



SAXON | GILMORE

SAXON GILMORE & CARRAWAY, P.A.
Attorneys and Counselors at Law

GERALD T. BUHR, P.A., *Of Counsel*
1015 Wyndham Lakes Drive, Odessa, Florida 33556
Certified City, County and Local Government Attorney

Direct Dial: 863.508.7055
Facsimile: 863.508.7066
Email: Gerald@geraldtbuhr.com
www.saxongilmore.com



City Attorney for:
Town of Zolfo Springs
City of Bowling Green
City of San Antonio

MEMORANDUM

To: Bowling Green City Commission; Jerry Conerly, City Manager
From: Jerry Buhr, City Attorney
Date: June 9, 2017
Subject: Formation of Recreation Committee Independent from City Oversight, and Exempt from Sunshine Act and Public Records Act.

ISSUES

1. WHETHER THERE IS A MANNER OF FORMATION OF A NEW RECREATION COMMITTEE INDEPENDENT OF THE CITY AND EXEMPT FROM THE STRICTURES AND RECORDKEEPING OF THE FLORIDA SUNSHINE ACT AND PUBLIC RECORDS ACT, AS WELL AS THE ACCOUNTING REQUIREMENTS FOR CITY EXPENDITURES?
2. WHAT CIRCUMSTANCES AND CHANGES COULD ASSIST IN CREATING AN ORGANIZATION THAT NEED NOT FOLLOW THE PUBLIC RECORDS ACT OR SUNSHINE ACT?

FACTS AND PREMISES

The City has an advisory committee that presently plans, prepares and holds events in the interest of the citizens of the City, making recommendations to the city as to such events and their funding (Hereinafter, "Existing Committee"). It has been an ongoing problem for the City to maintain members on a recreation committee over the years, because the recordkeeping requirements of the Public Records Act (Chapter 119, Florida Statutes "FS", hereinafter "PRA"), the recordkeeping and other requirements of Florida's Government in the Sunshine Act (§286.011 FS, et seq., hereinafter "GISA"), and accounting for committee and event expenditures such as to satisfy the City's public accounting requirements. A proposal was discussed by the City and the Existing Committee to terminate the Existing Committee, and form a new independent and private organization ("New Organization") to perform all of the tasks the Existing Committee performs now, but without all of the stringent strictures of the PRA, GISA and accounting requirements. I have been asked to opine on whether such an independent

recreation organization can be formed, and if so, whether it would be able to avoid those strictures as desired.

Based on correspondence with the City Manager, the following are presumptions that are important to this analysis:

1. The New Organization would be created by a group of volunteers who would elect their own officers, develop Organization policies, set goals, and create an annual budget.
2. After review of the New Organization's proposed annual budget, the City would consider making a contribution to the New Organization without any direction as to how the money will be spent. The New Organization would attempt to obtain charitable contributions and charge some fees, however, a substantial amount of the funding would be from the City.
3. There would be no commingling of City and New Organization funds.
4. Because they would be recreational activities, most of the New Organization's activities would occur on public property. The City would receive no financial gain, other than occasion park rental fees (unless waived) from the New Organization's activities.
5. The New Organization would play no part in the City's decision making process.
6. The City would not regulate or have any involvement in the New Organization's activities or decision making process.
7. Other making contributions to the Committee, the City would have no financial interest in the New Organization and would have no ownership interest in the New Organization's property.
8. The goal of the New Organization would be to help the citizens served by the City by providing recreational activities. This would be an indirect benefit to the City.

I. ANALYSIS

The analysis of this issue must begin with considering the question of whether a private, independent corporation or organization must comply with the PRA and the GISA. Generally, it does not. Those acts *may*, however, apply to any private company or

organization if the entity is “acting on behalf of” a public agency such as the City.ⁱ Through an evolution of case law and Florida Attorney General Opinions (“AGO”), the best analysis of this issue is through the “*Schwab* factors” established in the Florida Supreme Court case, *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*,ⁱⁱ to establish whether the activities of the private organization are sufficient under the law to rise to the level of being considered to be “acting on behalf of” a public agency, and thus, be itself an “agency” obligated to follow the PRA and GISA. The subsequent analysis then, will concentrate on my opinion as to the application of those *Schwab* factors to the New Organization, considering the presumptions numbered above. It should be noted that application of such factors should not concentrate on the applicability or non-applicability of any one or two factors, but, “it is the totality of factors that controls the determination.”ⁱⁱⁱ

Analysis of *Schwab* Factors^{iv}:

1. Creation – did the public agency play a part in the creation of the private entity?

The first presumption above would tend to indicate that the City has, at most, a very limited involvement in the creation of the New Organization. It would be too much to say that the City had *no* participation, given that the City would need, at the very least, to terminate the existence of the Existing Committee, and agree to cooperate with the New Organization to the extent of funding, and the objectives replacing the Existing Committee’s work. It is not likely that a successful argument can be made that the New Organization is not intended by the City to supplant the Existing Committee in all objectives and endeavors. In my opinion, this factor tends towards concluding that the New Organization would be an agency, although not strongly.

2. Funding – has the public agency provided substantial funds, capital or credit to the private entity or is it merely providing funds in consideration for goods or services rendered by the public entity?

After considering the second presumption above, it appears that this factor would not be a good one for the issue. It appears that a substantial amount of the funding would be through the City’s fisc, and a much smaller, uncertain amount would be from contributions and fees. Although the presumption states that the City “would not direct how the money is spent,” it contradicts that premise when it provides in the same premise that the City would “review of the New Organization’s proposed annual budget” prior to deciding whether to make a contribution. In my opinion, this factor strongly indicates that the New Organization is an agency because the New Organization’s funding is largely coming from the City’s fisc after the City has evaluated the budget to ascertain whether it agrees with how the money will be spent.

3. Commingling of Funds – whether there is a commingling of funds.

Given presumption number 3 above, this factor would strongly weigh against the New Organization being an agency.

4. *Public Property – whether the activity is conducted on publicly-owned property.*

Given presumption number 4 above, this factor would strongly weigh in favor of the New Organization being an agency. Whether the City would *monetary* benefit from the use of the City's property is, in my opinion, not that important. The purpose of most City recreational programs is not for the City to gain monetary benefit, but to provide recreational and social opportunities for its citizens.

5. *Decision-making process – does the private entity play an integral part in the public agency's decision-making process?*

This is an arguable point. On the one hand, the New Organization will no longer be making recommendations on each and every event as an advisory committee, which influence commission decisions. Nevertheless, the City will be making a decision as to whether to fund the activities based on the goals, and possibly even deciding on whether to fund based on the budgeted events as before. In my opinion, the budgeted goals and activities will influence the commission's decision, but in an "integral" way? I would call this one even.

6. *Governmental Function – whether the private entity is performing a governmental function or a function which the public agency otherwise would perform.*

This appears to me the strongest factor in favor this New Organization being considered an agency. It will be performing all the tasks that are normally performed by any City recreational advisory committee, and in fact, stated intent is replacing the Existing Committee, and then performing all the same tasks privately, even still retaining primary funding through the City.

7. *Regulation – does the public agency regulate or otherwise control the private entity's professional activity or judgment?*

Once again, to presume that the City does not control the New Organization would require that the City did not review the budget and then contribute a substantial portion of the New Organization's funding if it agrees with the proposed objectives and events. Is such budget control not control? I believe that it is. The New Organization management would be very clear that if it does not provide objectives and events that would be suitable to the commission, they would not be funded.

8. *Financial Interest – whether the governmental agency has a substantial financial interest in the private entity.*

This factor really begs the question of “what is a financial interest?” I could find no coherent definition of “financial interest” in *Schwab* or its progeny. Nevertheless, Merriam Webster’s dictionary defines “interest” as: “right, title, or legal share in something (2) : participation in advantage and responsibility.” The legal financial interest is not the same as a nonprofit hospital operation company formed by county, whereby the losses of the company would ultimately become the responsibility of the county.^v In the case at hand, if the New Organization goes bankrupt, the City would not appear to be responsible to the debtors. The definition would, however, appear to me to apply to the overall general responsibility over the financial stability and capabilities of the New Organization, as evidenced by a review and approval of a budget as a prelude to funding as in the case at hand. In my opinion, this factor slightly favors the entity being an agency.

9. *Goals – is the goal of the private entity to help the public agency and the citizens served by the agency?*

The goal of the New Organization as stated in the premises above, would be to help the citizens served by the City by providing recreational activities. I can see no difference between that goal and the goal of the Existing Committee, nor in the general (albeit secondary) goals of a municipality. In my opinion, this factor weighs heavily towards the New Organization being an agency. Perhaps if the New Organization performed such services for private homeowners’ associations in Hardee and Polk, this factor would be somewhat ameliorated, as it would not be indicating that the New Organization is a mirror of the Existing Committee, proposed to be private to avoid recordkeeping.

Having reviewed and analyzed the factors considering the premises provided, the overall weight is towards the New Organization being considered to be acting on behalf of the City, and thus, be itself considered an agency for the purposes of application of both the PRA and GISA. Even if it was a close case, which I do not believe that it is, the Florida Supreme Court has warned that “the principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.”^{vi} One of the stated purposes of providing the New Organization is to avoid the strict application of the PRA and GISA, however, the Florida Supreme Court has also warned that “the Sunshine Law is to be construed so as to frustrate all evasive devices.”^{vii}

CONCLUSION

In my opinion, based on the premises, case law and Attorney General opinions, the New Organization would be an agency under the *Schwab* factors, because it is just the Existing Committee made private. I doubt that the Florida Attorney General would find otherwise. I will discuss alternatives with the City Manager.

II. CIRCUMSTANCES AND CHANGES THAT COULD CREATE AN ORGANIZATION EXEMPT FROM PRA AND GISA

A. As a Fact-Finding City Committee.

City advisory committees that have some commission-delegated authority, or make recommendations to the commission are required to adhere to the PRA and the GISA, however, purely fact-finding committees are exempt.^{viii} Florida courts have stated that “The law is quite clear. An ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law.”^{ix}

Thus, if the commission wishes to have a more loosely formed committee not subject to GISA and PRA, then the committee must not make any substantive decisions on when, where and how the recreational events are carried out. They can still gather information about when, where and how the event could be best carried out, and volunteer to make arrangements after the commission have made the substantive decision-making authority, and pay vendors and equipment companies with city funds approved by the commission or staff,^x but should avoid *recommendations* that could be construed as merely “rubber-stamped” by the commission. For example, the City could maintain and update an annual calendar or list of potential events, and the committee could ascertain what dates are available at the desired venue; how much the cost would be, including the materials and equipment necessary, and submit this all to the City Manager and Council for review, modification and approval. Once approved, the committee members could make the approved arrangements, and attend as volunteers to assist in the event. The types of things that should be avoided are recommending approval of budgets; recommending entry fees; approving vendors, inspecting setup, etc.

B. As an Independent Non-Profit Organization.

As with the original analysis above, the analysis relies on the *Schwab* factors. Oddly enough, a review of the *Schwab* factors does not change too much. Given that this New Organization would need funds to operate, it would appear that the City would still be required to fund the New Organization, unless that New Organization could exist and operate solely on contributions from elsewhere. But it otherwise appears that

independence required for the New Organization would coincidentally be its downfall in avoiding the GISA and PRA, as it would still be formed and operating solely for the benefit of the citizens, and performing a task which might be construed as being generally one that cities perform.

CONCLUSION

It would appear to me that the best manner to handle recreational arrangements by non-staff would remain with a city committee, but with assurance that the committee does not act in a manner deemed to be based on delegated authority, but to simply provide the facts of the when, where and how an event would be best handled to the City Manager and Commission without making a recommendation, and leave the details to them. I would still recommend an attorney general's opinion on that organization.

ⁱ Section 119.011(2) FS., *and see, e.g.*, AGO 2011-01 (regarding application of *Schwab* factors as to application of both PRA and GISA to a private organization).

ⁱⁱ 596 So. 2d 1029 (Fla. 1992).

ⁱⁱⁱ AGO 2011-01, *citing, Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 379 (Fla. 1999) (*citing Schwab, id.* at 1031-32).

^{iv} As the factors are summarized in AGO-2011-01.

^v *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373

^{vi} *See, e.g., Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)

^{vii} *Id.*

^{viii} AGO 95-06 & *Sarasota Citizens For Responsible Government, etc., et al., v. City of Sarasota, Florida*, et al. 48 So.3d 755 (2010) (“When a committee has been established for and conducts only information gathering and reporting, the activities of that committee are not subject to [GISA]”), *citing with approval, Lyon v. Lake County*, 765 So.2d 785, 789 (Fla. 5th DCA 2000).

^{ix} *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988).

^x The City Manager would also be able to make decisions authorized to him/her under the City's charter and ordinances.