

2-B-2 | PRIVATE ORGANIZATIONS

A more complex question is presented when a private corporation or entity provides services for, or receives funds from, a governmental body. The term "agency," as used in the Public Records Act, includes private entities "acting on behalf of any public agency." Section 119.011(2), F.S. The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). Cf. *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 229n.4 (Fla. 3d DCA 1998) (private company operating state university bookstores is an "agency" as defined in s. 119.011[2], F.S., "[n]otwithstanding the language in its contract with the universities that purports to deny any agency relationship"); and *Schwartzman v. Merritt Island Volunteer Fire Department*, 352 So. 2d 1230 (Fla. 4th DCA 1977), cert. denied, 358 So. 2d 132 (Fla. 1978) (private nonprofit volunteer fire department, which had been given stewardship over firefighting, which conducted its activities on county-owned property, and which was funded in part by public money, was an "agency" for purposes of the Public Records Act, and its membership files, minutes of its meetings and charitable activities were subject to disclosure).

While the mere act of contracting with, or receiving public funds from, a public agency is not sufficient to subject a private entity to Ch.119, F.S., the following discussion considers when the statute has been held applicable to private entities.

a. Private Entities Created Pursuant to Law or by Public Agencies

The fact that a private entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act, but rather the issue is whether the entity is "acting on behalf of" a public agency. The Attorney General's Office has issued numerous opinions advising that if a private entity is created by law or by a public agency, it is subject to Ch. 119 disclosure requirements. The following are some examples of such entities: Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County to provide assistance in the funding and administration of certain governmental programs,



AGO 94-34; South Florida Fair and Palm Beach County Expositions, Inc., created pursuant to Ch. 616, F.S., AGO 95-17; rural health networks established as nonprofit legal entities to plan and deliver health care services on a cooperative basis pursuant to s. 381.0406, F.S., Inf. Op. to Ellis, March 4, 1994. And see s. 20.41(8), F.S., providing that area agencies on aging, described as "nongovernmental, independent, not-for-profit corporations" are "subject to [the Public Records Act], and, when considering any contracts requiring the expenditure of funds, are subject to ss. 286.011-286.012, relating to public meetings."

b. Private Entities Contracting with Public Agencies or Receiving Public Funds

There is no single factor which is controlling on the question of when a private corporation, not otherwise connected with government, becomes subject to the Public Records Act. However, the courts have held that the mere act of contracting with a public agency is not dispositive. See, e.g., *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra (private corporation does not act "on behalf of " a public agency merely by entering into a contract to provide architectural services to the agency); *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343 (Fla. 3d DCA 1983); *Stanfield v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract with county to provide services does not in and of itself subject the organization to Ch. 119 disclosure requirements). And see *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970 (Fla. 2d DCA 2002) (fact that private development is located on land the developer leased from a governmental agency does not transform the leases between the developer and other private entities into public records).

Similarly, the receipt of public funds, standing alone, is not dispositive of the organization's status for purposes of Ch. 119, F.S. See *Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991) (mere provision of public funds to the private organization is not an important factor in this analysis, although the provision of a substantial share of the capitalization of the organization is important); and *Times Publishing Company v. Acton*, No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999), available online in the Cases database at



the open government site at myfloridalegal.com (attorneys retained by individual commissioners in a criminal matter were not "acting on behalf of " a public agency for purposes of Ch. 119, F.S., even though county commission subsequently voted to pay the legal expenses in accordance with a county policy providing for reimbursement of legal expenses to officers successfully defending charges filed against them arising out of the performance of their official duties). Cf. Inf. Op. to Cowin, November 14, 1997 (fact that nonprofit medical center is built on property owned by the city would not in and of itself be determinative of whether the medical center's meetings and records are subject to open government requirements).

The courts have relied on "two general sets of circumstances" in determining when a private entity is "acting on behalf of " a public agency and must therefore produce its records under Ch. 119, F.S. See *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002); *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008), review denied, 4 So. 3d 1220 (Fla. 2009); and *County of Volusia v. Emergency Communications Network, Inc.*, 39 So. 3d 1280 (Fla. 5th DCA 2010). Each of these circumstances or tests is discussed below.

(1) "*Totality of Factors*" test

Recognizing that "the statute provides no clear criteria for determining when a private entity is 'acting on behalf of ' a public agency," the Supreme Court adopted a "totality of factors" test to serve as a guide for evaluating whether a private entity is subject to Ch. 119, F.S. *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992). See *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993); *Wells v. Aramark Food Service Corporation*, 888 So. 2d 134 (Fla. 4th DCA 2004).

Accordingly, when a public agency contracts with a private entity to provide goods or services to facilitate the agency's performance of its duties, the courts have considered the "totality of factors" in determining whether there is a significant level of involvement by the public agency so as to subject the



private entity to Ch. 119, F.S. See *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, supra at 974.

The factors listed by the Supreme Court in *Schwab* include the following:

- 1) the level of public funding;
- 2) commingling of funds;
- 3) whether the activity was conducted on publicly owned property;
- 4) whether the contracted services are an integral part of the public agency's chosen 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;
- 9) for whose benefit the private entity is functioning.

Thus, the application of the totality of factors test will often require an analysis of the statutes, ordinances or charter provisions which establish the function to be performed by the private entity as well as the contract, lease or other document between the governmental entity and the private organization.

For example, in AGO 92-37 the Attorney General's Office, following a review of the Articles of Incorporation and other materials relating to the establishment and functions of the Tampa Bay Performing Arts Center, Inc., concluded that the center was an "agency" subject to the Public Records Act, noting that the center was governed by a board of trustees composed of a number of city and county officials or appointees of the mayor, utilized



city property in carrying out its goals to benefit the public, and performed a governmental function. See also AGOs 97-27 (documents created or received by the Florida International Museum after the date of its purchase/lease/option agreement with city subject to disclosure under Ch. 119, F.S.), 92-53 (John and Mable Ringling Museum of Art Foundation, Inc., subject to Public Records Act), and 11-01. Cf. Inf. Op. to Goodman, September 26, 2016 (in the absence of a request from the chief of the volunteer fire department or additional information making the relationship between the town and the fire department clearer, the Attorney General's Office may not respond formally to town attorney's inquiry about the application of the Public Records Act to the town's volunteer fire department).

By contrast, an architectural firm providing architectural services associated with construction of school facilities was found to be outside the scope of the Public Records Act. See *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, supra. See also *Sipkema v. Reedy Creek Improvement District*, No. CI96114 (Fla. 9th Cir. Ct. May 29, 1996), per curiam affirmed, 697 So. 2d 880 (Fla. 5th DCA 1997), review dismissed, 699 So. 2d 1375 (Fla. 1997), available online in the Cases database at the open government site at myfloridalegal.com (private security force providing services on Walt Disney World property, including traffic control and accident reports is not subject to Ch. 119), *Trepal v. State*, 704 So. 2d 498 (Fla. 1997) (soft drink company cooperating with law enforcement in the testing of soda bottles during an investigation of a poisoning death is outside the scope of the Public Records Act); and Inf. Op. to Michelson, January 27, 1992 (telephone company supplying cellular phone services to city officials for city business is not an "agency" since the company was not created by the city, did not perform a city function, and did not receive city funding except in payment for services rendered). Cf. *National Council on Compensation Insurance v. Fee*, 219 So. 3d 172, 182 (Fla. 1st DCA 2017) (trial court conclusion that insurance rating organization violated Public Records Act was erroneous because the court



"expressly declined to apply the Schwab factors" prior to making this determination).

Stated another way, "[a] private entity does not act on behalf of a public agency merely by entering a contract to provide professional services to the agency." *Holifield v. Big Bend Cares, Inc.*, 326 So. 3d 739 (Fla. 1st DCA 2021) [Emphasis supplied by the court]. Thus, the Public Records Act did not apply to a private corporation providing health care services pursuant to a contract with a state agency because the private corporation was not created pursuant to any governmental action, the amounts paid were all paid in consideration for professional services already rendered, and the agency did not delegate any decision-making authority to the corporation, nor did it control or regulate the corporation's professional activity or judgment. *Id.* And see *National Council on Compensation Insurance v. Fee*, 219 So. 3d 172, 182 (Fla. 1st DCA 2017) (trial court conclusion that insurance rating organization violated Public Records Act was erroneous because the court "expressly declined to apply the Schwab factors" prior to making this determination).

(2) Delegation of function test

While the mere act of contracting with a public agency is not sufficient to bring a private entity within the scope of the Public Records Act, there is a difference between a party contracting with a public agency to provide services to the agency and a contracting party which provides services in place of the public body. *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997), approved, 729 So. 2d 373 (Fla. 1999). And see *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

For example, if a private entity contracts to relieve the public body from the operation of a public obligation such as operating a jail or providing fire protection, the open government laws apply. *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997), approved, 729 So. 2d 373 (Fla. 1999). And see *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, 307 (Fla. 3d DCA 2001)



(consortium of private businesses created to manage a massive renovation of an airport was an "agency" for purposes of the Public Records Act because it was created for and had no purpose other than to work on the airport contract; "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be"); and *Fox v. News-Press Publishing Company*, 545 So. 2d 941, 943 (Fla. 2d DCA 1989) (upholding a trial court decision finding that business records maintained by a towing company in connection with its contract with a city were public records, as the company "was clearly performing what is essentially a governmental function, i.e., the removal of wrecked and abandoned automobiles from public streets and property"). See also AGOs 08-66 (Public Records Act applies to not-for-profit corporation contracting with city to carry out affordable housing responsibilities and screening applicant files for such housing); 99-53 (while not generally applicable to homeowners associations, Ch. 119 applies to an architectural review committee of a homeowners association which is required by county ordinance to review and approve applications for county building permits as a prerequisite to consideration by the county building department); and 07-44 (property owners association, delegated performance of services otherwise performed by municipal services taxing unit, subject to Public Records Act when acting on behalf of the taxing unit). Compare AGO 87-44 (records of a private nonprofit corporation pertaining to a fund established for improvements to city parks were not public records since the corporation raised and disbursed only private funds and had not been delegated any governmental responsibilities or functions).

Thus, in *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997), the Fifth District recognized that the delegation of function test was the appropriate standard to use to determine that records generated by the Salvation Army in performing a contract to provide misdemeanor services for a county were subject to Ch. 119, F.S. As stated by the court: "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 in Schwab.” Stanfield, 695 So. 2d at 503. B & S Utilities v. Baskerville-Donovan Inc., 988 So. 2d. 17, 21 (Fla. 1st DCA 2008), citing to Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373 (Fla. 1999). In Baskerville, the court recognized that while the “totality of factors” test favored a private engineering firm’s position that it was not an agency, “the fact that the City delegated its municipal engineering functions” to [the firm] “is dispositive.” Baskerville, 988 So. 2d at 22. (e.s.)

The following are other examples of private businesses and nonprofit entities which were delegated a governmental function and thus determined to be subject to the Public Records Act in carrying out that function:

Corrections company operating county jail:

Times Publishing Company v. Corrections Corporation of America, No. 91-429 CA 01 (Fla. 5th Cir. Ct. December 4, 1991), affirmed per curiam, 611 So. 2d 532 (Fla. 5th DCA 1993), available online in the Cases database at the open government site at myfloridalegal.com. And see Prison Health Services, Inc. v. Lakeland Ledger Publishing Company, 718 So. 2d 204 (Fla. 2d DCA 1998), review denied, 727 So. 2d 909 (Fla. 1999) (medical services).

Employment Search Firm:

Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc. 379 So. 2d 633 (Fla. 1980). Accord AGO 92-80 (materials made or received by recruitment company in the course of its contract with a public agency to seek applicants and make recommendations to the board regarding the selection of an executive director, subject to Ch. 119).



Humane society investigating animal abuse for county: Putnam County Humane Society, Inc. v. Woodward, 740 So. 2d 1238 (Fla. 5th DCA 1999).

However, the "delegation of function" test should not be used unless there is a "clear, compelling, complete delegation of a governmental function" to the private entity. Economic Development Commission v. Ellis, 178 So. 3d 118, 123 (Fla. 5th DCA 2015). In Ellis, the Fifth District found that the trial judge should not have used the delegation test to determine whether a private economic development entity (EDC) under contract with the county to provide services was an "agency." The appellate court explained that the EDC was the county's "primary" but not its "sole" agency for economic development activity. Id. The county "continued to carry out economic development activities itself through its own paid county employees and in conjunction with other entities to the exclusion of EDC." Id. In other words, "EDC did not take over the county's role or completely assume the county's provision of economic development services." Id. Because "EDC provided services to, not in place of, the county," the trial judge should have applied the "totality of factors" test instead of the "delegation of function" test. Id.

c. Private Company Delegated Authority to Keep Certain Records

If a public agency has delegated its responsibility to maintain records necessary to perform its functions, such records have been deemed to be accessible to the public. See, e.g., Harold v. Orange County, 668 So. 2d 1010 (Fla. 5th DCA 1996) (where county hired a private company to be the construction manager on a county project and delegated to the company the responsibility of maintaining records necessary to show compliance with a "fairness in procurement ordinance," the company's records for this purpose were public records). See also Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc., 718 So. 2d 227 (Fla. 3d DCA 1998), review denied, 729 So. 2d 389 (Fla. 1999) (private company operating a campus bookstore pursuant to a contract with a state university is the custodian of public records made or received by the store in connection with university business).



d. Subcontractors

A circuit court has addressed whether a subcontractor may be subject to the Public Records Act if both the subcontractor and contractor have been delegated a public function. In *Multimedia Holdings Corporation v. CRSPE, Inc.*, No 03-3474-G (Fla. 20th Cir. Ct. December 3, 2003), available online in the Cases database at the open government site at myfloridalegal.com, the court required a consulting firm to disclose its timesheets and internal billing records generated pursuant to a subcontract with another firm (CRSPE) which had entered into a contract with a town to prepare a traffic study required by the Department of Transportation. Rejecting the subcontractor's argument that Ch. 119, F.S., did not apply to it because it was a subcontractor, not the contractor, the court found that the study was prepared and submitted jointly by both consultants; both firms had acted in place of the town in performing the tasks required by the department: "[T]he Public Records Act cannot be so easily circumvented simply by CRSPE delegating its responsibilities to yet another private entity."

e. Other Statutory Provisions Governing Records of Private Entities**(1) Contract Requirements**

Section 119.0701, F.S., mandates that all agency contracts for services must contain specific provisions requiring the contractor to comply with public records laws, including retention and public access requirements. The term "contractor" is defined to mean "an individual, partnership, corporation or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency as provided under s. 119.011(2), [F.S.]." Section 119.0701(1)(a), F.S. (e.s.). "Thus, based on the terms of section 119.0701(1)(a), Florida Statutes, the nature and scope of the services provided by a private contractor determine whether he or she is 'acting on behalf of ' an agency and thus, would be subject to the requirements of the statute." AGO 14-06. For more information on when a private entity is determined to be "acting on behalf of " a public agency for purposes of s. 119.011(2), F.S., please refer to the preceding discussion on pages 61-65.



In addition, contracts entered into or amended after July 1, 2016, must contain a statement, in the form prescribed by the statute, providing the contact information for the public agency's custodian of public records in the event that the contractor has questions about its duty to provide public records relating to the contract. Section 119.0701(2)(a), F.S. A request for records for records relating to the contract must be made directly to the public agency. Section 119.0701(3)(a), F.S. If the public agency does not possess the requested records, the public agency shall immediately notify the contractor of the request, and the contractor must provide the records to the public agency or allow the records to be inspected or copied within a reasonable time. Id. Sections 119.0701(3) and (4), F.S., establish consequences in the event of a contractor's noncompliance.

Section 287.058(1)(c), F.S., provides, with limited exceptions, that every procurement for contracted services by a state agency be evidenced by a written agreement containing a provision allowing unilateral cancellation by the agency for the contractor's refusal to allow public access to "all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt" from disclosure.

(2) Legislative Appropriation

Section 11.45(3)(e), F.S., states that all records of a nongovernmental agency, corporation, or person with respect to the receipt and expenditure of an appropriation made by the Legislature to that entity "shall be public records and shall be treated in the same manner as other public records are under general law." Cf. AGO 96-43 (Astronauts Memorial Foundation, a nonprofit corporation, is subject to the Sunshine Law when performing those duties funded under the General Appropriations Act).

(3) Public Funds Used for Dues

Section 119.01(3), F.S., provides that if an agency spends public funds in payment of dues or membership contributions to a private entity, then the private



entity's financial, business and membership records pertaining to the public agency are public records and subject to the provisions of s. 119.07, F.S.

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