

**ON APPEAL** by NOREEN MARCUS

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**Case Tests Open Records Application to Business Booster**



EDC attorney Edward Guedes, of Weiss Serota Helfman Cole & Bierman in Coral Gables, argues for a public interest in safeguarding the confidentiality of certain proprietary information.

A high-profile case tests for the first time whether a business-expansion group that's a government contractor must comply with Florida's public records law.

In January 2013, Brevard Clerk of Courts Scott Ellis filed a public records lawsuit against the Economic Development Commission of the Space Coast. Ellis demanded the commission's files on BlueWare Inc., a Michigan-based information technology company.

The EDC had announced in 2012 that BlueWare would relocate to Melbourne, bringing 190 jobs. Also that year, then-Brevard County Clerk of Courts Mitch Needelman awarded BlueWare an \$8.52 million contract to scan court documents.

The Florida Department of Law Enforcement investigated and the state filed public corruption charges against Needelman and two BlueWare executives. Allegedly, Needelman gave

BlueWare the contract in exchange for contributions to his failed 2012 reelection campaign against Ellis. These felony charges are pending.

In March 2014, Brevard Circuit Judge John Moxley ruled Ellis was entitled to the BlueWare records because as

BlueWare records because as an agent for the county, the EDC is subject to the same public records rules.

Not so fast, the Fifth District Court of Appeal seemed to say in its opinion published Oct. 30. The appellate court reversed Moxley, finding he used the wrong test to determine whether the EDC replaced the county in its role of nurturing corporate growth.

Now Moxley or another judge—Moxley retired but may keep the case as a senior jurist—is supposed to apply the correct test, one that takes many more factors into account. The key question is whether the EDC is effectively a public entity, or a private one that incidentally contracts with Brevard County to provide marketing services.

**POLICY DEBATE**

Although the ruling doesn't assure victory to the EDC, it pleases EDC attorney Edward Guedes.

"The Fifth District could have resolved this case in two or three paragraphs," citing authority for the right test, said Guedes of Weiss Serota Helfman, Cole & Bierman in Coral Gables. "Instead it wrote a 10-page opinion in which it laid out all of the facts it thought were important.

"Why devote all that effort to detailing all of these facts if you're not communicating to the parties and the lower court, hey, when you take another look at this consider the following," he said.

He argues for a public interest in safeguarding the confidentiality of certain proprietary information. If the EDC is trying to woo a company to move to Florida from another state, it must review the company's financials to help secure incentives.

"If the company believes the entire state of Florida will be able to find out everything about its business, nobody will want to do it," Guedes said.

That interest is less compelling than the longstanding state policy of openness in economic development, according to an amicus brief supporting Ellis that was filed on behalf of 14 media groups. Among them are the First Amendment Foundation, the Associated Press, Florida Press Association, the Florida Center for Investigative Reporting and several special-interest collectives and newspaper companies.

The brief notes that Brevard County, which filed an amicus brief opposing county official Ellis, said companies seeking incentives have "zero tolerance" for disclosure of even their names on public records requests. And the EDC "predicts 'devastating' results to Florida's economy" should Ellis prevail.

"[T]hey urge this court to elevate unrecognized public policy grounded in a 'sky is falling' argument over and above what Floridians have constitutionally demanded as the overriding public policy of transparency," Sarasota lawyer Andrea Flynn Mogensen wrote for the media amicus.

**FEE FIGHT**

Guedes said Ellis won the first round in the trial court by convincing the judge to focus on how the EDC started out in 1989—just one step removed from the county.

"What the appellate court clearly communicated is that it doesn't matter what happened in 1989; what matters is what's happening today," he said.

Back in the trial court he'll present a timeline that emphasizes the EDC's transition to a separate operation with a nongovernmental purpose. The commission has evolved into an entity that "primarily services private business development and only secondarily provides marketing services to Brevard County under a contract," Guedes said.

This contract pays the EDC \$1.4 million annually, amounting to nearly half its operating budget, the Fifth District noted.

One bill the EDC won't have to pay is attorney fees in the Ellis case. Moxley ruled the EDC acted in good faith when it contested the clerk's records request, and good faith means no liability for fees.

The Fifth District agreed. "That is a done issue," Guedes said.

Not to the media amicus, however.

"There can be no good faith basis to deny attorneys' fees when a public entity is converted into a private entity that performs the same functions on behalf of the public and executes a written agreement acknowledging that the public body has the right to inspect records under the Public Records Act," Mogensen's brief states.

Taking fees off the table will encourage the illegal privatizing of public records, the brief warns.

"Litigation to enforce open government laws was traditionally brought by the media. However, severe budgetary cuts in the newsroom have had a profound impact on litigation brought under open government laws."

**ECONOMIC DEVELOPMENT COMMISSION, APPELLANT, V. SCOTT ELLIS, APPELLEE**

**Case No.:** 5D14-1356

**Date:** Oct. 30, 2015

**Case type:** Public records

**Court:** Fifth District Court of Appeal

**Author of opinion:** Judge James A. Edwards

**Lawyers for petitioner:** Edward G. Guedes and Alicia H. Welch, Weiss Serota Helfman Cole & Bierman Coral Gables

**Lawyers for respondent:** Curt Jacobus, Alec D. Russell and Charles T. Wells, GrayRobinson, Melbourne, and Kevin C. McBride, Staff Counsel, Brevard County Clerk of Courts, Titusville

**Panel:** Edwards, Judge Kerry I. Evander and Associate Judge T.R. Perkins

**Originating court:** Brevard Circuit Court