Sunshine Law, confidential information considered

Number: AGO 2012-20

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Subject:
Sunshine Law, confidential information considered

Mr. Charles Fletcher
Hillsborough Transit Authority
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RE: GOVERNMENT IN THE SUNSHINE--WHISTLEBLOWERS--PUBLIC RECORDS--OPEN MEETINGS--HILLSBOROUGH TRANSIT AUTHORITY--consideration of confidential information at authority meeting. s. 286.011, Fla. Stat.

Dear Mr. Fletcher:

On behalf of the Hillsborough Transit Authority (HART), you ask substantially the following questions:

1. May the HART board of directors be designated as an appropriate local official permitted to receive complaints and investigative documents under section 112.3188, Florida Statutes?

2. If so, is the board required to consider and take action upon such a complaint at a public meeting pursuant to section 286.011, Florida Statutes?

In sum:

1. The HART board of directors may be designated as the appropriate local official to receive complaints and investigative documents under section 112.3188, Florida Statutes. In light of the discussion in Question Two, however, such designation may not be advisable.

2. The HART board of directors is a collegial public body which must comply with the public meeting requirements in section 286.011, Florida Statutes, when carrying out official business of the authority. Absent a statutory exemption, the handling of confidential information or records during the course of public meetings does not otherwise allow meetings of the board to be closed.

You state that the HART board of directors has adopted an interim procedure naming itself as the appropriate local official to receive certain whistle-blower complaints and to investigate such claims.[1] The board, however, questions whether it may carry out such functions and, if so, whether it must do so at an open meeting.

Question One

The Whistle-blower's Act (act), sections 112.3187-112.31895, Florida Statutes, is intended to prevent agencies, or independent contractors of agencies, from taking retaliatory action against an employee who reports violations of law on the part of a public employer or an independent contractor.[2] It protects any individual "who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee."[3]

In order to qualify as a whistle-blower complaint, particular information must be disclosed to certain statutorily designated officials.[4] The act provides that for disclosures concerning a local governmental entity, such as a county, the information must be disclosed to a chief executive officer as defined in section 447.203(9), Florida Statutes, or "other appropriate local official."[5]

While the term "other appropriate local official" is not defined in the act, this office in Attorney General Opinion 96-40 considered whether a town's ethics commission could be considered within the scope of the term. Recognizing that the use of a singular noun could raise questions of its application to a collegial body, the opinion found that the legislation clearly contemplated that confidential information gathered during the processing of a complaint could be shared with others and still maintain its confidential status.[6] The opinion stated that to read the act otherwise would render its confidentiality provisions useless and negate the protections afforded to individuals who come forward with complaints. Based upon the above, this office concluded that the town's ethics commission constituted an "other appropriate local official."[7]

Here, the board of directors has been named the "appropriate local official" to receive and consider certain whistle-blower complaints. Applying the analysis and conclusion in Attorney General Opinion 96-40 and finding nothing in the Whistle-blower Act that would preclude the appointment of a board to be the appropriate agency official to handle whistle-blower complaints, I would conclude that the HART board of directors may receive and act upon such complaints. In light of the discussion in Question Two, however, such a designation to a collegial body subject to the open meetings requirements in section 286.011, Florida Statutes, may not be advisable.

Question Two

Section 112.3188(1), Florida Statutes, provides:

"(1) The name or identity of any individual who discloses in good faith to the Chief Inspector General or an agency inspector general, a local chief executive officer, or other appropriate local official information that alleges that an employee or agent of an agency or independent contractor:

(a) Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or

(b) Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty may not be disclosed to anyone other than a member of

the Chief Inspector General's, agency inspector general's, internal auditor's, local chief executive officer's, or other appropriate local official's staff without the written consent of the individual, unless the Chief Inspector General, internal auditor, agency inspector general, local chief executive officer, or other appropriate local official determines that: the disclosure of the individual's identity is necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime; or the disclosure is unavoidable and absolutely necessary during the course of the audit, evaluation, or investigation."

Moreover, all information received in the course of a whistle-blower investigation is confidential and exempt, if the information is being received or derived from allegations as set forth in paragraph (1)(a) or paragraph (1)(b) of section 112.3188(1) and an investigation is active.[8]

Thus, the act protects the identity of employees and persons who disclose information that can serve as the basis for a whistle-blower complaint, as well as information received in the course of a whistle-blower investigation. The act specifies those to whom confidential information may be disclosed and limits the disclosure of a whistle-blower's identity to specific circumstances. You have not asserted that such circumstances are present.

As a collegial body of a public agency created by law or ordinance, however, the board of directors for HART must take official action at a public meeting which complies with the requirements of section 286.011, Florida Statutes, Florida's Government in the Sunshine Law.[9] Only the Legislature, by general law passed by a two-thirds majority, may provide for the exemption of meetings from the Sunshine Law.[10]

The Supreme Court of Florida has held that in the absence of a statute exempting a meeting in which privileged material is discussed, section 286.011, Florida Statutes, may not be construed to contain any exceptions for such meetings.[11] Section 119.07(7), Florida Statutes, clearly provides that an exemption from the Public Records Law "does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided." Thus, exemptions from the Public Records Law do not by implication allow a public agency to close a meeting where exempt records are to be discussed in the absence of a specific exemption from the Sunshine Law.[12]

This office, in an opinion request with confidentiality concerns similar to those you have raised, concluded that a committee created by a public agency and charged with the responsibility of reviewing confidential files was subject to the requirements of section 286.011, Florida Statutes, in the absence of an exemption from the Sunshine Law. The committee involved in Attorney General Opinion 95-65 was established to provide for uniform case review and approval of treatment for emotionally disturbed children and adolescents. In reviewing individual cases, confidential information contained within the clinical files of patients was disseminated to the committee and case managers presented psychiatric and psychological evaluations of children and updated the committee on individual children's progress in treatment. While several statutory exemptions to the Sunshine Law for meetings or portions of meetings at which confidential records must be considered were cited, no exemption from section 286.011, Florida Statutes, was found for the review committees presented in the opinion. The opinion concluded that the meetings at which confidential records were discussed were subject to the Government in the

Sunshine Law.

I would also note that in Attorney 2010-04, this office declined to comment on particular procedures for conducting meetings of a school board at which confidential student records would be discussed, but suggested that the school board be sensitive to the confidentiality of such records reviewed during a meeting and protect the records to the extent that is possible to protect the privacy of the student involved. Similarly, the HART board must protect the confidential information it is considering at a meeting and must not disclose the name of the whistle-blower unless one of the specific circumstances listed in the statute is present.[13]

Several statutory provisions exempt meetings of various boards or committees from the Sunshine Law when confidential information is presented or discussed.[14] You have not cited, nor have I found, any statutory provision that would close the meetings of the HART board of directors when it is considering a whistle-blower complaint. Absent a statutory exemption from section 286.011, Florida Statutes, for the HART board of directors when it is considering or acting upon a whistle-blower complaint, the board must otherwise comply with the public meetings requirements of the Sunshine Law and may not close its meetings.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* HART Board of Directors, Interim Whistleblower Complaint Review Procedures, Doc. \551050\1 - #2807895v3, designates the HART board of directors as the appropriate official to receive and investigate whistle-blower complaints when a complaint alleges a violation by the chief executive officer (CEO) or a board member, or involves a conflict by the CEO that precludes the CEO from appropriately addressing the complaint.

[2] *See* s. 112.3187(3)(a), Fla. Stat., defining "Agency" as "any state, regional, county, local, or municipal government entity, whether executive, judicial, or legislative; any official, officer, department, division, bureau, commission, authority, or political subdivision therein; or any public school, community college, or state university."

[3] *See* s. 112.3187(2), Fla. Stat.

[4] *See* Op. Att'y Gen. Fla. 93-80 (1993) in which it was concluded that a complaint filed with the Office of the Public Counsel did not come within the scope of the Whistle-blower's Act so that the protections of the act would be extended to the complainant, nor would transferring a copy of the complaint to the Chief Inspector General transform the complaint into one made within the terms of the statute.

[5] Section 112.3187(6), Fla. Stat. *See* s. 447.203(9), Fla. Stat., stating that "'[c]hief executive officer' for the state shall mean the Governor and for other public employers shall mean the

person, whether elected or appointed, who is responsible to the legislative body of the public employer for the administration of the governmental affairs of the public employer."

[6] Op. Att'y Gen. Fla. 96-40 (1996) citing Senate Staff Analysis and Economic Impact Statement, Senate Bill 530, March 20, 1995, and comparing Op. Att'y Gen. Fla. 85-99 (1985), in which this office concluded that the term "chief executive officer" could include a duly appointed labor negotiating committee such that discussions between the committee and the governing body relative to collective bargaining negotiations would be exempt from the public meetings law as provided under state statute.

[7] *Cf. Hutchison v. Prudential Insurance Co. of America*, 645 So. 2d 1047, 1049 (Fla. 3d DCA 1994) (sheriff's department determined to be an appropriate governmental agency to receive whistle-blower complaint, as it had authority to "otherwise remedy the violation or act"). *And see* Op. Att'y Gen. Fla. 10-48 (2010) (county's ethics commission designated to investigate whistle-blower complaints).

[8] Section 112.3188(2)(b), Fla. Stat. *See also* s. 112.3188(2)(c), Fla. Stat., providing an exception for the release of confidential and exempt information, when it is determined that disclosure of the information is absolutely necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime, to persons who are in a position to prevent the public danger or to prevent the imminent commission of a crime based on the disclosed information.

[9] Section 286.011, Fla. Stat., requires that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings and the minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection.

[10] *See* s. 24, Art. I, Fla. Const.

[11] *See City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

[12] *See* Ops. Att'y Gen. Fla. 04-44 (2004) (PRIDE), 95-65 (1995) (district case review committee), 93-41 (1993) (county criminal justice commission), 91-88 (1991) (pension board), and 91-75 (1991) (school board). *And see* Op. Att'y Gen. Fla. 05-03 (2005) (confidentiality provisions of cited federal law do not authorize child abuse death review committee to close its meetings although the committee should take steps to ensure that identifying information is not disclosed at such meetings).

[13] *Cf.* Op. Att'y Gen. Fla. 96-40 (1996) (town's ethics commission may not require an individual to sign a waiver of confidentiality as a condition of processing a complaint under the "Whistle-blower's Act," in light of the statute's terms making the identity of the complainant confidential as an integral part of the process).

[14] *See, e.g.,* s. 286.0113(1), Fla. Stat. (portion of meeting that would reveal a confidential security system plan or portion thereof is exempt from s. 286.011 and s. 24[b], Art. I, State Const.); s. 288.9551(3), Fla. Stat. (portion of meeting of board of directors of Scripps Florida Funding Corp. at which confidential information is presented or discussed is exempt from s. 286.011 and s. 24[b], Art. I, State Const., and records generated during any portion of an exempt meeting are confidential and exempt from s. 119.07[1] and s. 24[a], Art. I, State Const.); s. 383.412(3)(a), Fla. Stat. (portions of meetings of the State Child Abuse Death Review Committee or a local committee at which confidential information is discussed are exempt from s. 286.011 and s. 24[b], Art. I, State Const.); s. 627.0628(3)(f)2.a., Fla. Stat. (portion of meeting of the Florida Commission on Hurricane Loss Projection Methodology or of a rate proceeding on an insurer's rate filing at which a confidential trade secret is discussed is exempt from s. 286.011 and s. 24[b], Art. I., State Const.); s. 1004.226(8)(b)1., Fla. Stat. (portion of meeting of the Florida Technology, Research, and Scholarship Board at which confidential information is discussed is exempt from s. 286.011 and s. 24[b], Art. I, State Const.); and s. 1004.4472(4), Fla. Stat. (portion of meeting of the Florida Institute for Human and Machine Cognition, Inc., or a subsidiary at which confidential information is presented or discussed is exempt from s. 286.011 and s. 24[b], Art. I, State Const.).