Sunshine Law -- Shade Meetings

Number: INFORMAL

Date: December 01, 2014

Subject:
Sunshine Law -- Shade Meetings

Mr. Robert D. Pritt
City of Naples Attorney
Office of the City Attorney
735 Eighth Street South
Naples, Florida 34102-6796

Dear Mr. Pritt:

As City Attorney and on behalf of the Naples City Council, you have asked for assistance in determining whether the unauthorized disclosure by a council member of information discussed during a "shade meeting" pursuant to section 286.011(8), Florida Statutes, would violate the Government in the Sunshine Law or have other legal consequences. Attorney General Bondi has asked me to respond to your letter.

Section 286.011, Florida Statutes, is Florida's "Sunshine Law" requiring that meetings of governmental boards or commissions at which official actions are to be taken must be open to the public. Section 286.011(8), Florida Statutes, provides a limited exception to this general openness requirement and makes litigation strategy or settlement meetings private when they are held between a board and its attorney and the board is a party before a court or administrative agency. The statute limits the persons who may attend such a meeting, the subject of any such meeting, and the length of time the record of the meeting may be kept closed. The statute provides:

"(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."

As an exception to the broader provisions of the Sunshine Law, section 286.011(8), Florida Statutes, should be read strictly or narrowly to accomplish the specific purpose of the exception.[1] The purpose of this exemption is to put local governments and state agencies on an equal footing with the other parties in a lawsuit by allowing these governmental agencies to protect their theories of litigation strategy or settlement negotiations from the opposing party during the pendency of a lawsuit.[2] Recognizing the public's interest in this type of public business, however, this office will continue to read this exemption narrowly, as it would with any other specific exemption to the law.[3]

A local government is not required to meet in closed session to discuss settlement negotiations or strategy sessions relating to litigation expenditures, but may take advantage of the exception in section 286.011(8), Florida Statutes, so long as the conditions of the statute are met. As this office observed in Attorney General Opinion 2013-21, section 286.011(8)(e), Florida Statutes, "should be seen as a tool which governmental boards or commissions may employ in their discretion but the statute should not be read as a prohibition against the release of such records prior to the conclusion of . . . litigation."[4] In that Attorney General Opinion, it was the city council, as the collegial body to which the exemption applies, that was authorized to waive the exemption and release transcripts of meetings held pursuant to section 286.011(8), Florida Statutes, prior to the conclusion of litigation.

It appears that a member of the city council may have spoken in public about matters that were the subject of a closed council session to discuss settlement negotiations or strategy sessions relating to litigation expenditures. This action by the council member was done without the consent of the other members of the council. Whether this may represent a breach of the council member's duties under the city's ordinances or other local legislation or compromised the fiduciary duty the council member owes the city is beyond the authority of this office to determine. It does not appear, however, that this action would constitute a violation of section 286.011(3), Florida Statutes, which provides:

"(a)Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding $500.
(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
(c) Conduct which occurs outside the state which would constitute a knowing violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083."

The statute appears to be directed at attendance at meetings held outside the directives of the statute and requirements for taking minutes and providing notice of meetings. Section 286.011(8), Florida Statutes, represents a discretionarily utilized exception to the open meetings law and I cannot say that the actions you have reported would fall under the proscriptions of section 286.011(3), Florida Statutes. However, this office cannot definitively pass on whether a violation may have occurred as investigations and prosecution of criminal and noncriminal violations of the Sunshine Law are the province of the State Attorney for the judicial circuit in which the violation may have occurred.[5]

"Other statutory provisions relating to the disclosure of privileged information which may apply to this situation may include section 112.313(8), Florida Statutes:

DISCLOSURE OR USE OF CERTAIN INFORMATION.(A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity."

As section 112.313, Florida Statutes, comes within the Code of Ethics for Public Officers and Employees, any complaints of violations of this statute should be forwarded to the Florida Commission on Ethics.

Section 839.26, Florida Statutes, provides:

"Misuse of confidential information.(Any public servant who, in contemplation of official action by herself or himself or by a governmental unit with which the public servant is associated, or in reliance on information to which she or he has access in her or his official capacity and which has not been made public, commits any of the following acts:
(1) Acquisition of a pecuniary interest in any property, transaction, or enterprise or gaining of any pecuniary or other benefit which may be affected by such information or official action;
(2) Speculation or wagering on the basis of such information or action; or
(3) Aiding another to do any of the foregoing,

shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

As a criminal statute, complaints of violations of section 839.26, Florida Statutes, should be directed to the State Attorney in the judicial circuit in which the violation is alleged to have taken place.

Finally, section 112.51, Florida Statutes, authorizes the suspension and removal of municipal officers for "malfeasance, misfeasance, neglect of duty, habitual drunkenness, incompetence, or permanent inability to perform official duties" and section 100.361, Florida Statutes, provides for the recall of municipal governing board members by elector petition.

I trust that these informal comments will be helpful to you in advising your client, the Naples City

Council.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *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).

[2] *See also* Op. Att'y Gen. Fla. 94-33 (1994), applying the exemption in s. 286.011(8), Fla. Stat., to voluntary dismissals.

[3] *See, e.g.*, Op. Att'y Gen. Fla. 85-89 (1985), contracts for legal counsel between county and private law firm not within the exemption expressed in s. 119.07(3)(o), Fla. Stat. (1984 Supp.), for work product; and Op. Att'y Gen. 84-81 (1984), information revealing identity of victim of sexual battery or victim of child abuse contained in public records made part of court file and not specifically closed by order of court are not excepted or exempted from public disclosure and inspection.

[4] *And see* Op. Att'y Gen. Fla. 94-64 (1994).

[5] *See* s. 286.011(3)(a) - (b), Fla. Stat.