IN THE CIRCUIT COURT OF THE 20th JUDICIAL CIRCUIT,
IN AND FOR COLLIER COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: 2023-CA-2009

FRANCIS A. OAKES, III,

Plaintiff,

vs.

SCHOOL BOARD OF COLLIER COUNTY,

Defendant.
_____/

DEFENDANT, SCHOOL BOARD OF COLLIER COUNTY'S MOTION TO DISMISS

Defendant, SCHOOL BOARD OF COLLIER COUNTY (the "School Board"), hereby moves to dismiss the Complaint[1] filed by Plaintiff, FRANCIS A. OAKES, III ("Plaintiff") and, in support thereof, states the following.

PRELIMINARY STATEMENT

Plaintiff's Complaint should be dismissed as the facts alleged in the Complaint and shown in the exhibits to the Complaint demonstrate that the School Board did not violate Florida's Sunshine Law in the process of selecting its next superintendent. There is no suggestion by Plaintiff that the School Board's own meetings violated the Sunshine Law. Rather, the gravamen of Plaintiff's claim is that Hazard Young Atea Associates ("HYA"), an executive search firm that provided a recommendation to the School Board, violated the Sunshine Law when it did not hold its own public meetings during its process of gathering information regarding applicants and determining a slate of ten (10) recommended candidates.

1 Cited herein as "Compl., ¶__."

However, the facts alleged in the Complaint together with the exhibits to the Complaint demonstrate unequivocally that HYA is a private contractor that was delegated only fact-finding responsibilities. Florida law is clear that HYA is, therefore, not subject to the requirements of the Sunshine Law. The express allegations of the Complaint further demonstrate that, even if, *arguendo*, there was a Sunshine Law violation, it was cured through three subsequent public meetings during which the School Board considered the applicants, narrowed the list of candidates, and took final action in the sunshine by selecting a new superintendent. Importantly, the Complaint demonstrates that the School Board did not merely "rubber stamp" the recommendations made by HYA. Instead, during three critical public meetings, the School Board actually added a candidate to the list of finalists, used a ranking matrix to narrow the field, further narrowed the field to two candidates, and then ultimately selected the next superintendent. Accordingly, it is evident from the face of the Complaint that there has been no Sunshine Law violation and the Complaint should be dismissed.

FACTS RELEVANT TO PLAINTIFFS' CLAIM AND THIS MOTION[2]

1. On November 7, 2022, the School Board approved a contract HYA pursuant to which HYA was hired to perform the fact-gathering tasks of soliciting applicants and compiling candidates for the position of the Superintendent of the Collier County School District. Compl., ¶5.

2. Pursuant to the School Board's contract with HYA, during the "Recruit Phase" HYA performed the following tasks:

a. Coordinate and place advertisements as selected and paid for by the Board;

[2] For the limited purpose of this Motion, the School Board accepts all properly pleaded allegations within the Complaint, together with the Exhibits thereto, as true. *See W. Kendall Holdings, LLC v. Downrite Eng'g Corp.*, 112 So. 3d 614, 615 (Fla. 3d DCA 2013).

b. Recruit and contact candidates utilizing state and national networks;

c. Correspond with candidates regarding the search process, timeline, Leadership Profile and desired characteristics;

d. Interview candidates;

e. Conduct reference checks;

f. Identify best qualified candidates;

g. Prepare applications materials of selected slate of candidates for the Board consideration.

Compl., Ex. A.

3. Pursuant to the School Board's contract with HYA, during the "Select Phase" HYA performed the following tasks:

a. Present a slate of candidates, the number of candidates to be determined by the Board with a recommendation from HYA;

b. Conduct the Interview Workshop and provide materials and protocol to ensure informative effective Board interviews;

c. Schedule interviews for the Board with selected semi-finalists and finalists;

d. Facilitate Board discussion to narrow candidate pool after each round of interviews;

e. Coordinate and provide investigative background check(s) of candidates to the Board President as selected and paid for by the Board.

Compl., Ex. A.

4. The contract between the School Board and HYA also expressly provides that HYA is an independent contractor and that "[t]he Board's decision to hire or not hire a particular candidate is at the sole discretion of the Board, and the Board takes responsibility for that decision." Compl., Ex. A.

5. In furtherance of its contractual obligations, HYA compiled a list of 45 candidates for the Superintendent position. Compl., ¶8.

6. At the April 5, 2023 School Board Meeting, HYA presented the list of candidates to the School Board and recommended its top ten (10) ranked applicants. Compl., ¶¶8-11.

7. During the same April 5, 2023 meeting, the School Board added an additional candidate to the list of finalists, bringing the total to 11. Compl., ¶14.

8. In addition, during the April 5, 2023 meeting, the School Board then utilized a ranking matrix to reduce the field from 11 candidates down to the final four (4) candidates. Compl. ¶15.

9. Subsequently, during the School Board's next meeting on April 19, 2023, the School Board reduced the field down to two (2) final candidates. Compl. ¶16.

10. Finally, during a meeting on May 3, 2023, the School Board selected one candidate to be the next superintendent. *Id.*

STANDARD OF REVIEW

Florida Rule of Civil Procedure 1.110(b) provides that a pleading "shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." "In considering a motion to dismiss, the trial court is bound by the four corners of the complaint[.]" *Miami-Dade Cnty. v. Perez*, 343 So. 3d 175, 177 n.2 (Fla. 3d DCA 2022) (citations omitted). Exhibits should be treated as a part of, and incorporated into, the complaint for purposes of a motion to dismiss. *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So. 2d 736, 736 (Fla. 3d DCA 1971) (citing *Dade Cnty. v. Harris*, 90 So. 2d 316 (Fla. 1956)). If there are any inconsistencies between the complaint and the exhibits, "the plain meaning of the exhibits control." *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 494 (Fla. 3d DCA 1994) (citations omitted).

Although well-pleaded facts must be taken as true and viewed in a light most favorable to the plaintiff, *Perez*, 343 So. 3d at 177 n.2, upon a showing beyond doubt that the plaintiff cannot prove any set of facts in support of its claim, the movant is entitled to an order of dismissal. *Morris v. Fla. Power & Light Co.*, 753 So. 2d 153, 154-55 (Fla. 4th DCA 2000). Moreover, "[w]here the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss." *Bivins v. Douglas*, 335 So. 3d 1214, 1218 (Fla. 3d DCA 2021) (quoting *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015)).

ARGUMENT

I. THE PRIVATE EXECUTIVE SEARCH FIRM HIRED BY THE SCHOOL BOARD IS NOT SUBJECT TO SUNSHINE LAW REQUIREMENTS.

Undoubtedly, "[a]ll governmental authorities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted." *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010). As such, "[t]he Sunshine Law applies to actions of school boards." *Knox v. District School Bd. of Brevard*, 821 So. 2d 311, 314 (Fla. 5th DCA 2002). The Sunshine Law requirements "may also apply to committees subordinate to or selected by traditional governmental authorities." *Id.* The dispositive question, though, is whether the government agency has delegated its "decision-making authority." *Sarasota Citizens,* 48 So. 3d at 762. Therefore, where a government agency has delegated its decision-making authority to a committee, "the committee's meetings must be open to public scrutiny." *Id.*

Conversely, where only "information-gather or fact-finding authority" is delegated to a committee, the Sunshine Law does not apply. *Id.*; *see also Lyon v. Lake County*, 765 So. 2d 785, 789 (Fla. 5th DCA 2000) ("When a committee has been established for and conducts only information gathering and reporting, the activities of that committee are not subject to section 286.011, Florida Statutes."). Ultimately, the test for determining whether decision-making

authority or fact-finding authority has been delegated is measured by the "nature of the act performed, not on the make-up of the committee or the proximity of the act to the final decision. *Sarasota Citizens*, 48 So. 3d at 763 (quoting *Wood v. Marston*, 442 So. 2d 934, 939 (Fla. 1983)).

Here, HYA is a private corporation and not a committee or board that has been formed by the School Board. Therefore, generally, HYA is not subject to Sunshine Law requirements. Indeed, the Sunshine Law "applies to governmental bodies and does not apply to private organizations that were not created by a public entity." *National Council on Compensation Insurance v. Fee*, 219 So. 3d 172, 180 (Fla. 1st DCA 2017) (citing Op. Att'y Gen. Fla. 07–27 (Fla. AGO 2007)). "However, the sunshine requirements may apply if a public entity has delegated 'the performance of its public purpose' to a private entity." *Id.* (quoting *Mem'l Hosp.–W. Volusia, Inc. v. News–Journal Corp.*, 729 So. 2d 373, 382–83 (Fla. 1999)).

It is evident from the express allegations of the Complaint and the agreement attached to the complaint that the School Board did not delegate its public purpose or any decision-making authority to HYA. Instead, HYA served only in a fact-finding and consulting capacity. HYA conducted interviews and reference checks, prepared application materials for the School Board's consideration, coordinated background checks of candidates, and provided the School Board with its recommendations. *See* Compl., Ex. A. HYA initially compiled a list of 45 candidates for the Superintendent position. Compl., ¶8. Then, at the April 5, 2023 School Board Meeting, HYA presented the list of candidates to the School Board and recommended its top ten (10) ranked applicants. Compl., ¶¶8-11. Importantly, HYA did not actually eliminate any of the other 35 candidates as they remained available for consideration by the School Board, which actually added an additional candidate to the list of finalists, bringing the total to 11. Compl., ¶14.

Moreover, during the April 5, 2023 meeting, the School Board then utilized a ranking matrix to reduce the field from 11 candidates down to the final four (4) candidates. Compl. ¶15.

Subsequently, during the School Board's next meeting on April 19, 2023, the School Board reduced the field down to two (2) final candidates. Compl. ¶16. Ultimately, during a meeting on May 3, 2023, the School Board exercised its discretion and selected one candidate to be the next superintendent. *Id.* Critically, pursuant to its agreement with HYA, the School Board always retained this discretion. Specifically, the agreement provided that "[t]he Board's decision to hire or not hire a particular candidate is at the sole discretion of the Board, and the Board takes responsibility for that decision." Compl., Ex. A.

The instant action is similar to *Knox*, where an area superintendent with the School Board of Brevard County met with a group of five school board employees for the purpose of interviewing candidates for an open principal position. 821 So. 2d at 312-13. With the input from the group of employees, the area superintendent provided all applicants' names to the superintendent and specifically recommended two of the applicants. *Id.* at 313. The Fifth District ultimately held that "[a] Sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties." *Id.* at 315. Here, while HYA recommended ten (10) applicants to the School Board, the names of all applicants were provided and the School Board even added another finalist from the other 35 applicants.

Accordingly, HYA served only a fact-finding purpose and did not have decision-making authority. Florida law is clear that, under these circumstances, HYA was not subject to the requirements of the Sunshine Law. *See, e.g., Jordan v. Jenne*, 938 So. 2d 526, 530 (Fla. 4th DCA 2006)(holding that group that was responsible for reviewing investigative reports involving deputies with the Broward County Sheriff's Office "provided only a mere recommendation to the inspector general and did not deliberate with the inspector general, the ultimate authority on termination, we conclude that the [group] does not exercise decision-making authority so as to constitute a "board" or "commission" within the meaning of section 286.011, and as a result, its

meetings are not subject to the Sunshine Act."); *Knox*, 821 So. 2d at 314-15 (finding that the school board's interview team was not subject to the Sunshine Law where the interview team's "purpose was to gather information and impressions about the applicants" and "Although the team made recommendations, all the applications went to the superintendent and he decided which applicants to interview and nominate to the school board. Since the interview team simply had a fact-finding or advisory role, their meetings were not governed by the Sunshine Law."); *Molina v. City of Miami*, 837 So. 2d 462, 463 (Fla. 3d DCA 2002) (holding that meetings of the Discharge of Firearms Review Committee were not subject to Sunshine Law where the committee makes factual findings and passes those findings on to chief of police); *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985) (holding that group which assisted city manager in interviewing persons for the position of police chief was not governed by Sunshine Law where their function was to assist the city manager in acquiring information by asking questions during the interview and discussing with the city manager the qualifications of each candidate after the interview so that he could decide which of three candidates he wished to interview further).

Because it is clear from the face of the Complaint that HYA is not subject to the Sunshine Law, this Court should enter an Order dismissing Plaintiff's Complaint.

II. TO THE EXTENT A SUNSHINE LAW VIOLATION OCCURRED, THE SCHOOL BOARD'S SUBEQUENT PUBLIC MEETINGS CURED THE OSTENSIBLE VIOLATION.

Even if, *arguendo*, HYA was subject to the Sunshine and a Sunshine Law violation ostensibly occurred, Florida law is clear that such a violation may be cured by holding subsequent open meetings in compliance with the Sunshine Law. *See Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755 (Fla. 2010)). In *Sarasota Citizens*, the Florida Supreme Court found that a possible violation of the Sunshine Law through the exchange of emails was cured because "the Board took independent, final action in the sunshine[.]" *Id.* at 766. Similarly, the

Third District Court of Appeal has recognized that "[g]overnmental actions will not be voided whenever governmental bodies have met in secret where sufficiently corrective final action has been taken." *Monroe Cnty. v. Pigeon Key Hist. Park, Inc.,* 647 So. 2d 857, 861 (Fla. 3d DCA 1994). The policy underlying the need for such a rule is clear: if a governmental entity cannot cure a sunshine law violation, then it would never be able to act once there was a violation. For example, if a school board improperly discussed a school calendar in a private meeting, it must be able to cure that violation through a properly noticed public meeting in the future or it would never be able to adopt a calendar.

Of course, the curative meeting must comply with the Sunshine Law, and a violation "will not be cured by a perfunctory ratification of the action taken outside of the sunshine." *Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. 4th DCA 1988) (citations omitted). Thus, "independent, final action in the sunshine" is necessary to cure a Sunshine Law violation; "ceremonial acceptance" or "perfunctory ratification" of secret actions and decisions is not sufficient. *Sarasota Citizens*, 48 So. 3d at 765.

The issue raised by this Motion is whether the alleged violation of the Sunshine Law by HYA was cured through the School Board's subsequent public meetings held on April 5, 2023, April 19, 2023, and May 3, 2023.[3] Importantly, the issue raised here is different from the issue in *Fla. Citizens Alliance, Inc. v. Sch. Bd. of Collier Cnty.*, 328 So. 3d 22 (Fla. 2d DCA 2021). There, the Collier County School Board asserted that a violation of the Sunshine Law by its textbook committee was cured through two subsequent public meetings of the Collier County School Board, itself (as opposed to a subsequent curative meeting by the textbook committee). The Second District reviewed the substance of the two Collier County School Board meetings and concluded

[3] The Motion should be granted if any of the three meetings, taken individually, cured the ostensible violation, or if two or all three of the meetings taken together did so.

that they did not cure the textbook committee's violation because the school board meetings lasted only 30 minutes for thirty-six recommended titles; there was no discussion of the substance of the textbooks; and the school board's policy effectively barred the school board from considering alternative textbooks previously considered by the textbook committee. *Id.* at 29.

In contrast, the Complaint here demonstrates that the School Board cured the alleged Sunshine Law violation through its three subsequent public meetings. The express allegations of the Complaint concerning the subsequent public meetings show, on their face, that the School Board did not "merely perfunctorily ratify or ceremoniously accept" the prior HYA recommendations. At the April 5, 2023 School Board Meeting, HYA presented the list of candidates to the School Board and recommended its top ten (10) ranked applicants. Compl., ¶¶8-11. During the same April 5, 2023 meeting, the School Board added an additional candidate to the list of finalists from the other 35, bringing the total to 11. Compl., ¶14. In addition, during the April 5, 2023 meeting, the School Board then utilized a ranking matrix to reduce the field from 11 candidates down to the final four (4) candidates. Compl. ¶15. Subsequently, during the School Board's next meeting on April 19, 2023, the School Board reduced the field down to two (2) final candidates. Compl. ¶16. Then, during a meeting on May 3, 2023, the School Board selected one candidate to be the next superintendent. *Id.*

Judicial precedent supports the School Board's position. In *Tolar v. School Bd. of Liberty Cnty.*, 398 So. 2d 427 (Fla. 1981), the Florida Supreme Court determined that even though certain private discussions between school board members and the superintendent violated the Sunshine Law, that violation was cured at a public meeting of the school board where the issue was discussed and formally decided. *Id.* at 429. The plaintiff in *Tolar* relied on *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974), in which the Supreme Court invalidated a public action based upon prior secret discussions. The Supreme Court in *Tolar*, however, ruled that the *Gradison* rule did

not always apply:

> [The *Gradison*] holding does not mean, however, that public final action of the Board will always be void and incurable merely because the topic of the final public action was previously discussed at a private meeting. Here, the School Board held a public meeting and permitted discussion on the abolishing of the position of director of administration and, then by voice vote at a public meeting, decided to abolish the position. This action taken in the sunshine will not now be voided.

398 So. 2d at 428. The *Tolar* court then noted that, subsequent to *Gradison*, the Florida Supreme Court considered *Occidental Chemical Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977), *receded from on other grounds, Citizens of State v. Beard*, 613 So. 2d 403, 405 (Fla. 1992). In that case, the public service commission "adopted essentially verbatim" a lengthy staff report that had allegedly been improperly discussed privately prior to the public meeting. The *Occidental* Court found that the 90-minute public meeting was sufficient to cure the violation, and was distinguishable from *Gradison,* where the town council "merely gave summary approval to the citizen planning committee's recommendations in a purely ceremonial public meeting." *Tolar*, 398 So. 2d at 429.

The limited situations where courts have found curative meetings insufficient because they were merely "ceremonial" and "perfunctory" all involved curative meetings that lacked any meaningful discussion. *See, e.g., Gradison*, 296 So. 2d at 478 (town council gave summary approval to committee's recommendation); *Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694, 695 (Fla 3d DCA 1988) (public meeting did not cure prior violation where "[c]ontrary to the recommendation of its own attorney, the Board ratified the committees report without a full and open public hearing on the matter"); *Zorc*, 722 So. 2d at 891 (Sunshine Law violation not cured because "[t]his was not a full, open public hearing" and "[t]here was no significant discussion of the issues or a discourse as to the language sought to be included"); *Transparency for Fla. v. City of Port St. Lucie,* 240 So. 3d 780, 786 (Fla. 4th DCA 2018) (holding special meeting did not cure Sunshine Law violation regarding termination of City Manager because the "separation agreement was not discussed at all," "[n]o one mentioned the terms of the

agreement, nor did they discuss at length the reasons for the termination," "the public was never invited to speak," and the "entire proceeding lasted less than fifteen minutes").

In contrast, in numerous published decisions on the issue, courts have rejected claims like the one brought by Plaintiff here, because the subsequent meeting included a discussion in public prior to the final decision that cured any violation. *See, e.g., Bassett v. Braddock*, 262 So. 2d 425, 428-29 (Fla. 1972) (secret written ballot election of school board chair was "cured and rendered 'sunshine bright' by the corrective open, public vote which followed"), *superseded by statute on other grounds as stated by City of Fort Myers v. News-Press Pub. Co., Inc.*, 514 So. 2d 408, 411-12 (Fla. 2d DCA 1987); *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 170-73 (Fla. 4th DCA 2002) (resolution discussed at a private executive session subsequently approved twice at public meetings); *Monroe Cnty.*, 647 So. 2d at 861 (unnoticed advisory committee meeting cured through curative public advisory committee meeting and County Commission meetings, holding that "[g]overnmental actions will not be voided whenever governmental bodies have met in secret where sufficiently corrective final action has been taken"); *Bd. of Cnty. Comm'rs of Sarasota Cnty. v. Webber*, 658 So. 2d 1069, 1072 (Fla. 2nd DCA 1995) (finding that vote at cure meeting was not a perfunctory ratification); *B. M. Z. Corp. v. City of Oakland Park*, 415 So. 2d 735, 738 (Fla. 4th DCA 1982) (subsequent meetings cured violation because there was no evidence that subsequent formal action was merely a "perfunctory ratification of decisions" or a "ceremonial acceptance of secret actions"); *Finch v. Seminole Cnty. Sch. Bd.*, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008) (non-public bus tour by school board violated Sunshine Law but the violation was cured by subsequent public meeting); *Sarasota Citizens*, 48 So. 3d at 766 (any possible Sunshine Law email violations cured through independent, final action); *Jackson v. City of Tallahassee*, 265 So. 3d 736 (Fla. 1st DCA 2019) (public meeting filling vacant commission seat cured any prior Sunshine Law violations).

Here, the express allegations within the Complaint clearly show that the School Board engaged in independent final action in public; this is not a case of a ceremonial, perfunctory ratification by the School Board. Accordingly, the Complaint should be dismissed.

CONCLUSION

Based on the forgoing, the School Board respectfully requests that the Court enter an Order dismissing Plaintiff's Sunshine Law Complaint. HYA is a private executive search firm that was delegated only fact-finding and advisory responsibilities and was not delegated any decision-making authority. As such, HYA is not subject to the requirements of the Sunshine Law. However, even if HYA was subject to the Sunshine Law and thereby ostensibly violated the Sunshine Law, such purported violations were cured by the School Board's subsequent public meetings and final action in the sunshine which did not serve to merely rubber stamp HYA's recommendations.

WHEREFORE, Defendant School Board respectfully requests that the Court grant this Motion to Dismiss, dismiss Plaintiff's Complaint, and enter any further relief that the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via State Court E-Portal this 30th day of May, 2023 to: **Steven J. Bracci, Esq.**, (steve@braccilaw.com; michelle@braccilaw.com) Steven J. Bracci, P.A., 9015 STRADA STELL COURT, SUITE 102, NAPLES, FL 34109; Telephone: (239) 596-2635 (*Attorneys for Plaintiff).*

/s/ *Samuel I. Zeskind*
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