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**Public meetings -- Government in the Sunshine Law -- Motion to dismiss or for summary judgment on information brought by Office of State Attorney charging that city commissioners who attended breakfast not noticed to public, at which sheriff spoke and commissioners individually questioned sheriff but did not direct comments or questions to each other, committed non-criminal civil infractions of Sunshine Law is denied -- Jurisdiction -- Office of State Attorney is authorized to initiate and prosecute non-criminal civil infractions under Sunshine Law -- No merit to argument that there was no Sunshine Law violation because there was no discussion among commissioners - Commission members directing questions to sheriff is likely interaction and dealing with subject matter in violation of Sunshine Law even though commissioners may not have had direct exchanges with each other /**

STATE OF FLORIDA, Plaintiff, vs. SUSAN FOSTER, KAY MCGINN, GEORGE BRUMMER & LAMAR FISHER, Defendants. County Court, 17th Judicial Circuit in and for Broward County. Case No. 05-7108 COCE 53. September 26, 2005. Robert W. Lee, Judge. Counsel: Timothy Donnelly, Assistant State Attorney, Fort Lauderdale. Larry S. Davis, Hollywood.

*ORDER DENYING DEFENDANT'S MOTION TO DISMISS*

*OR, IN THE ALTERNATIVE, MOTION FOR*

*SUMMARY JUDGMENT*

THIS CAUSE came before the Court on September 7, 2005 for hearing of the Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, and the Court's having reviewed the Motion and entire Court file; heard argument; reviewed the relevant legal authorities; and been sufficiently advised in the premises, the Court finds as follows:

*Background* . The parties stipulate to the following facts.

1. The Defendants in this case are Commissioners for the City of Pompano Beach, Florida.
2. On June 4, 2004, the Commissioners attended a breakfast hosted by Broward Sheriff Ken Jenne.
3. The breakfast was not noticed to the public.
4. Each Commissioner arrived for the breakfast separately.
5. The Sheriff spoke at the breakfast concerning recent media reports about his office's crime reporting statistics.
6. Some of the Commissioners individually asked the Sheriff questions.

The Commissioners apparently did not direct comments or questions to each other. On May

4, 2005, the Office of the State Attorney filed an information charging non-criminal civil infractions against the Defendants alleging that they violated Fla. Stat. §286.011, the Sunshine Law.

On June 22, 2005, prior to filing an Answer, the Defendants filed a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. The matter was set for hearing for September 7, 2005. At the hearing, the parties acknowledged the applicability of the Rules of Civil Procedure. The State, however, waived any objection to the premature filing of a Motion for Summary Judgment.

In response to the filing of the non-criminal infraction, the Defendants have filed a Motion to Dismiss and for Summary Judgment that raises two issues: 1) that the Office of the State Attorney lacks jurisdiction to initiate non-criminal civil infractions under the Sunshine Law absent specific or general law authorizing the State Attorney to bring such an action, and 2) that the Court should dismiss the Information because the Commissioners did not “discuss” any commission business among themselves while at the breakfast.

*Conclusions of Law.* The relevant statutory provision, Fla. Stat. §286.011, provides:

(1) 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, 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.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

(3) (a) Any public officer who violates any provision of this section is guilty of a non-criminal infraction, punishable by fine not exceeding \$500.

(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.

(c) Conduct which occurs outside the state which would constitute a knowing violation of this section is a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083.

1. *Lack of Jurisdiction.* As noted, the Defendants argue that the State Attorney has no

jurisdiction over civil infractions arising under the Sunshine Law. The Court disagrees as a result of the following analysis.

Prior to 1985, the Defendants' conduct could have constituted a second degree misdemeanor, instead of a non-criminal infraction. Sections 286.011(1) and (2) were the same in 1985, as they are now. Section 286.011(3) then read:

Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who violates the provisions of this subsection by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

However, the Florida Supreme Court, in *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 (Fla. 1969), construed subsection (3) of Fla. Stat. §286.011 to impliedly require a charge and proof of scienter for criminal prosecution.

Chapter 85-301, section 6, Laws of Florida, amended §286.011, Fla. Stat. by adding subsection (3)(a), thereby making a violation of the Sunshine Law a non-criminal civil infraction and by adding the word “knowingly” to the newly renumbered subsection (3)(b) thereby making a knowing violation of the Sunshine Law a second degree misdemeanor.

Section 6. Section 286.011, Florida Statutes, was amended to read:

(3)(a) Any public officer who violates any provision of this section is guilty of a non-criminal infraction, punishable by fine not exceeding \$500.

(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

Chapter 85-301, section 5, Laws of Florida, also amended §119.10, Fla. Stat. in the same way by making a non-knowing violation of the Public Records Law a non-criminal infraction.

The Defendants rely upon *State, By and Through the State Attorney for the Twelfth Judicial Circuit v. General Development Corporation*, 448 So.2d 1074 (Fla. 2d DCA 1984), to argue that the State Attorney does not have jurisdiction to initiate a non-criminal infraction for a violation of the Sunshine Law, §286.011, Fla. Stat.

In this case, the State Attorney for the Twelfth Judicial Circuit initiated a complaint against General Development Corporation for damages and civil penalties pursuant to §403.141(1), Fla. Stat. (1981), and administrative enforcement of the state's environmental laws pursuant to §120.69(1), Fla. Stat. (1981). The Court held that “neither the state constitution, nor any statute, nor any case law gives a state attorney independent authority to commence, in his appropriate judicial circuit and on behalf of the state, a civil action for damages and penalties

under §403.141(1) and/or institute an administrative action to enforce DER's related rules and regulations under §120.69(1)(a)." 448 So.2d at 1076. The Court noted that §403.061 specifically gave the Department of Environmental Regulation (DER) "the power and the duty to control and prohibit pollution of the air and water in accordance with the law and rules and regulations adopted and promulgated by it." Section 403.061(1)-(27), Fla. Stat. (1981). 448 So.2d at 1078. In fact the Court specifically stated, "the legislature has enacted Chapter 403 and clearly has intended for DER to be the state entity responsible for bringing civil actions for damages and penalties pursuant to §403.141(1). 448 So.2d at 1081.

The appellate court further found that §403.121(1) gave DER the authority to institute civil actions to enforce Chapter 403 and that §403.121(2) gave DER the authority to institute administrative proceedings. 448 So.2d at 1079. The court wrote, "section 403.121 empowers DER *alone* to sue for civil damages and penalties." 448 So.2d at 1082. Further, the court stated that §403.231 specifically provides, "The Department of Legal Affairs shall represent the state and its agencies as legal advisor in carrying out the provisions of this act." 448 So.2d at 1081.

With respect to the Twelfth Circuit State Attorney's petition for enforcement of agency action filed pursuant to §120.69(1)(a), Fla. Stat., the court found that the State Attorney was not an "agency" within the meaning of §120.52(1)(b). The court further said that even if the State Attorney was an "agency" within the meaning of the statute, under §120.69(1)(a), "only DER, the agency specifically designated by the Legislature responsible for adopting and enforcing the rules and regulations allegedly violated in this case, has standing to file an action under that section." 448 So.2d at 1084.

Finally, the court looked at the legislative intent behind the enactment of the statute and found that §120.72, Fla. Stat. (1981) provided *inter alia*: "The intent of the Legislature in enacting this complete revision of chapter 120 is to make uniform the rulemaking and adjudicative procedures used by the administrative agencies of this state." The court found that a state attorney does not conduct adjudicatory proceedings nor does a state attorney adopt rules and regulations as mandated by §120.53. 448 So.2d at 1083, 1084.

Against the backdrop of the *General Development* decision, this Court considers the various formal opinions which have been issued by the Florida Attorney General. In Op. Att'y Gen.Fla. 91-38 (1991), the Attorney General determined "that the state attorney may pursue actions on behalf of the state against public officials for violations of Ch. 119, Fla. Stat., the Public Records Law, and §286.011, Fla. Stat., the Government in the Sunshine Law, which may result in a finding of guilt for a non-criminal infraction." While Opinions of the Attorney General are advisory only, not law, and not binding in a court of law, they are intended to address questions of law.

In Op. Att'y Gen.Fla. 91-38 (1991), the Attorney General acknowledged the Second District Court of Appeal decision in *State, By and Through the State Attorney for the Twelfth Judicial Circuit v. General Development Corporation*, 448 So.2d 1074 (Fla. 2d DCA 1984), but nevertheless distinguished the court's decision and determined that "the official duties of a state attorney are not limited to the prosecution of criminal cases and could include

representation of that state in a suit against a public official for violation of the Public Records Law or the Government in the Sunshine Law.” The Attorney General took note of *State v. Chiaro*, Case No. 90-39277 (Broward Cty. Ct., July 18, 1990), in which the Hollywood City Attorney was charged by Information with violating §286.011 and found guilty of a non-criminal infraction. On appeal, the case was reversed on other grounds. Case No. 91-000008AC10A.

Unlike Chapter 403 in *General Development* which specifically authorized DER to be the state agency responsible for bringing civil actions and damages, §286.011 does not authorize any other governmental agency, other than the State Attorney's Office, to initiate an action for violating the statute. Section 286.011(2) allows “any citizen of this state” to apply for an injunction in circuit court to enforce the purposes of this section of the statute. When the Legislature created §286.011(3), a violation of the conduct proscribed by this statute constituted a Second Degree Misdemeanor, enforceable by prosecution by the State Attorney's Office. When the courts inferred from the statute a scienter requirement for a criminal prosecution, the Legislature changed the statute by adding the word “knowingly.” Section 286.011(3)(a) was created to make the unknowing violation of the statute a non-criminal infraction. Although the Legislature never wrote in the statute that the State Attorney would have the authority to initiate non-criminal violations, it is difficult to argue that the State Attorney did not now have the authority to prosecute the same conduct that the Legislature had originally said that it did have the authority to prosecute, when all that the Legislature did was to make the non-criminal infraction a lesser offense of the second degree misdemeanor.

At worst, the statute is ambiguous as to who may enforce. Under such a circumstance, Florida courts may look to the Legislature's intent to resolve the ambiguity. *See Lee v. City of Jacksonville*, 793 So.2d 62, 64 (Fla. 1st DCA 2001). Cf. *General Development*, 448 So.2d at 1083 (appellate court looked to legislative intent). Therefore, this Court concludes that the Office of the State Attorney is authorized to initiate and prosecute non-criminal civil infractions under Fla. Stat. §286.011.

2. *Lack of Prima Facie Case.* The Defendants' further assert that there was no Sunshine Law violation because they did not “discuss” among themselves any commission business. This argument is, however, contrary to the statute and the case law interpreting the statute. Fla. Stat. §286.011(1) states:

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, 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.

“The Sunshine Law was enacted to ‘protect the public from “closed door” politics and, as such, the law must be broadly construed to effect its remedial and protective purpose.’ ”

*Evergreen Tree Treasurers of Charlotte County, Inc. v. Charlotte County Bd. of County Com'rs*, 810 So.2d 526, 531 (Fla. 2d DCA 2002), citing *Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983). "The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board." *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 698 (Fla. 1969).

Rarely, could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion states within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken. *Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (Fla. 1974).

It is the how and why officials decided to so act which interests the public, not merely the final decision. As the court recognized in *Times Publishing Company v. Williams*, 222 So.2d 470, 473 (Fla. 2d DCA 1969), disapproved in part on other grounds, *Neu v. Miami Herald Publishing Company*, 462 So.2d 821 (Fla. 1985):

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his duties, is a matter of public concern; and it is the entire decision-making process that the Legislature intended to affect by the enactment of the statute before us.

The courts have rejected attempts by public officials to create exemptions from the Sunshine Law:

Various boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute. The benefit to the public far outweighs the inconvenience of the board or agency. If the board or agency feels aggrieved, then the remedy lies in the halls of the Legislature and not in efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exception into the law. *Canney v. Board of Public Instruction of Alachua County*, 278 So.2d 260, 264 (Fla. 1973).

The Defendants misconstrue the rationale of *Gradison* when they state, "there can be no Sunshine Law violation unless there was some 'collective inquiry and discussion' among the commissioners concerning issues on which foreseeable action will be taken." When this phrase in *Gradison* is read in its entirety as it was written in *Gradison*, its context is entirely different. "That statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion states with the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on

which foreseeable action will be taken.” 296 So.2d at 477. From this language, the Defendants assert that there needs to be discussion among themselves in order for there to be a violation of the Sunshine Law, when such is not the case. In *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693, 698 (Fla. 1969) the court said, “the obvious intent was to cover any gathering of the members where the members *deal with some matter* on which foreseeable action will be taken by the board” (emphasis added).

The Defendants based much of their argument upon Attorney General Opinions: AGO 81-42 (1981); AGO 82-93 (1989); AGO 92-05 (1992); AGO 94-62 (1994); AGO 96-35 (1996); AGO 98-79 (1998); AGO 2000-68 (2000); AGO 2001-20 (2001); and AGO 2001-21 (2001). As noted, the opinions of the Attorney General, although entitled to careful consideration and regarded as persuasive, are not the law or binding upon the courts. *State of Family Bank of Hallandale*, 623 So.2d 474 (1993). The Defendants claim that these Opinions hold that there is no Sunshine Law violation where commissioners do not discuss or deliberate among themselves matters that may come before the commission. In this Court's view, the Defendants read these Attorney General opinions too narrowly.

In AGO 81-42, the Attorney General opined that no Sunshine Law violation occurred when a member of a public agency communicated his probable voting intentions to a news reporter intending to publish the comments. The Attorney General said, “The test for determining whether a violation of the law has occurred is whether the members have *dealt with any matter* on which foreseeable action may be taken by the board.” *Hough v. Stembbridge*, 278 So.2d 288 (Fla. 3rd DCA 1973) (emphasis added). “As any conversation or interview between an individual board member and a news reporter would not involve ‘two or more members of a public board,’ it is my opinion that ordinarily such conversations or interviews are not prohibited by §286.011, F.S.” The Attorney General then emphasized though, “that if the news reporter in fact has been appointed as the agent of and is being designedly used by a member or members of the council as or for the purpose of a ‘liaison’ or ‘intermediary’ to calculate among the board members the thoughts of such member or members in order to circumvent the statute, then such conversations or interviews might well be found by the courts to be violative of the letter and spirit of the law.” The Attorney General said that news coverage in advance of the meeting:

. . . can serve as a positive stimulant for interested citizens to participate more in the governing process. If the interested citizen reads in advance of the public hearing what the “probable vote” of his or her representatives will be, that citizen is then given the opportunity ahead of time to write letters, make telephone calls or plan to attend the public hearing to voice his or her position. . . . By reading the story citizens are given the opportunity to take appropriate steps to change this “probable” vote and “probable” result.

In AGO 89-23, the Attorney General opined that the use of a memorandum by a city commissioner to provide information through the city manager to the commission on a particular subject to be discussed at a meeting did not violate the Sunshine Law as long as there was no response from or interaction among the commissioners. The opinion stated, “The circumstances you question do not appear to involve the use of a report as a substitute

for action at a public meeting, inasmuch as there is no *interaction* among the commissioners prior to the public meeting. Nor does it appear the report is provided to enable the city manager to act as an intermediary among the commissioners” (emphasis added).

In the instant case, the Defendants filed affidavits in support of their Motion for Summary Judgment in which they acknowledge, “[t]he Sheriff spoke at the breakfast concerning media reports about his office's crime reporting statistics,” and “[s]ome commissioners individually asked the Sheriff questions concerning crime statistics and code enforcement.” Clearly, “interaction” or “dealing with a subject matter” can occur without council members talking to each other when there is a common facilitator, here the Sheriff, who is receiving comments from each council member in front of other council members. It is not impossible to imagine that one council member might direct a comment to the Sheriff in response to a comment from another council member. This is likely “interaction” and “dealing with a subject matter” even though the council members may not have had a direct exchange with another council member. This Court does not find this view to be inconsistent with any of the Attorney General Opinions referenced by the Defendants.

The Court therefore finds that the Defendants are not entitled to a dismissal. Further, because there is a dispute as to the facts of what and how statements were made at the breakfast meeting, the Defendants are not entitled to summary judgment. Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion to Dismiss and Motion for Summary Judgment are hereby DENIED. The Defendants shall file an Answer within the next 15 days.

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