THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

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

Appellant,

vs. CASE NO. 5D14-1356

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

Appellee.
_____/

Appeal from the Circuit Court of the Eighteenth Judicial Circuit
Orange County, Florida
Lower Tribunal Case No. 05-2013-CA-069095

BRIEF OF *AMICI CURIAE* THE FIRST AMENDMENT FOUNDATION, INC., THE ASSOCIATED PRESS, THE BRADENTON HERALD, INC., THE FLORIDA CENTER FOR INVESTIGATIVE REPORTING, THE FLORIDA PRESS ASSOCIATION, THE FLORIDA SOCIETY OF NEWS EDITORS, HALIFAX MEDIA GROUP, LLC, MIAMI HERALD MEDIA COMPANY, MORRIS COMMUNICATIONS CORPORATION, ORLANDO SENTINEL COMMUNICATIONS, LLC, PALM BEACH NEWSPAPERS, LLC, SCRIPPS MEDIA, INC., SUN-SENTINEL COMPANY, LLC, AND THE TAMPA MEDIA GROUP

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

1. The First Amendment Foundation is a 501(c)(3) tax-exempt, non-profit organization established in 1984 by other non-profits – the Florida Press Association, the Florida Society of News Editors and the Florida Association of Broadcasters – to ensure government openness and transparency. The Foundation was created to advocate the public interest in free speech, free press and open government and to provide training and legal advocacy. The Foundation has filed numerous amicus briefs in the Florida courts relating to Florida's Public Records Act and access to judicial proceedings. The Foundation provides education and training, monitors open records and meetings laws, and assists citizens and journalists in obtaining access to government.

2. The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

3. The Bradenton Herald, Inc. publishes *The Bradenton Herald*, a daily newspaper of general circulation serving Manatee County since 1922.

4. The Florida Press Association is a Section 501(c)(6) trade association incorporated in Tallahassee, Florida. It represents daily and weekly newspapers in Florida on a variety of issues, including those affecting the First Amendment rights of its member newspapers and rights of access to records and proceedings.

5. Florida Society of News Editors is a membership organization that seeks to advance the cause of responsible journalism through educating the public about relevant stories and publications around the state.

6. The Florida Center for Investigative Reporting ("FCIR"), founded in 2010, is a nonprofit, digital and bilingual investigative journalism organization working to expose corruption, waste and miscarriages of justice. FCIR produces investigative journalism in collaboration with its partners, including traditional and ethnic news media. FCIR is a statewide network that delivers reports on multiple platforms, including print, radio, television and online. FCIR is a member of the Investigative News Network, a coalition of nonprofit news organizations dedicated to in-depth, investigative journalism in the public interest.

7. Halifax Media Group, LLC (d/b/a *The Daytona Beach News-Journal, The Gainesville Sun, Ocala Star Banner,* and *The Ledger)* owns 35 newspaper publications and affiliated websites. *The Daytona Beach News-Journal* is a newspaper of general circulation that has served Volusia and Flagler counties since 1883; *The Gainesville Sun* is a newspaper of general circulation that has served

Alachua and surrounding counties for decades; *The Ledger* is an award-winning newspaper of general circulation that has served Polk and surrounding counties since 1924; and the *Ocala Star Banner* is a newspaper of general circulation based in Ocala, Florida that serves Marion and surrounding counties.

8. Miami Herald Media Company publishes the *Miami Herald*, a daily newspaper of general circulation in South Florida. It has won 20 Pulitzer Prizes for its reporting.

9. Morris Communications Corporation (d/b/a *The Florida Times-Union)* is a diverse media organization with interests in newspaper, magazines, radio and specialized print publications. Specifically, *The Florida Times-Union* is a general circulation newspaper located in Jacksonville, Florida and serving Duval and surrounding counties.

10. Orlando Sentinel Communications Company, LLC, publishes the *Orlando Sentinel*, a daily newspaper located in Central Florida that circulates throughout the State.

11. Palm Beach Newspapers, LLC, a division of Cox Media Group, owns and operates The Palm Beach Post and The Palm Beach Daily News, newspapers and affiliated websites serving Palm Beach County and the Treasure Coast.

12. Scripps Media, Inc. (d/b/a *Naples Daily News, Stuart News, St. Lucie News Tribune, Jupiter Courier, Indian River Press Journal, TC Palm, Sebastian*

Sun, *Vero Beach Newsweekly*, WFTS-TV and WPTV-TV) is a diverse media concern with interests in newspaper publishing, broadcast television stations, national lifestyle cable networks, electronic commerce, interactive media, and licensing and syndication. Scripps operates daily and community newspapers in more than a dozen markets across the country, broadcast TV stations, cable and satellite television programming networks, a television retailing network and online search and comparison shopping services.

13. Sun-Sentinel Company, LLC is the publisher of the *Sun-Sentinel*, a Pulitzer Prize-winning daily newspaper located in South Florida that circulates throughout the State.

14. The Tampa Media Group, Inc. (d/b/a *The Tampa Tribune*, *Brandon News, Carrollwood News, Central Tampa News*, *Hernando Today*, *Highlands Today, Northeast News, Northwest News, Pasco Tribune*, *St. Petersburg Tribune*, *Plant City Courier*, *South Shore News, South Tampa News, The Sun*, and *Suncoast News*), owns several newspaper publications and affiliated websites in the Tampa Bay region.

PRELIMINARY STATEMENT

Scott Ellis shall be referred to as the "Clerk." The Economic Development Commission of Florida's Space Coast, Inc., shall be referred to as the " EDC." The Brevard County Board of County Commissioners shall be referred to as the "County."

Citations to the record on appeal shall be designated as "R" followed by the applicable volume and pagination. Citations to the trial transcript shall be "Tr." Citations to the Clerk's exhibits shall be designated as "Clerk's Ex.).

SUMMARY OF THE ARGUMENT

A private entity is created "pursuant to law" within the meaning of Art. I, § 24(a), Fla. Const., and § 119.011(2), Fla. Stat., when a county takes official action, through a vote of its county commissioners, to convert and transfer the functions of an existing public body to a private entity. The Court need not look beyond this point to affirm the trial court's judgment that the records of the private entity are subject to the Florida's Public Records Act.

Alternatively, the trial court's application of the delegation test should not be disturbed. When a private entity assumes the same public functions previously performed by a public body, delegation has occurred.

The EDC's suggested framework for determining when delegation occurs is unworkable and would invite public-private partnerships that would frustrate the constitutional right of inspection. It would also create opportunities for secrecy and corruption that would undermine the public's trust.

Public policy demands enforcement of written agreements which expressly recognize that the Public Records Act applies to records held by a private entity performing a public function.

The trial court erred in refusing to award attorneys' fees and costs because there was no good faith basis to withhold the requested records. In contrast to an entity that merely provides services to a governmental body, when a private entity

is created "pursuant to law" to perform a public function, it is an "agency" within the meaning of the Public Records Act and there can be no legally valid reason to avoid the requirements of the Public Records Act. Also, there can be no good faith basis when a written agreement expressly provides that records related to the public function performed by the private entity are subject to the Public Records Act. Denying attorneys' fees under these circumstances would incentivize those with superior resources to deny citizens access to public records, frustrating Florida's strong public policy of openness.

ARGUMENT

I.

THE TRIAL COURT CORRECTLY APPLIED THE DELEGATION TEST IN DETERMINING THAT THE EDC WAS SUBJECT TO FLORIDA'S PUBLIC RECORDS ACT.

1. History of Florida's Public Records Act

Florida's long tradition of transparency in government is widely recognized as the model for other states. That tradition started as early as 1892 when the legislature enacted Sections 1390 and 1391, Revised Statutes of 1892, the precursor to what has come to be known as the Public Records Act, Chapter 119 of the Florida Statutes. ("the Public Records Act"). See *State v. McMillan*, 49 Fla. 243, 246, 38 So. 666, 667 (1905) (recognizing no limitations on a citizen's right to access public records).

In November 1992, Florida citizens overwhelmingly approved elevating the right of access to public records to constitutional dimension by ratifying Article I, § 24(a), of the Florida Constitution.[1] At the time, Florida became the only state in the nation securing this right by constitutional decree. As one commentator noted:

> The breadth of Florida's Sunshine Law and the liberal construction of the statute by Florida courts has resulted in Florida's longstanding reputation as a national leader in open meetings laws. In the first Florida Open Government Law Manual, published in 1978 by Florida Attorney General Robert L. Shevin, and funded in part by The New York Times Company, Shevin described the state's open government laws as "among the broadest and most all-encompassing of their kind in the entire nation."

Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position As A Leader in Open Government*, 35 Fla. St. U.L. Rev. 245, 257-58 (2008).

In *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009) ("*NCAA*"), the First District Court of Appeal stated that the Public Records Act "implements a right guaranteed to members of the public under the Florida Constitution and it therefore promotes a state interest of the highest order."

[1] "The amendment was favored by 83 percent of those voting." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So.2d 857, 861 (Fla. 3d DCA 1994) (citing Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)—Let the Sunshine In!*, 18 Nova Law R. 973, 979 n. 32 (1994)).

Id. at 1212. The Public Records Act was enacted for the benefit of the public. "'Statutes enacted for the public benefit should be interpreted most favorably to the public.'" *Grapski v. City of Alachua*, 31 So. 3d 193, 198-99 (Fla. 1st DCA 2010) (quoting *Bd. of Pub. Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla.1969)). Similarly, it has been recognized that the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA")—the federal counterpart to the Public Records Act—sets forth a policy of broad disclosure of government documents in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *FBI v. Abramson*, 456 U.S. 615, 621 (1982) (quotation marks omitted). If there is any doubt about the application of the law in a particular case, the doubt is resolved in favor of disclosing the documents." *NCAA*, 18 So. 3d at 1206.

2. Private entities created "pursuant to law" are subject to the Act.

When a county commission votes by motion to reorganize and convert a public body into a private entity that assumes the same public functions, and appoints several board members to sit on the new entity, it acts "pursuant to law" within the meaning of Article I, § 24(a) of the Florida Constitution and § 119.011(2), Florida Statutes.

Art. I, § 24(a) mandates that every person has the right to inspect public records made or received "in connection with the official business of any public body … or persons acting on their behalf[.]" Additionally, the constitutional

provision states that this right extends to every branch of government including any "entity created pursuant to law or this Constitution." Art. I, § 24(a).

Similarly, § 119.011(2) defines an "agency" to mean any entity "created or established by law including … any ... business entity acting on behalf of any public agency." *Id*.

Amici contend that when a not-for-profit entity is created through an official vote and act following a reorganization of a public board and subsequently assumes the same functions of the previously-existing public board, it has been created pursuant to law and is acting on behalf of the public entity for the purposes of applying the Public Records Act to its records. This is particularly true when one of the reasons advanced in support of the conversion is for secrecy.[2]

The broad range of powers of a county commission are enumerated in § 125.01(1)(a)-(cc), Florida Statutes. Additionally, Brevard County is a charter county and its Charter expressly provides that official acts occur "by the adoption of ordinances, resolutions **or motions**." *See* Brevard County Charter at § 2.10.1, available at http://goo.gl/NX8EjS (last accessed December 28, 2014). (Emphasis added). A county has the authority and power, pursuant to law, to take action and appropriate funding for economic development activities. *See* § 125.045(3),

[2] The ad hoc committee report adopted by the County stated that "[i]Issues of confidentiality and the ability to respond quickly to marketing opportunities are central to the rationale for taking BEDC private." [Clerk's Ex. 18, Final Report of the Ad Hoc Steering Committee on Economic Development at 7].

Florida Statutes ("[I]t constitutes a public purpose to expend public funds for economic development activities, including … making grants to private enterprises for the expansion of businesses existing in the community or the attraction of new businesses to the community."). Thus, the County was using its official powers "pursuant to law" when it reorganized the Council and created the EDC.

Courts have repeatedly stated that "[t]he Public Records Act is to be liberally construed in favor of open government." *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987). *See also Barfield v. Sch. Bd. of Manatee County*, 135 So. 3d 560, 562 (Fla. 2d DCA 2014); *Morris Pub. Group, LLC v. Florida Dept. of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2013), *rev. denied*, SC14-691, 2014 WL 7005109 (Fla. 2014); *Marino v. Univ. of Florida*, 107 So. 3d 1231, 1233 (Fla. 1st DCA 2013); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994).

Liberally construing the constitutional and statutory language compels the conclusion that a private entity is created "pursuant to law" when it is born from a reorganization of a public body through an official act of county government. As described, the EDC was born by vote of the Brevard County Commission. Amici urge this Court to look no further than this fact to uphold the trial court's judgment that the EDC's records are public.

3. Delegation occurs upon transfer of an existing public function.

When a public body transfers the execution of a public function to a private entity, the delegation test is appropriately applied. *See Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 381 (Fla. 1999) ("When the agreement transfers the actual public function, public access follows[.]") ("*Memorial Hospital*"); *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17, 21 (Fla. 1st DCA 2008) (noting *Memorial Hospital* expressed the view that "transfer of an actual public function to a private entity brings documents the private entity generates within the purview of chapter 119, to the extent the private entity creates the documents while performing the public function.").

In *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997), the Salvation Army contracted with a county to provide "certain probation services for the efficient administration of justice within this circuit." *Id*. at 502. The contract required the Salvation Army to perform a variety of services relating to misdemeanant probation functions. This Court construed that contract not as one that provided services to the county, but in place of the county, and concluded that:

> Because we find the statutory and contractual delegation of governmental responsibility so compelling in this case, it is unnecessary to engage in the factor-by-factor analysis outlined by *Schwab*.

Id. at 503.

As explained in *NCAA*, "[t]he common feature of all of the cases in this [delegation] line of authority … is that they all involve efforts to determine whether a private entity has assumed the role of the government."

> Typically, the private entity has a contract with the government and performs a public function in the course of its duties under the contract. The private entity is acting not as a business adversary to the government but as a surrogate for the government.

NCAA, 18 So. 3d at 1209.

To be clear, Amici do not contend that a delegation occurs merely because a contract for services has been entered into. Rather, delegation is appropriately found when the duties and activities of a previously existing public function by a public board are assumed by a private entity. [3]

4. The complete transfer of a public function is unnecessary.

The EDC's argument that only a complete and comprehensive transfer of a governmental function invokes the Public Records Act is unworkable. EDC's Initial Brief at 22 ("the assumption of the governmental obligation must be complete and comprehensive."). As demonstrated below, a complete transfer is not required to determine that delegation of a public function has occurred and this Court should decline embracing that view because it would frustrate, if not altogether void, Florida's public policy of transparency.

[3] Amici agree with the Clerk's argument that the analysis under *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992), would produce the same result as the delegation test.

In *Memorial Hospital*, the legislature created an independent taxing district, the West Volusia Hospital Authority, whose purpose was to "construct, operate, and maintain such hospital or hospitals as in its opinion shall be necessary for use of the people of the district." *Id*., 729 So. 2d at 377. "[T]he Authority developed and **operated two hospitals** in Deland: Fish Memorial Hospital and West Volusia Memorial Hospital." *Id*. (emphasis added). Because of difficulties in adapting public hospitals to the competitive health care market, the Authority decided to lease and transfer one of the public hospitals to a private not-for-profit entity.[4]

The News-Journal Corporation filed suit against the newly created private entity, contending that its records were subject to the Public Records Act and that meetings of its board of directors were subject to the Sunshine Law. *Id*. at 376.

The trial court concluded that the new entity was not subject to the Public Records Act, but this Court overturned that decision on appeal. *News-Journal Corp. v. Mem'l Hosp.-W. Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997). The Florida Supreme Court affirmed, holding that when an "agreement transfers the actual public function, public access follows[.] *Memorial Hospital* at 381.

[4] Prior to the lease and transfer of West Volusia Memorial, the Authority had entered into a financing and development agreement with another private entity, Adventist Health System/Sunbelt, Inc., for the joint development of an inpatient/outpatient health care facility. The new corporation, was owned equally by the Authority and Adventist. Fish Memorial Hospital's patients were transferred to the new hospital, and the old facility was taken out of service. *Id*. at 379, n. 12.

The delegation test recognized in *Memorial Hospital* was not based on the complete assumption of a governmental function. As noted above, another public hospital, Fish Memorial Hospital, existed that was not transferred. Thus, *Memorial Hospital* did not involve a complete transfer or the wholesale assumption of a governmental function by a private entity. The Authority still retained 50% ownership over one public hospital.

Under the EDC's interpretation of the delegation test, a public body would merely have to retain some discrete portion of a public function while transferring 95% of that function to a private entity.

For example, Lynda Weatherman, the current president and CEO of the EDC, testified that "economic development is quite a ubiquitous term." [R8-1495; Tr. 217]. According to Ms. Weatherman, economic development activities could be a city employee with a name tag that says Economic Development who merely welcomes someone and helps them fill out an application. "Really it's a term that can be used anywhere." [R8-1496; Tr. 218]. Under Ms. Weatherman's view, even when the county develops a road it constitutes economic development. [*Id*.]

Such an approach is unworkable and would encourage the privatization of governmental functions without any accompanying public scrutiny. So long as the public body had someone with a name tag that said Economic Development who performed some minimal activity consistent with the broad and ubiquitous

definition of economic development, economic development entities across the state would argue that no delegation has occurred.

In this case, the Court need not split hairs over where to draw the line on what constitutes the minimum threshold to find that delegation of a public function has occurred. It would be enough if the Court finds that the EDC assumed the same objectives and functions previously administered by the public body.

5. Written agreements should be enforced

The EDC entered into a written agreement acknowledging that its records were subject to inspection by the County and under Chapter 119. When a written agreement expressly states that records related to the performance of an agreement by a private entity are subject to inspection by the public agency as well as under the Public Records Act, public policy requires a court to find that the private entity assumed the responsibility and was delegated the authority to maintain the records on behalf of the public agency. As one commentator noted:

> Privatization may be desirable in itself, but it should not come without statutory or contractual provisions leaving public accountability intact. Not only should the public be able to monitor the private company's activities, but the monitoring should be on the same terms as when the public agency was the information vendor.

Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law, 27 Fla. St. U.L. Rev. 825, 833 (2000) (footnotes omitted).

Curiously, the EDC and the County fail to cite *Harold v. Orange County, Fla.*, 668 So. 2d 1010 (Fla. 5th DCA 1996). In that case, an agreement required a private entity to maintain records relating to a construction project and to allow Orange County to inspect those records at any time to ensure compliance with the terms of the agreement. *Id*. at 1012. Under those circumstances, it was determined that the private entity had been delegated the responsibility, on behalf of Orange County, to maintain those records, which the Court found to be public records. *Id*.

If a private entity is acting for the benefit of a public agency, then it follows that the records are connected to the transaction of public business based on the ***content*** of the records, not the ***nature*** of the entity or the ***location*** of the records. *See State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) ("The determining factor is the nature of the record, not its physical location.").

When a private entity has been paid substantial sums of monies from the public treasury to perform functions for a public body, it should not be heard to complain that it has to fulfill a contractual obligation that requires its records to be open for inspection under the Public Records Act.

6. Public policy considerations do not defeat disclosure

The Public Records Act declares that "[i]t is the policy in this state that all state, county and municipal records are open for personal inspection and copying by any person." § 119.01(1), Florida Statutes. The Florida Supreme Court has

"repeatedly acknowledged the strong public policy in this State that allows members of the public to have access to public records. Indeed, the Florida Constitution demands no less." *Media Gen. Convergence, Inc. v. Chief Judge of Thirteenth Judicial Circuit*, 840 So. 2d 1008, 1020 (Fla. 2003).

Despite this body of law, the County argues the Public Records Act should be construed narrowly in its confusing patchwork legislative history argument.[5] County's Amicus Brief at 12. The County has it completely wrong.

> The public policy pervading [cases brought under the Public Records Act] is that public records must be freely accessible unless some overriding public purpose can only be secured by secrecy. This public policy favoring open records must be given the broadest expression. It is the exception which must be narrowly construed.

Tribune Co. v. Pub. Records, P.C.S.O. No. 79-35504 Miller/Jent, 493 So. 2d 480, 484 (Fla. 2d DCA 1986) (citation omitted). It is exemptions from disclosure that are construed narrowly and limited to their stated purpose. *Rameses, Inc. v.*

[5] The County's legislative history argument has nothing to do with the trial court's judgment and does not appear to have been raised by any party in the proceedings below. This case is not about whether an exemption from disclosure applies or whether more than one economic development agency within a county can legally assert an exemption. Regardless, *Amici* assert that nothing in the legislative history supports the County's assertion that the 2006 legislative changes intended that only one economic development agency could assert an exemption under § 288.075. *See* Fla. S. Comm. on Gov't Oversight and Prod., CS/SB 734 (2011), Staff Analysis, (Apr. 25, 2006) (on file with comm.), available at http://goo.gl/igjXpF (last accessed December 29, 2014).

Demings, 29 So. 3d 418, 421 (Fla. 5th DCA 2010); *WFTV, Inc. v. Sch. Bd. of Seminole,* 874 So. 2d 48, 53 (Fla. 5th DCA 2004).

As Amici understand it, this case is not about whether exemptions apply, but whether the EDC is subject to the Public Records Act at all. Any argument that application of the Public Records Act to economic development agencies must be narrowly construed to favor secrecy turns the Public Records Act on its head and defies the well-established rules of construction in Chapter 119 cases.

Amici supporting the EDC also advance public policy arguments in favor of secrecy for economic development activities.

For example, the County argues that private companies seeking governmental incentives "have ZERO tolerance" for any transparency including the disclosure of their name "as part of a public records request, period!" County's Amicus Brief at 5. Similarly, the FEDC predicts "devastating" results to Florida's economy should the Public Records Act be applied to economic development entities that facilitate government incentives. FEDC Amicus Brief at 4.

Both these arguments ignore the fact that the Legislature has seen fit to protect **certain** records from disclosure relating to confidential business relocation plans or trade secrets held by an economic development agency involving governmental incentives. *See* § 288.075(2)-(6), Florida Statutes. The Legislature has expanded the definition of economic development agency over the years to

cover anyone who is acting on behalf of a public body, thus ensuring that the exemption from disclosure could be invoked regardless of who holds the records. Whether an exemption applies to certain records held by an economic development agency, however, does not alter the delegation analysis.

The arguments by the County and FEDC also attempt to advocate for a public policy the Legislature has not seen fit to recognize beyond the narrow statutory exemptions from disclosure afforded under § 288.075. Worse, they urge this Court to elevate unrecognized public policy grounded in a "sky is falling" argument over and above what Floridians have constitutionally demanded as the overriding public policy of transparency.

Floridians did not pass a constitutional amendment relating to the rights of private enterprise to keep records relating to economic development activities secret. Rather, they insisted that the rights of citizens to discover the activities of its government be considered paramount. *Miami Herald Pub. Co., v. City of N. Miami*, 452 So. 2d 572, 573 (Fla. 3d DCA 1984) (recognizing that § 119.01 establishes the "preeminent public policy" of openness even above privileges established in the Evidence Code). "Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution

resulting from such disclosure." *News-Press Pub. Co., Inc. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980).

Public policy exceptions to the Public Records Act were rejected as far back as 1975 after the decision of the Second District Court of Appeal in *Wisher v. News-Press Publishing Co*., 310 So. 2d 345 (Fla. 2d DCA 1975), *rev'd*, 345 So. 2d 646 (Fla.1977). In *Wisher*, the Second District held that non-statutory public policy considerations could restrict public access to documents otherwise deemed "public records" within the meaning of chapter 119. In 1975, and in response to the *Wisher* decision, the legislature amended the statute to make it clear that only expressly enumerated exemptions could provide the basis for withholding public records.

As explained in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979), "that the very purpose of the statutory amendment was specifically to overrule the Second District *Wisher* conclusion and preclude judicially-created exceptions to the Act in question." *Id*. at 424 (quotation marks omitted).

By constitutional fiat, public policy arguments cannot prevent the disclosure of records; only the legislature can consider and enact statutory exemptions that limit the disclosure of records. Art. I, § 24(c), Fla. Const. *See also Ingram v. State*, 39 Fla. L. Weekly D412 (Fla. 5th DCA Feb. 21, 2014) *rev. granted*, SC14-564, 2014 WL 3888168 (Fla. 2014) ("The Florida Constitution provides an overriding policy directing full public access to public records."). Judges may not

create exemptions from disclosure. *See Marino*, 107 So. 3d at 1234 ("the University must go to the legislature for such an exemption."); *Miller/Jent*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986) ("only the legislature can create such an exemption, not the court or custodian.").

Despite arguments advanced by amici supporting the EDC that Florida's economy would be shattered if the trial court's judgment were upheld, Florida courts have repeatedly declined invitations to close records based on policy arguments that compete with the state's long tradition of transparency when it comes to the activities of the government. Economic development is no exception. The Legislature has dealt with the competing interests by establishing statutory exemptions that protect against confidential information being obtained by competitors in the private industry. That the Legislature has not acted on requests by proponents of economic development seeking the shelter of broader exemptions demonstrates that the public policy served by transparency retains its vitality.

II.

RECOVERY OF ATTORNEYS' FEES IS ESSENTIAL TO PROTECTING THE CONSTITUIONAL AND STATUTORY RIGHT OF ACCESS TO PUBLIC RECORDS.

Section 119.12 provides that if a court determines that an agency "unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable costs of

enforcement including reasonable attorneys' fees." The proper inquiry under section 119.12 is whether an agency "unlawfully refused to produce records, not whether any such refusal was willful." *Lilker v. Suwannee Valley Transit Auth.*, 133 So. 3d 654, 655 (Fla. 1st DCA 2014).

The trial court erred when it applied the good faith exception recognized in limited cases involving purely private entities unsure of their status as a public agency. There can be no good faith basis to deny attorneys' fees when a public entity is converted into a private entity that performs the same functions on behalf of the public and executes a written agreement acknowledging that the public body has the right to inspect records under the Public Records Act held by the private entity performing the public function.

In *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993), the private entity's status as an agency under chapter 119 was unclear. That case did not involve a private entity created from a public body that assumed the same functions as the public body. Moreover, unlike the instant case, *PHH Mental Health Services* did not involve a written agreement that required the private entity to allow a government agency to inspect the records, much less one that explicitly acknowledged that the records were subject to Chapter 119.[6]

[6] It is also noteworthy that *PHH Mental Health Services* was decided only shortly after the *Scwhab* decision that provided guidance for application of the Public Records Act to private entities providing services to governmental agencies.

The decision in *Times Pub. Co., Inc. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990), is more illustrative and provides ample support for imposing the sanction of attorneys' fees when a private entity violates the Public Records Act under circumstances where it clearly understands the transparency obligations imposed by law.

In that case, a major league baseball team argued that attorneys' fees were not recoverable because it was not an agency within the meaning of § 119.011(2) when it purposefully held possession of records that had been viewed by city officials. The Second District Court of Appeal upheld the trial court's decision to impose the sanction on the private party because it was uncontroverted that it had assumed custody of public records. *Id*. at 495.

Amici contend that recovery of attorneys' fees is an essential component of protecting the constitutional right of access to public records. Often, an agency possesses superior resources to the average citizen who seeks to enforce the Public Records Act. Litigation to enforce open government laws was traditionally brought by the media. However, severe budgetary cuts in the newsroom have had a profound impact on litigation brought under open government laws. *See* RomNell Anderson Jones, *Litigation, Legislation and Democracy in a Post-Newspaper America*, 68 Wash. & Lee L. Rev. 557, 594-97 (2011). These days, citizens are

more frequently bringing litigation to enforce transparency laws, often with attorneys representing them on a contingent fee basis.

If the trial court's judgment denying attorneys' fees were upheld, it would encourage private entities that have no doubt as to their status and obligations under the Public Records Act to refuse production of public records. In cases such as this where a written agreement acknowledges that the private entity possesses records that are subject to inspection, there can be no good faith basis to deny attorneys' fees. Similarly, when an agreement explicitly provides that the records held by the private entity are subject to inspection or copying under the Public Records Act, there can be no good faith basis to force a citizen to hire an attorney to fight the refusal to allow the records to be inspected or copied. The EDC understood the circumstances of its creation by a public entity and the accompanying public functions and transparency obligations it assumed – which were affirmed in the written contract between the EDC and the County. Like the major league baseball franchise in the *Times Pub. Co.* case, the EDC cannot avoid Chapter 119's mandate requiring the payment of attorneys' fees.

CONCLUSION

Amici respectfully request that this Court affirm the trial court's judgment finding that the Public Records Act applies to the EDC, but reverse the determination that denied attorney's fees to the Clerk.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an electronic copy of the foregoing has been filed with the Clerk of Court via the e-Portal, causing a copy to be delivered via e-mail to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the font requirements set forth in Fla. R. App. P., Rule 9.210(a)(2).

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