Sunshine/Public Records, conclusion of litigation

Number: INFORMAL

Date: December 14, 2012

Subject:
Sunshine/Public Records, conclusion of litigation

Ms. Eve A. Boutsis
Office of the Village Attorney
18001 Old Cutler Road, Suite 533
Miami, Florida 33157-6416

Dear Ms. Boutsis:

As Village Attorney for the Village of Palmetto Bay, you have requested this office's assistance in addressing two questions relating to statutory exemptions from the Government in the Sunshine Law and the Public Records Law.

According to your letter, the Village of Palmetto Bay has been involved in protracted litigation over a land use related matter since 2008. You have provided extensive background details on six separate actions, some of which are appeals of lower court decisions. All six actions involve the same parties and the same actions by the parties. As described in your letter:

"The two civil actions (Cases 2 and 5) remain in litigation. The matters have not been noticed for trial. The two matters have been consolidated before the same judge solely for discovery purposes. Again, the operative facts of the six Cases are the same operative facts as contained in four appeals (Cases 1, 3, 4, and 6). The parties remain in motion practice and possible appeals as it relates to appellate actions listed as Cases 4 and 6. Cases 4 and 6 derive out of Cases 1 and 3. The mandates have issued in these two actions but there are pending motions relating to fees and costs, and possible appeals relating to these motions."

You advise that several of the cases in which the Village of Palmetto Bay is a party are appeals of lower court decisions and question whether the transcript of a meeting held to discuss settlement negotiations or strategy sessions related to litigation expenditures must be made public while the appeal is pursued. You, therefore, ask whether the provision in section 286.011(8)(e), Florida Statutes, that a transcript is a public record "upon conclusion of the litigation" would include the appellate phase of litigation. You also ask whether the language "the conclusion of the litigation" in section 119.071(1)(d), Florida Statutes, would extend the exemption created by that section through the prosecution of an appeal. While this office is not a fact finder and therefore cannot resolve mixed questions of law and fact as to the status of the six cases in question, I offer the following general comments regarding the above exemptions in an effort to be of assistance.

Government in the Sunshine Law

While discussions between a public board and its attorney are generally subject to the requirements of section 286.011, Florida Statutes, the Government in the Sunshine Law,[1] section 286.011(8), Florida Statutes, provides a limited exemption for certain discussions of pending litigation between a public board and its attorney. Subsection (8) states:

"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.[2] Thus, for example, this office concluded that the above exemption does not apply when no lawsuit has been filed even though the parties involved believe that litigation is inevitable.[3] 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.[4]

It is the primary purpose in construing statutes to ascertain the intent of the Legislature and to give effect to that intent.[5] A review of the legislative history developed during the consideration and passage of CS/HB 491, which became section 286.011(8), Florida Statutes, suggests that the Legislature intended the exemption from disclosure to extend "until the conclusion of the litigation," that is, to apply through the trial and appeals process. An early version of HB 491 required that the audio tapes made of these meetings would be released to the public at the conclusion of each stage of litigation. CS/HB 491 "changed the requirement that the record of the attorney-client meeting be available to the public at the conclusion of each stage of litigation to require that the transcribed record be made available at the conclusion of all litigation regarding the matter."[6] Thus, the legislative history indicates that the Legislature intended the exemption to continue through the appeals segment of the litigation.

You suggest that a claim for payment of attorney's fees may also extend the application of the exemption after a final judgment has been entered, but during the course of the determination of attorney's fees. You cite to the case of *Brown v. City of Lauderhill*,[7] a 1995 Fourth District Court of Appeal case, involving a closed-door meeting held pursuant to section 286.011(8), Florida Statutes, between the city attorney and the city commission. The city had filed a claim in the mayor's name to recover attorney fees incurred in successfully defending the mayor on ethics charges while opponents sought injunctive and declaratory relief, claiming in part that city commissioners had violated the Sunshine Law by meeting in executive session with the city's attorney regarding the fee claim. The court held that the city was the real party in interest on the fee claim and, therefore, the Sunshine Law authorized the city commission to meet in executive session with the city attorney to discuss the action for attorney's fees. The discussion of attorney's fees was not tangential to the litigation; it was the direct subject of the litigation and the minutes of the executive session were closed until resolution of the action for attorney's fees. I am not aware of a court holding that litigation in which the issues have been resolved and a mandate issued, was still considered to be "pending" pursuant to section 286.011(8), Florida Statutes, for purposes of resolving issues of attorneys' fees and costs.

Public Records Law

Section 119.071(1)(d)1., Florida Statutes, provides an exemption for certain agency records prepared for litigation or adversarial administrative proceedings:

"A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution *until the conclusion of the litigation or adversarial administrative proceedings*. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence." (e.s.)

The exemption applies only to those records that contain the attorney's mental impressions, litigation strategy, or legal theory *and* that are prepared exclusively for litigation or in anticipation of imminent litigation.[8] The courts of this state have recognized that the limited attorney-client exemption in section 119.071(1)(d), Florida Statutes, applies until the conclusion of the litigation or administrative proceedings even though such disclosure could negatively impact the agency's position in related cases or claims.[9]

In *State v. Kokal*,[10] the Supreme Court of Florida considered the meaning of the language "conclusion of litigation" in section 119.07(3)(o), Florida Statutes (1985) that is now contained in section 119.071(1)(d), Florida Statutes. Kokal, the post-conviction relief movant, who had been convicted of first-degree murder, moved to compel disclosure of the state attorney's files relating to his prosecution. The State Attorney argued that several exemptions applied to records of that

office relating to Kokal's case. Section 119.07(3)(d), Florida Statutes (1985), exempted criminal investigative information so long as it was deemed "active."[11] The statute provided in part that "criminal intelligence and criminal investigative information shall be considered 'active' *while such information is directly related to pending prosecutions or appeals*." (e.s.) Such language is currently contained in section 119.011(3)(d), Florida Statutes.

Quoting from the decision of the Second District Court of Appeal in *Tribune Co. v. Public Records*,[12] the *Kokal* Court stated that "[i]f the legislature had meant to include post-conviction relief proceedings as a basis for an exemption to the Public Records Act it surely would have said so."[13] Thus, the Court concluded that "[t]he use of the words 'pending prosecution or appeals' in section 119.011(3)(d)(2) means ongoing prosecutions or appeals from convictions and sentences which have not become final."[14]

The *Kokal* Court held that this rationale would apply equally to the exemption in section 119.07(3)(o), Florida Statutes (1985) (now section 119.071(1)(d), Florida Statutes), stating that "'the conclusion of litigation' with respect to a criminal conviction and sentence occurs when that conviction and sentence have become final."[15]

Subsequently, the Florida Legislature adopted Chapter 95-398, Laws of Florida, which amended the attorney work product exemption to permit attorneys in the Attorney General's Office to claim the exemption "for those public records prepared *for direct appeal as well as for all capital collateral litigation* after direct appeal until execution of sentence or imposition of a life sentence." (e.s.) Thus, it appears that the Legislature recognized that post-conviction relief or appeals were not generally covered within the scope of the attorney work product exemption. An exemption under this section exists only until the conclusion of the litigation, or for an appeal or post-conviction proceedings in capital collateral litigation, only until the execution of the sentence.[16]

However, the Fifth District Court of Appeal in *Wagner v. Orange County*,[17] after noting that the language of section 119.071(1)(d), Florida Statutes, does not include reference to post-judgment claims or appeals,[18] held that "the legislature's use of the phrase 'conclusion of the litigation' encompasses post-judgment collection efforts, which include the claim bill filed here." The court noted that, at common law, privileges such as attorney-client and work-product are applicable to post-judgment collection efforts and that the Legislature is presumed to know existing law when it enacts a statute. The court stated that such a construction of the statute "effectuates the purpose and intent of the exemption:"

"[T]he statutory exemption now in effect well accommodates the competing interests in the confidentiality of the attorney-client relationship and government in the sunshine under the Public Records Act by providing a temporary exemption from disclosure."[19]

The *Wagner* court also concluded that such a construction aligned the exemption in section 119.071(1)(d), Florida Statutes, with that contained in section 768.28(16)(b), Florida Statutes, which is discussed more fully below and was also applicable in *Wagner*.[20]

It appears that the *Wagner* court, in an effort to read these statutory provisions relating to work product in a consistent manner and in *pari materia*, read the "conclusion of the litigation" language to extend through the prosecution of appeals. In addition, an interpretation of the

language "conclusion of the litigation" used in both sections 286.011(8) and 119.071(1)(d), Florida Statutes, in a similar manner would support a reading which extends the exemption through the prosecution of appeals.

Section 768.28(16)(c), Florida Statutes

Your letter also refers to section 768.28(16)(c), Florida Statutes, which provides that portions of meetings and proceedings relating solely to the evaluation of claims or to offers of compromise of claims filed with a risk management program of the state, its agencies and subdivisions, are exempt from section 286.011, Florida Statutes. The statute also exempts the minutes of such meetings and proceedings from public disclosure until the termination of the litigation and settlement of *all claims* arising out of the same incident.[21]

As noted *supra*, the court in *Wagner v. Orange County* concluded that the exemption applied to the claims bill process.[22] This limited exemption, however, applies only to tort claims for which the agency may be liable under section 768.28, Florida Statutes.[23] Moreover, the exemption does not apply to meetings held prior to the filing of a tort claim with the risk management program.[24] Further, a meeting of a city's risk management committee is exempt from the Government in the Sunshine Law only when the meeting relates solely to the evaluation of a tort claim filed with the risk management program or relates solely to an offer of compromise of a tort claim filed with the risk management program.[25] In contrast to section 286.011(8), Florida Statutes, however, section 768.28(16), Florida Statutes, does not specify the personnel who are authorized to attend the closed meetings.[26]

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *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.

[2] *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).

[3] *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.

[4] Attorney General Opinion 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).

[5] *See Ervin v. Peninsular Telephone Company*, 53 So. 2d 647 (Fla. 1951) (Supreme 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).

[6] *See, e.g.*, House of Representatives Committee on Governmental Operations, Bill Analysis & Economic Impact Statement for CS/HB 491, dated March 3, 1993.

[7] 654 So. 2d 302 (Fla. 4th DCA 1995).

[8] Section 119.071(1)(d)2., Fla. Stat., provides that the exemption continues if the record is released "to another public employee or officer of the same agency or any person consulted by the agency attorney." An agency relying on this exemption to withhold a public record, however, is required to identify the potential parties to any such criminal or civil litigation or adversarial administrative proceedings. *Id.* In any civil action in which this exemption is asserted, the public record or part in question must be submitted to the court for an *in camera* inspection and determination of the applicability of the exemption. *See* s. 119.07(1)(g), Fla. Stat. *And see* s. 119.12, Fla. Stat., authorizing the assessment of the reasonable costs of enforcement, including reasonable attorneys' fees, if the court determines that an agency unlawfully refused to permit a public record to be inspected or copied.

[9] *See State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990); *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); and *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007), *cert. denied*, 553 U.S. 1059 (2008) (rejecting a "continuing exemption" claim by the state). *And see Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. August 19, 1991) (settlement agreement not exempt as attorney work product even though another related case was pending, and agency attorneys feared disclosure would have a detrimental effect upon the agency's position in the related case).

[10] 562 So. 2d 324 (Fla. 1990).

[11] *See* s. 119.011(3)(d)2., Fla. Stat. (2012), for the current version of this language.

[12] 493 So. 2d 480 (Fla. 2d DCA 1986), *review denied*, 503 So. 2d 327 (Fla. 1987).

[13] 562 So. 2d at 326, quoting *Tribune Co. v. Public Records, supra*n.9 at 483.

[14] 562 So. 2d at 326.

[15] *Id.* at 327. The attorney work product exemption, unlike the exemption for active criminal investigative and active criminal intelligence investigation, does not expressly refer to appeals.

[16] *See Lightbourne v. McCollum*, 969 So. 2d 326, 332 (Fla. 2007).

[17] 960 So. 2d 785 (Fla. 5th DCA 2007).

[18] *Compare* s. 768.28(16)(b), Fla. Stat.

[19] 960 So.2d at 791-792, citing *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1029 (Fla. 1986).

[20] 960 So. 2d at 792.

[21] Section 768.28(16)(d), Fla. Stat.

[22] 960 So. 2d at 789.

[23] *See* Op. Att'y Gen. Fla. 04-35 (2004).

[24] *See* Op. Att'y Gen. Fla. 92-82 (1992).

[25] *See* Op. Att'y Gen. Fla. 04-35 (2004).

[26] *See* Op. Att'y Gen. Fla. 00-20 (2000), advising that personnel of the school district who are involved in the risk management aspect of the tort claim being litigated or settled may attend such meetings without jeopardizing the confidentiality provisions of the statute.