Shade Meetings -- Sunshine Law

Number: INFORMAL

Date: February 22, 2016

Subject:
Shade Meetings -- Sunshine Law

Ms. Lynn M. Barrett
General Counsel
North Broward Hospital District
1800 Northwest 49th Street, Suite 110
Fort Lauderdale, Florida 33309

Dear Ms. Barrett:

As General Counsel for the North Broward Hospital District you have asked for this office's assistance relating to "shade meetings" under section 286.011(8), Florida Statutes. Attorney General Bondi has asked me to respond to your letter.

After reviewing the information you have submitted, it does not appear that this is an issue upon which this office may formally comment. In situations involving the duties and responsibilities of a collegial body such as the Broward Health board, it is the policy of this office to require that an opinion request come from a majority of the members of the board.[1] Your letter does not contain any information on the position of the board on this request. However, in an effort to assist you, I offer the following informal comments.

Section 286.011(8), Florida Statutes, provides that:

"Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed

with the entity's clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney client session and the names of the persons attending. At the conclusion of the attorney client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation." (e.s.)

The purpose of the exemption is to provide a governmental entity's attorney an opportunity to receive necessary direction and information from the governmental entity regarding pending litigation. An entity is entitled to use the exemption if the entity "is presently a party before a court or administrative agency. . . ."

The material you have forwarded to this office reflects the existence of an investigation and subpoena, but no current on-going judicial or administrative proceeding. The courts have recognized that the Legislature intended a strict construction of section 286.011(8), Florida Statutes.[2] In the absence of an on-going judicial or administrative proceeding, the exemption provided in section 286.011(8), Florida Statutes, would not apply.[3]

You have also cited section 905.27, Florida Statutes, which prohibits the disclosure of testimony and other evidence received by a grand jury and makes it unlawful to disclose such information. You ask whether this privilege would allow for a shade meeting "to protect the attorney-client relationship under Section 905.27, Florida Statutes." Section 905.27, Florida Statutes, does prohibit the disclosure of "testimony of a witness examined before the grand jury or other evidence received by it[.]" However, this office has not been provided with any information suggesting that a grand jury has been impaneled in this matter.[4]

I trust that these informal comments will assist you in advising your client, the North Broward Hospital District.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* Department of Legal Affairs Statement Concerning Attorney General Opinions available at www.myfloridalegal.com / About the Office / AG Opinions / Frequently Asked Questions.

[2] *See City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995). *Accord School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99 (Fla. 1st DCA 1996).

[3] *Cf.* Ops. Att'y Gen. Fla. 13-17 (2013) (s. 286.011[8], Fla. Stat., may not be used to close a meeting regarding mandatory arbitration proceedings when there is no pending legal proceeding in a court or before an administrative agency); 06-03 (2006) (exemption not applicable to pre-litigation mediation proceedings); 09-14 (2009) (exemption not applicable to discussion of terms of mediation in conflict resolution proceedings under the "Florida Governmental Conflict Resolution Act"); 09-25 (2009) (town council which received pre-suit notice letter under Bert Harris Act is not a party to pending litigation for purposes of statute).

[4] *Compare* Op. Att'y Gen. Fla. 90-48 (1990) (grand jury subpoenas, as part of the grand jury proceeding made secret by s. 905.24, Fla. Stat., would not be subject to disclosure under Ch. 119, Fla. Stat.).