Sunshine Law -- Dismissal with Prejudice -- Settlement

Number: AGO 2015-03

Date: January 30, 2015

Subject:
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The Honorable Bruce H. Colton
State Attorney, Nineteenth Judicial Circuit
411 South Second Street
Fort Pierce, Florida 34950

Dear Mr. Colton:

As State Attorney for the Nineteenth Judicial Circuit of Florida, you have asked for my opinion on substantially the following question:

Does a dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement which have not been fulfilled by the parties operate to conclude litigation for purposes of section 286.011(8), Florida Statutes, to permit the release of a transcript of a settlement or litigation strategy session closed to the public while the litigation was ongoing?

In sum:

A dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement would operate as a conclusion of the litigation for purposes of section 286.011(8), Florida Statutes, making the transcript of a settlement or litigation strategy session which was closed to the public while the litigation was ongoing, open for inspection and copying.

According to your letter, a municipality within the Nineteenth Judicial Circuit was sued. Pursuant to section 286.011(8), Florida Statutes, the governing body of the municipality held a settlement or litigation strategy session that was closed to the public. The municipality subsequently reached a settlement agreement with the plaintiff. The settlement agreement was approved by the court and the lawsuit was dismissed with prejudice, but the court retained jurisdiction to enforce the terms of the agreement. The terms of the agreement have not yet been satisfied and you note that the parties may seek to invoke the jurisdiction of the court to enforce the terms of the agreement. A copy of the transcript of the closed litigation strategy session has been requested, but the municipality is concerned that releasing the transcript when further litigation to enforce the settlement agreement may occur would allow the plaintiff to gain access to the transcript and use it to its advantage in future litigation. The Nineteenth Judicial Circuit State Attorney's Office became involved in this matter as it is the State Attorney who is statutorily charged with investigation and prosecution of Public Records violations.[1] You have advised this office that you have discussed your request for an Attorney General's Opinion with the city

attorney involved in the litigation who has agreed that an Opinion on this question would be helpful.

Discussions between a public board and its attorney are generally subject to the requirements of the Government in the Sunshine Law, section 286.011, Florida Statutes.[2] However, the statute provides a limited exemption for certain discussions of pending litigation between a public board and its attorney. As provided in the statute:

"(8) 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.)

When considering the construction of this provision, Florida courts have held that the Legislature intended a strict construction of the exemption.[3] Applying such strict construction, this office concluded that the exemption in section 286.011(8), Florida Statutes, did not apply when no lawsuit had been filed even though the parties involved in the dispute believed that litigation was inevitable.[4] However, when on-going litigation had been suspended temporarily pursuant to a stipulation for settlement, this office stated that the litigation had not been concluded for purposes of section 286.011(8), Florida Statutes, and therefore, a transcript of meetings held between the city and its attorney to discuss such litigation could be kept confidential until the litigation was concluded.[5]

Your factual situation involves transcripts of strategy sessions relating to a complaint in an action that has been dismissed with prejudice. This office, in Attorney General Opinion 94-33, concluded that to give effect to the purpose of section 286.011(8), Florida Statutes, a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run. That opinion involved the question of whether a voluntary dismissal

operated to conclude litigation for purposes of section 286.011(8), Florida Statutes. The plaintiff in the action had previously filed lawsuits against the Gainesville-Alachua County Regional Airport Authority and voluntarily dismissed these actions after a year or two of litigation. The airport authority was concerned that the plaintiff would dismiss his suits, allege that the litigation was concluded, request a copy of the transcript of strategy meetings, and then refile the lawsuits.

In a subsequent opinion, Attorney General Opinion 13-13, the Citrus County School Board was sued in federal court by three plaintiffs who alleged that they had been denied equal access to educational opportunities and that retaliatory action had been taken against them. The matter was resolved between the parties and the complaint was dismissed with prejudice by the court. Subsequently, claims were filed by the parents of the original plaintiffs which derived directly from the same facts and circumstances litigated in the original lawsuit. A request for the transcripts of the meetings between the school board and its attorney pursuant to section 286.011(8), Florida Statutes, was received from the parent of two of the original plaintiffs. Shortly thereafter, a complaint against the school board was filed in federal court by the parents of the original plaintiffs based on the complaints made by their daughters in the original lawsuit. The attorneys for the Citrus County School Board asked whether the language in section 286.011(8)(e), Florida Statutes, requiring the release of transcripts of closed meetings held to discuss settlement negotiations and litigation expenditure strategy upon the "conclusion of the litigation" would apply in light of the filing of the subsequent, derivative claim. As was noted in Attorney General Opinion 13-13, "[i]n light of the language of section 286.011(8)(e), Florida Statutes, making the transcripts of strategy meetings held pursuant to that section public records 'upon conclusion of the litigation,' it does not appear that the Legislature intended to recognize a continuation of the exemption for 'derivative claims.'"[6]

In a recent Second District case, *Chmielewski v. City of St. Pete Beach*,[7] the court commented favorably on Attorney General Opinion 13-13 and held that a "shade meeting" transcript, prepared pursuant to section 286.011(8), Florida Statutes, became a matter of public record at the entry of a final judgment at the conclusion of a quiet title action. The final judgment contained executory provisions which the city characterized as enforcement proceedings resulting from the settlement of an earlier lawsuit. The court rejected the city's characterization and stated that nothing in the settlement of the earlier lawsuit could be interpreted to suggest that the quiet title lawsuit was still open, ongoing, or capable of being reopened as to that issue. Thus, the court held that "[t]he transcript does not regain 'secret' status just because a new tangentially related lawsuit is filed."[8]

You have advised this office that a settlement agreement has been reached and the lawsuit has been dismissed with prejudice. "Dismissed with prejudice" is commonly understood to mean "[a] dismissal, usually after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim."[9] While it appears that the court has retained jurisdiction to enforce the terms of the settlement agreement, a lawsuit on the same claim is precluded by the dismissal with prejudice. Thus, this litigation appears to be concluded and section 286.011(8), Florida Statutes, requires that "[t]he transcript shall be made part of the public record *upon conclusion of the litigation*." (e.s.)

In sum, it is my opinion that a dismissal with prejudice pursuant to a settlement agreement that

confers continuing jurisdiction on the court to enforce the terms of the settlement agreement would operate as a conclusion of the litigation for purposes of section 286.011(8), Florida Statutes, making the transcript of a settlement or litigation strategy session which was closed to the public while the litigation was ongoing a public record which would be open for inspection and copying.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Op. Att'y Gen. Fla. 91-38 (1991) (a state attorney may prosecute suits charging public officials with violations of the Public Records Act, including those violations which may result in a finding of guilt for a noncriminal infraction); and s. 119.10, Fla. Stat. (violations of Ch. 119, Fla. Stat.).

[2] *See Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, Fla. Stat., providing for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings; application of the Sunshine Law to such discussions does not usurp Supreme Court's constitutional authority to regulate the practice of law, nor is it at odds with Florida Bar rules providing for attorney-client confidentiality). *Cf.* s. 90.502(6), Fla. Stat., stating that a discussion or activity that is not a meeting for purposes of s. 286.011, Fla. Stat., shall not be construed to waive the attorney-client privilege.

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

[4] *See* Ops. Att'y Gen. Fla. 13-13 (2013), 04-35 (2004), and 98-21 (1998). *And see* Ops. Att'y Gen. Fla. 06-03 (2006) (exemption not applicable to pre-litigation mediation proceedings) and 09-25 (2009) (town council which received pre-suit notice letter under the Bert J. Harris Act, s. 70.001, Fla. Stat., is not a party to pending litigation for purposes of s. 286.011[8], Fla. Stat.).

[5] *See* Op. Att'y Gen. Fla. 94-64 (1994). *And see* Ops. Att'y Gen. Fla. 06-03 (2006) (exemption not applicable to pre-litigation mediation proceedings) and 09-25 (2009) (town council which received pre-suit notice letter under the Bert J. Harris Act, s. 70.001, Fla. Stat., is not a party to pending litigation for purposes of s. 286.011[8], Fla. Stat.).

[6] *And see* Op. Att'y Gen. Fla. 94-33 (1994) (a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run). *Cf.* Op. Att'y Gen. Fla. 96-75 (1996) (disclosure of medical records to city council during closed-door meeting under s. 286.011(8), Fla. Stat., does not affect requirement that transcript of such meeting be made part of public record at conclusion of litigation).

[7] ----- So. 3d -----, 2014 WL 4212742 (Fla. 2d DCA 2014).

[8] *And see Wagner v. Orange County*, 960 So. 2d 785 (Fla. 5th DCA 2007), noting that conclusion of litigation generally occurs when final judgment is entered. The court in *Wagner* concluded that the phrase "conclusion of the litigation or adversarial administrative proceedings" for purposes of the attorney work product exemption in s. 119.071(1)(d), Fla. Stat., encompasses post-judgment collection efforts such as a legislative claims bill.

[9] Black's Law Dictionary (8th ed.), p. 502.