

without taking him into custody or otherwise depriving him of his freedom of action in any significant way.

As the United States Supreme Court said in the *Miranda* case:

More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation.

* * * * *

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

However, I point out that §316.066, F. S., provides that accident reports made by persons involved in accidents shall not be used as evidence in any civil or criminal trial arising out of the accident. The privilege afforded to drivers by this statutory provision applies to a verbal statement concerning the accident, made to the investigating officer by a driver involved in such accident, even though the statement is made at some place other than the scene of the accident. [Ippolito v. Brenner, Fla., 89 So.2d 650 (Fla. 1956); and Nash Miami Motors, Inc. v. Ellsworth, 129 So.2d 704 (3 D.C.A. Fla., 1961).]

Nevertheless, in some situations such a statement by a driver involved in an accident would be admissible in evidence at a trial. If the investigating officer has completed the accident report required to be made by him to the Department of Highway Safety and Motor Vehicles and has probable cause to believe that a crime has been committed by a driver involved in the accident, and goes to such driver's home and advises him that he has completed his accident report and is now investigating a crime which he has probable cause to believe has been committed in connection with the accident, then if such driver makes any incriminating statement to the officer, I think that the officer should be permitted to testify as to such statement at such driver's trial under the authority of *State v. Coffey*, 212 So.2d 632 (Fla. 1968).

073-56—March 13, 1973

SUNSHINE LAW

CONSULTATION BETWEEN SCHOOL BOARD AND ITS ATTORNEY

To: Edward J. Marko, Attorney, Broward County School Board, Ft. Lauderdale

Prepared by: Henry George White, Assistant Attorney General

QUESTION:

May a district school board' consult secretly with its attorney to consider the question of whether litigation pending against the board should be settled without such consultation constituting a violation of the Sunshine Law?

SUMMARY:

A discussion by a public body with its attorney concerning whether pending litigation should be settled does not constitute an exception to the Sunshine Law and must therefore be held openly and publicly as required by §286.011, F. S.

The question is prompted by your desire to discuss with the district school

board the advisability of settling a suit which is presently pending against it. As attorney for the board you feel that your client will be placed in a disadvantageous position by having the strength and weakness of the case revealed in a discussion of a settlement which is open to the public. At the same time, however, your client wants to assure that its actions do not violate the Government in the Sunshine Law.

Section 286.011, F. S., the Sunshine Law, requires that all meetings of public bodies at which official acts are to be taken be open to the public, except as otherwise provided in the Constitution. School boards have repeatedly been held to be subject to the Sunshine Law. *See Bassett v. Braddock*, 262 So.2d 425 (Fla. 1972), and *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969). *Accord*: Attorney General Opinions 071-32 and 071-389. The real question then is whether there is some constitutional provision which excepts the school board from the requirements of the Sunshine Law in the situation suggested by your question.

The impact of a constitutional exception to the Sunshine Law was recently dealt with by the Florida Supreme Court in *Bassett v. Braddock*, *supra*. The court held that a school board's labor representative could negotiate in private with the teachers' representative, in preliminary contract negotiations, without violating the Sunshine Law. The court concluded that Art. I, §6, State Const., which grants public employees the right to organize and bargain collectively, was one of the constitutional exceptions contemplated by the drafters of the Sunshine Law. It was also held that a school board could meet in private for the purpose of consulting with or instructing its labor negotiator concerning matters which were subject to collective bargaining with teachers' representatives. As the court noted, such private meetings are necessary in order to fully implement the constitutional rights involved.

The effect that the attorney-client relationship has on the duties of a school board under the Sunshine Law was discussed at length in the case of *Times Publishing Co. v. Williams*, 222 So.2d 470 (2 D.C.A. Fla., 1969). That opinion notes that by enacting §286.011, F. S., the legislature waived the privilege of confidentiality which public bodies covered by the Sunshine Law might otherwise have enjoyed in their relationship with their attorney. The opinion recognizes, however, that the legislature does not have the authority to directly or indirectly interfere with an attorney in the exercise of his ethical duties. This authority is vested exclusively in the Supreme Court under revised Art. V, §15, State Const. In the *Times Publishing Company* case, the court expressed the view that the open meeting concept could not constitutionally be applied to a consultation between a public body and its attorney at which the settlement of pending litigation is to be discussed. To do so, the court reasoned, would interfere with the attorney in the exercise of the professional judgment required of him under Canon Number 8, with respect to the settlement of pending litigation. While this restrictive interpretation of the applicability of the Sunshine Law may have been required under former Canon Number 8, it is no longer supportable under the Code of Professional Responsibility which was promulgated by the Supreme Court subsequent to the opinion in the *Times Publishing Company* case.

Canon Number 4 of the Code of Professional Responsibility states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Ethical Consideration 4-2 provides in part:

The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information *when his client consents* after full disclosure, when necessary to perform his professional employment, *when permitted by a Disciplinary Rule, or when required by law*. (Emphasis supplied.)

Disciplinary Rule 4-101 provides, among other things that:

(c) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client . . . but only after full disclosure to them.

* * * * *

(d) A lawyer shall reveal:

(1) Confidences or secrets when required by law. . . .

It is obvious that in promulgating the Code of Professional Responsibility the Supreme Court gave recognition to statutory exceptions in the same way that the legislature acknowledged constitutional exceptions when it enacted the Sunshine Law. And, as was observed earlier, the enactment of §286.011, F. S., constituted a legislative consent to the disclosure of confidential information possessed by an attorney by virtue of his relationship with a client that is a public body within the meaning of the Sunshine Law. Public bodies are also on notice of the fact that the Sunshine Law constitutes the type of legal requirement which, under the Code of Professional Responsibility, relieves an attorney of the ethical duty to maintain the confidences of his clients. It appears, therefore, that the Code of Professional Responsibility does not constitute a constitutional exception to the applicability of the Sunshine Law as it does not create for attorneys any impediment to full compliance with the letter and spirit of the Sunshine Law.

I have not overlooked the following statement from the *Bassett* opinion, which was made in reference to the school board's right to privately instruct its negotiator:

It might be noted that in a case like the present where the negotiator is an *attorney* that certainly he is entitled to consult with the Board on matters regarding preliminary advices.

The issue of the attorney-client privilege as it relates to the Sunshine Law was not squarely before the court in *Bassett* and it was apparently not a determinative factor in the decision. Furthermore, it is not clear whether the court intended the quoted comment to extend beyond the fact situation therein or whether its reference to "a case like the present" was intended to limit its scope to labor negotiations. In any case, particularly in light of the Supreme Court's consistently broad interpretation of the Sunshine Law, *see City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971), and *Board of Public Instruction v. Doran*, *supra*, I am not prepared to seize upon the cited statement in *Bassett* as an excuse to engraft a broad new exception onto the law.

I am aware of no other exception, constitutional or otherwise, which would relieve you of the duty to comply with the requirements of the Sunshine Law in the situation described in your question. In both *Berns* and *Doran*, *supra*, the Supreme Court refused to judicially amend the Sunshine Law by creating exceptions to its provisions. I, no less than the court, must refrain from reading into the Sunshine Law exceptions not intended by the legislature. Accordingly, until such time as this matter is legislatively or judicially clarified, your question must be answered in the negative.

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CRIMINAL LAW

VIOLATION OF STATE STATUTE ALSO VIOLATION OF MUNICIPAL ORDINANCE

To: Charles A. Hall, City Attorney, New Smyrna Beach

Prepared by: Reeves Bowen, Assistant Attorney General.