South Broward Hospital District - Public Records

Number: AGO 2016-16

Date: October 06, 2016

Subject:
South Broward Hospital District - Public Records

Ms. Kimarie Stratos
General Counsel
Memorial Healthcare System
South Broward Hospital District
3111 Stirling Road
Fort Lauderdale, Florida 33312

RE: SOUTH BROWARD HOSPITAL DISTRICT – PUBLIC RECORDS – ATTORNEY'S FEES – PUBLIC FUNDS – authority of district to reimburse attorney's fees to individual commissioner retaining private counsel to respond to public record request. ss. 119.07 and 286.011, Fla. Stat.

Dear Ms. Stratos:

As general counsel to the South Broward Hospital District, you submit substantially the following question:

May the district reimburse a board member's attorney's fees incurred by her in responding to a public records request pertaining to her board service when no suit, claim, charge, or action has been instituted against the commissioner during the time the attorney's fees were incurred?

In sum:

The South Broward Hospital District is not authorized to reimburse a board member for attorney's fees incurred by her in responding to a public records request when no suit, claim, charge or action has been instituted against the commissioner during the time the attorney's fees were incurred.

You have provided the following background. The South Broward Hospital District (hospital district) was conducting a search for a new chief operating officer. A public records request was made of all commissioners in relation to the search. Allegations of violation of section 286.011, Florida Statutes (Government in the Sunshine Law) were made, but no legal action was filed, and the subject commissioner retained private counsel to assist in her response to the public records request. The district did not provide a district email address or phone for individual commissioners to conduct district business such that the commissioner's private computer and telephone records had to be reviewed to recover the requested public records. Due to her concerns about the independence of the district's counsel, the commissioner was unwilling to turn over all of her records to the district's counsel for review or to make use of the district's information technology staff who were made available to all commissioners to extract and copy

responsive material from their individual devices. At no point were any legal charges filed against the commissioner.

Section 286.011(7), Florida Statutes, provides:

“Whenever any member of any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision is charged with a violation of this section and is subsequently acquitted, the board or commission is authorized to reimburse said member for any portion of his or her reasonable attorney’s fees.”

While the language in section 286.011(7), Florida Statutes, is clear in the parameters which must be met before a member of a board may be reimbursed for his or her attorney’s fees in successfully defending a charge of violation of the Government in the Sunshine Law, the facts in this situation are that no legal action has been filed against the commissioner and she retained private counsel in order to respond to a public records request.[1] The authority extended by section 286.011(7), Florida Statutes, to reimburse attorney’s fees, therefore, is not applicable.

Chapter 2004-397, Laws of Florida, is the enabling legislation for the South Broward Hospital District. The act sets forth the broad powers of the district’s governing board to carry out the district’s purpose of providing health care services.[2] The commissioners are required to

“cause true and accurate minutes and records to be kept of all business transacted by them, and shall keep full, true, and complete books of account and minutes, which minutes, records, and books of account shall at all reasonable times be open and subject to the inspection of inhabitants of the district; and any person desiring to do so may make or procure a copy of the minutes, records, or books of account, or such portions thereof as he may desire.”[3]

There is no question that all records of the district are public records, subject to inspection and copying by anyone requesting same, unless exempted or made confidential by law.[4] While there is provision for the recovery of attorney’s fees when a plaintiff files a civil action against an agency to enforce the provisions of this chapter and the court determines that such agency unlawfully refused to permit a public record to be inspected or copied,[5] there is no provision similar to that found in section 286.011(7), Florida Statutes, nor is there authority for the reimbursement of attorney’s fees to a public official who has hired a private attorney to assist in the production of public records.

As an administrative agency created by statute, the South Broward Hospital District is constrained to exercise those powers expressly granted or by implication necessary to carry out the express authority granted them by statute.[6] Any reasonable doubt as to the lawful existence of a particular power sought to be exercised must be resolved against the exercise thereof.[7]

Therefore, it is my opinion that the South Broward Hospital District is not authorized to reimburse a board member for attorney’s fees incurred by her in responding to a public records request when no suit, claim, charge, or action has been instituted against the commissioner during the time the attorney’s fees were incurred.

Sincerely,

Pam Bondi
Attorney General

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[1] *See also* s. 111.07, Fla. Stat., authorizing any agency of the state, or any county, municipality, or political subdivision of the state to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

[2] *See* s. 4, Ch. 2004-397, Laws of Fla.

[3] Section 5, Ch. 2004-397, Laws of Fla.

[4] *See* s. 119.07(1), Fla. Stat.

[5] *See* s. 119.12, Fla. Stat.

[6] *See State ex rel. Greenberg v. Fla. State Bd. of Dentistry*, 297 So. 2d 628, 634 (Fla. 1st DCA 1974) (administrative agencies are creatures of statute and have only such powers as statutes confer); *Fiat Motors of North America, Inc. v. Calvin*, 356 So. 2d 908, 909 (Fla. 1st DCA 1978).

[7] *See, e.g., Gardinier, Inc. v. Fla. Dep't of Pollution Control*, 300 So. 2d 75, 76 (Fla. 1st DCA 1974); *Williams v. Fla. Real Estate Comm'n*, 232 So. 2d 239, 240 (Fla. 4th DCA 1970).