

**IN THE CIRCUIT COURT, FIFTH
JUDICIAL CIRCUIT IN AND FOR
CITRUS COUNTY, FLORIDA**

**CASE NO: 2012-CA-1339
DIVISION CIRCUIT CIVIL**

JUDGE HOWARD

ROBERT A. SCHWEICKERT, JR.,

Plaintiff

vs.

**CITRUS COUNTY PORT AUTHORITY, a
body corporate of the State of Florida and
JOHN C. MARTIN ASSOCIATES, LLC, a
foreign limited liability company,**

Defendants

ORDER DETERMINING ENTITLEMENT TO ATTORNEY FEES

This case came before the Court on September 11, 2013 for determination of entitlement to attorneys' fees pursuant to plaintiff's Verified Motion for Order Awarding Attorneys' Fees and Costs and Incorporated Memorandum of Law in Support Thereof. The Court has reviewed the pleadings, plaintiff's verified motion and memorandum, and supporting exhibits and affidavits. The defendant filed no response to the verified motion but appeared and argued at the hearing. Now, having heard the argument of counsel for both parties and being fully advised in the premises, the Court finds that the plaintiff is entitled to recover reasonable attorneys' fees and costs from the defendant for the reasons that follow.

THE CASE

The Complaint alleges that the defendant violated Florida Constitution, art. I, § 24(a) and Florida Statutes, Section 286.011 (collectively, referred to as the "Sunshine Law") in the course

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of awarding a contract for consulting services to defendant Martin Associates, LLC. The Complaint alleged: (i) that without holding a public meeting, an *ad hoc* committee ranked the proposers on evaluation sheets which were compiled into rankings by staff and submitted to the Citrus County Board of County Commissioners ("Board") sitting as the defendant's governing board; and (ii) that the Board selected the winning proposer by secret ballot. Plaintiff sought judgment declaring the selection null and void. See, Fla. Stat., § 286.011(1).

The Board denied the violations, but in a later meeting for the purpose of curing any violation, it reconsidered its selection. ("Cure Meeting") After a thorough reconsideration, the Board selected a different consultant. The parties then stipulated that the Cure Meeting effectively cured the alleged violations and that the Court would enter final judgment for defendant and retain jurisdiction to consider a motion or motions for award of attorneys' fees.

This issue of plaintiff's entitlement to reasonable attorneys' fees is now before the Court.

In pertinent part, Section 286.011(4) Florida Statutes provides:

Whenever an action has been filed against any board or commission of any . . . county . . . to enforce the provisions of [Section 286.011, Florida Statutes], and the court determines the defendant . . . acted in violation of this section, the Court shall assess a reasonable attorneys' fee against such agency

The ultimate issue is whether the Board acted in violation of the Sunshine Law in either instance alleged by plaintiff. In deciding this issue, the Court observes the well-settled standard "that the Sunshine Law, enacted for the public benefit, should be liberally construed to give effect to its public purpose . . ." *Zorc v. City of Vero Beach*, 722 So. 2d 891, 897 (Fla. 4th DCA 1998).

Before reaching the merits, the Court will dispose of certain preliminary points regarding plaintiff's entitlement to attorneys' fees.

The Attorneys' Fee Claim is Not Moot

Plaintiff correctly argues, and the Board does not dispute, that his claim of entitlement to attorneys' fees was not rendered moot by the Board's subsequent curative action. See, *Soud v. Kendall*, 788 So.2d 1051 (Fla. 1st DCA 2001) (a request for attorney's fees pursuant to the Sunshine Law is a collateral legal consequence and an exception to dismissal based on mootness). Compare, *Mazer v. Orange County*, 811 So.2d 857, 859 (Fla. 5th DCA 2002) (following *Soud's* reasoning where requested public records were produced only after suit was filed.)

The Cure Does Not Preclude Recovery of Attorneys' Fees.

Plaintiff also correctly argues, without dispute, that the Board's subsequent curative action will not absolve it of responsibility for attorneys' fees if the Court determines, as it has done, that the Board violated the Sunshine Law. See, AGO 73-264 (opining that "[a]lthough the initial [Sunshine violation] can be rendered valid by a subsequent public affirmation, the initial misconduct is not thereby excused.") Compare *Indian River County Hosp. District v. Indian River Memorial Hospital, Inc.*, 766 So.2d 233, 234-35 (Fla. 4th DCA 2000) ("[w]hen a trial court finds that a public authority has violated the Sunshine Law, 'the Court shall assess a reasonable attorneys' fee against such agency.'" *Id.* (quoting Florida Statutes, § 286.011(4)).

Plaintiff Did Not Waive his Claim for Attorneys' Fees.

At the hearing, defendant objected for the first time that plaintiff had waived his right to recover attorneys' fees because he initially cited an incorrect statutory basis for his claim of attorneys' fees. Plaintiff generally pled his claim for attorneys' fees but cited Florida Statutes, § 119.12, which applies to public records cases. Plaintiff should have cited Florida Statutes, § 286.011(4), which applies to Sunshine Law cases.

The Court will not sustain defendant's objection. Defendant previously had been informed that plaintiff claimed fees under Florida Statutes, § 286.011(4), had not previously objected, and was not prejudiced by the incorrect citation. In any event, defendant waived this objection by stipulating that the Court would hear motions for attorneys' fees after judgment for the defendant had been entered. Compare, *Stockman v. Downs*, 573 So.2d 835, 838 (Fla. 1991) ("Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees."); *Mainlands of Tamarac by the Gulf Unit No. Four Association, Inc.*, 388 So.2d 226, 227 (Fla. 2d DCA 1980) (objection to failure to plead specific ground for fees waived where the parties stipulated during trial that the question of attorney fees and costs to the prevailing party would be heard after the final hearing in the case, the stipulation was filed with the court, and in the final judgment the court reserved jurisdiction for the purpose of considering motions for attorney fees).

MERITS

1. The *ad hoc* Committee Violated the Sunshine Law Because It Failed to Rank the Proposers in a Public Meeting.

On November 29, 2011, the Board approved a Request for Qualifications (the "RFQ") seeking proposals from consulting firms to prepare a feasibility study for Port Citrus. The RFQ provided:

Upon closure of the submittal period, Port staff shall evaluate the received applications for standards compliance. All applications which pass that test will be forwarded to a review team which will undertake a preliminary ranking based on the criteria established in subsection 6. . . . The Team will submit a short list of top firms to the Citrus County Port Authority which will then convene a special meeting where each applicant will be able to provide an oral presentation to the full CCPA.

See plaintiff's verified motion, page 4, note 1.

The *ad hoc* committee, (the "Committee") as finally constituted, consisted of four individuals: Mr. Brad Thorpe, county administrator; Mr. Richard Wm. Wesch, county attorney; Mr. Ken Frink, assistant county administrator, and Mr. George Boyle, an employee of FDOT. *Id.*

When the Board met on March 27, 2012, to consider the Committee's recommendation, Mr. Wesch reported that the Committee had not met and had not created a short list as the RFQ had stipulated. Instead, each member had submitted written evaluations to the staff, which compiled the scores into a ranking. Mr. Wesch said the staff was submitting the names of all nine applicants in ranked order. See the video record of the March 27, 2012 Citrus County Port Authority Board Meeting at 03:44 to 06:07, a certified copy of the DVD being attached to plaintiff's verified motion as Exhibit D.

The video record of the meeting shows that the Board determined to hear presentations from the "top six" applicants as ranked by the Committee based solely on the Committee's ranking. The Board did not discuss the applicants individually or weigh their relative merits *Id.*

The Court agrees with plaintiff that the Committee acted in violation of the Sunshine Law by failing to rank the proposers in an open public meeting. Section 286.011(1) provides that all meetings of a state or local collegial body "are declared to be open to the public at all times, and no formal action shall be considered binding except as taken or made at such meeting." The Committee's ranking of the applicants was formal action. By failing to take this action in the Sunshine, the Committee and thus the Authority acted in violation of the Sunshine Law.

This case fits squarely within the facts considered in *Leach-Wells v. City of Bradenton*, 734 So.2d 1168 (Fla. 2d DCA 1999). When the city received six responses to a request for proposals to build a municipal building, the city council appointed an *ad hoc* committee

consisting of the city clerk, a city councilman, the public works director, and a local engineer and gave the committee "the responsibility of reviewing the proposals and ranking or short-listing the top three firms." *Id.* at 1169. Each committee member completed a written evaluation of the proposals and submitted it to the city clerk. When the clerk observed that all members listed the same top three contractors, he determined that the committee need not meet. "All but one of the [proposing] firms . . . attend[ed] the [city council] meeting. The council members had been provided all six proposals for review, however, only the three short-listed firms made presentations." *Id.* at 1169-70.

After the council selected the winning bidder, a citizen sued to enjoin the construction, alleging that the council had violated the Sunshine Law in selecting the contractor. The trial court denied plaintiff's motion for temporary injunction, plaintiff did not appeal, and the construction continued. The trial court later entered summary final judgment, agreeing with the city that a meeting of the *ad hoc* committee was not necessary.

Because the building had been completed by the time the case reached the appellate court, the court determined the case moot. "Nevertheless," the court said, "we write to address the asserted Sunshine Law violation because although this is not a case in which a pattern of conduct likely to be repeated has been alleged, we write to correct what we perceive to be a misinterpretation of the Sunshine Law." *Id.* at 1171. "[T]he narrow question presented is whether the committee was required to hold a meeting. If the committee's task to short-list the firms responding to the RFP, was 'formal action,' a meeting was required." *Id.*

The court pointed out that "the committee members' individual evaluations were tallied and acted upon, albeit by unilateral action of the city clerk, which resulted in three bidders being selected to make presentations to the council. Therefore . . . we conclude that the short-listing

was formal action that was required to be taken at a public meeting.” *Id.* (citing *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974) and *Silver Express Co. v. District Board of Lower Tribunal Trustees*, 691 So.2d 1099 (Fla. 4th DCA 1997)).

The present case is squarely on point with *Leach-Wells*. Here, the Committee ranked the proposals and submitted the names of all nine respondents in ranked order. The Board decided to interview the “top six” firms as ranked by the Committee without discussing the relative merits of the competing respondents, basing its decision strictly on the Committee’s ranking.

Defendant seeks to distinguish this case by arguing that the Port Authority’s committee did not short-list the applicants whereas the *Leach-Wells* committee was tasked to report a short-list of applicants. However, this does not distinguish *Leach-Wells*. The Board accepted and acted on the Committee’s ranking when it decided to interview the Committee’s “top six” firms. Regardless of the fact that the staff submitted all nine firms to the Board, the Committee’s ranking determined which six firms were invited to present to the Board. Those firms would not have been selected to present if not ranked in the top six by the Committee.

The Committee was subject to the Sunshine Law because its evaluation and ranking of the proposals had a substantial if not determinative effect on the selection of the presenting firms. That was the four-square holding in *Silver Express*, 691 So.2d at 1100-01. There, the court held that a temporary committee appointed by a purchasing agent to assist in evaluating certain proposals was subject to the Sunshine Law. The court said, “[T]he committee’s function was to weed through the various proposals, to determine which were acceptable and to rank them accordingly [which] helped to crystalize the decision to be made by the College.” *Id.* at 1100. This is exactly what the Committee in the present case did.

The *Silver Express* court explained that advisory committees whose “recommendations . . . eliminate opportunities for alternative choices by the final authority, or which rank applications for the final authority—have been determined to be agencies governed by the Sunshine Law.” *Id.* at 1101 (emphasis supplied). The court quoted *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988), as follows:

The law is quite clear. An *ad hoc* advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law. The committee here, made a ruling affecting the decision-making process and it was of significance. As a result, it was improper for the committee to reach its recommendation in private since that constituted a violation of the Sunshine Law.

Silver Express at 1101 quoting *Spillis Candela* at 695 (citations omitted).

The defendant did not file a response to plaintiff’s memorandum, but in a letter of August 1, 2012, Mr. Pelham relied on *Knox v. School Board of Brevard*, 821 So.2d 311 (Fla. 5th DCA 2002). The letter is attached to the verified motion as Exhibit J. He argued that *Knox* holds that “[e]ven when an advisory team makes recommendations, if the team gives applications to the Board for the final decision on whom to interview and finally nominate, the team’s role is still advisory.” That is plainly not the holding of *Knox*. Nor is it the implication of *Knox* because such a holding would have been inconsistent with *Silver Express*, which *Knox* cited as comparable, not contrary authority.

Obviously, the *Knox* court concluded that the interview team had no significant effect on the Brevard School Board’s decision-making process. The interview team was made up of staff members, and the Court said “[s]ince the interview team simply had a fact-finding or advisory role, their meetings were not governed by the Sunshine Law. . . . A Sunshine violation does not

occur when a governmental executive uses staff for a fact-finding and advisory role in fulfilling his duties. *Knox* at 315 [citing *Wood v. Marston*, 442 So.2d 226 (Fla. 1980)].

Here, the ranking of applicants by the Committee played a significant role in the selection of the consultant because this ranking determined the “top six” who were selected to present to the Board. The Committee should have performed that role in an open public meeting. In failing to do so it violated the Sunshine Law.

2. The Board Violated the Sunshine Law When It Selected The Winning Proposer By Secret Ballot.

In the meeting of April 17, 2012, the Board received presentations from the top six proposers. After the presentations were completed, the Board voted by silently marking written ballots in such manner that members of the public attending the meeting could not see or hear how the Board members voted. The individual votes of each member for each applicant were not announced nor otherwise revealed to the public at any time during the meeting. The City Attorney announced that the ballots would be preserved and could be inspected. The video recording of the voting process appears on Exhibit E to the verified motion at 05:38:20 to 05:42:45.

The Court agrees that this vote violated the Sunshine Law. In AGO 71-32, Attorney General Robert L. Shevin advised a state attorney that “the election of the chairman of the district school board by secret ballot during a public meeting [is] a violation of [Florida Statutes Section. 286.011].” The Attorney General explained:

The phrase “at all times” indicates that the meeting shall be open to the public and the news media continuously during the period of the meeting. If at any time during the meeting the proceedings become covert, secret, or not wholly exposed to the view and hearing of the public and news media, then that portion of the meeting becomes violative of the statutory requirement imposed by the phrase “at all times.” A secret ballot conducted at an otherwise open meeting constitutes a violation of the sunshine

enactment, since the public and the news media are denied the right to know who voted for whom, and the meeting cannot therefore be regarded as "open to the public at all times."

The voting method employed by the Board fails this standard because the votes were not exposed to the view and hearing of the public and news media attending the meeting. That the public could watch Board members silently marking their ballots does not distinguish the present case from the facts considered by Attorney General Shevin in AGO 71-32.

In his letter of August 1, 2012 (Exhibit J to the verified motion), the Board's counsel, Mr. Pelham, argued that the vote was lawful. He relied on a phrase in the 2012 edition of the Sunshine Manual, which states that a written ballot does not violate the Sunshine Law "if the votes are made openly at a public meeting" and if the written ballots are preserved as public records. See Sunshine Manual (2012) at 45 (citing AGO 73-264). Mr. Pelham said the Board "had an open vote in the [meeting] room with the public present and the meeting was recorded on video. This constitutes 'made openly.'" (Exhibit J at page 3).

That is not what the Sunshine Law means when it says that a meeting must be "open at all times." Allowing the public merely to watch an elected official sit at a dais and silently write on a paper ballot not visible to the watcher does not satisfy the public right of access to the meeting. The Attorney General often has explained that the requirement of transparency is a substantive and not a formalistic requirement. For example, in 1976, he explained that the Sunshine Law requires that the public be allowed to attend the meeting "so that the views of its elected officials may be known." AGO 76-240 (advising that a board may not use codes in lieu of names when discussing candidates for city manager). In AGO 76-240, the Attorney General cited *State ex rel. Crago v. Hunter*, Case No. 75-515 (Cir. Ct. Indian River County, 1975), where the Circuit Court "enjoined a school board . . . to conduct its sessions in such a manner that 'a

person of reasonable intelligence and reading ability, . . . can comprehend what is transpiring.”

Watching a board member silently mark a ballot does not meet this requirement.

There is no authority holding or implying that the voting method employed by the Board complies with the Sunshine Law. In his letter of August 1, 1912, Mr. Pelham relied on the Sunshine Manual’s phrase “made openly.” This phrase was taken from AGO 74-344, but this opinion does not support defendant’s argument that the mere act of silently marking a written ballot at the dais of a public meeting is a vote “made openly” for purposes of the Sunshine Law. In fact, AGO 71-32 expressly disapproved of “[a] secret ballot conducted at an otherwise open meeting.” Clearly that “secret ballot” was “made openly” at the public meeting.

The only support for defendant’s argument is its interpretation of the opaque statement “made openly” in the 2012 edition of the Sunshine Manual, which presents commentary prepared by the Attorney General but does not have the authority of a case or formal opinion. In any case, the opacity now has been clarified. The 2013 edition of the Sunshine Manual adds this passage clarifying “made openly:”

In addition, because the Sunshine Law expressly requires that public meetings be open to the public “at all times,” after the ballots are marked, it may be advisable for the person who tallies the votes to announce the names of the persons who voted and their votes See AGO 71-32 (if any time during a public meeting, the proceedings become ‘covert, secret, or not wholly exposed to the view and hearing of the public, that portion of the meeting is not “open to the public at all times”).

By contrast, a secret allot violates the Sunshine Law. (citing AGOs 73-64, 72-326, and 71-32)

Attorney General, Government-in-the-Sunshine Manual (2013) 44-45.

The fact that the ballots are preserved as public records available for inspection does not satisfy the requirement of openness. The law never has been construed such that release of records of an unlawfully closed meeting would satisfy the Sunshine Law. On the contrary, in

Neu v. Miami Herald Pub. Co., 426 So.2d 821, 823 (Fla. 1985), the Florida Supreme Court held that a scheme to close and transcribe a board meeting and later disclose the transcript to the public would violate the Sunshine Law. The Court explained, "Under the Sunshine Law, a meeting is either fully open or fully closed; there are no intermediate categories." *Id.* at 823. Just as disclosure of the transcript of a closed meeting will not legitimize a closed meeting, so also making the ballots available after the meeting cannot substitute for conducting a meeting that is open to the public at all times.

CONCLUSION

For the reasons stated, the Court finds and determines that defendant, albeit without malevolent intent, acted in violation of the Sunshine Law in both instances alleged in the Complaint. Therefore, Plaintiff is entitled to recover a reasonable attorneys' fee from defendant. The Court reserves jurisdiction to consider any necessary motions for determination of the amount of such reasonable attorneys' fees.

Done and Ordered in Citrus County, Florida this 30th day of September


Richard A. Howard
Circuit Judge

Copies to: John C. Pelham, William H. Hughes, III, and Jonathan D. Kaney Jr.

Furnished by U.S. or

Electronic Mail

pursuant to SC10-2101 this

7 day of Oct. 2013

Citrus County Clerk of Court

By V. C. [Signature] D.C.