Sunshine Law, conclusion of litigation

Number: AGO 2013-13

Date: June 27, 2013

Subject:
Sunshine Law, conclusion of litigation

Mr. David M. Delaney
Dell Graham, P.A.
203 Northeast First Street
Gainesville, Florida 32601

RE: GOVERNMENT IN THE SUNSHINE LAW – SETTLEMENT – "CONCLUSION OF LITIGATION" – DERIVATIVE CLAIMS – whether exemption for litigation strategy meetings would extend to "derivative claims" brought in subsequent action. s. 286.011(8), Fla. Stat.

Dear Mr. Delaney:

As attorneys for and on behalf of the Citrus County School Board, you have asked for my opinion on substantially the following question:

Does the provision of section 286.011(8)(e), Florida Statutes, requiring the disclosure of transcripts of private meetings between a state entity and its attorney upon the conclusion of litigation apply when the initial litigation has concluded, but a close relative of the initial plaintiff seeks information to assist in a subsequent derivative claim?

In sum:

Section 286.011(8)(e), Florida Statutes, provides that transcripts of closed meetings to discuss settlement negotiations or strategy sessions related to litigation expenditures "shall be made part of the public record upon conclusion of the litigation." The statute does not recognize a continuation of the exemption for "derivative claims" made in separate, subsequent litigation.

According to your letter, 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 in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. ss. 1681 *et seq*. The allegations, as you have summarized them, were that the young women had been threatened and harassed by their high school soccer coaches after they complained of a hostile, sexually-harassing environment on their soccer team. While the litigation was pending, the Citrus County School Board held private meetings with its attorney to discuss settlement negotiations and a strategy of litigation expenditures as provided in section 286.011(8), Florida Statutes. There is no contention about the appropriate use of section 286.011(8), Florida Statutes, during the initial lawsuit. The matter was resolved between the parties and the complaint was dismissed with prejudice[1] by the court in September 2012.

In November of 2012, an attorney representing the parents of the three initial plaintiffs demanded payment from the Citrus County School Board in satisfaction of a claim that the parents, too, suffered retaliation in response to the young women's assertion of their Title IX rights. You note that all of the claims directly derive 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 father of two of the original plaintiffs in December 2012. Shortly after this request was received, a complaint against the Citrus County School Board was filed in federal court by the parents of the original plaintiffs alleging violations of Title IX and intentional infliction of emotional distress stemming from the complaints made by their daughters. The complaint in this second action has been served on the Citrus County School Board and you state that the "request for the transcripts of the attorney meetings from the previous lawsuit are clearly sought for use in the present lawsuit." Thus, your question to this office is 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.

While discussions between a public board and its attorney are generally subject to the requirements of the Government in the Sunshine Law,[2] section 286.011(8), Florida Statutes, provides a limited exemption for certain discussions of pending litigation between a public board and its attorney. As provided therein:

"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.)

Florida courts have held that the Legislature intended a strict construction of section 286.011(8), Florida Statutes.[3] Thus, for example, this office concluded that the exemption in subsection (8) does not apply when no lawsuit has been filed even though the parties involved believe that litigation is inevitable.[4] However, when on-going litigation has been temporarily suspended pursuant to a stipulation for settlement, this office has stated that the litigation has not been concluded for purposes of section 286.011(8) and, therefore, a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until the litigation is concluded.[5]

You have directed my attention to Attorney General Opinion 94-33 and suggest that the conclusion in that opinion may apply to your fact situation. Attorney General Opinion 94-33 involved a plaintiff who repeatedly filed lawsuits against a public authority and then voluntarily dismissed those actions after a year or two of litigation. The claims in these actions were similar and the members of the authority were concerned that the plaintiff would dismiss his suits, allege that the litigation was concluded, request a copy of the transcript of any strategy meeting held by the authority to discuss the litigation, and then refile the lawsuits to the disadvantage of the authority.

Based on the Florida Rules of Civil Procedure relating to *voluntary dismissals* this office advised the authority that

"A voluntary dismissal ends an action without prejudice, meaning that the action may be refiled at any time within the applicable statute of limitations. Thus, while the court is deprived of its jurisdiction to enter further orders once a voluntary dismissal is taken, the plaintiff's cause of action remains viable until the appropriate statute of limitations has run and the plaintiff retains control over the continuation of the suit."

Thus, the opinion notes that in a situation where the plaintiff takes a voluntary dismissal after a strategy or settlement meeting of the governing body and then seeks access to the record of such meeting, claiming the litigation has concluded, such action by the plaintiff could be interpreted by a court as a continuation of the litigation. To allow a plaintiff who has voluntarily dismissed a suit to gain access to transcripts of strategy or settlement meetings in order to obtain an advantage in the refiling of a lawsuit would subvert the purpose of the section 286.011(8), Florida Statutes.

Attorney General Opinion 94-33 suggests that "if a public records demand is made for the transcript of a strategy or settlement meeting by a plaintiff who has voluntarily dismissed the action which is the subject of such a meeting, it may be advisable to cite section 286.011(8), Florida Statutes, to maintain the confidentiality of such records. Furthermore, the public agency might inquire of the plaintiff to bar his or her claim before receiving the record of the strategy or settlement meeting, in light of the fact that the statute contemplates that the litigation has concluded before such records must be released."

Thus, Attorney General Opinion 94-33 concludes 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.

Your factual situation involves transcripts of strategy sessions relating to a complaint that was *dismissed with prejudice*. In 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 sum, it is my opinion that section 286.011(8)(e), Florida Statutes, provides that transcripts of closed meetings to discuss settlement negotiations or strategy sessions related to litigation expenditures "shall be made part of the public record upon conclusion of the litigation." A dismissal with prejudice constitutes the conclusion of that litigation. The statute does not recognize a continuation of the exemption for "derivative claims" made in separate, subsequent litigation and this office cannot read such an exemption into the statute.[7]

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Fla. R. Civ. P. 1.420 and "dismissal with prejudice" Black's Law Dictionary, p. 502 (8th ed. 2004) ("[a] dismissal, usu. after an adjudication on the merits, barring the plaintiff from prosecuting any later lawsuit on the same claim.").

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

[6] *See Ervin v. Peninsular Telephone Company*, 53 So. 2d 647 (Fla. 1951) (court has duty in construction of statutes to ascertain Legislature's intention and effectuate it); *State v. Webb*, 398 So. 2d 820 (Fla. 1981) (legislative intent is the polestar by which the courts must be guided).

[7] *See* Ops. Att'y Gen. Fla. 06-26 (2006) and 81-10 (1981) (this office is without authority to qualify or read into a statute an interpretation or define words in the statute in such a manner which would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would, in effect, be an act of legislation which is exclusively the prerogative of the Legislature); *cf. Chaffee v. Miami Transfer Company, Inc.,* 288 So. 2d 209 (Fla. 1974).