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Access To "Private" Documents Under the Public Records Act

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Abstract

Richard Roe described himself to his interviewers. “Square, loner-not with crowd.”’ **If** he could live his life over, he would ”eat less fast, be instantly likeable and charming, [and] lose 20 pounds.”

KEYWORDS: records, contracts, confusion

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I. INTRODUCTION

Richard Roe described himself to his interviewers. "Square, loner—not with crowd."[1] If he could live his life over, he would "eat less fast, be instantly likeable and charming, [and] lose 20 pounds."[2] Mr. Roe trusted the interviewers and opened up to them, even giving

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1. Byron, Harless, Schaffer, Reid & Assocs. v. State *ex rel.* Schellenberg, 360 So. 2d 83, 90 (Fla. 1st Dist. Ct. App. 1978) [hereinafter "*Schellenberg*"], *rev'd sub nom.* Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633 (Fla. 1980) [hereinafter "*Byron Harless*"].

2. *Schellenberg*, 360 So. 2d at 90.

unflattering opinions of his own son.[3] After all, the lawyers for the interviewers had promised him complete confidentiality.[4] The lawyers were wrong.[5]

Every word he said to his interviewers and every document he shared with them, including his psychological test results, could potentially become public.[6] It made no difference that Mr. Roe submitted the details of his life to the consulting firm, Byron, Harless, Schaffer, Reid & Associates [hereinafter "Byron Harless"], along with a letter saying it was "absolutely essential" that the information be kept secret.[7] In that letter, he told Byron Harless that he could be fired from his current job if it were to become publicly known that he was interested in a new job.[8] Moreover, the public revelation of intimate private facts could "decrease . . . [his] effectiveness as a witness in hearings related to regulatory matters at the federal, state and local level."[9]

Unfortunately for Mr. Roe, he was being screened by the private consulting firm as a candidate for a job with an agency of the State of Florida—executive director of the Jacksonville Electric Authority [hereinafter "JEA"]. In Florida, the documents generated by private firms doing business with a government agency sometimes, by law, become public records. The documents telling Mr. Roe's life story fell into that category.

State agencies often contract for private enterprises to act on their behalf. Private institutions often spend public tax dollars. There is no limit to the number of ways the government, in the business of governance, entangles itself with the private sector. Hence, the public sometimes has a right of access to documents in the hands of private-sector businesses, charitable institutions and individuals when they perform services for the government or spend the government's money.

This article sets forth the law in Florida on the public's right of access to the documents of private-sector actors pursuant to Chapter 119, Florida Statutes, the Florida Public Records Act. The subject of the article is closest to the hearts of the media and government lawyers who frequently must define the right of reporters to inspect documents

3. *Id.*
4. *Id.* at 87.
5. *Byron Harless*, 379 So. 2d at 640-41.
6. *Id.*
7. *Schellenberg*, 360 So. 2d at 90.
8. *Id.*
9. *Id.*

in the news-gathering process, but a far broader range of lawyers would be well advised to familiarize themselves with the subject.

The legal advisors for the JEA and Byron Harless, for instance, undoubtedly learned a bitter lesson when the provisions of Chapter 119, Florida Statutes, were applied to force the public release of many of Byron Harless's records on Richard Roe and other unsuspecting candidates. Today, any time attorneys in Florida represent a business enterprise contemplating a government contract, they should discern in advance whether any of their client's formerly proprietary internal documents might become subject to mandatory public disclosure[10] to any person who asks for them, regardless of that person's identity or motive.[11]

Unfortunately, as this article concludes, the Florida court cases are inconsistent in defining whether, and when, documents generated by private actors are "public records." In some circumstances, the public's right of access is clear. In others, the cases have not articulated a workable standard for determining whether the public has a right of access. The law therefore is badly in need of clarification.

II. Overview of the Public Records Act

In its first sentence, Chapter 119 states: "It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person."[12] This sweeping declaration of legislative intent creates a presumption in favor of disclosure.[13]

Every government record is subject to public inspection and copying[14] unless it is specifically exempt by statute, and any statute creating

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10. *See id.* at 87. Similarly, the confidentiality expectations of private parties were dashed in Times Publishing Co. v. St. Petersburg, 558 So. 2d 487 (Fla. 2d Dist. Ct. App. 1990), *see infra* notes 57-60 and accompanying text, after counsel for the city and the Chicago White Sox went to great lengths to avoid being subject to the Public Records Act.

11. Fla. Stat. § 119.01(1) (1991) (records open for personal inspection "by any person"); News-Press Publishing Co. v. Gadd, 388 So. 2d 276 (Fla. 2d Dist. Ct. App. 1980).

12. Fla. Stat. § 119.01(1) (1991).

13. *E.g.*, Sarasota Herald-Tribune Co. v. Community Health Corp., 582 So. 2d 730, 732 n.2 (Fla. 2d Dist. Ct. App. 1991); Mills v. Doyle, 407 So. 2d 348, 350 (Fla. 4th Dist. Ct. App. 1981).

14. The right to make copies of records follows from the right to inspect them. Fla. Stat. § 119.07(1)(a) (1991) ("the custodian shall furnish a copy"); Fla. Stat. § 119.08(1) (1991) ("[i]n all cases where . . . any person interested has a right to in-

an exemption is narrowly construed.[15] Chapter 119 contains specific exemptions for: 1) certain police investigative and intelligence-gathering materials,[16] 2) the identities of confidential informants,[17] 3) the questions and answer sheets of licensing examinations,[18] and 4) various other categories of documents. Scores of other exemptions are scattered throughout Florida Statutes.[19]

Circuit courts are given the power to enforce the law by ordering the release of documents wrongly withheld.[20] Any public records case must be given scheduling priority over other cases before the court.[21] If a plaintiff prevails in obtaining public records, the court is to order costs and attorney's fees to be paid by the agency even if the agency

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spect . . . any public record, . . . any person shall hereafter have the right of access . . . for the purpose of making photographs of the same"). In his experience as a journalist, the author occasionally encountered a state official who conceded the right to inspect a particular document freely and take notes about it, but attempted to disallow its photocopying. It is unlawful to refuse to allow photocopying of any record required to be disclosed. Schwartzman v. Merritt Island Volunteer Fire Dep't, 352 So. 2d 1230, 1232 n.2 (Fla. 4th Dist. Ct. App. 1977). The alternative would be absurd. There is surely no reason to disallow photocopying if a person could read the document, transcribe it verbatim and circulate every word publicly; or if indeed every member of the public, including, specifically, those from whom the agency prefers to keep the document secret, could go to the agency and inspect the document. FLA. STAT. § 119.07(1)(a)-(b) (1991) sharply limits the fees an agency may charge for copies.

15. Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979).

16. FLA. STAT. §§ 119.011, 119.07 (1991).

17. *Id.* § 119.07(3)(e) (1991).

18. *Id.* § 119.07(3)(c) (1991).

19. *E.g.*, pursuant to FLA. STAT. § 240.299(4) (1991), all records of State University System-certified "direct-support organizations," which are fund-raising foundations for the nine state universities, are exempt from Chapter 119 except the annual audit, management letter, and any supplemental data supplied to the Board of Regents. Special interests have obtained new enactments of such exemptions every year. By 1991, the Government-In-The-Sunshine Manual, updated annually by the Office of the Attorney General and published by the First Amendment Foundation, contained 83 pages of fine print listing exemptions scattered throughout the Florida Statutes; the previous year's edition contained 26 fewer pages. The Manual may be ordered by calling the First Amendment Foundation, (904) 222-3518. In 1985, responding to the growing list of such exemptions, the Florida legislature enacted the Open Government Sunset Review Act, which automatically repeals every exemption from Chapter 119 every 10 years unless the continuation of the exemption is "compelled" by a restrictive list of criteria in FLA. STAT. § 119.14((2) (1985). For a thorough review of the debate on exemptions, see Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U.L. REV. 705 (1985).

20. FLA. STAT. § 119.11(1) (1991).

21. *Id.*

acted in a good faith but with the mistaken belief that the documents were exempt from public disclosure.[22]

Suppose a person asks for a file of documents and the agency refuses to provide it. This person need not search through all of the Florida Statutes to determine for himself whether the agency had a lawful basis to refuse to produce the file. Chapter 119, Florida Statutes requires the agency, on his demand, to explain what statutory exemption the agency is relying on to withhold the file, and why the agency thinks the file is covered by the cited exemption.[23] If some of the documents in the file are not exempt, the agency must produce those documents, and cite a statutory exemption covering the others.[24]

The question of whether a document is exempt from public disclosure arises only after a determination that the document is one of the "records" of an "agency" within the meaning of the Public Records Act.[25] For purposes of the act, "public records" includes "documents

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22. *Id.* § 119.12 (1991); News & Sun-Sentinel Co. v. Palm Beach County, 517 So. 2d 743 (Fla. 4th Dist. Ct. App. 1987). An exception to the attorney fee requirement, created in Fox v. News-Press Publishing Co., 545 So. 2d 941, 943 (Fla. 2d Dist. Ct. App. 1989), is particularly relevant to this article. A private entity was the subject of a public records demand. The private entity filed suit for a declaratory judgment seeking guidance on whether it had to comply with the News-Press's public records demand. The court held that access to the records was not "unlawfully" denied because: 1) the recipient of the records demand was not an "agency," and 2) it filed suit promptly to seek judicial guidance; therefore, attorney's fees were not assessed. *See also* PHH Mental Health Services, Inc. v. New York Times Co., 582 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1991). News media have been joined by the attorney general in lobbying the legislature to change the law to eliminate the *Fox* loophole. Letter from Gregg D. Thomas of Holland & Knight, Tampa, Florida to Media Lawyers Throughout the State (Jan. 4, 1991) (specifically explaining *Fox*; proposing legislative change; claiming attorney general's support; seeking additional support); Letter from Patricia Riste Gleason, Assistant Attorney General to Gregg D. Thomas (Dec. 18, 1990) (confirming attorney general's support; proposing revisions to section 119.12(1)) (copy enclosed with Thomas' letter to media lawyers).

23. FLA. STAT. § 119.07(2)(a) (1991); *Fox*, 545 So. 2d at 942.

24. FLA. STAT. § 119.07(2)(a) (1991); Tribune Co. v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984), *appeal dismissed sub nom.*, DePerte v. Tribune Co., 471 U.S. 1096 (1985).

25. A "public record" is a "public record" regardless of whether it is exempt from disclosure. FLA. STAT. § 119.011(1)-(2) (1991). This article focuses on whether the records of a private-sector actor are within the "definitional reach" of the Public Records Act. *See Schellenberg*, 360 So. 2d at 87-88. If the records of a private actor are "within the definitional reach," they might nonetheless be kept confidential because of an exemption from Chapter 119's requirement of disclosure. There are hundreds of exemptions, *see supra* note 19 and accompanying text, any one of which might cover

. . . made or received pursuant to law or ordinance or in connection with the transaction of official business *by any agency*."[26] An "agency" includes any unit of government at the state or local level "and any other public *or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency*."[27] The latter clause, first enacted into the law in 1975,[28] swept private-sector entities under the coverage of the Public Records Law. However, when is a private person or business "acting on behalf of any public agency?" The answer to that question is elusive.

III. THE SEMINAL CASE: *BYRON HARLESS*

Predictably, private business enterprises resist the idea that their proprietary records are "public records," and hence subject to all the mandates of Chapter 119. In *Shevin v. Byron Harless, Schaffer, Reid & Assocs.*,[29] a private consultant claimed that the law was an unconstitutional invasion of privacy when applied to require disclosure of documents that private parties, between themselves, had agreed to keep secret.[30]

Byron Harless was a management consulting firm hired by JEA to conduct the first phase of a nationwide search for a new executive director.[31] Byron Harless advertised nationally, took applications, and screened them for the JEA.[32] At some point, Byron Harless was to turn over to the JEA a report naming one or a few finalists. At that time the report became a public record. Counsel for the JEA advised that Byron Harless's records were not public records.[33] The identities of those applicants who did not become finalists would never have to be made pub-

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any or all the documents of a private actor, as in the case of the example cited in note 11. If the advisor to a private-sector actor determines that it is in possession of public records, the next step is to determine if any or all of them are exempt from disclosure under Chapter 119. At that point in the inquiry, the most concise source of exemptions is the well-indexed Government-In-the-Sunshine Manual. *See supra* note 19. Also, government lawyers are normally familiar with the statutory exemptions dealing with their particular agency or field of specialty.

26. FLA. STAT. § 110.011(1) (1991) (emphasis added).
27. *Id.* § 119.011(2) (1991) (emphasis added).
28. *See Schellenberg*, 360 So. 2d at 87-88.
29. 379 So. 2d 633 (Fla. 1980).
30. *Id.* at 635.
31. *Id.* at 634-35.
32. *Id.* at 635.
33. *Id.*

lic; and as to the finalists, extensive information would remain in the private files of Byron Harless.[34]

In the meantime, applicants were assured of confidentiality until, and unless, they eventually became finalists. Even then, the extremely personal information used by Byron Harless to evaluate the candidates, but not turned over to the JEA, would never become public. Richard Roe was but one of several candidates who said they would suffer "dire consequences" if this confidentiality were breached.[35]

A Jacksonville television executive sought, and was denied, Byron Harless's records. He was joined by then Attorney General Shevin in suing for the disclosure of the records under Chapter 119. Byron Harless and some of the persons secretly identified in Byron Harless's files asserted a right of privacy under the state and federal constitutions. Chapter 119, they said, was unconstitutional to the extent that it required the release of their identities and certain other private information about them in Byron Harless's records.[36]

The Supreme Court of Florida, reversing the First District Court of Appeal, found first that the persons named in public records do not have a state or federal right to privacy that is violated by the release of public records.[37] Next, the supreme court refined the definition of "records,"[38] which the first district had defined too expansively.

But the supreme court accepted, and thus ratified without discussion, the first district's conclusion that Byron Harless was "acting on behalf of" a public agency.[39] On that point, the appellate court's ruling said:

> A business entity such as the consultant must be regarded as "acting on behalf of" the public agency if the services contracted for are an integral part of the agency's chosen process for a decision on the question at hand . . . . Because the consultant was employed to perform and did perform a preliminary search and inquiry function which JEA thought necessary or desirable for its proper deci-

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34. *Schellenberg*, 360 So. 2d at 87.

35. *Id.*

36. *Id.* at 85-87.

37. *Byron Harless*, 379 So. 2d at 638-39.

38. *Id.* at 640. A "record" includes any materials "intended to perpetuate, communicate, or formalize knowledge of some type," and not their "precursors," such as notes made by a public official (or, in this case, a Byron Harless employee) purely for his own use.

39. *Id.* at 635.

> sion, the consultant was "acting on behalf of" JEA and was therefor an "agency" to which the public records law applied.[40]

In other contexts, this quote provides little guidance about when the private sector is "acting on behalf of" a state agency. Whether the private party is "acting on behalf of" the public agency depends on how "integral" the private party's role is in the public agency's decision-making process, but what facts would make a consulting firm's role more "integral" to the decision-making process, and thus surely covered by the Public Records Law, or less "integral," and thus more likely to *not* be covered by the Public Records Law?

Some guidance might be derived from a case on the application of the Government-in-the-Sunshine Law, Chapter 286, Florida Statutes, which requires collegial boards and commissions to give notice of their meetings and open them to the public. The supreme court has stated that the Sunshine Law and the Public Records Act are "closely related in purpose and policy," and case law on one sometimes sheds light on the other.[41] In a Sunshine Law case, *Wood v. Marston*,[42] the supreme court required a faculty committee screening candidates for a University of Florida dean's post to meet in the open because of its "undisputed decision-making function in screening the applicants. In deciding which of the applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university . . . ."[43]

In *Wood v. Marston*, the committee would have to meet in the open even though the president or a faculty committee could in effect ignore its decisions by selecting a candidate from those eliminated by the committee. The committee is covered by the open-government law because, if the president or faculty were to *accept* the committee's recommendations, then the process by which some candidates were eliminated would never have been scrutinized publicly.[44] The policy choice to eliminate candidates would have been made in a closed session.

This analysis sheds light on whether a hired consultant's activities are an "integral" part of the decision-making process. If the consultant's activities *could* (even if they would not *necessarily*) foreclose JEA

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40. *Schellenberg*, 360 So. 2d at 88 (citation omitted).
41. Wood v. Marston, 442 So. 2d 934, 938 (Fla. 1983).
42. *Id.* at 934.
43. *Id.* at 938.
44. *Id.* at 939.

from further considering the candidates eliminated by Byron Harless, or limit the information JEA has about its candidates, then policy-making choices have been delegated to Byron Harless. This would be why Byron Harless's activities for the JEA are an "integral" part of the decision-making process by which JEA chose its director. With less influence over JEA's consideration of information and screening of candidates, Byron Harless would be less likely to be covered by the Public Records Law.

IV. EVOLUTION OF THE LAW SINCE *BYRON HARLESS*

The shortcoming of the *Byron Harless* analysis is that it helps to define "acting on behalf of" only in limited contexts. The analysis may be extended to a school board's screening of multiple sites for a new school,[45] for instance, or any other type of outsider-assisted process of screening many options down to a few. Still, it helps only to define when a private actor is *making a decision* "on behalf of" a state agency. What *other types* of *acting* "on behalf of" a state agency might there be?

A. *An Easy Case: Attorneys*

An attorney representing a public agency is a relatively clear case of a private party "acting on behalf of" the agency.[46] Since the attorney is the client's stand-in for purposes of the representation, the conclusion seems compelled that he is "acting on behalf of" the agency. That a staff attorney's documents are public records is obvious; what is less obvious, but no less true, is that the records of an attorney in private practice pertaining to his representation of a state agency in litigation or negotiation are public records also.

This conclusion may run counter to the intuition of a private lawyer, accustomed, as he is, to the notion that his files are made confidential by ethics, the attorney-client privilege, and the work-product doctrine.[47] Nonetheless, the confidentiality of an attorney's papers in all

45. *Cf.* News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 570 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *aff'd*, 17 Fla. L. Weekly S156 (1992) (No. 77,131).

46. *See* Jim Smith, *The Public Records Law and the Sunshine Law: No Attorney-Client Privilege Per Se, and Limited Attorney Work Product Exemption*, 14 STETSON L. REV. 493 (1985) (authored by the then-attorney general of Florida).

47. *Smith*, *supra* note 46. Smith says there is no attorney client privilege "per

these doctrines is one running to the client, not the lawyer. The client of a lawyer working for a government agency is the people; the expression of those peoples' will can be made only by the legislature; and the legislature has waived any attorney-client privilege or work-product exemption by enacting Chapter 119. There are several exemptions to Chapter 119, narrowly crafted and limited in duration, to protect certain secrets when their release could damage an agency's position in litigation[48] or negotiation.[49]

B. *The "Totality of Factors" Test*

Another test for gleaning when a private actor is "acting on behalf of" an agency, found in *Schwartzman v. Merritt Island Volunteer Fire Department*,[50] has come to be called the "totality of factors test."[51] In *Schwartzman*, community volunteers organized a nonprofit corporation to operate the county-owned fire fighting equipment. The corporation received $850 a month in tax money; the county paid for all supplies and equipment and owned the fire station property; and all county funds were placed in the same bank accounts with money the corporation obtained in such fund-raising activities as fish frys.[52] The court held that the "totality" of these facts led "irresistibly to the conclusion that this department is subject to the Public Records Act."[53]

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se," and a "limited" attorney work-product doctrine, because there are narrowly focused exceptions to the Public Records Act resembling the attorney-client privilege and work product doctrine. To this author, it seems more logical to say that the Public Records Act waives any attorney-client privilege or work product exemption in behalf of the public, but that certain documents may be withheld from the public, not under an attorney-client privilege or work product exemption, but under exemptions to the Public Records Act. *See* Edelstein v. Donner, 450 So. 2d 562, 562 (Fla. 3d Dist. Ct. App. 1984) (referring to "a non-existent work product exemption to the Public Records Act"). Either view obtains the same result by different semantics.

48. *E.g.*, FLA. STAT. § 119.07(3)(n) (1991) (work product exemption no longer applies when litigation ends).

49. *E.g.*, *id.* at (3)(p) (appraisals of real property sought by an agency by purchase or eminent domain exempt from disclosure until conditional acceptance of a contract for sale).

50. 352 So. 2d 1230, 1232 (Fla. 4th Dist. Ct. App. 1977), *cert. denied*, 358 So. 2d 132 (Fla. 1978).

51. The name "totality of factors test," was first used in Sarasota Herald-Tribune Co. v. Community Health Corp., 582 So. 2d 730, 733 (Fla. 2d Dist. Ct. App. 1991).

52. *Schwartzman*, 352 So. 2d at 1230.

53. *Id.* at 1232.

The court held that if certain private-sector entities pass the totality of factors test, *all* of their documents become public records.[54] It is not clear why this is so. Under the logic of *Byron Harless*, only those records pertaining to an activity carried out "on behalf of" the county would be public records. Suppose the Merritt Island volunteers engaged in some activities that were *not* on behalf of the county. If they organized a fish fry to contribute money to help an accident victim, they might generate planning memoranda, correspondence with the victim's family, tickets, contracts with vendors and other documents. Why should these be public records if the volunteers are not acting on behalf of the county for purposes of the charity drive?

The court must have meant that everything the volunteers undertake is "on behalf of" the county because the entity would not exist were it not for the county; none of its activities could be segregated from the county's contribution of money and property. If so, the totality of factors test can be understood to apply when so much of an entity's money and property comes from an agency that it would not exist were it not for the agency. Then, every document is a public record.

This would not be inconsistent with *Byron Harless*; it would simply deal with a set of circumstances in which the *Byron Harless* analysis would not be helpful. The Merritt Island Volunteer Fire Department was not assisting the county in the type of decision-making process to which *Byron Harless* applies; instead, it was deemed to be totally a creature of the government.

C. *Another Test: The Essential Governmental Function*

In *Fox v. News-Press Publishing Co.*,[55] the totality test was applied in a manner so different that it really is not the same test at all. Fox had entered into a contract to tow wrecked and abandoned vehicles from public streets and property.[56] Concluding, ostensibly based on *Schwartzman*, that the documents generated in carrying out Fox's contract with the city were "public records," the Second District Court of Appeal said:

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54. *Id.* The totality test was followed in Tribune Co. v. Palm River Volunteer Fire Department, 7 Fla. Supp. 2d 32 (Fla. 13th Cir. Ct. 1984), although the Palm River volunteers received no direct cash operating subsidy from the county. Thus, the totality need not be quite as total as was the case in *Schwartzman*.

55. 545 So. 2d 941 (Fla. 2d Dist. Ct. App. 1989).

56. *Id.* at 943.

> While there is no one factor that determines when records of a private business under contract with a public entity fall within the purview of the public records law, a totality of factors which indicate a significant level of involvement by the public entity, such as the City in this instance, can lead to the conclusion that the records are subject to the Public Records Act.[57]

The court looked to the fact that the vehicles were being towed away pursuant to city ordinances enacted under the city's police powers. The contract called for the city police to have extensive control over the towing activities. Therefore, the court concluded, the totality of factors involved in the contract showed that the contractor was "clearly performing what is essentially a governmental function."[58]

In *Schwartzman*, the totality of factors pointed to the totality of the volunteer fire department's dependence on the government for its existence, and led to the conclusion that all its records were public. In *Fox*, a totality of factors pointed to whether the particular contract was one to perform an "essentially governmental function," and only the documents related to that function were deemed public records. *Fox*, in reality, did not depend on *Schwartzman*, but created a new test: an "essentially governmental function" test to determine if a particular activity undertaken by a private entity is one in which the entity is "acting on behalf of" a public agency to perform the agency's functions.

Reversing the facts in *Fox* and *Schwartzman* illustrates that the tests they use are not the same. Applying the *Fox* analysis to *Schwartzman* would require looking to a totality of factors involved in operating a volunteer fire department to determine if that activity was an "essentially governmental function." The *Schwartzman* court did not do that. The *Schwartzman* court applied the totality test to determine if the entity was a totally governmental entity. One test looks to the entity; the other, to the function. The *Schwartzman* test would find an entity covered by Chapter 119 if the entity were funded and maintained by the government, regardless of whether a particular function being undertaken by the entity was an "essentially governmental function."

The totality of factors test was applied in *Sarasota Herald-Tribune Co. v. Community Health Corp.*[59] There, the Second District

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57. *Id.* (citation omitted).
58. *Id.*
59. 582 So. 2d 730, 733 (Fla. 2d Dist. Ct. App. 1991).

Court of Appeal found *Fox* and *Schwartzman* to be consistent and purported to apply both of them[60] without recognizing the difference in their approaches. In reality, however, the court applied the *Schwartzman* approach.

In *Sarasota Herald-Tribune*, a private, not-for-profit corporation was created by a local Public Hospital Board to carry out many of the functions of the hospital tax district.[61] In applying the totality of factors test, the second district thoughtfully weighed the not-for-profit corporation's creation and existence, funding and capitalization, goals, purposes, ownership and interdependence with the local hospital taxing district.[62] Note that all these factors look to the character of the not-for-profit company, not to the character of the function being carried out by the company. Concluding that the not-for-profit corporation existed basically as a creature of the public hospital agency, the second district declared the not-for-profit company's records to be public records under Chapter 119.[63]

This reasoning and result would be consistent with *Schwartzman*, but the second district went one step further—and it was a step more consistent with *Fox* than with *Schwartzman*. The court said that if any *particular function* of the not-for-profit corporation were found *not* to be "performed on behalf of" the hospital board, the records related to that particular function would not be subject to mandatory disclosure under Chapter 119.[64]

This latter dictum contradicts *Schwartzman* and, indeed, the entire *Sarasota Herald Tribune* analysis. The court, in accord with *Schwartzman*, analyzed the characteristics of the corporation itself to find the corporation covered by Chapter 119. It did not look to whether operating a hospital is an "essentially governmental function," as the *Fox* court would.

D. *Confusion Among the Cases on Contracts with Agencies*

Fox's "essentially governmental function" analysis attempts to provide some guidance as to when a business enterprise that enters into a contract to provide goods or services to a public agency is "acting on

60. *Id.*
61. *Id.* at 732.
62. *Id.* at 734.
63. *Id.*
64. *Sarasota Herald-Tribune Co.*, 582 So. 2d at 734.

behalf of" the agency, and thus subject to Chapter 119 as to that function.[65] Other cases, however, show how unworkable the "essentially governmental function" test can be under different circumstances.

In *Fritz v. Norflor Construction Co.*,[66] an engineering firm was held to be "acting on behalf of" a city when it served as city engineer in the construction of a wastewater treatment facility.[67] Throughout the court's opinion there was no mention as to how or why this type of contract, to provide a city with professional services, brought the engineers under the Public Records Act.

In contrast, *Parsons & Whittemore, Inc. v. Metropolitan Dade County*[68] found that none of three private-sector companies were "acting on behalf of" Dade County "merely by contracting with a governmental agency."[69] The three included the contractor of a solid waste facility, a firm that contracted to manage and operate the facility upon its completion, and a firm that guaranteed the obligations of the other two. The court, in *Parsons & Whittemore*, cited to *Fritz* for the proposition that "entities which perform an essentially governmental function come within the purview of section 119.011(2) only as to those functions which are performed in that capacity."[70]

Having acknowledged the governmental function test, the *Parsons & Whittemore* court said it was "unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation 'acts on behalf of' the agency."[71] This method of distinguishing *Fritz* does not explain why the engineering firm in *Fritz* had not "merely" contracted with the city to provide engineering services. *Parsons & Whittemore* might be understood to stand for the proposition that acting as the city engineer on a construction project is an "essentially governmental function." This might be a logical conclusion because cities often have a person on their staff who is nominally the "city engineer." However, if that is what the court meant, it did not say so.

Furthermore, *Parsons & Whittemore* did not separately explain why any one of the three corporations was individually distinguishable

65. *See Fox*, 545 So. 2d at 941.
66. 386 So. 2d 899, (Fla. 5th Dist. Ct. App. 1980).
67. *Id.* at 901.
68. 429 So. 2d 343 (Fla. 3d Dist. Ct. App. 1983).
69. *Id.* at 346.
70. *Id.*
71. *Id.*

from the subject of the public records request in *Fritz*. One could say it is an "essentially governmental function" to build a waste water treatment plant since the private sector does not. On the other hand, one might say the contractor was not engaged in an "essentially governmental function" since governments normally do not undertake construction projects themselves, but hire contractors instead. It is far harder to explain why the firm that was to manage the waste water treatment plant was not engaged in an "essentially governmental function."[72]

E. *The Florida Supreme Court's Latest Venture Into the Field*

Even more difficult to distinguish from the engineering firm in *Fritz* is the architectural firm in *News & Sun Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*.[73] There, the Fourth District Court of Appeal held that an architect hired by a school board to design a school was not within Chapter 119.[74]

In affirming, the Supreme Court of Florida claimed that the district courts of appeal "generally have made the determination" of whether a private entity's records are covered by Chapter 119 "based on the 'totality of factors.' "[75] The supreme court thus pushed all the conflicting cases on "acting on behalf of" a public agency under one giant umbrella. Without mentioning *Fritz*, the supreme court described the *Schwartzman* "totality of factors" test and the *Fox* "essential governmental function" test as if they were on and the same.[76]

Sarasota Herald Tribune and *Parsons & Whittemore* were cited

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72. The *Parsons & Whittemore* opinion noted that the management firm was to manage the waste water treatment facility "upon its completion and purchase by the county, but the county has not yet purchased the plant." *Id.* at 345. In State *ex rel.* Florida Publishing Co. v. Kinard, 14 Fla. Supp. 2d 170, 172 (Fla. 4th Cir. Ct. 1985), a trial court interpreted this fact as explaining why the *contractor* was not "acting on behalf of" the county. It does not help explain why the management firm was not performing an essentially governmental function in the third district's view. If managing the facility were an "essentially governmental function," and the management firm was already engaged in activities preparatory to managing the facility, why would the management firm not *already* be "acting in behalf of" Dade County for purposes of the Public Records Act?

73. 570 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *aff'd*, 17 Fla. L. Weekly S156 (March 5, 1992) (No. 77,131).

74. *News & Sun Sentinel Co.*, 570 So. 2d at 1096.

75. *News & Sun Sentinel Co.*, 17 Fla. L. Weekly at S157.

76. *Id.*

in further support of the concept of a single "totality of factors" test. *Byron, Harless*'s analysis of whether a private entity played an "integral part" in a decision-making process became not a separate test designed for the unique situation of a decision-making process, but a "factor" within the supreme court's super-totality of factors test.[77] By seeming to endorse the outcomes of so many of the district court cases, *News & Sun Sentinel Co.* seems to have left all their inconsistencies intact.

F. *The Special Case of the Private Records-Keeper*

At least one attempt by a private party to keep its business with the government private reached the point of being tragicomical. In *Times Publishing Co. v. City of St. Petersburg*[78] [hereinafter "*Chisox*"], the city and the Chicago White Sox commenced negotiations for the White Sox (represented by Chisox Corp., an appellee/cross appellant) to play in St. Petersburg's Suncoast Dome. Because of politics in their home state, the White Sox required confidentiality concerning the existence of the discussions and the city assured them it would try to oblige.

Under a plan worked out by the city attorney and Chisox Corp., the city agreed never to take physical possession of any correspondence or draft contracts.[79] The city attorney took a five-inch stack of notes on the drafts. He felt that his notes were not public records because they were merely his own personal "precursors" to public records.[80] Armed with his notes, he shuttled back and forth between city officials and Chisox Corp. as the negotiations proceeded, yet nobody from the city ever took possession of any documents, wrote Chisox any letters or wrote themselves any memoranda.[81] To illustrate the sham character of this arrangement, it is worth quoting at length from a letter Chisox sent to the city. The city attorney helped draft the letter as part of his

77. *Id.*

78. 558 So. 2d 487, 489 (Fla. 2d Dist. Ct. App. 1990).

79. *Id.*

80. *Id.* Whether the city attorney's notes were in fact mere "precursors" and not public records was never resolved in *Chisox* for procedural reasons. *Id.* at 491-92. It seems clear, however, that some or all of the notes were not "precursors" but were subject to mandatory disclosure as public records because they were written to "perpetuate, communicate, or formalize knowledge of some type," despite the city attorney's effort to create a fiction to the contrary. *Byron Harless*, 379 So. 2d at 640.

81. *See Times Publishing Co.*, 558 So. 2d at 489-95.

participation in the secrecy arrangements.

> This letter is provided to you in conjunction with a proposed draft Stadium Lease Agreement dated April 27, 1988 between Chicago White Sox, Ltd. and the City of St. Petersburg. While you are authorized to examine this document in your office, this document is not to leave your possession. You are not authorized to receive, possess, or copy this document. This document is not to come into your possession or custody and is not transmitted to you.[82]

In the text of a letter transmitted to the city, and in the possession and custody of the city, the letter declared itself not to have been transmitted to the city and not to be in the possession and custody of the city. This was like all the members of the White Sox pointing to a baseball, declaring it to be a catcher's mitt and agreeing to speak about the thing for the rest of the day as if it were a catcher's mitt. Unfortunately for the city the local appellate court insisted on calling a baseball a baseball.

The court ruled that many of the documents possessed by Chisox were really owned by the city and were merely left in the possession of Chisox to evade the Public Records Act.[83] Therefore, Chisox was "acting on behalf of" the city as the custodian of the city's records. From this emerges the most unusual definition of "acting on behalf of" an agency: A private entity "acting on behalf of" a city as its records-keeper.

Only two years earlier, in *News-Press Publishing Co. v. Kaune*,[84] the same court passed up an opportunity to create the records-keeper concept. Dr. Centafont was hired by the city to perform drug screening of the city's firefighters.[85] He kept the records, but, if a firefighter's blood or urine sample showed drug use, he was to take the results to the fire chief, show them to him, and then keep physical possession of the documents so that they would not become public record as part of

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82. *Id.* at 489-90.

83. *Id.* at 492. Interestingly, a provision of Iowa's public records law would have made the second district's result easier to reach: "A government body shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions." KMEG Television, Inc. v. Iowa State Bd. of Regents, 440 N.W.2d 382, 385 (Iowa 1989) (citing IOWA CODE § 22.2(2) (1987)).

84. 511 So. 2d 1023 (Fla. 2d Dist. Ct. App. 1987).

85. *Id.* at 1024.

the firefighter's personnel file.[86]

The second district found Dr. Centafont's records not to be public records even though the city paid for them, they were about city employees, and they were showed to the fire chief to transmit information to the chief that the city was entitled to receive so that he could act on the information to remove, discipline or assist a firefighter.[87] After reading *Chisox*, it is impossible to explain why Dr. Centafont was not acting as the records-keeper for the city. Perhaps the court felt sympathy for the traditional notion that medical records are confidential. If so, the court could have kept the records secret by an expedient that would not have cast an analytically unsound gloss on the definition of "acting on behalf of" an agency. The medical records in *Kaune* were exempt from disclosure under a specific exemption from the Public Records Act's disclosure requirement. The court even so held.[88]

The fire chief, therefore, could have kept them in his office and kept them secret. The court could have ruled simply that the documents were exempt from disclosure even if they were public records. Perhaps the dictum that the documents were not public records should be ignored. Perhaps it is bad law after *Chisox*.

G. *The Trade Mission Exception To "Acting On Behalf Of"*

News & Sun-Sentinel Co. v. Modesitt[89] illustrates well the unpredictable variety of contexts in which "acting on behalf of" might have to be defined. The records of the Florida Agricultural Trade Mission Group, which organized many private-sector agricultural interests for trade missions abroad,[90] were sought under the Public Records Act. Although the agriculture commissioner's own expenses on the trade missions were paid by the state, he served as custodian of funds contributed by the private interests to pay their expenses.[91] He used his position to secure cooperation from the U.S. federal officials and those of foreign governments to make the trade missions a success.[92]

The First District Court of Appeal said the records were "clearly" not public because the commissioner acted only as custodian of private

86. *Id.*
87. *Id.*
88. *Id.* at 1026.
89. 466 So. 2d 1164 (Fla. 1st Dist. Ct. App. 1985).
90. *Id.*
91. *Id.*
92. *Id.* at 1165 (Wentworth, J., dissenting).

funds.[93] It is not clear why the public versus private character of the funds was controlling; in *Schwartzman*, private funds donated to the Merritt Island Volunteer Fire Department became subject to the Public Records Act because of the character of the entity.[94]

Schwartzman would require an inquiry into whether the Trade Mission Group owes its existence to the agriculture commissioner, yet *Modesitt* did not discuss whether the Trade Mission Group was acting on behalf of the state. If the Trade Mission Group were not acting on behalf of the state, the question is begged: Why did these private agribusiness firms turn their money over to the commissioner as custodian? They presumably wanted to be the *Official State of Florida Trade Mission Group*, which would mean they wanted to be seen as a state agency or be a quasi-public entity. Instead, the court saw the commissioner as a state official acting on behalf of the private sector. This case, in sum, does not fit into the analytic framework of any other case defining "agency" or "acting on behalf of" under Chapter 119. In fact, it contains no reference to any of the "acting on behalf of" cases cited in this article, or even to any particular subsection of Chapter 119.

V. CONCLUSION

Countless businesses are engaged in contracts to perform services or provide goods to government agencies, and countless other entities are involved with government, spending its money, taking over its services, performing its functions. Perhaps the courts of Florida have not intelligibly defined when such private actors are "acting on behalf of" a public agency for purposes of Chapter 119 because of the infinite variety of potential factual settings in which government and the private sector work together.

For whatever reason, the decisions on this question in Florida are inconsistent and irreconcilable. They leave the public unable to predict, except in a few clear circumstances, whether records generated by a private actor will be subject to mandatory public disclosure.

93. *Id.* at 1164.
94. *See Schwartzman*, 352 So. 2d at 1232.