Sunshine Law -- Arbitration

Number: AGO 2013-17

Date: August 13, 2013

Subject:
Sunshine Law -- Arbitration

Ms. Nicolle Shalley
City Attorney
City of Gainesville
Post Office Box 490, Station 46
Gainesville, Florida 32627

RE: GOVERNMENT IN THE SUNSHINE LAW – PUBLIC MEETINGS – MUNICIPALITIES – ability to meet in closed meeting when party to mandatory arbitration. s. 286.011, Fla. Stat.

Dear Ms. Shalley:

On behalf of the Gainesville City Commission, you ask the following question:

Does the exemption provided in section 286.011(8), Florida Statutes, allow a closed attorney-client session between the city commission and its attorney to discuss settlement negotiations or strategy related to expenditures for pending mandatory and binding arbitration to which the city is presently a party?

In sum:

While the city may conduct a closed attorney-client session to discuss settlement negotiations or strategy relating to litigation expenditures when the city is a party to pending litigation before a court or an administrative agency, this office cannot say that mandatory and binding arbitration, absent an identifiable lawsuit, constitutes litigation for purposes of the exemption in section 286.011(8), Florida Statutes.

You state that the City of Gainesville (city), doing business as Gainesville Regional Utilities, is a party to a "Power Purchase Agreement" requiring that any controversy, dispute, or claim be settled finally and conclusively by arbitration, unless the parties agree otherwise. The agreement provides that any arbitration award will be final and enforceable in any court of competent jurisdiction. No appeal or adjudication before a court or administrative agency is contemplated. A dispute has arisen and the city filed a demand for arbitration.

The city commission has asked the city attorney whether it may hold a closed meeting to discuss the pending arbitration.[1] The commission has been advised by the City Attorney that a strict construction of the Government in the Sunshine Law would preclude such a meeting.

Section 286.011(8), Florida Statutes, provides:

"Notwithstanding the provisions of subsection (1),[2] 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.)

It is well settled that the Sunshine Law was enacted for the benefit of the public and should be construed liberally to give effect to its public purpose, while exceptions to its terms should be defined narrowly.[3] Courts have concluded that the Legislature intended that the exemption in section 286.011(8), Florida Statutes, be strictly construed, as in *School Board of Duval County v. Florida Publishing Company*,[4] where the district court found that the purpose of the exemption was to permit "any governmental agency, its chief executive and attorney to meet in private if the agency is a party to litigation and the attorney desires advice concerning settlement negotiations or strategy." As noted in Attorney General Opinion 98-21, had the Legislature intended to extend the exemption to include impending or imminent litigation as well as pending litigation, it could have easily so provided as it has in section 119.071(1)(d)1., Florida Statutes. That section provides a limited work-product exemption for records "prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings," and for records "prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings[.]"

The situation you pose is similar to the one considered in Attorney General Opinion 2006-03 where this office was asked whether a closed attorney-client session could be held to discuss settlement negotiations on an issue that was the subject of ongoing mediation pursuant to a partnership agreement between a water management district and others. After discussing the intent of section 286.011(8), Florida Statutes, and analyzing its terms, this office concluded that the statute did not apply to the mediation prescribed in the partnership agreement since no litigation had been filed in either the courts or before an administrative body.

More recently, in Attorney General Opinion 2009-14, this office considered whether a city could hold a closed meeting pursuant to section 286.011(8), Florida Statutes, to discuss the terms of

mediation undertaken pursuant to the conflict resolution procedures set forth in Chapter 164, Florida Statutes. The opinion concludes that the exemption contained in section 286.011(8), Florida Statutes, is limited to the specific circumstances prescribed in the statute and does not extend to discussions between the city attorney and the city commission regarding settlement under the Florida Governmental Conflict Resolution Act.[5]

The basic question presented herein is whether mandatory and binding arbitration would be considered pending litigation before a court or an administrative agency for purposes of the statute. While a controversy between two parties may serve as the basis for litigation, absent the filing of a suit in a court of competent jurisdiction or application for consideration by an administrative agency, it would not appear that arbitration is litigation for purposes of the statute.[6]

Accordingly, it is my opinion that section 286.011(8), Florida Statutes, may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a court or before an administrative agency.

Sincerely,

Pam Bondi
Attorney General

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[1] It should be noted that one of the conditions of a private meeting under s. 286.011(8), Fla. Stat., is the initiation by the entity's attorney that he or she desires advice.

[2] Section 286.011(1), Fla. Stat., provides:

"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, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, 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."

[3] *See City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995) and *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969).

[4] 670 So. 2d 99 (Fla. 1st DCA 1996). *And see City of Dunnellon v. Aran, supra*; *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998).

[5] *See also* Inf. Op. to McQuagge, dated February 13, 2002 (absent expression of legislative intent that officials attending mediation sessions pursuant to s. 164.1055, Fla. Stat., are authorized to privately discuss among themselves the matters being considered at such a

meeting, such meetings must be conducted openly and in accordance with the provisions of s. 286.011, Fla. Stat.).

[6] *Cf.* s. 682.02, Fla. Stat., of the Florida Arbitration Code, recognizing the authority of two or more parties to agree in writing to submit to arbitration any controversy existing between them or to include in a written contract a provision for the settlement by arbitration of any controversy which might arise from their contractual relationship. *See also* Op. Att'y Gen. Fla. 96-75 (1996) (workers compensation proceeding operates as a means to adjudicate workers compensation claims before an administrative tribunal which would be considered litigation before an administrative agency within purview of s. 286.011[8], Fla. Stat.).