PUBLIC RECORDS & MEETINGS

Public Records & Meetings: Labor Costs

***Board of County Commissioners of Highlands County v. Colby*,**
976 So. 2d 31 (Fla. 2d Dist. App. 2008)

A records custodian may require citizens to pay a special service charge that reflects the labor cost of conducting research, including employee benefits, in order to inspect or copy public records when extensive clerical assistance is required.

FACTS AND PROCEDURAL HISTORY

In 2005, Preston Colby (Colby) attended a hurricane preparedness workshop in Highlands County, Florida (County). Colby learned that a group of local officials had met in preparation for the 2004 hurricane season. Colby inquired as to whether the group was subject to government-in-the-sunshine laws, and whether he could see records from the meeting. He filed a request for all documents related to the meeting. An assistant county administrator faxed Colby a letter indicating that the request would require extensive research, estimated at four hours, and that Colby would have to pay $65.12 before the county would begin researching his request.

Colby complained to the public information officer that the county lacked authority to assess a service charge for public records inspections. She told him to sue her. The next day he filed suit and delivered a complaint to the county attorney. The county attorney provided the records Colby had requested. He also offered Colby a partial refund because the search took less time than expected; however, Colby refused to accept the partial refund.

At trial, the circuit court upheld the County's authority to charge a service fee and to demand a deposit before commencing research. However, the court ruled that the County's labor cost calculation improperly included employee benefits in addition to wages. Colby appealed the former ruling, while the County appealed the latter to the Second District Court of Appeal.

ANALYSIS

The County argued that State law permits its record custodian to include employee benefits in its special-service-charge calculation. The district court reversed the circuit court's ruling, determining that State law indeed permits record custodians to include benefits when calculating the labor cost of public records research. The appellate court affirmed the circuit court's ruling that the County's practice of requiring a deposit before conducting a record search was permitted by the statute.

Florida Statutes Section 119.07(4) permits a records custodian to charge a special service charge if the nature or volume of the request requires extensive clerical assistance or use of technological resources. The County's policy was to charge the special fee if the records request would require more than fifteen minutes to locate, copy, and refile. The County calculated the labor cost by multiplying the research time by the responding employee's hourly wages and benefits. The court reasoned that by using the term "labor cost" instead of wages or salary, the legislature intended for the special service charge to include employee benefits. This is especially true considering that, in 1984, the original term "actual salary rate" was replaced with the term "labor costs." Consequently, the court approved "the County's formula that includes both an employee's salary and his or her benefits when calculating the labor cost to be included in the special service charge authorized by [Section 119.07(d) of the Florida Statutes]." *Highlands County*, 976 So. 2d at 37.

Colby further argued that the service charge should not apply because he was seeking only to inspect, not copy, the records. However, the court explained that the County may require a deposit before conducting research when the deposit is reasonably based on labor costs that are actually incurred in responding to a request to inspect or copy records. The court opined that taxpayers should not bear the initial burden of responding to an extensive records request.

SIGNIFICANCE

Highlands County solidifies the practice of including employee benefits in special service charges for extensive public-records requests. However, the limit on what may be included as labor costs remains unresolved, which could lead to additional,

indirect costs being included in special service charges for public-records requests.

RESEARCH REFERENCE

- 44 Fla. Jur. 2d *Records & Recording Acts* §§ 64, 65 (2005 & Supp. 2009).

Erik G. Detlefsen

Public Records & Meetings: Private Entities

***B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*,**
988 So. 2d 17 (Fla. 1st Dist. App. 2008)

A private party to whom a public body delegates responsibility must make available to the public all documents relating to the fulfillment of that responsibility if the delegation amounts to an assumption of a public function by the private party. The inquiry into whether a delegation amounts to an assumption of a public function is dependent upon the facts and circumstances of the particular case. The more extensive the responsibilities assumed, the more likely it is that the delegation amounts to an assumption of a public function.

FACTS AND PROCEDURAL HISTORY

Since 1992, Baskerville-Donovan, Inc. (BDI) has provided a range of engineering services for the City of Apalachicola (City). The City had no engineering staff on its payroll; therefore, it contracted with BDI to provide ongoing engineering services for the City. In 1998, the City contracted with BDI for engineering services related to the construction of water-distribution-system improvements.

In 2002, B & S Utilities, Inc. (B & S), a utility and excavation contractor, entered into a contract with the City whereby B & S agreed to construct the water-distribution-system improvements in accordance with design plans drafted by BDI. BDI's responsibilities were described in a contract between B & S and the City.

Believing BDI to be the City's agent in the construction project, and thus subject to Florida's Public Records Act, B & S sent letters to BDI requesting that BDI turn over documents relating

to the project. When BDI refused, B & S filed suit to compel production of the documents. The circuit court held in favor of BDI, finding that BDI had not acted on the City's behalf in providing engineering services. B & S appealed, and the First District Court of Appeal reversed the circuit court on the issue of agency.

ANALYSIS

The First District began its discussion by observing that Florida's policy of guaranteeing access to public records contemplates the possibility that some records subject to public review may be in the possession of private entities. The Florida Constitution provides that "[e]very person has the right to inspect . . . any public record made . . . in connection with the official business of any public body, officer, or employee of the state, *or persons acting on their behalf*." Fla. Const. art. 1, § 24(a) (emphasis added). Under the Public Records Act, "[e]very person who has custody of a public record shall permit the record to be inspected . . . by any person desiring to do so." Fla. Stat. § 119.07(1)(a) (2008). Where an agreement between a public body and a private entity transfers an actual, public function from the public body to the private entity, documents produced in carrying out that public function are public records, and the private entity must provide public access to such documents.

In reversing the circuit court, the First District held that "BDI acted as the 'owner's representative' in regard to construction of the system improvements that took place in [the City]. Documents it generated in that capacity are public records." *B & S Utilities*, 988 So. 2d at 21. The First District emphasized several characteristics of the relationship between the City and BDI that led to the court's conclusion that BDI's documents relating to the project fell within the ambit of Florida's Public Records Act. BDI was responsible for improving the City's water-distribution services, thus giving BDI a large part in the performance of a public function. Moreover, the contract between B & S and the City referred to BDI as the City's representative. The City furnished BDI with office space, and BDI was in charge of recommending budget priorities and financing, signing off on any construction improvements, and fulfilling any necessary permit or application requirements relating to construction of the City's water-distribution improvements. The City also referred any dis-

cussion of the construction improvements to BDI, and BDI's senior project manager referred to herself as the City's engineer.

Consequently, the court concluded that BDI acted as the City's *de facto* engineer, thereby subjecting BDI to the Public Records Act's disclosure requirements. The court explained that the duties for which BDI was responsible were not limited merely to construction and supervision activities. Rather, BDI's responsibilities encompassed such a broad range of activities that it was clear that the City had essentially handed over the water-distribution-improvement project to BDI. The City had delegated a governmental function to a private entity—BDI. As a result, any documents BDI possessed concerning the project were subject to the Public Records Act and must have been made available to B & S.

SIGNIFICANCE

B & S Utilities demonstrates the applicability of the Public Records Act to a private entity that performs work for a public body, thereby exposing the private entity's internal records to public scrutiny. As a result of this exposure, private entities concerned with maintaining confidentiality of internal records should consider whether and to what extent to perform work for public bodies.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 5, § 14:15 (3d ed., West 2008).
- 44 Fla. Jur. 2d *Records and Recording Acts* § 48 (2005 & Supp. 2009).

Charles E. Simpson

Public Records & Meetings: Sunshine Law

***Finch v. Seminole County School Board*,**
995 So. 2d 1068 (Fla. 5th Dist. App. 2008)

A decision-making body that violates Florida's Sunshine Law by holding a private meeting can remedy the violation by subsequently holding full, open, and public hearing on the disputed

issue so long as the violation was neither willful nor egregious. Additionally, the fact-finding exception to the Sunshine Law is limited to actions by committees established for investigative and advisory purposes only.

FACTS AND PROCEDURAL HISTORY

The appellants sought a permanent injunction to prevent the Seminole County School Board (Board) from enacting a rezoning plan based on an alleged violation of Florida Statutes Section 286.01, Florida's Sunshine Law. The alleged violation occurred while the Board was deciding how to modify zoning after opening a new school. The Board formed a Core Committee that assigned the task of developing potential plan alternatives. The Core Committee developed three plans which it then presented to the Board. The Board then took a bus tour of the potentially affected areas. Viewing the tour as a fact-finding trip, the Board took precautions to separate themselves by several rows of seats, not to discuss preferences or opinions of the plans, nor record any minutes or take any vote. Additionally, two members of the media were present on the tour.

One week after the bus trip, the Board held a public meeting to discuss the rezoning plans. The meeting lasted in excess of five hours, and more than 800 people attended. After a lengthy discussion, the Board unanimously approved one of the plans. After this meeting, the appellants sought injunctive relief to prevent the Board from implementing the approved plan, alleging that the bus trip was a private meeting held in violation of the Sunshine Law. The trial court denied the injunction, finding that the bus trip fell under a fact-finding exception to the Sunshine Law. The Board then held a second public meeting. At the second meeting, there was community discussion regarding the rezoning, followed by the plan being reaffirmed and finally adopted. The appellants appealed the trial court's order denying the injunction. On appeal, the district court held that Board did violate Florida's Sunshine Law, but also held that the Board adequately remedied the violation and therefore, the district court upheld the trial court's order denying the injunction.

ANALYSIS

On appeal, the court first considered whether the bus trip constituted a violation of the Sunshine Law. Florida Statutes Section 286.011 mandates that all meetings of any board or agency of the state, a county, a municipality, or a political subdivision where official acts are taken must be open to the public. The statute further states that any actions taken at meetings not in compliance with the public requirement are void. Fla. Stat. § 286.011 (2004). However, relevant case law has carved out an exception to the public meeting rule for fact-finding missions, and the Board argued that the bus trip fell under this exception. The court held that although the bus trip exhibited characteristics of a fact-finding mission because the Board members were on the trip to evaluate, but not decide on, the rezoning plans, the fact-finding exception was not applicable. After examining precedent, the court held that the exception applies only to advisory committees that do not have a decision-making function. Because the Board had the ultimate decision-making authority as to which rezoning plan to adopt, it was not entitled to the fact-finding exception. Therefore, the Board violated the Sunshine Law when it "gathered together in a confined bus space; [where] it undoubtedly had the opportunity . . . to make decisions outside the public's scrutiny." *Finch*, 995 So. 2d at 1073.

The court then analyzed whether the Board's violation was incurable and constituted appropriate grounds for the granting of a permanent injunction against the rezoning plan. Sunshine Law violations may be cured if the decision-making authority subsequently holds a "full, open and independent public hearing of the disputed issue." *Id.* The court held that the public hearing following the bus tour remedied the violation because it was open to and well attended by the public, it was lengthy, the potential rezoning plans were published in advance, and there was significant debate at the meeting among the Board members and the public. The court also considered the fact that the initial violation seemed to be inadvertent, rather than willful, as the Board took apparent precautions to comply with the Sunshine Law, and even invited members of the media. Based on the above analysis, the court held that an injunction prohibiting the implementation of the rezoning plan was not appropriate because the violation had been remedied.

SIGNIFICANCE

Finch reaffirms that not all final board actions that violate the Sunshine Law will be void. Private meetings that are neither willful nor egregious may be cured by a subsequent full, open, and independent public hearing held by the decisionmaker. Additionally, the fact-finding exception to the Sunshine Law is limited to advisory committees that have no decision-making authority. Moreover, it is the opportunity to make decisions outside of the public's scrutiny, rather than the actual facts of a case, that figures most prominently in a court's analysis.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Administrative Law* §§ 36, 38 (2005 & Supp. 2009).

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