

Sunshine law; settlement agreement committee

Number: INFORMAL

Date: October 24, 1996

Subject:
Sunshine law; settlement agreement committee

Ms. Barbara A. Markham
General Counsel
South Florida Water Management District
Post Office Box 24680
West Palm Beach, Florida 33416-4680

RE: GOVERNMENT IN THE SUNSHINE LAW--PUBLIC MEETINGS--ENVIRONMENTAL PROTECTION, DEPARTMENT OF--SOUTH FLORIDA WATER MANAGEMENT DISTRICT--COURTS--committee established by two state agencies as part of settlement agreement in federal lawsuit subject to Sunshine Law. s. 286.011, Fla. Stat.

Dear Ms. Markham:

You ask whether the Technical Oversight Committee (TOC) created pursuant to a settlement agreement in federal court is subject to the open meeting requirements of section 286.011, Florida Statutes.

For the reasons discussed below, I am of the opinion that the TOC is an advisory committee created by the Department of Environmental Protection (DEP) and the South Florida Water Management District (SFWMD) and would, therefore, be subject to section 286.011, Florida Statutes.

Section 286.011(1), Florida Statutes, provides in pertinent part:

"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. . . ."

In determining which entities may be covered by the Sunshine Law, the courts have stated that it was the Legislature's intent to extend application of the law so as to bind "every board or commission" of the state, or of any county or political subdivision over which it has dominion and control."^[1] Moreover, the Sunshine Law is to be construed "so as to frustrate all evasive devices."^[2] Clearly, boards or commissions created by a state agency are subject to the provisions of section 286.011, Florida Statutes.

The TOC was created as part of the settlement of a federal lawsuit in which the United States Department of Justice (DOJ) sought to require the Florida DEP^[3] and SFWMD to fulfill their

duties and obligations under state law relative to the restoration, preservation, and protection of the Everglades National Park.[4]

The settlement agreement designates the members of the TOC as follows:

"(1) Superintendent of the Everglades National Park;
(2) Manager of the Arthur R. Marshall Loxahatchee National Wildlife Refuge;
(3) Secretary of DEP;
(4) Executive Director of the South Florida Water Management District; and
(5) District Engineer, Jacksonville District, U.S. Army Corps of Engineers."[5]

The settling parties have set forth their intention for the TOC to function as a "consensus building and dispute avoidance body [that] does not bind any party or person since the TOC is not an independent authority."[6] The settlement agreement was approved by the federal court as a consent decree in 1991.

Under the agreement,

"The TOC will plan, review and recommend all research, monitoring and compliance, conducted pursuant to the terms of this agreement, and will consider technical advice and assistance for each activity as necessary from the appropriate agencies and from other state and federal agencies and consultants. The TOC will make technically based recommendations by consensus approach; when a technically based recommendation cannot be reached by consensus, a 4 out of 5 majority, the impasse will be reported back to the Parties for mediation . . ."[7]

Thus, the role of the committee is to serve in an advisory capacity to both DEP and SFWMD regarding the agencies' roles in restoring and preserving the Everglades as required by state law. While the TOC has no independent authority to bind the principals of the individual members, its power to make recommendations to a public agency subjects it to the Sunshine Law.[8]

You ask, however, whether the creation of the committee by a settlement agreement in a federal lawsuit would remove the TOC from the requirements of the Sunshine Law.[9] It is recognized that a federal agency created under federal law falls outside the purview of the state's Sunshine Law.[10] No assertion has been made that the TOC was created as a federal agency.

In this case the TOC was created by two state agencies jointly with a federal agency. The TOC is not created pursuant to federal law, but rather it makes recommendations relative to the duties and responsibilities of the DEP and SFWMD in carrying out the comprehensive scheme for Everglades restoration and preservation contained in state law. Moreover, nothing in the settlement agreement or the court order approving it mandates secrecy or evinces an intent to supersede or circumvent the state's open government requirements.

The DEP and SFWMD have used the settlement agreement to create an entity to carry out an integral part of the decision-making process relative to their duties and responsibilities under state law.[11] The agreement is an artfully drafted mechanism for dispute resolution, whereby policies developed by consensus of the TOC directly impact the manner in which the restoration

and preservation of the Everglades will be accomplished by DEP and SFWMD. Thus, the activities of the committee, as an integral part of the decision-making process of both entities, should be open to public scrutiny.

Accordingly, it is my opinion that the creation of the Technical Oversight Committee by the Department of Environmental Protection and the South Florida Water Management District to perform an integral function in the decision-making process regarding the restoration, preservation, and protection of the Everglades by these agencies makes it subject to the open meeting requirements of section 286.011, Florida Statutes.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

[1] See, e.g., *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), and *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); and see, Op. Att'y Gen. Fla. 92-17 (1992).

[2] *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

[3] Formerly the Department of Environmental Regulation, one of the defendants in the federal lawsuit.

[4] Paragraph 18, Settlement Agreement, *United States of America v. South Florida Water Management District and Florida Department of Environmental Regulation*, Civil No. 88-1886-CIV-Hoeveler, July 26, 1991, p. 24.

[5] See Paragraph 19A, Settlement Agreement, *United States of America v. South Florida Water Management District and Florida Department of Environmental Regulation*, Civil No. 88-1886-CIV-Hoeveler, July 26, 1991, p. 25.

[6] Joint Progress Report, *United States of America v. South Florida Water Management District and Florida Department of Environmental Regulation*, Civil No. 88-1886-CIV-Hoeveler, October 30, 1995, p. 12.

[7] Paragraph 18, Settlement Agreement, *United States of America v. South Florida Water Management District and Florida Department of Environmental Regulation*, Civil No. 88-1886-CIV-Hoeveler, July 26, 1991, pp. 24-25.

[8] See *Town of Palm Beach v. Gradison*, *supra*, (committee established by town council to act in advisory capacity subject to the government in the sunshine law). *Accord Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988). See also Ops. Att'y

Gen. Fla. 95-06 (1995) (public hospital advisory board subject to the Sunshine Law), 93-41 (1993) (meetings of commission established by county ordinance to develop and make recommendations on criminal justice issues must be open), and 92-26 (1992) (committee responsible for making recommendations to city council on personnel matters subject to Sunshine Law).

[9] The settlement negotiations have been completed as evidenced by the approved settlement agreement, and further actions by the TOC in carrying out the agreement are unlike the activities in *Cincinnati Gas and Electric Company v. General Electric Company*, 854 F.2d 900 (6th Cir. 1988). In that case, the court concluded that the public's "right to know" has no validity in federal summary jury trials, since the public is not entitled to observe any negotiations leading to the settlement of a case.

[10] *Cf. Op. Att'y Gen. Fla. 71-191* (1971) (agencies created under federal law operating within the state do not come within the purview of the Sunshine Law).

[11] See Settlement Agreement, *United States of America v. South Florida Water Management District and Florida Department of Environmental Regulation*, Civil No. 88-1886-CIV-Hoeveler, July 26, 1991; *United States v. South Florida Water Management District*, 847 F. Supp. 1567, 1572 (S.D. Fla. 1992), wherein the court stated that the "Agreement requires the District and DE[P] to fulfill their obligations under existing state law . . ."; and s. 373.4592, Fla. Stat., prescribing the program for Everglades improvement and management by the SFWMD and DEP.