

Sunshine Law, applicability to river basin commission

Number: INFORMAL

Date: December 11, 1998

Subject:

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Mr. Kirby Green
Secretary
Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

RE: DEPARTMENT OF ENVIRONMENTAL PROTECTION--APALACHICOLA-
CHATTAHOOCHEE-FLINT RIVER BASIN COMMISSION--GOVERNMENT IN THE SUNSHINE
LAW--applicability of Sunshine Laws to ACF River Basin Commission. s. 373.71, Fla. Stat.

Dear Secretary Green:

Your predecessor asked for my opinion on whether the Apalachicola-Chattahoochee-Flint (ACF) River Basin Commission is subject to Florida's Sunshine Law.

It is my opinion that the ACF River Basin Commission is subject to the Sunshine Law.

The states of Alabama, Florida and Georgia and the United States of America are parties to the "Apalachicola-Chattahoochee-Flint River Basin Compact" (the "ACF Compact"), which has been codified in section 373.71, Florida Statutes. The Compact became effective upon enactment of concurrent legislation by each respective state legislature and the Congress of the United States.[1]

As expressed in Article VII of the Compact:

"It is the intent of the parties to this Compact to develop an allocation formula for equitably apportioning the surface waters of the ACF Basin among the states while protecting the water quality, ecology and biodiversity of the ACF . . . "[2]

The purpose of the Compact is to promote interstate comity, remove causes of present and future controversy, equitably apportion the surface waters of the Apalachicola, Chattahoochee, and Flint River Basin, engage in water planning, and develop and share common data bases.[3]

Article VI of the ACF Compact creates the ACF Basin Commission:

"(a) There is hereby created an interstate administrative agency to be known as the 'ACF Basin Commission.' The Commission shall be comprised of one member representing the state of Alabama, one member representing the state of Florida, one member representing the state of

Georgia, and one non-voting member representing the United States of America. The state members shall be known as 'State Commissioners' and the federal member shall be known as the 'Federal Commissioner.' The ACF Basin Commission is a body politic and corporate, with succession for the duration of this Compact."

Under the provisions of the Compact, the Governor of each state serves as the State Commissioner for that state. The State Commissioner appoints one or more alternate members. One of such alternates shall be designated by the State Commissioner to serve in the State Commissioner's place and to carry out those functions, including voting on Commission matters, in the event the State Commissioner is unable to attend a Commission meeting.[4]

Each state has one vote on the ACF Commission, and the Commission must make all decisions and exercise its powers by unanimous vote of all three State Commissioners.[5] The Commission is required to meet at least once a year[6] and "[a]ll meetings of the Commission shall be open to the public." [7]

Among the powers of the ACF Commission are the following general powers:

- "(6) To create committees and delegate responsibilities;
- (7) To plan, coordinate, monitor, and make recommendations for the water resources of the ACF Basin for the purposes of, but not limited to, minimizing adverse impacts of floods and droughts and improving water quality, water supply, and conservation as may be deemed necessary by the Commission;
- (8) To participate with other governmental and nongovernmental entities in carrying out the purposes of this Compact; [and]
- (12) To establish and modify an allocation formula for apportioning the surface waters of the ACF Basin among the states of Alabama, Florida and Georgia[.] "[8]

Florida's Government in the Sunshine Law, section 286.011(1), Florida Statutes, provides that

"[a]ll 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 . . . at which official acts are to be taken are declared to be public meetings open to the public at all times The board or commission must provide reasonable notice of all such meetings."

Florida courts have determined that it was the Legislature's intent in adopting the Sunshine Law to extend the law's application to bind "every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control." [9] As stated by the courts, the Sunshine Law applies to the entire decision-making process, and extends to discussions and deliberations as well as formal actions taken by a public board or commission.[10]

Although the Government in the Sunshine Law does not apply to federal agencies,[11] it was the Florida Legislature that authorized the creation of the Compact and the ACF Commission. Therefore, it appears that the Commission is subject to the requirements of the Sunshine Law.

The provisions of the Compact regarding the scope of federal law do not change this result. Article X of the Compact states that:

"(d) Once adopted by the three states and ratified by the United States Congress, this Compact shall have the full force and effect of federal law, and shall supersede state and local laws operating contrary to the provisions herein or the purposes of this Compact; provided, however, nothing contained in this Compact shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective signatory states relating to water quality, and riparian rights as among persons exclusively within each state."

The legislation creating the Compact provides that it "shall have the full force and effect of federal law," and that the terms of the Compact supersede any state or local enactments that are contrary to its provisions. Thus, in the event of any conflict, the provisions of the Compact would prevail over those of the state Sunshine Law. However, a review of the open meeting mandates established in the Compact does not disclose any conflict between the Compact's public access requirements and those of the Sunshine Law.[12]

For example, Article XI of the ACF Compact provides:

"All meetings of the Commission shall be open to the public. The signatory parties recognize the importance and necessity of public participation in activities of the Commission, including the development and adoption of the initial allocation formula and any modification thereto. Prior to the adoption of the initial allocation formula, the Commission shall adopt procedures ensuring public participation in the development, review, and approval of the initial allocation formula and any subsequent modification thereto. At a minimum, public notice to interested parties and a comment period shall be provided. The Commission shall respond in writing to relevant comments."

Accordingly, the ACF Compact specifically requires open meetings and public participation in Commission activities.

The operating guidelines of the ACF Commission provide that

"Notice of meetings of the Commission shall be published in at least one newspaper of general circulation in each of the states of Alabama, Florida, and Georgia at least fifteen days in advance of said meeting. In addition, notice of meetings of the Commission shall be mailed to each person and organization included on the list developed [under provisions of the compact] at least fifteen days in advance of said meeting. Such notice shall be effective upon mailing. Each State Commissioner shall select the newspaper(s) within his or her state in which notices of the meeting shall appear and this information shall be maintained by the Commission and available to the public. *A 'meeting of the Commission' is a meeting in which the members are present and participating as members of the Commission.*"[13] (e.s.)

Therefore, when members of the Commission are meeting in their capacity as Commission members (*i.e.*, meeting to discuss some matter that will foreseeably come before the Commission for action),[14] that meeting must be noticed and open to the public.[15] Nothing in the Compact indicates an intent to limit public access to only the "formal" meetings of the entire Commission, or to otherwise authorize secret meetings in violation of the Sunshine Law.[16] Moreover, by following the notice requirements set forth in the Compact, the Commission also complies with the "reasonable notice" requirement in section 286.011, Florida Statutes.[17]

Accordingly, the public access provisions of the Compact complement those of the Sunshine Law and each may be given effect.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

[1] Section 373.71, Fla. Stat. *And see* P.L. 105-104 [H.J.Res. 91]; November 20, 1997.

[2] Article VII(a), ACF Compact.

[3] Article I, ACF Compact.

[4] Article VI(b), ACF Compact.

[5] Article VI(d) ACF Compact.

[6] Article VI(e), ACF Compact.

[7] Article VI(f), ACF Compact.

[8] Article VI(g)(6)(7)(8) and (12), ACF Compact.

[9] *See, e.g., Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

[10] *Times Publishing Company v. Williams, supra*, at 473. Thus, the Sunshine Law is applicable to any gathering of two or more members of a public board when the board members meet to discuss some matter on which foreseeable action will be taken by the board. *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). *And see City of Miami Beach v. Berns, supra; Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969); and *Wolfson v. State*, 344 So. 2d 611 (Fla. 2d DCA 1977).

[11] *See* Op. Att'y Gen. Fla. 71-191 (1971), noting that federal agencies, *i.e.*, agencies created under federal law and operating within the state, do not come within the purview of the state Sunshine Law.

[12] *Cf. State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935) (no provision in federal law indicating an intent to supersede state disclosure laws simply because some of the city's records might contain information that was subject to federal disclosure requirements); *Ops. Att'y Gen. Fla. 73-278* (1973), *74-372* (1974), *80-31* (1980), *81-101* (1981), *85-03* (1985), and *90-102* (1990) (records which are otherwise public under state law are not available for public inspection

only when there is an absolute conflict between state and federal record disclosural provisions).

[13] Section 5.03, Art. V, Operating Guidelines of the Apalachicola-Chattahoochee-Flint River Basin Commission, approved February 18, 1998.

[14] See Op. Att'y Gen. Fla. 88-45 (1988) (a meeting between a board member and his or her alternate is not subject to the Sunshine Law).

[15] *Cf. Turner v. Wainwright*, 379 So. 2d 148, 153 (Fla. 1st DCA 1980), *affirmed and remanded*, 389 So. 2d 1181 (Fla. 1980) (rejecting the argument that a legislative requirement for certain meetings of the Parole Commission to be open to the public implies that the Commission may meet privately to discuss other matters).

[16] It is noted that the Compact specifically addresses the confidentiality of certain documents. See Article XIII(a)(8), providing for confidentiality of all "records, reports, or other documents received by a mediator while serving as a mediator" for the Commission. See *also* Art. XIII(e)(2), *supra*, providing that hearings or mediations shall be conducted in accordance with the Federal Administrative Procedures Act, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence.

[17] See *Florida Parole and Probation Commission v. Baranko*, 407 So. 2d 1086 (Fla. 1st DCA 1982).