Sunshine Law -- "Conclusion of Litigation" -- Waiver

Number: AGO 2013-21

Date: September 13, 2013

Subject:
Sunshine Law -- "Conclusion of Litigation" -- Waiver

Ms. Eve Boutsis
Office of the Village Attorney
18001 Old Cutler Road, Suite 560
Miami, Florida 33157-6416

RE: GOVERNMENT IN THE SUNSHINE LAW – MUNICIPALITIES – EXEMPTIONS – "CONCLUSION OF LITIGATION" – early release of transcripts of "shade" meetings of city council to discuss pending litigation. s. 286.011, Fla. Stat.
Dear Ms. Boutsis:

On behalf of the Village Council of the Village of Palmetto Bay, you have asked for my opinion on substantially the following question:

Would the release of attorney-client transcripts from meetings held pursuant to section 286.011(8), Florida Statutes, prior to the "conclusion of litigation" constitute a violation of that statute?

In sum:

The release, by the Village Council of the Village of Palmetto Bay, of attorney-client transcripts from meetings held pursuant to section 286.011(8), Florida Statutes, prior to the "conclusion of litigation" would not constitute a violation of that statutory provision, but would represent a waiver of the limited exemption afforded to government agencies and their attorneys to discuss pending litigation issues.

According to your letter, the Village of Palmetto Bay has been involved in protracted litigation for the past five years. The village has held over 25 "shade sessions" pursuant to section 286.011(8), Florida Statutes, since 2008 to discuss "settlement negotiations or strategy sessions related to litigation expenditures" on pending litigation matters. You indicate that changes on the village council and the passage of time have resulted in a change in the council's position on holding closed attorney-client "shade" sessions pursuant to section 286.011(8), Florida Statutes. Members of the village council have suggested that transcripts from this protracted litigation should be released by the council after settlement of the subject litigation, but prior to the "conclusion of litigation" as provided in section 286.011(8), Florida Statutes.[1] As a result of these discussions, you have asked whether the early release of transcripts of "shade" sessions by the village council[2] would subject the council to a charge of violating section 286.011(3), Florida Statutes.

Section 286.011(8), Florida Statutes, 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 requires the release of the record of such meetings when the litigation has been concluded. 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."

Your question is whether the Village Council of the Village of Palmetto Bay may waive the provisions of the statute and release its record of these meetings prior to the conclusion of litigation. It is my opinion that the council, as the governing body of the village, may release these records prior to the conclusion of litigation and that such action would not constitute a violation of the Government in the Sunshine Law.[3]

This office has consistently read the Government in the Sunshine Law to assure the public's right of access to meetings of public boards or commissions. In order to place local governments and state agencies on equal footing with the other parties in a lawsuit, however, the Legislature has provided a specific exemption from the open meetings requirements by adopting section 286.011(8), Florida Statutes.[4] The purpose of this exemption is to allow governmental agencies to protect their theories of litigation strategy or settlement negotiations from the opposing party during the pendency of a lawsuit, but there is no requirement of confidentiality expressed in section 286.011(8), Florida Statutes.[5] In this regard, 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 such litigation.[6]

Therefore, it is my opinion that the Village of Palmetto Bay, as the collegial body to which it

applies, may waive the exemption provided in section 286.011(8), Florida Statutes, and release the transcripts of meetings held to discuss settlement negotiations or strategy sessions related to litigation expenditures prior to the conclusion of litigation. The waiver of this exemption would not constitute a violation of section 286.011(3), Florida Statutes, as the early release of these transcripts would satisfy the requirement in subparagraph (8)(e) that the transcripts be made a part of the public record.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Op. Att'y Gen. Fla. 94-64 (1994), in which this office discussed whether a stipulation for settlement would constitute the conclusion of litigation for purposes of s. 286.011(8), Fla. Stat., and in which this office stated that "a stipulation does not, *except by its express terms*, operate to bring litigation to a conclusion." (e.s.) This office has not been advised of the terms of any proposed stipulation, but would note that a stipulation could, by its express terms, operate to bring litigation to a conclusion and thus, satisfy the terms of s. 286.011(8), Fla. Stat. *Cf.* Op. Att'y Gen. Fla. 94-33 (1994), concluding that, although a voluntary dismissal of an action usually operates to end the action and to divest a trial court of jurisdiction, to avoid a subversion of the rules of procedure that would deprive an agency of its rights to a fair trial, a public agency could maintain the confidentiality of a record of a strategy or settlement meeting until the suit is dismissed with prejudice or the applicable statute of limitation has run.

[2] The discussion herein relates to a decision made by a collegial body in a public meeting to release transcripts of "shade" sessions held pursuant to s. 286.011(8), Fla. Stat.; prior opinions of this office suggest that the release and/or discussion of matters occurring in closed session to the public by individuals rather than by decision of the collegial body could be inappropriate or raise ethical issues. *See, e.g.,* Ops. Att'y Gen. Fla. 03-09 (2003) and 91-75 (1991).

[3] Section 286.011(3), Fla. Stat., provides:

"(3)(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."

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

[5] As this office and the courts have noted, if records are not made confidential but are simply exempt from the mandatory disclosure requirements of the law, the agency is not prohibited from disclosing the documents in all circumstances. *See, e.g., Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991); Op. Att'y Gen. Fla. 07-21 (2007) (while statute makes photographs of law enforcement personnel exempt rather than confidential, custodian, in deciding whether such information should be disclosed, must determine whether there is a statutory or substantial policy need for disclosure and in the absence of a statutory or other legal duty to be accomplished by disclosure, whether release of such information is consistent with the exemption's purpose); Op. Att'y Gen. Fla. 08-24 (2008). *And compare* Op. Att'y Gen. Fla. 03-09 (2003), in which this office considered the disclosure of information discussed at a closed labor negotiation meeting pursuant to s. 447.605(1), Fla. Stat., making such meetings "closed and exempt from the provisions of s. 286.011." The opinion concludes that this statutory language "does not specifically restrict the dissemination of information discussed at closed labor negotiation meetings, other than work product developed in preparation for negotiations and during negotiations."

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