to a public body to facilitate the public body's own performance of its public function and an agreement under which a private actor performs the public function

in place of the public body.

Id. at 381. In turn, MH-WV was held to be subject to the Public Records Act.

Since *Memorial Hospital*, this Court has repeatedly applied the delegation test to determine that a private entity is subject to the Public Records Act when a public function has been delegated to the private entity. For example, in *Stanfield, supra*, Marion County transferred its role as the provider of misdemeanor probation services to the Salvation Army. 695 So. 2d at 502-03. Noting that "the Salvation Army did more than enter into a contract to provide professional services to Marion County," this Court ruled the Salvation Army was required to comply with the Public Records Act. *Id.* at 503. The Court also determined that, because there was a clear delegation of a governmental function to a private entity, it was "unnecessary to engage in the factor-by-factor analysis outlined in *Schwab*." *Id.* *See also Woodward*, 740 So. 2d at 1239-40 (applying delegation test to find Putman County Humane Society subject to the Public Records Act without analysis of *Schwab, Twitty* factors because it had been delegated the public function of certain criminal investigations) and *Harold*, 668 So. 2d at 1011-12 (applying delegation test to find private construction manager subject to Public Records Act due to delegation of public function by Orange County).

2. The Trial Court Correctly Applied the Delegation Test.

For more than twenty years, the Council operated as the County's internal

economic development agency. Tr. 403-06. The function of the Council was to attract and retain industry looking to relocate or expand in the County. Tr. 404. However, because chambers of commerce representing the north, central and south regions of the County sometimes worked against one another, members of the Counsel, representatives of the three chambers and other business leaders formed an *ad hoc* committee to evaluate solutions to unify economic development in the County. Tr. 380, 409-11; Clerk's Ex. 18. The committee developed a plan including five action steps to make the County more competitive in economic development. *Id.* The action steps included a plan to convert the Council into a private, non-profit organization. Clerk's Ex. 18 at 1.

The County unanimously approved the committee's recommendation and converted its Council into the EDC. Tr. 405, 416-22; Clerk Ex. 17. On May 2, 1989, the County and the EDC entered into a multi-year Agreement for the EDC to serve as the "chief marketing recruitment agency for economic development" in the County. Clerk Ex. 20 at 1. The EDC agreed to use its best efforts to accomplish that task "on behalf of" the County. *Id.* The agreement also acknowledged that, "the provision of economic development services for the County by the [EDC] constitutes a public purpose...." Clerk Ex. 20 at 4.

Mr. Potter, who is a prior chairman of the Council and the first chairman of the EDC after its privatization, testified that the "functions previously conducted

by the [Council] were assumed by the [EDC]," and that their "objectives were the same." Tr. 405. Some of the Council's board members and its entire staff also transferred to the EDC. Tr. 422. The County even transferred the Council's budget, its equipment and its supplies to the EDC to facilitate its assumption of the public functions previously performed by the Council. *Id.*; *see also News-Journal Corporation v. Memorial Hospital-West Volusia, Incorporated*, 695 So. 2d 418, 420 (Fla. 5th DCA 1997) (private entity's use of equipment purchased by public entity for function previously performed by public entity makes "privatization of such venture[,] to the extent that it can avoid public scrutiny[,] ... appear to be extremely difficult....").

The EDC's argument that it was not delegated the public functions previously performed by the Council is not in accord with the record facts. In fact, both the EDC and the County tacitly acknowledged not only the EDC's performance of the public function previously performed by the County, but also the EDC's statutory obligations under the Public Records Act in connection with the delegation. Section 5(b) of their Agreement provides in relevant part:

> All records, books and accounts related to the performance of this Agreement shall be subject to the applicable provisions of the Florida Public Records Act, Chapter 119, Florida Statutes.

The trial court correctly ruled that the County delegated a public function to the EDC, and that the records generated and maintained by the EDC in connection with that delegation are subject to the requirements of the Public Records Act.

3. The EDC Erroneously Argues that the Trial Court Misapplied the Delegation Test.

The EDC argues the trial court misapplied the delegation test created in *Memorial Hospital*, *supra*, as "[i]t is now an inescapable principle in Florida law that merely contracting with the government to provide goods or services does not *automatically* subject the contracting party to the requirements of public records law." (Emphasis added). *See Schwab, Twitty*, 596 So. 2d at 1031. The EDC fails to recognize the obvious difference between private entities that merely have an agreement with a public entity and those private entities that actually perform a governmental function on behalf of a public entity. *See Fritz v. Norflor Constr. Co.*, 386 So. 2d 899, 901 (Fla. 5th DCA 1980).

The Clerk does not argue that a private entity is *automatically* subject to the Public Records Act solely because it contracts with the government to provide goods or services. For example, a contract to provide office supplies to a county would not subject a vendor to the Public Records Act. However, the case at bar involves far more than a contract to purvey office supplies. In a case such as this, where the contract in question delegates a public function to a private entity and tasks the private entity with performing the public function "on behalf of" the

government, that entity is subject to the requirements of the Public Records Act.

The EDC cites *Parsons & Whittemore, Incorporated v. Metropolitan Dade County*, 429 So. 2d 343 (Fla. 3d DCA 1983) in support of its argument. *Parsons & Whittemore* involved the construction of a facility by a private entity, and management of that facility by a second private entity, both before and after Dade County's planned purchase of the facility. *Id.* at 345. Ultimately, the Dade County purchase never came to fruition, and the second entity never managed the facility on Dade County's behalf. *Id.* Therefore, the Third District ruled that the private entities' actions never rose to acting "on behalf of" Dade County as they had not actually performed any function on Dade County's behalf. *Id.* at 346. The EDC's reliance on *Parsons & Whittemore* is also misplaced because the case pre-dates the Supreme Court's decisions in *Memorial Hospital* and *Schwab, Twitty*.

4. The EDC's Argument that a Delegation Must Involve a Mandatory or Essential Governmental Function is Incorrect.

The EDC argues that only the delegation of a mandatory or essential governmental function will subject a private entity to the mandates of the Public Records Act. The EDC cites *Stanfield, supra,* in support of its position, but its reliance on *Stanfield* is misplaced.

In *Stanfield*, Marion County contracted with the Salvation Army to provide misdemeanor probation services. 695 So. 2d at 502. This Court noted in *dicta* that the provision of misdemeanor probation services was an "essential" governmental

function and, because Marion County delegated a governmental function to the Salvation Army, it held that the Salvation Army was subject to the Public Records Act. *Id.* at 502-03. Merely because this Court noted that the delegation function in *Stanfield* was an essential governmental function, the EDC argues that *only* the delegation of an essential or mandatory governmental function may subject a private entity to the requirements of the Public Records Act. The EDC reads far too much into the facts of *Stanfield* and fails to acknowledge this Court's subsequent pronouncements, which are fatal to the EDC's argument.

In *Woodward, supra,* this Court elaborated on its decision in *Stanfield* and clarified that a governmental function delegated to a private entity need not be an essential or mandatory function in order to trigger the mandates of the Public Records Act; rather, the delegation of a permissible governmental function to a private entity also subjects that entity to the Public Records Act:

> The only substantial difference between the instant case and *Stanfield* is that in *Stanfield*, the Salvation Army contractually obligated itself to perform governmental services which otherwise would have had to be performed by Marion County. In the instant case, the provisions of sections 828.03 and 828.073 authorize the Society, but do not compel it, to perform the governmental function. We conclude that this difference is immaterial once the Society assumed the authority under the enabling statutes.

740 So. 2d at 1239-40 (emphasis added). Thus, while the delegated governmental function was not mandatory, the Putnam County Humane Society was nevertheless subject to the Public Records Act. *Id.* Similarly, in *Sarasota Herald-Tribune*

Company v. Community Health Corporation, Incorporated, 582 So. 2d 730 (Fla. 2d DCA 1991) (approved by the Supreme Court in *Memorial Hospital*, *supra*), the Second District rejected the notion that a delegated governmental function must be mandatory or essential in order to trigger the mandates of the Public Records Act: "The issue is more a matter of whether the government could perform the function itself – not whether it is essential . . . ." 582 So. 2d at 733.

Economic development, including the attraction and retention of industry within a county, is an authorized governmental function under section 125.045(1) of the Florida Statutes ("The Legislature declares that it is necessary and in the public interest to facilitate the growth and creation of business enterprises in the counties of the state."). That the delegated governmental function was merely authorized and not statutorily mandated is "immaterial." *See Woodward*, 747 So. 2d at 1239-40 and *Sarasota Herald-Tribune*, 582 So. 2d at 733.

The Council performed the permissible governmental functions of attracting and retaining industry in Brevard County for more than twenty years, and the documents created and acquired by the County in connection with those functions were subject to the retention and production requirements of the Public Records Act. A public agency cannot avoid disclosure under the Public Records Act by contractually delegating a governmental function to a private entity. *See Schwab, Twitty*, 596 So. 2d at 1031. Therefore, when the County delegated those

governmental functions to the EDC, the EDC became subject to the same statutory requirements.

5. The EDC's Argument that a Delegation Only Occurs when Every Facet of Governmental Function is Transferred to a Single Entity is Incorrect.

The EDC argues anything less than the wholesale delegation of every facet of a governmental function does not amount to delegation at all. Specifically, the EDC argues that the County's delegation of the public functions of attracting and retaining industry in Brevard County do not meet the delegation test under *Memorial Hospital*, *supra*, because the County retained other economic development functions such as the authority to grant tax incentives to businesses, and because chambers of commerce and other entities also engage in economic development activities. This argument finds no support in Florida law.

Reaching to find support of its argument, the EDC again points to *Stanfield*, *supra*, in which this Court determined that Marion County's transfer of all misdemeanor probation services to the Salvation Army constituted a delegation of a governmental function and subjected the Salvation Army to the Public Records Act. The EDC then extrapolates from those facts a rule of law not found in *Stanfield* or any other authority, arguing that delegation does not occur unless the government transfers every aspect of a broad public function to a single private entity. The EDC's argument is mistaken in two critical respects.

First, the *Stanfield* decision does not even suggest that the result would have been different had Marion County delegated the public function to more than one private entity. For example, Marion County could have decided to delegate misdemeanor probation services for probationers having last names beginning with *A* through *M* to the Salvation Army, and separately delegated services for probationers having last names beginning with *N* through *Z* to another private entity. Nothing in *Stanfield* or any other authority suggests that, by doing so, Marion County or the private entities to which it delegated the public function would thereby evade the requirements of the Public Records Act.

Additionally, the EDC creates a straw-man argument by reframing the question at issue. The trial court found that the County's transfer of the function of attracting and retaining industry in the County constituted the delegation of a public function under the authority of *Memorial Hospital* and its progeny. However, the EDC asks this Court to decide whether the facts evidence a complete delegation of the broader public function of "economic development," thus allowing the EDC to argue that a wholesale delegation did not occur because the County retained the authority to grant tax incentives and other entities also engage in economic development activities within the County. Applying the same fallacious logic to *Stanfield*, no delegation would have occurred because Marion County did not delegate the entire public function of "criminal justice" to the

Salvation Army. However, this Court did not allow the Salvation Army to evade the Public Records Act merely because Marion County continued to operate its own county courts and county jail. The argument would not have worked in *Stanfield* and it does not work here.

6. The EDC's Argument that Economic Development Consists Entirely of the Award of Incentive Packages is Incorrect.

The EDC argues that the governmental function of economic development consists solely of awarding economic incentives and nothing more. Working from this fallacious premise, the EDC argues further that, because the County did not delegate to the EDC the authority to award economic incentive packages, the County did not delegate the governmental function of economic development to the EDC. The EDC's argument contradicts its own contractual acknowledgement that it serves as the "chief marketing recruitment agency for economic development" in the County. It also contradicts the legislature's express pronouncements on economic development and the body of case law addressing a private entity's role in economic development.

Section 125.045(1) provides that "this state faces increasing competition from other states and other countries for the location and retention of private enterprises within its borders." It does not define economic development as merely the handing out of incentive packages. Such a notion is also incongruent with sections 125.045(4) and 288.075(1)(a)6 allowing private entities to perform

economic development functions on behalf of counties. Section 125.045(3) provides:

> [I]t constitutes a public purpose to expend public funds for economic development activities, including, but not limited to, developing or improving local infrastructure, issuing bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants, leasing or conveying real property, and making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community.

The County pays the EDC $1.4 million annually to engage in economic development activities on the County's behalf. Such money is "expend[ed] public funds for economic development activities" by the EDC. If the EDC were not engaged in economic development activities on the County's behalf, it is difficult to imagine why the County would spend tens of millions of dollars funding the EDC's activities over a period of decades.

Even if economic development were reduced to merely the award of economic incentives, there is no statutory provision limiting the definition of "economic incentives" in either sections 125.045 or 288.075. Contrarily, Mr. Potter testified "the incentives [the early EDC] could offer were primarily things like infrastructure projects, and we would work with whatever government agency might be appropriate so far as infrastructure projects: the cities, the county, the

state, the airport authority, the port."[12] Tr. 411-12. When asked what the major differences were between the EDC of Mr. Potter's day and present, Mr. Potter responded:

> [T]he incentives are a lot more significant than they were in those days, the 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.

Tr. 413.

The EDC actively participates in the decisions made by the County in determining the type and amount of incentives awarded to entities seeking to locate, relocate or expand their businesses in the County. The EDC is the County's primary agent in attracting and retaining industry for the County's economic betterment. In fact, the EDC's Agreement with the County states the EDC is the first hurdle over which a company must jump before it may go to the County for final approval of incentives. This process is similar to the one analyzed in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Incorporated*, 379 So. 2d 633 (Fla. 1980).

In *Shevin*, the Jacksonville Electric Authority ("JEA") contracted with Byron, Harless, Schaffer, Reid & Associates, Incorporated. ("Byron") to conduct a nationwide search to locate applicants for JEA's managing director position. 379

[12] Mr. Potter testified the state's constitution had not yet been amended to allow for *ad valorem* tax abatement during his tenure with the EDC. Tr. 411.

So. 2d at 634. During the search, Byron received resumes and letters from interested parties and made written notes of the applicants interviewed. *Id.* at 635. Prior to a final report of Byron's findings to JEA, a local television outlet asked to examine Byron's papers. *Id.* Bryon refused the outlet's request. *Id.* Both the outlet and the state's Attorney General filed for a petition for writ of mandamus, alleging the papers in Byron's possession were public records subject to the Public Records Act. *Id.* The First District agreed, finding the records in Byron's possession were in fact public records because they were "made and received in connection with the transaction of official business which the JEA employed the consultant to perform." *Id.* (internal quotations omitted).

While the Supreme Court differed from the First District slightly in the number of documents it believed were public records, it nevertheless found "the letters, memoranda, resumes, and travel vouchers made or received by the consultant in the course of [Byron's] agreement with JEA were intended to formalize the information contained in them." *Id.* at 640-41. As such, they were public records. *Id.* Under the EDC's logic, Byron's records would not be subject to production under the Public Records Act because the JEA naturally retained the ultimate authority to make the hiring decision, but that fact had no impact on the Courts' determination that Byron was subject to the Public Records Act.

Even if economic development was purely defined as the physical award of incentive packages, it is undeniable that the EDC oversees much of this process and does the legwork for the County. Tr. 356. The EDC is charged with "[r]eview[ing] applications for the County's Economic Development Tax Abatement program and mak[ing] recommendations to the Board of County Commissioners as requested." Clerk Ex. 8 at 4. Applications are submitted to the County, which are in turn provided to the EDC for review and recommendation. Tr. 216. If a company's financials or potential impact does not meet a certain threshold, the company may never be considered for certain incentives.[13] The County depends on the EDC's analysis, just as JEA did of Byron in *Shevin*.

B. THE EDC'S REQUEST FOR REVERSAL TO CONSIDER THE FACTORS TEST IS UNFOUNDED; EVEN IF ANALYSIS OF THE FACTORS TEST WERE NECESSARY, THIS COURT HAS SUFFICIENT EVIDENCE TO MAKE THAT DETERMINATION.

The EDC mistakenly argues that the trial court failed to consider the factors test under *Schwab, Twitty*, *supra*, and that the trial court's failure to consider the factors test requires remand for further proceedings. The EDC is wrong in both respects. First, because the trial court correctly determined that the County delegated a public function to the EDC, it was not required to consider the *Schwab,*

[13] Likewise, the EDC is tasked with "review[ing] applications for Industrial Development Revenue Bonds and mak[ing] recommendations to the Board of County Commissioners as to the economic significance of such applications and bonds, as requested." Clerk Ex. 8 at 4.

Twitty factors test in order to conclude that the EDC was subject to the Public Records Act. *See Stanfield*, 695 So. 2d at 503 (cited with approval in *Memorial Hospital*, 729 So. 2d at 381); *Harold*, 668 So. 2d at 1012; and *Woodward*, 740 So. 2d at 1239.

Second, even if the trial court had been required to consider the *Schwab, Twitty* factors after determining the County had delegated a public function to the EDC, there is no evidence to suggest that it failed to do so. The trial court took painstaking care to afford both parties ample opportunity to provide the arguments and authorities supporting their respective positions before making its decision. The trial court held a two-day evidentiary hearing and heard multiple witnesses who tracked the history of the EDC from its genesis as the public Council through its conversation to the current private organization. The trial court then instructed the parties concerning its intent to review the evidence and consider both the delegation and factors tests:

> Okay. So you guys are going to write on this. The reason why you're going to write is because we now have the evidence concluded. So it was kind of in a vacuum. Now we have evidence. So I don't need—I need closing argument just on those two tests based on the evidence presented here: Schwab, delegation.

Tr. 428. Both parties submitted written closing arguments on both tests as instructed by the trial court, and the court took more than a month to deliberate over the parties' briefs and arguments, as well as the transcript of the two-day

hearing itself, before making its ruling.

Finally, even assuming, *arguendo,* the trial court was required to consider the *Schwab, Twitty* factors test even after finding the delegation of a public function to the EDC, and that the trial court failed to consider the *Schwab, Twitty* factors, there still is no basis for remand because this Court may make a determination applying the evidence on the record to the *Schwab, Twitty* factors. The trial court laid the groundwork to provide a rare, extremely thorough record of which this Court now has benefit. Were this Court to dispense with the delegation test and apply the factors test, the outcome would be the same: the EDC would still be subject to the Public Records Act.

1. The *Schwab* Factors.

Schwab, Twitty establishes factors that courts consider in determining whether the level of involvement between a government body and a private entity is significant enough to subject the private entity to the requirements of the Public Records Act even without the delegation of a public function. These factors include, but are not limited to: (1) the level of public funding; (2) the comingling of funds; (3) whether the activity in question was conducted on publicly-owned property; (4) whether the services contracted for are an integral part of the public agency's decision-making process; (5) whether the private entity is performing a governmental function or a function which the public agency otherwise would

perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for whose benefit the private entity is functioning (the "*Schwab* factors").

The *Schwab* factors are designed to ascertain a public agency's level of involvement in a private entity and, in turn, the applicability of the Public Records Act. Florida's courts have relied on the "totality of factors." *Schwab, Twitty*, 596 So. 2d at 1031; *see also Schwartzman v. Merritt Island Volunteer Fire Department,* 352 So. 2d 1230, 1232 (Fla. 4th DCA 1977); *Sarasota Herald-Tribune*, 582 So. 2d at 733. Analysis of the *Schwab* factors reveals the EDC is clearly subject to the Public Records Act.

a. The Level of Public Funding.

The level of public funding received by the EDC is substantial and undeniable. As required by the Agreement between the EDC and the County, an annual, independent audit was performed for the EDC covering years 2012 and 2011. Clerk Ex. 8 at 4; Clerk Ex. 9. The audit reports that the EDC's total revenue for 2012 was $2,861,078. Clerk Ex. 9, pp. 12, 17. Approximately seventy-nine percent (79%) of the EDC's total revenue, or $2,265,097, derived from public sources. Clerk Ex. 9 at 12. The County alone provided the EDC $1,400,050—

nearly half the EDC's total budget. Clerk Ex. 9 at 12.

In 2011, the EDC's total revenue was $2,085,968, with approximately seventy-four percent (74%) derived from public sources. Clerk Ex. 9 at 12. The EDC's Senior Director of Operations, Ms. McCarthy testified that figure was high because $700,000 in pass-through grants the EDC received and awarded was not actual revenue but was erroneously counted as such in the audit. Tr. 281-83. However, removing the pass-through grants from the revenue figure reduces the EDC's actual revenue from $2,861,078 to $2,135,156, and thereby increases the percentage of its funding from the County from forty-nine percent (49%) to sixty-five percent (65%). Tr. 301-02.

Further, the EDC receives investor payments from its public members, such as municipalities, colleges, airports, and Port Canaveral. EDC Ex. 2. These payments are lumped together with private investor payments, so the amount of public versus private funding is not ascertainable from the EDC's audit. Nevertheless, little doubt remains that the EDC receives a significant level of funding from public sources. Tr. 122. In reality, the EDC could not survive in its present state without public funding.

b. The Comingling of Funds.

The second factor is whether the EDC's private and public funds are commingled. The EDC comingles all of its public and private funds in one bank

account. Tr. 124-25; R. 693. Separate books are not kept so the EDC cannot be sure if it is expending public money on private expenditures or *vice versa*. *Id.*

c. Whether the Activity in Question is conducted on Publicly-Owned Property.

The third factor is whether the public function occurs on publicly-owned land. While the EDC's physical headquarters is located in a privately-owned building, economic development is not a sedentary activity. Nevertheless, this is insignificant given the totality of factors.

d. Whether the Services Contracted Are an Integral Part of the Public Agency's Decision-Making Process.

The fourth factor is whether the contracted services are an integral part of the County's chosen decision-making process. The County has had a detailed Agreement with the EDC since 1989 that requires no less than eighteen separate functions for the EDC to perform on the County's behalf. Clerk Exs. 8, 20. Several of those functions require the EDC to be the fact-finding recommendation group for the County in place of its former Council, because the EDC serves as the County's "chief marketing recruitment agency for economic development." Clerk Ex. 8 at 2.

For example, the EDC is tasked with making recommendations and assistance with regard to the County's *ad valorem* tax abatement and industrial revenue bond programs. *Id.* at 3-4. Without the EDC's review of applications and

recommendations to the County, the County would be at a loss to determine which entities may be entitled to economic incentive packages. The County approves what the EDC finds and presents to the County and the county manager. Tr. 356. The EDC's actions are an integral part of the County's decision-making process. *Accord Shevin, supra.*

e. Whether the Private Entity is Performing a Governmental Function or a Function Which the Public Agency Would Otherwise Perform.

The fifth factor is whether the EDC is performing a governmental function or a function which the public agency would otherwise perform. Again, the EDC is performing economic development functions under sections 125.045 and 288.075 of the Florida Statutes. Such performance constitutes a valid public purpose. *See* §§ 125.045(1) and (3), Fla. Stat.

As Mr. Potter testified, the Council performed this function for more than two decades, and the EDC performs the same function as its successor. Tr. 403-06. The objectives were the same both before and after the Council's privatization into the EDC. Tr. 405. Further, the EDC's initial agreement states the County believed "the provision of economic development services for the County by the [EDC] constitutes a public purpose." Clerk Ex. 20 at 4 (emphasis added). Mr. Wuensch also testified that the EDC serves a public function. Tr. 395. Finally, the County would not have spent tens of millions of dollars funding the EDC since

1989 if it were not performing a public function on the County's behalf.

f. The Extent of the Public Agency's Involvement With and Control Over the Private Entity.

The sixth factor relates to a public agency's involvement in or control over the affairs of a private entity. When the County reorganized the Council into the EDC in 1989, there were twelve members on its board of directors, five of which were appointed by the County. The County still retains five voting positions on the EDC's board of directors. Clerk Ex. 17; Tr. 240. The Agreement between the EDC and the County requires the EDC to act on the County's behalf to fulfill a public purpose. Clerk Ex. 8 at 2. The Agreement also requires the EDC to provide quarterly and annual reports so the County may measure the EDC's performance under the Agreement. *Id.* at 4. In compensation for the EDC's performance of public functions on the County's behalf, the County pays more than $1.4 million dollars annually (in addition to the EDC's other public funding). *Id.* at 3; Clerk Ex. 9 at 12; EDC Ex. 2; Tr. 398. Moreover, with the quorum necessary to conduct the EDC's business being just thirty percent (30%) and public investors accounting for almost twenty percent (20%) of the board, the public members have significant voting power and control over the EDC's direction.[14] EDC Ex. 2; Tr. 232, 398.

[14] At least 25 members of the EDC's board of directors for FY 2012-13 represented either municipalities, the County, Port Canaveral, the Melbourne International Airport, public hospitals, state agencies, or the military. EDC Ex. 2.

g. Whether the Private Entity Was Created by the Public Agency.

The seventh factor concerns whether the private entity was created by the public agency; in the EDC's instance, it was. In 1989, the County reorganized its Council into the EDC on recommendation of members of the Council and others. Clerk Ex. 10 at 39; Clerk Ex. 17. The County transferred the Council's board members, executive director, staff, equipment, supplies and the remainder of its fiscal year budget to the EDC. Tr. 422; Clerk Ex. 20 at 3. Without the County's approval to transfer the members and budget of the Council to the EDC, it would have been but a fifth impediment to successful economic development in the County. Tr. 393-94, 410-11.

h. Whether the Public Agency has a Substantial Financial Interest in the Private Entity.

The eighth factor is whether the public agency has a substantial financial interest in the private entity; clearly it does. The EDC is a not-for-profit corporation that receives more than seventy-nine percent (79%) of its total revenue from public sources. The County's $1.4 million accounts for half of the EDC's revenue. Clerk Ex. 9 at 12; Clerk Ex. 7. As a result, the EDC's lease has a provision that it may be terminated early in the event of reduction in funding from the County. Clerk Ex. 9 at 16. Certainly, the County's financial interest in the EDC is substantial.

i. For Whose Benefit the Private Entity is Functioning.

The ninth factor is for whose benefit the private entity is functioning. There is no doubt that the EDC's primary goal is to work for the betterment of the public as a whole on behalf of the County. Mr. Wuensch testified that the EDC serves a public function and operates for the "general welfare of the community." Tr. 395. Both Ms. Weatherman and the EDC's Senior Director of Business Development, Greg Weiner, testified that the County is a beneficiary of the EDC's operations. Tr. 139, 343. The legislature has declared economic development "necessary and in the public interest to facilitate the growth and creation of business enterprises in the counties of this state." § 125.045(1), Fla. Stat. While Ms. Weatherman suggested in her testimony that the EDC operated for the benefit of the private entities it dealt with (R. 663, Tr. 138), such testimony contrasts starkly with the EDC's contractual mandate and begs the question of why Brevard County taxpayers would fund such an endeavor.

j. An Additional Factor: the County Health Insurance Plan.

While not one of the *Schwab* factors, the fact the EDC has been a two-decade-long member of the County's group health insurance plan (the "Plan") certainly presents a unique additional aspect to the EDC's unusually close involvement with the County. On November 13, 1990, the County unanimously approved a measure to add the EDC to the Plan effective January 1, 1991, and the

EDC's employees have participated in the Plan ever since. Clerk Ex. 11 at 3. While multiple public entities participate in the Plan, only one private entity enjoys this privilege: the EDC. The Plan provides:

> 1. Pursuant to Section 112.08 of Florida Statutes, counties, municipalities, constitutional officers and special districts of the State of Florida have authority to self insure any plan for health, accident and hospitalization coverage or enter into a risk management consortium to provide such coverage, subject to approval by the Florida Office of Insurance Regulation.
>
> 2. In addition, such units of local government have authority to enter into interlocal agreements and exercise jointly with any other public agency of the state any power, privilege, or authority which they share in common and which each might exercise separately as provided in Section 163.01, Florida Statutes.
>
> 3. The parties executing this group health plan agreement (the "Agreement") have been participating in and desire to continue participation in a self insurance program for health, accident, and hospitalization coverage for the mutual benefit of each and to provide for the payment by the parties hereto of contribution amounts necessary to achieve and preserve adequate levels of funding and reserve balances to enable payment of the benefits and administrative costs incurred under such program.

Id. at 1 (emphasis added). The EDC is not a county, a municipality, a constitutional officer or a special district of the state but it has enjoyed the privilege befitting each of these because it exists to serve a public function.

ARGUMENT ON THE CROSS-APPEAL

A. THE TRIAL COURT MISAPPLIED THE FACTS AND THE LAW IN DETERMINING THE EDC WAS UNAWARE OF ITS STATUS UNDER THE PUBLIC RECORDS ACT.

Throughout the trial court's two-day evidentiary hearing, evidence was presented that contradicted the EDC's argument it believed in good faith it was not subject to the Public Records Act. First, the record clearly shows the EDC had an Agreement and bylaws that addressed the EDC's unique status as a custodian of public records. Second, the EDC tacitly acknowledged for months that it was subject to the Public Records Act by arguing its entitlement to exemptions thereunder. Third, after disclosing limited items after initiation of the action below, the EDC admitted to withholding other documents that were responsive to the Clerk's public records request. Lastly, the trial court misapplied the cases relied upon in its denial of the Clerk's request for attorneys' fees. For these reasons, the trial court's denial of attorney's fees on grounds the EDC was in doubt as to its status as an agency was unreasonable and constituted an abuse of discretion.

1. The EDC's Agreement and its Bylaws.

The Agreement between the EDC and the County requires all records related to the Agreement and its scope of services be subject to the Public Records Act. The EDC's counsel and the trial court described the importance of public records

when contracting with a governmental entity or public agency:

> MS. REZANKA: Thank you, Your Honor. Kim Rezanka representing the Economic Development Commission of Florida's Space Coast. The fact that the EDC claims that its records are private and confidential is what any private entity does. If you went into Harris [Corp.] and asked for records, they would say, nope, they are private and confidential. We're not giving them to you, unless, of course, it was with some federal mandate.
> THE COURT: With the United States government they would.
> MS. REZANKA: Well, for the United States government they would.
> THE COURT: If they had a agreement with the United States government, they sure would.

Tr. 14 (emphasis added). There was a clear understanding that contractual obligations between public and private entities may necessitate disclosure of records usually considered private or confidential. On the Agreement's face, the EDC acknowledged that it was subject to the Public Records Act. Beyond its Agreement with the County, the EDC's bylaws also address its role as a custodian of public records and the policies regarding the same.

a. All Records Related to the Agreement With the County are Public.

The EDC's Agreement with the County expressly confirms the EDC's status as an agency under the Public Records Act. The Agreement requires "[a]ll records, books, and accounts related to the performance of this agreement shall be subject to the applicable provisions of Florida Public Records Act, Chapter 119, Florida Statutes." Clerk Ex. 8 at 5. Ms. Weatherman contends this language only relates

to the annual audit the EDC is required to provide the County. Tr. 116. That argument is strained as the audit Ms. Weatherman refers to is required by section 5(a) of the Agreement. Clerk Ex. 8 at 5. The provision regarding the EDC's records being public and its role as a custodian of the same is at section 5(b). *Id.* No provision of the EDC's Agreement with the County could be interpreted to suggest that the EDC's public records obligations under section 5(b) is limited to its duty to provide an annual audit to the County. Then-deputy county manager Stockton Whitten even admitted the EDC was a custodian of public records for "what's outlined in the agreement . . . ." Tr. 357.

The EDC contractually assented to its records being public. R. 668; Clerk Ex. 8 at 7. By Ms. Weatherman's signature, the EDC bound itself to the terms therein. *See Owings v. T-Mobile USA, Incorporated*, 978 F. Supp. 2d 1215, 1221 (M.D. Fla. 2013) (*quoting L & H Constr. Co., Incorporated v. Circle Redmont, Incorporated*, 55 So. 3d 630, 634 (Fla. 5th DCA 2011)) ("Under Florida law, a valid agreement arises when the parties' assent is manifested through written or spoken words, or inferred in whole or in part from the parties' conduct."); *Knowling v. Manavoglu*, 73 So. 3d 301, 303 (Fla. 5th DCA 2011) (*citing Gendzier v. Bielecki*, 97 So. 2d 604, 608 (Fla. 1957)) ("Mutual assent does not mean that two minds must agree on one intention; rather, the formation of an agreement depends on the parties having said the same thing, not on their having meant the same

thing."). If the EDC did not agree with this provision, it had every right to reject the same; it did not. *See Tara Woods SPE, LLC v. Cashin*, 116 So. 3d 492, 501 (Fla. 2d DCA 2013) (*citing Wexler v. Rich*, 80 So. 3d 1097, 1100-01 (Fla. 4th DCA 2012)) ("Florida adheres to the principle that a 'party has a duty to learn and know the contents of a proposed agreement before [s]he signs' it.").

b. The EDC Admits Many of its Records Are Public Pursuant to the Agreement.

Ms. Weatherman admitted that at least part of the work performed on behalf of the County is in fact subject to the Public Records Act and chapter 286 of the Florida Statutes (which Ms. Weatherman described as the "Sunshine"). Ms. Weatherman openly detailed portions of the Agreement related to *ad valorem* tax abatement and industrial revenue bonds:

> We have an Ad Valorem Tax Abatement Committee and this committee convenes. It is in the Sunshine, as is the [Industrial Revenue Bond Council]. It convenes in the Sunshine. It's advertised as any Sunshine operations [sic] would.

Tr. 216; EDC Ex. 1 at 18. The EDC considers records related to these functions public records. Tr. 217. Ms. Weatherman admitted the EDC performed these functions because they are in fact part of the Agreement with the County. Clerk Ex. 8 at 4; Tr. 217. Clearly, the EDC was not in doubt or confused about the fact that at least some of its records were public.

c. The EDC's Bylaws Require its Records be Subject to the Public Records Act.

During trial, counsel for the EDC inquired as to Ms. Weatherman's familiarity with a portion of the EDC's bylaws requiring disclosure of public records that are in the custody of the EDC. The portion in question provides:

> 10.3.2 Inspection by Public. All books and records of the EDC which are "public records" within the meaning of chapter 119, Florida Statutes, except records pertaining to prospects designated as confidential by the Chair of the Board or President or which are otherwise exempt from disclosure pursuant to Chapter 119 or other applicable provisions of Florida law, may be inspected in accordance with the provisions of Chapter 119 and other applicable provisions of Florida law.

EDC Ex. 1 at 21. Ms. Weatherman indicated she was unaware of this portion of the bylaws. Tr. 210. Regardless, "[a] corporation must act in accordance with its articles of incorporation and duly adopted by-laws." *World of Life Ministry, Incorporated v. Miller*, 778 So. 2d 360, 363 (Fla. 1st DCA 2001) (*citing Yarnall Warehouse & Transfer, Incorporated v. Three Ivory Brothers Moving Company,* 226 So. 2d 887, 890 (Fla. 2d DCA 1969)). Ms. Weatherman, as president, is an officer of the EDC and has a duty to know its bylaws. *See* § 617.0841, Fla. Stat. ("Each officer . . . shall perform the duties set forth in the bylaws or . . . prescribed by the board of directors . . . ."); *see also* EDC Ex. 1 at 12 (designating the president as an officer of the EDC).

Ignorance of a private entity's bylaws does not negate the contractual and legal obligations they place on the officers of a corporation. *See Stewart v. Am. Ass'n of Physician Specialists*, 5:13-CV-01670-ODW, 2014 WL 2197795 (C.D. Cal. 2014) (*citing Florida Bar v. Town*, 174 So. 2d 395 (Fla. 1965)) (finding that properly adopted by-laws of corporation are the "basis of important contractual and legal obligations" and "constitute a binding agreement . . . between the stockholders and the corporation").

Clearly, the bylaws do not excuse the EDC from the Public Records Act; rather, they embrace it and recognize that the EDC is a custodian of public records, necessitating a policy for disclosure. The EDC knew its records were subject to the Public Records Act.

2. The Evolution of the EDC's Recognition of the Public Records Act.

At the outset of the Clerk's public records requests in January 2013, the EDC claimed its BlueWare records were exempt from disclosure under section 288.075. The EDC maintained that position for nearly a year before adopting the new position that it was not subject to the Public Records Act at all. The EDC raised the issue in such a way to mirror "a pattern of conduct which amounted to the very definition of stonewalling." *Knight Ridder, Incorporated v. Dade Aviation Consultants*, 808 So. 2d 1268, 1270 (Fla. 3d DCA 2002). While the EDC is entitled to any legal defenses it may proffer, it is not entitled to rewrite the

history of its actions prior to the final hearing.

a. January – October 2013: The EDC States that its Records are Temporarily-Exempt from Disclosure under Section 288.075.

Between January and October 2013, the EDC argued that the entirety of its records were temporarily-exempt from disclosure under section 288.075. The EDC admitted it was "a Non Profit Corporation operating and doing business in [the County] and is an 'economic development agency' as defined in § 288.075(1)([a]), Fla. Stat. (2011)."[15] R. 316. Only entities defined as "economic development agencies" under section 288.075(1)(a) may claim the exemptions found therein. *See* 12 Op. Att'y Gen. Fla. 36 (2012) (an entity that is "not an 'economic development agency' as defined in section 288.075, Florida Statutes . . . may not avail itself of the confidentiality provisions provided within the statute.").

The EDC further embraced the belief that its records were exempt from disclosure in its motion to dismiss the Clerk's initial petition. R. 345-47. The motion referenced Mr. Blake's memorandum. R. 346. In his memorandum, Mr. Blake opined the records requested by the Clerk were confidential pursuant to

[15] Under section 288.075(1)(a)6, the EDC is a "private agency, person, partnership, corporation, or business entity when authorized by the state, a municipality, or a county to promote the general business interests or industrial interests of the state or that municipality or county." (Emphasis added).

section 288.075(2)(a).[16] Clerk Ex. 3 at 2. When asked whether Mr. Blake reviewed the entire BlueWare file before writing his memorandum, Ms. Weatherman testified he did not. R. 628. Any claim regarding good faith denial based on Mr. Blake's opinion cannot stand where "no full and complete disclosure of the operative facts upon which its legal conclusions depended was ever made to counsel." *Knight Ridder*, 808 So. 2d at 1270 (internal quotations omitted).

Nevertheless, Ms. Weatherman understood the provision in section 288.075 to simply be an exemption, not a wholesale inapplicability of the Public Records Act. R. 619. She further detailed the confidentiality agreements the EDC enters into with entities under section 288.075 stating the agreements are entered into for "added legal protection." R. 623.

b. The EDC Argues for the First Time That it is Not Subject to the Public Records Act.

After receiving the Clerk's Memorandum of Law negating the EDC's argument that the records were temporarily exempt under section 288.075, the EDC abandoned its long-held belief that its records were temporarily-exempt, and now proclaimed the Public Records Act was altogether inapplicable to the EDC. R. 463. Not only did the EDC change its position after nearly a year of holding to

[16] Mr. Blake's memorandum also dealt with other exemptions from the Public Records Act such as trade secrets and proprietary business information including settlement agreements and audited financials. None of these items are before this Court.

the contrary, but it now denied it was an economic development agency under section 288.075(1)(a), thus negating its ability to "avail itself of the confidentiality provisions provided within the statute." 12 Op. Att'y Gen. Fla. 36 (2012).

Plainly, the EDC was not "confused" regarding its status as an agency. While the EDC may have had concerns regarding disclosing the entirety of its BlueWare file in light of the exemption in section 288.075, its later-adopted position of inapplicability of the Public Records Act can, at best, be described as opportune. The situation is analogous to that in *Times Publishing Company Incorporated v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990).

In *Times Publishing*, the Second District found a private entity had "formulated and orchestrated, with no voluntary aid, counsel or assistance . . . a scheme, plan, and design not merely to avoid the Public Records Act of this state, but in fact to evade it." *Id.* at 492 (internal quotations omitted) (emphasis added). The EDC's actions are clearly inconsistent with any reasonable interpretation of confusion, and evoke the authority of *Times Publishing* because the EDC's eleventh-hour change of position was intended solely to evade its obligations under the Public Records Act.

3. The EDC Finally Produced Some Documents but Knowingly Withheld Others.

As hearing drew near, the EDC informed the Clerk that it would produce some of the BlueWare records, conditioned on BlueWare's permission. R. 659-

662. Assuming, *arguendo*, "permissible" disclosure would have otherwise satisfied the Clerk's request for records, the records were only released *after* the Clerk had filed the instant action. "Unlawful refusal under section 119.12 includes not only affirmative refusal to produce records, but also unjustified delay in producing them." *Yasir v. Forman*, 39 Fla. L. Weekly D1924 (Fla. 4th DCA 2014) (*citing Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654, 655 (Fla. 1st DCA 2014)) (reversing trial court order denying attorney's fees where delay in production not addressed) (emphasis added). Thus, the first prong of the attorney's fees test was met. *See* § 119.12, Fla. Stat.

Upon review of the records "permissibly" produced, the Clerk was able to identify items that were missing or not disclosed, and which were not exempt from disclosure under section 288.075, or any other exemption to the Public Records Act. The second prong of the attorney's fees test was met when the EDC admitted it knowingly withheld records from the Clerk. *See Barfield v. Town of Eatonville*, 675 So. 2d 223 (Fla. 5th DCA 1996).

a. The EDC Only Provided Records that BlueWare Allowed to be released.

The EDC maintained it provided all records responsive to the Clerk's requests when it released several documents in late October 2013. R. 463 ("[A]ll records except confidential financial and proprietary information have been provided to the Petitioner."). During her deposition, Ms. Weatherman attempted to

take the same position. Her testimony, however, indicated the EDC was allowed to release records "except what [BlueWare's] attorney did not want released." R. 661 (emphasis added). Ms. Weatherman indicated those items included "[f]inancial statements and I think a balance sheet." *Id.* The EDC failed to provide any evidence supporting its claim that BlueWare allowed release of the EDC's records and, if it did, what records BlueWare requested be withheld from the Clerk. R. 659-61.

Regardless, disclosure of public records is not conditioned upon a private entity's approval. *See* 90 Op. Att'y Gen. Fla. 104 (1990) ("It is of no consequence that the . . . company wishes to maintain the privacy of particular materials filed with the department, unless such materials fall within a legislatively created exemption to Ch. 119, F.S."); *see also Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003), *rev. denied, sub nom., Crist v. Florida Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005) ("Neither the desire for nor the expectation of non-disclosure is determinative."); 95 Op. Att'y Gen. Fla. 58 (1995); and 80 Op. Att'y Gen. Fla. 31 (1980). Disclosure of public records in the EDC's possession or any claim to exemptions from the Public Records Act rested solely with the EDC, not BlueWare.

b. The EDC admits it made a Conscious Decision to Withhold Further Documents.

The Clerk audited the items produced by the EDC to ascertain "what [the Clerk] actually obtained and what was missing" in addition to determining whether or not the items were possibly exempt under section 288.075. Tr. 152-53. The Clerk found at least twenty-eight items that had been withheld from disclosure by the EDC. Tr. 162. When asked about the missing documents, Ms. McCarthy indicated that:

> The manner in which I printed everything out, if it was an e-mail with an attachment, the way the software printed it out, it printed out all the e-mails, then it printed the attachments, and it's possible that some of these attachments were with other documents. I can't say for sure.

Tr. 296.

In addition to those missing items, Ms. McCarthy detailed a wider range of documents that were knowingly withheld from the Clerk, even though they were responsive:

> [MR. JACOBUS]: And you mentioned that you withheld certain documents, such as internal notes, internal communications?
> [MS. MCCARTHY]: Uh-huh.
> [MR. JACOBUS]: There was some other stuff like agenda reports or when you were going to do press releases?
> [MS. MCCARTHY]: Uh-huh.
> [MR. JACOBUS]: Are those—what other documents have you withheld? Can you tell me which documents you withheld I guess?
>
> * * *
>
> [MS. MCCARTHY]: There is a large number of them. Off

> the top of my head, I mean it's more of the content of, as I mentioned, press releases, newsletters, how are we going to give the speaking points at a board meeting, things like that.
> [MR. JACOBUS]: So there's more documents than just the confidential client lists, confidential financials that you all withheld, you made a decision to withhold; is that correct?
> [MS. MCCARTHY]: I made the decision to withhold them, yes.

Tr. 297-28 (emphasis added).

Ms. McCarthy acknowledged she made the decision to withhold records. "Intentional wrongdoing or ineptitude . . . amounts to an unlawful refusal and is not a valid basis for denying recovery of attorney's fees and costs under Section 119.12(1), Florida Statutes." *Barfield,* 675 So. 2d at 225. Ms. McCarthy's testimony indicates public records were withheld from disclosure even though the EDC had proclaimed *only* confidential financial statements had been withheld.

4. The Trial Court's Application of the Case Law was Incorrect.

In denying the Clerk's request for attorney's fees, the trial court highlighted the rulings in *Harold, supra, B & S Utilities, Incorporated v. Baskerville-Donovan, Incorporated,* 988 So. 2d 17 (Fla. 1st DCA 2008), and *New York Times Company v. PHH Mental Health Services, Incorporated,* 616 So. 2d 27 (Fla. 1993). These cases are not controlling here.

None of the cases referenced by the trial court concern an entity whose agreement required records be maintained under the Public Records Act, nor did any of the cases involve an entity whose bylaws provided for disclosure of records

under the Public Records Act. The only case cited by the trial court similar to the instant action is *Harold.* In that case, the agreement in question required "that certain administrative and cost accounting records be maintained." 668 So. 2d at 1011. It did not, however, state that records were to be kept in compliance with the Public Records Act, as in the case at bar.

The trial court failed to consider the Second District's opinion in *Times Publishing, supra.* In that case, the Chicago White Sox entered into discussions with the City of St. Petersburg (the "City") for use of the Florida Suncoast Dome. *Id.* at 489. The *St. Petersburg Times* (the "*Times*") submitted a public records request to both the City and the White Sox. *Id.* at 490. Pointedly, the Second District wrote that it was "uncontroverted that [the] office [of the White Sox's attorney] became the de facto official repository of documents generated as a result of the negotiations." *Id.* at 494-95. "Thus, by its own actions, the White Sox assumed custody of the public records sought to be reviewed." *Id.* at 495.

Despite the White Sox's contentions that it was merely a private entity not working on behalf of the City (as is the EDC's argument in the instant action), the trial court found that the unique situation warranted an award of attorney's fees to the *Times*. The Second District affirmed the trial court's finding, opining that:

> Writers from the Times made demand upon the White Sox for access to these documents and the White Sox refused. Section 119.12(1), Florida Statutes, provides that "[i]f a civil action is filed against an agency to enforce the provisions of [the Public Records Act] and if the

> court determines that such agency unlawfully refused to permit a public record to be inspected . . . ., the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees." We think the intent of the statute is to reimburse a party who incurs legal expenses when seeking permission to view records wrongfully withheld, even if access is denied based on a good faith but mistaken belief that the documents are exempt. *See News & Sun-Sentinel Co. v. Palm Beach County,* 517 So.2d 743 (Fla. 4th DCA 1987). Accordingly, we hold that the trial court did not err in finding that the White Sox violated the Public Records Act by denying access to the draft leases and thus it properly held that attorney's fees and costs may be assessed.

Id. In the instant case, the EDC is the *de facto* custodian of public records related to its Agreement with the County. The decision in *Times Publishing* is particularly pertinent to the instant case and should be followed to the exclusion of *B & S Utilities*, *Harold* and *PHH.*

B. THE TRIAL COURT ABUSED ITS DISCRETION IN THAT ITS WRITTEN ORDER DIFFERED FROM ITS ORAL PRONOUNCEMENT.

At the end of the two-day evidentiary hearing, the Clerk's counsel requested the trial court reserve jurisdiction for the purposes of deciding attorney's fees:

> MR. RUSSELL: And we would ask that Your Honor reserve jurisdiction to make any necessary ruling on attorney's fees sometime [after exchange of closing arguments].
> THE COURT: Sure.
> MR. RUSSELL: Okay.
> MS. REZANKA: Okay.

Tr. 430.

The record is clear that the trial court orally reserved jurisdiction to address attorney's fees at a later date after written closings had been submitted. However, the trial court then summarily denied attorney's fees in its Final Judgment without so much as hearing argument from the Clerk's counsel.[17] In doing so, the trial court abused its discretion in making one oral pronouncement on the record and a second, written ruling contradicting the first. *See Leonard v. Leonard*, 613 So. 2d 1339, 1340 (Fla. 3d DCA 1993) (final judgment which does not conform to trial court's oral pronouncement must be reversed); *Gallardo v. Gallardo*, 593 So. 2d 522, 524 (Fla. 3d DCA 1991) *rev. denied*, 604 So. 2d 486 (Fla. 1992) (trial court erred in not conforming final judgment to oral pronouncements); and *Ivens Corporation v. Cohen*, 560 So. 2d 1352, 1353 (Fla. 3d DCA 1990) (reversal required where "trial court expressed to the parties findings different from those memorialized in the final judgment").

C. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT HOLDING AN EVIDENTIARY HEARING ON ATTORNEY'S FEES.

Section 119.12 allows the award of attorney's fees "if the court determines that [an] agency unlawfully refused" to disclose public records. "Only a hearing will permit the trial court to make this determination." *Woodfaulk v. State*, 935 So. 2d 1225, 1227 (Fla. 5th DCA 2006). The trial court did hold a two-day evidentiary

[17] The trial court did have the benefit of argument from the EDC, which the Clerk will address later.

hearing on whether or not the EDC was subject to the Public Records Act. The trial court did *not*, however, hear argument on attorney's fees, nor did it ask the parties to brief the issue of entitlement to attorney's fees.

Furthermore, the EDC went outside the bounds of the trial court's pronouncement requiring written arguments "just on those two tests based on the evidence presented here: Schwab, delegation." Tr. 428 (emphasis added). Rather than devoting its entire brief to the two tests as instructed by the trial court, the EDC dedicated a portion of its arguments to attorney's fees and costs, (R. 1821-23), while the Clerk abided by the trial court's instruction. The Clerk was prejudiced by the EDC's inclusion of this material because the EDC's arguments impacted the trial court's decision, while the Clerk was denied a fair opportunity to present its arguments on attorneys' fees. As evidence that the trial court was influenced by the EDC's unsolicited, unilateral arguments on attorneys' fees, the Final Judgment cites the same two cases cited by the EDC in denying the Clerk's request for attorneys' fees.

The trial court not only misinterpreted the facts and misapplied the case law, but also abused its discretion in ruling on attorney's fees after it had reserved jurisdiction for a later date and by ruling on attorneys' fees based on arguments from only one party without conducting an evidentiary hearing.

CONCLUSION

Based on the foregoing, the Clerk respectfully requests this Court affirm the portion of the trial court's Final Judgment finding the EDC subject to the Public Records Act under the delegation test in *Memorial Hospital.* In the event this Court believes that test was inappropriately applied, the Clerk requests this Court make a determination that the EDC is subject to the Public Records Act under the *Schwab, Twitty* factors test, and deny the EDC's request for remand.

Further, the Clerk asks that this Court reverse the portion of the Final Judgment denying attorney's fees and find the EDC did unlawfully refuse to provide access to its public records. The EDC had no reason to believe that its status as an agency was in controversy, particularly given its Agreement with the County and its bylaws. Additionally, for nearly a year, the EDC acted in a manner consistent with the belief that the Public Records Act applied. Only after it became opportune to allege inapplicability of the Public Records Act did the EDC do so. The Clerk asks this Court to find he is entitled to attorney's fees under *Times Publishing* and *Knight Ridder, Inc.*, and remand this action to the trial court for a determination on a reasonable amount of fees to be awarded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with Rule 9.100(l), Fla.R.App.P., and was prepared in double-spaced 14-point Times New Roman font.

/s/ Curt Jacobus
CURT JACOBUS, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December, 2014, I filed the foregoing with the Clerk of the Fifth District Court of Appeal and furnished a true and correct copy of the same to the following:

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