

Court Holds Off Making Fla. Commission's Docs Public

By Alex Wolf

Law360, New York (October 30, 2015, 10:15 PM ET) -- A Florida appeals court overturned a ruling Friday that granted a clerk of court access to a local economic development commission's documents in an investigation into a bribery scandal involving information technology company BlueWare Inc., saying the wrong test was used to determine whether the documents are subject to public records law.

An appellate panel found that a lower court had erred when it **determined last year** that the records of the Economic Development Commission of Florida Space Coast Inc. are subject to Florida's Public Records Act and therefore accessible to Brevard County Clerk of Court Scott Ellis, who had sued to obtain copies of certain files. The judges said the trial court mistakenly failed to conduct a nine-factor test to see whether the EDC, a private entity, was subject to the public records law.

The panel said that instead of carrying out a so-called Schwab test to look at whether EDC was acting on behalf of the county government or merely providing services to a public agency pursuant to contract, which would determine whether EDC is subject to the law, it erroneously utilized a "delegation of function" test, which was inappropriate because there was not a clear and complete delegation of a governmental function to EDC.

"In this case, Brevard County contracted with EDC to serve as the county's primary, not its sole, agent for economic development activity," the opinion said. "EDC provided services to, not in place of, the county. Although local governments may engage in a variety of economic development activities, those services in our opinion are not traditional governmental obligations or functions."

Accordingly, the panel remanded the case to the trial court for analysis under the Schwab, or "totality of factors test," which looks at certain elements like the level of public funding, whether the services contracted for are an integral part of the agency's decision-making process and the extent of the public agency's involvement with or control over the private entity.

In an email to Law360 on Saturday, EDC attorney **Edward G. Guedes of Weiss Serota Helfman Cole & Bierman PL** noted that the panel found the organization had evolved since its original creation and is now geared more toward servicing the interests of private businesses.

An attorney for Ellis did not immediately provide a comment Friday.

The ruling overturns the March 2014 opinion of Judge John D. Moxley Jr., who said the records were public because Brevard County had delegated a statutorily authorized function to EDC, an organization that allegedly receives \$1.4 million in taxpayer funds each year as part of its contract with the county.

The authorized function in the case is economic development, which is a "traditional and long-accepted function of government," Moxley said.

Ellis had sued the EDC in an attempt to gain access to documents related to its dealings with BlueWare, which received a multimillion-dollar contract with the Brevard County Court to digitize the county's court records after donating money to former Clerk of Court Mitch Needelman's re-election campaign.

Ellis, who took office after Needelman lost his bid for re-election for Brevard County Clerk of Court in August 2012, has been looking into his predecessor's actions with regard to BlueWare.

Needelman, along with his onetime business partner, lobbyist William Matthew Dupree, were arrested and charged with bid tampering and bribery, according to the Florida Department of Law Enforcement's Office of Executive Investigations. Needelman is accused of awarding BlueWare the contract as part of a scheme in which he tampered with bids submitted by other companies and received donations for his re-election campaign.

The FDLE said that the scanning contract for the digitization of the county's records was awarded to BlueWare even though the company had no equipment to scan the documents at the time.

Needelman was also charged with official misconduct for allegedly directing employees to use private email accounts to circumvent public records laws, the FDLE said.

Before leaving office, he entered into a loan with **Hewlett-Packard Financial Services** for \$5.6 million, money that was forwarded to BlueWare even though Brevard County was obligated to repay the loan, the FDLE said.

Ellis is represented by Curt Jacobus and Alec Russell of **GrayRobinson PA**.

The EDC is represented by Edward G. Guedes and Alicia H. Welch of Weiss Serota Helfman Cole & Bierman PL.