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**IN THE CIRCUIT COURT OF THE
IN AND FOR HILLSBOROUGH**

**TIMES PUBLISHING COMPANY,
a Florida Corporation,**

Petitioner,

vs.

**EMELINE ACTON, JIM NORMAN,
THOMAS SCOTT, GARY TROMBLEY
& MORRIS WEINBERG,**

Respondents.

Case No. 99-8304

Division I

**ORDER ON PETITION FOR DECLARATORY JUDGMENT, PETITION FOR
WRIT OF MANDAMUS, ALTERNATIVE WRIT OF MANDAMUS
AND PERMANENT INJUNCTION**

THIS CAUSE came before the Court on October 27, 1999, on a Petition for Declaratory Judgment, Petition for Writ of Mandamus, Alternative Writ of Mandamus and Permanent Injunction filed on or about October 11, 1999, by the Times Publishing Company, a Florida Corporation. The Court, after review of the court file and having heard argument of counsel, hereby finds as follows:

FINDINGS OF FACT

1. In August 1998, Hillsborough County Commissioners James Norman and Thomas Scott were served with subpoenas to appear before the federal grand jury for the Middle District of Florida.
2. It is believed that the federal grand jury, before which the Commissioners were to appear, was investigating irregularities related to a potential vote by the Hillsborough Board of County Commissioners on the lien authority of Tampa General Hospital.
3. County Attorney Emeline Acton, who is a named Respondent herein, advised Commissioners Norman and Scott that legal representation by the Office of the County Attorney was not available, due to the nature of legal representation necessitated by the federal subpoenas.
4. Therefore, as a result of receiving the subpoena, Commissioner Norman retained Attorney Weinberg, to represent him in this matter. The contract for legal services was negotiated

between Commissioner Norman and Attorney Weinberg. Hillsborough County was not a party to the contract.

5. Therefore, as a result of receiving a subpoena, Commissioner Scott retained Attorney Trombley, to represent him in this matter. The contract for legal services was negotiated between Commissioner Scott and Attorney Trombley. Hillsborough County was not a party to the contract.

6. Commissioner Norman appeared before the federal grand jury on September 15, 1998.

7. Commissioner Scott appeared before the federal grand jury pursuant to the subpoena, however, the exact date is unknown.

8. The policy of the Board of County Commissioners, pursuant to Section .03.04.01.05, effective August 5, 1992, is "[t]o provide reimbursement of legal expenses to individual Commissioners and other officers who successfully defend criminal charges filed against them where conduct complained of arises out of or in connection with performance of official duties."

9. On May 5, 1999, the Board of County Commissioners found that the legal expenditures of Commissioners Norman and Scott arose out of the performance of their official duties and while serving a public purpose. As such, in accordance with board policy, the legal representation expenditures incurred by Commissioners Norman and Scott for the services of Attorneys Weinberg and Trombley, would be reimbursed by the county.

10. Attorney Weinberg was paid \$17,405.48 and Attorney Trombley was paid \$17,170.32 by the county.

11. On June 28, 1999, reporter David Karp of the St. Petersburg Times issued a public records request pursuant to Chapter 119, Florida Statutes, to the Office of the County Attorney. The letter indicates the public records request includes "any and all records related to the representation of Commissioners Norman and Scott, including but not limited to letters, memorandums, notes, e-mails, phone messages, and legal research materials."

The letter also states that if all or part of the public records request is denied, the specific exemption(s) under which the county is withholding the records be cited in writing.

12. On July 14, 1999, Senior Assistant County Attorney Mary Helen Campbell, corresponded with Attorneys Weinberg and Trombley regarding the County's receipt of a public records request for their files. The correspondence indicates that a copy of the June 28, 1999, letter is attached for review. The attorneys were also informed that a timely response to the public records request must be given.

13. On August 10, 1999, David Karp directed individual public records requests to

Commissioner Norman, Commissioner Scott, Attorney Trombley, and Attorney Weinberg. The request included any and all records related to the legal representation of the commissioners by their respective attorneys.

14. On August 11, 1999, a letter from Emeline Acton, County Attorney, was hand-delivered to David Karp, stating no authority could be found whether or not the requested materials were public records. Ms. Acton also indicated that the requested documents were in the possession of Attorneys Weinberg and Trombley.

15. No further action was taken on the part of the respondents until the Petition for Declaratory Judgment, Petition for Writ of Mandamus, Alternative Writ of Mandamus and Permanent Injunction was filed by the Petitioner herein.

16. At the October hearing before this Court, the Respondents argued the records in the possession of Attorneys Trombley and Weinberg were not subject to Chapter 119, Florida Statutes, as they were private records in the possession of private counsel.

17. Pursuant to the affidavit of Attorney Weinberg filed on or about October 26, 1999, the vast majority of the file at issue "consists of my handwritten notes that memorialize my mental impressions, legal strategies and conclusions relative to Mr. Norman's case." Another portion of the file consists of "relevant documents gathered and assembled by me or at my direction in a manner that reflects my mental impressions and opinions about the documents' relevance to the grand jury investigation."

LEGAL ANALYSIS

As a benchmark for an analysis herein, it must be noted that the Sixth Amendment of the Constitution of the United States of America and Article I, Section 16(a) of the Florida Constitution, guarantees the defendant's right to counsel in criminal proceedings. The right to effective counsel is the cornerstone of our criminal justice system. Although the grand jury proceeding is considered inquisitorial rather than adversarial and therefore protections afforded by the Bill of Rights do not fully attach, grand jury witnesses are entitled to the assistance of counsel. See United States v. Mandujano, 425 U.S. 564, 96 S. Ct. 1768, 48 L. Ed. 2d 212 (1976); Antone v. State, 382 So. 2d 1205 (Fla. 1980); and Federal Rule of Criminal Procedure 6(d).

Beyond the constitutional guarantees of the right to counsel in criminal matters, evolved the

oldest of the privileges for confidential communications known to the common law. The attorney-client privilege is an absolute privilege, rather than a qualified one. Ehrhardt, Florida Evidence §502.1 (1999 Edition). The privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." Ehrhardt, Florida Evidence §502.1 (1999 Edition) *quoting* Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 127, 32 L. Ed.488 (1888).

The privilege attaches "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." Skorman v. Hovnanian of Florida, Inc., 382 So. 2d 1376 (Fla. 4th DCA 1980) *quoting* 8 Wigmore, Evidence section 2292 (McNaughton rev. 1961).

Although the attorney-client privilege is long grounded in common law, the right of the public to records of the government pursuant to chapter 119, Florida Statutes, has abridged this privilege. Section 119.011(1), Florida Statutes (1999), defines public records as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency* (emphasis added). Section 119.011(2), Florida Statutes (1999), defines agency as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the

purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and *any other public or private agency person, partnership, corporation, or business entity acting on behalf of any public agency* (emphasis added). Section 119.07(3)(l) provides for a limited privilege to the State policy of open public records when the records are prepared by attorneys employed or retained by a governmental entity in anticipation of litigation or adversarial administrative proceeding. That exemption, however, ceases to exist at the conclusion of the litigation or adversarial administrative proceeding.

In City of North Miami Beach v. Miami Herald, 468 So. 2d 218 (Fla. 1985), the Florida Supreme Court held that attorney-client privilege does not exempt written communications between the government and its attorneys from disclosure under the public records act. It does not matter if the attorney is a government employee or a privately retained attorney representing the State or its subdivision. However, notes, drafts, and proposed trial outlines that are precursors of government records or that are designed to aid the attorney in remembering are not public records. State v. Kokal, 562 So. 2d 324 (Fla. 1990). See Johnson v. Butterworth, 713 So. 2d 985, (Fla. 1998).

As the attorneys who represented the commissioners here were private attorneys, it is incumbent upon this Court to determine if those attorneys were *acting on behalf of* a public agency so as to come under the ambit of Chapter 119. In Donner v. Edelstein, 415 So. 2d 830 (Fla. 3d DCA 1982), the City of Miami was the subject of litigation. Both the city attorney and privately retained counsel hired for the purpose of this litigation represented the city. Under this factual scenario, the records were found to clearly fall within the definition of public records. See also Sarasota Herald-Tribune Company v. Community Health Corporation, Inc., 582 So. 2d 730 (Fla. 2d DCA 1991)(holding that the Public Records Act applies to a not-for-profit entity that was acting on behalf

of a government agency).

In contrast, the Florida Supreme Court in Trepal v. State, 704 So. 2d 498 (Fla. 1997), held that the Coca-Cola Company was not acting on behalf of a public agency when it cooperated with and conducted product testing requested by law enforcement.

News and Sun-Sentinel Company v. Schwab, Twitty & Hanser, Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992), discusses some factors that the courts should look at when determining whether a private entity is acting on behalf of a governmental agency causing it to fall within the purview of the Public Records Act. The Supreme Court engaged a "totality of factors" approach when determining whether a private entity is an agency for the purposes of the Public Records Act. The factors considered include, but are not limited to:

- 1) the level of funding;
- 2) commingling of funds;
- 3) whether the activity was conducted on publicly owned property;
- 4) whether services contracted for 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; and
- 9) for who's benefit the private entity is functioning.

Id. at 1031.

Applying the Schwab factors to this case,

- 1) the taxpayers of Hillsborough County funded \$34,575.80 in legal fees to Attorneys Trombley and Weinberg;
- 2) there was no evidence of commingling of public and private funds;
- 3) the meetings between Commissioners Norman and Scott and their attorneys presumably occurred at the office of their attorneys;
- 4) contracts for attorney services are not germane to the role of the board of county commissioners;
- 5) according to the affidavit of Emeline Acton, attorneys Trombley and Weinberg were not performing a governmental function or function that the public entity would otherwise perform;
- 6) the individual commissioners were involved with their defense counsel, however, it cannot be said that they controlled or regulated the actions or professional autonomy of their attorneys;
- 7) attorneys Trombley and Weinberg are in private practice, the governmental agency did not establish this practice;
- 8) although the board of county commissioners did pay a total of \$34,575.80, this does not translate into the public agency having a substantial financial interest in the private entity; and
- 9) the individual commissioners were the beneficiaries of the representation by their respective private counsel.

Furthermore, a contract between a private entity and a governmental agency, does not, by virtue of the contract, subject the private entity to the Public Records Act.

If one merely undertakes to provide material - such as police cars, fire trucks, or computers - or agrees to provide services - such as legal services, accounting services, or other professional services - for *the public body to use* in performing its obligations, then there is little likelihood that such contractor's business operation or business records will come under the open meetings or public records requirements. On the other hand, if one contracts to relieve a public body from the operation of a public obligation - such as operating a jail or providing fire protection - and uses the same facilities or equipment acquired by public funds previously used by the public body then the privatization of such venture to the extent that it can avoid public scrutiny would appear to be extremely difficult,

regardless of the legal skills lawyers applied to the task. *Emphasis in original.*

News-Journal Corp. v. Memorial Hospital-West Volusia, Inc., 695 So. 2d 418 (Fla. 5th DCA 1997), *aff'd* News-Journal Corp. v. Memorial Hospital-West Volusia, Inc., 729 So. 2d 373 (Fla. 1999).

Here, reimbursement of legal expenses incurred were determined by the Board of County Commissioners to be a legitimate expense under board policy. Although all public expenditures must be for a public purpose, the mere payment of legal fees does not render the supporting records subject to Chapter 119. See Lomelo v. City of Sunrise, 423 So. 2d 974 (Fla. 4th DCA 1982); Salt River Pima-Maricopa Indian Community v. Rogers, 815 P. 2d 900 (Ariz. 1991).

It is therefore **ORDERED AND ADJUDGED** that:

1. As to Petitioner's Petition for Declaratory Judgment, neither Attorney Trombley or Attorney Weinberg were acting on behalf of a governmental agency, upon consideration of the totality of factors as enumerated in Schwab.

Therefore, the files and/or records requested by the Petitioner herein are not public records as defined under Chapter 119, Florida Statutes (1999), and, as such, are not subject to disclosure.

2. Although the Court finds that these files and/or records are not public records, even assuming that they were, they would arguably be exempted under Chapter 119, Florida Statutes (1999) due to the perceived continuing federal investigation and attorney-client exemptions under section 119.07(3)(b) and section 119.07(3)(l).

3. Petitioner's Petition for Writ of Mandamus is **DENIED**.

4. Petitioner's Petition for Alternative Writ of Mandamus is **DENIED**.

5. Petitioner's Petition for Permanent Injunction is **DENIED**.

6. The Court retains jurisdiction over the cause and parties as to Petitioner's request for attorney fees and as to the Respondents' request for attorney fees.

DONE AND ORDERED at Tampa, Hillsborough County, State of Florida this 5th day of November 1999.

CONFORMED COPY
ORIGINAL SIGNED

NOV - 5 1999

JUDGE DICK GRECO, JR.
CIRCUIT JUDGE

Dick Greco, Jr.
Circuit Court Judge

cc:

Thomas H. McGowan, Esq.

Charles A. Carlson, Esq.

Wayne Lee Thomas, Esq.

Robert R. Hearn, Esq.