Florida Law Review

Volume 25 | Issue 3 Article 9

March 1973

Government in the Sunshine: Another Cloud on the Horizon

Joseph S. Gillin

GOVERNMENT IN THE SUNSHINE: ANOTHER CLOUD ON THE HORIZON

Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972)

Professional labor negotiators, employed by the Dade County School Board to negotiate tentative teacher contracts, met privately with representatives of the Dade County Classroom Teachers' Association and privately with the school board.[1] Bassett and other citizens of Dade County sought to enjoin these private collective bargaining activities as violations of Florida's "government in the sunshine" law.[2] The Circuit Court of Dade County held for the school board. On direct appeal[3] the Florida supreme court affirmed and HELD, that private preliminary negotiations between representatives of the school board and representatives of a teachers' association do not violate the sunshine law and that the board may instruct and consult with its negotiators without such violation.[4]

The first legislative recognition of the public's right to know was a 1905 statute[5] requiring the opening of town and city council meetings. In 1967, after several years of consideration,[6] the Florida Legislature significantly enhanced this right by enacting the broadly worded "government in the sunshine" law,[7] requiring all meetings of any state, county, or municipal board or commission to be open to the public. The provision was aimed at reviving the public's confidence in the integrity of governmental process.[8]

Similar statutes enacted in other jurisdictions typically contain explicit exceptions[9] to the open meeting requirement. Common exceptions include

---

1. 262 So. 2d 425 (Fla. 1972).

2. FLA. STAT. §286.011 (1) (1971) provides in part: "All meetings of any board or commission of any state agency or authority . . . 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 . . . formal action shall be considered binding except as taken or made at such meeting."

3. FLA. CONST. art. V, §4 (2) provides for direct appeal to the supreme court where the circuit court has construed a constitutional provision.

4. 262 So. 2d at 426. Dekle, J., provided a majority opinion, joined by Carlton & McCain, JJ., and Drew, J. (retired). Roberts, C.J., concurred specially while Adkins, J., dissented, joined by Boyd, J.

5. FLA. STAT. §165.22 (1971). This statute requires meetings of city or town councils to be open to the public but was construed as applying only to "formal assemblages" required by law. Turk v. Richard, 47 So. 2d 543 (Fla. 1950).

6. Two similar bills introduced in April 1961 would have prohibited public boards of state, county, district, or municipal governments from holding closed meetings. FLA. S. JOUR. 103 (April 12, 1961); FLA. S. JOUR. 125 (April 13, 1961).

7. FLA. STAT. §286.011 (1971).

8. For a general discussion of the scope of the sunshine law, see Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361 (1971).

9. *See, e.g.*, ARK. STAT. ANN. §12-2805 (1968) (excepts personnel matters); CAL. GOV'T CODE §54,957 (West 1966) (excepts personnel matters, grand juries, matters affecting national security and examination of witnesses); IND. ANN. STAT. §57-605 (1961) (excepts confidential records); N.J. STAT. ANN. §10:4-4 (Supp. 1972) (excepts confidential records and eminent domain proceedings); N.M. STAT. ANN. §5-6-17 (1953) (excepts grand juries).

personnel matters,[10] grand juries,[11] and confidential records.[12] Florida's law provided no exceptions. For example, the senate rejected a proposed house of representatives amendment excepting hearings involving individuals charged with violation of law or regulations regarding employment.[13] Since specific exceptions were rejected by the senate, it can only be presumed that, aside from constitutional limitations expressed in the statute,[14] a broad application of the sunshine requirements was intended.[15]

This legislative intention has been effectuated through the broad interpretation given the law by the Florida courts.[16] For instance, in *Times Publishing Co. v. Williams*[17] the Second District Court of Appeal delineated the breadth of the sunshine requirement. In granting the petitioner's plea to enjoin the Pinellas County School Board from holding secret "informal" meetings to discuss school personnel matters and to consult with the board's attorney, the court held the statute applicable to every board or commission gathering at which any official action was to be taken or considered.[18] Rejecting the respondent's argument that personnel matters and consultation with its attorney were beyond the statute's scope the court stated that, with one narrow exception,[19] it is the "entire *decision-making process* that the legislature intended to affect by the enactment of the statute before us."[20] The court found that each step of the decision-making process constitutes an "official act" within the meaning of the statute,[21] since it is how and why the officials decide to act that primarily interests the public.[22]

Having defined the scope of the sunshine law the supreme court was next asked to determine what constituted a meeting. In *Board of Public Instruc-*

---

10. *See, e.g.*, ARK. STAT. ANN. §12-2805 (1968); CAL. GOV'T CODE §54,957 (West 1966).
11. *See, e.g.*, CAL. GOV'T CODE §54,957 (West 1966); N.M. STAT. ANN. §5-6-17 (1953).
12. *See, e.g.*, IND. ANN. STAT. §57-605 (1961); N.J. STAT. ANN. §10:4-4 (Supp. 1972).
13. FLA. H.R. JOUR. 958-59 (June 5, 1967); FLA. S. JOUR. 679 (June 6, 1967).
14. FLA. STAT. §286.011 (1) (1971) provides in part: "All meetings of any board . . . *except as otherwise provided in the constitution* . . . are declared to be public meetings." (Emphasis added.)
15. One commentator has identified three flaws in the present statute: It does not state which bodies are not affected by the law, it fails to exclude any types of deliberation from its scope, and it does not recognize any state in the deliberative process that might be exempt from the open meeting requirement. Note, *supra* note 8, at 364.
16. *See* City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Board of Pub. Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); Canney v. Board of Pub. Instruction 231 So. 2d 34 (1st D.C.A. Fla. 1971); Times Publishing Co. v. Williams, 222 So. 2d 470 (2d D.C.A. Fla. 1969); OPS. ATT'Y GEN. FLA. 071-32 (1971).
17. 222 So. 2d 470 (2d D.C.A. Fla. 1969).
18. *Id.* at 474.
19. The exception was limited to that area of the attorney-client relationship in which the ethical obligations of the attorney conflict with the provisions of the statute. *Id.* at 476.
20. *Id.* at 473.
21. *Id.*
22. *Id.* at 474.

tion of Broward County v. Doran[23] appellant school board had met privately to discuss certain items of public business[24] but took formal action on these matters only during meetings. The court construed the meaning of "public meetings"[25] to include "any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board."[26] Thus, a meeting, whether formal or informal, was deemed to have taken place within the meaning of the statute if future action might have foreseeably been taken on matters under discussion.

The broad scope accorded the sunshine law in *Williams* and the foreseeable action criterion for determining the existence of a meeting established in *Doran* were both firmly supported by the supreme court in *City of Miami Beach v. Berns*.[27] In affirming the lower court decision granting an injunction prohibiting the city council from meeting in private to discuss personnel matters and eminent domain proceedings, the court found that where public officials meet privately, either formally or informally, to transact public business they violate the government in the sunshine law.[28]

An important exception to the reach of the government in the sunshine law was carved out by the First District Court of Appeal in *Canney v. Board of Public Instruction of Alachua County*.[29] Petitioner Canney sought review of his suspension from school by the county school board for failure to comply with a hair styling regulation, contending that the board violated the sunshine law by deliberating privately on the proper sanction.[30] In upholding the dismissal, the court found that once the legislature has delegated quasi-judicial responsibilities to an agency, its prerogatives in the matter have terminated.[31] Thus, quasi-judicial proceedings fall outside the scope of the sunshine law.[32]

In the instant case the court relied on the constitutional exception provided in the statute[33] to reach its result. The Florida constitution expressly

---

23. 224 So. 2d 693 (Fla. 1969). The sunshine law also withstood constitutional scrutiny under the void for vagueness doctrine as the court found the language of the statute sufficiently definite to satisfy due process requirements. *Id.* at 698.

24. *Id.* at 695.

25. *Id.* at 698.

26. *Id.*

27. 245 So. 2d 38 (Fla. 1971).

28. *Id.* at 41. The court also held that FLA. STAT. §286.011 (1971) supersedes and repeals FLA. STAT. §165.22 (1971) (providing for open meetings of city and town councils). *Id.* at 40.

29. 231 So. 2d 34 (1st D.C.A. Fla. 1970).

30. *Id.* at 39.

31. *Id.*

32. The attorney general of Florida has interpreted FLA. STAT. §286.011 (1971) as not applicable to the judicial branch of government in Florida nor to legislative bodies performing quasi-judicial functions. OPS. ATT'Y GEN. FLA. 071-32 (1971).

33. FLA. STAT. §286.011 (1) (1971) provides in part: "All meetings of any board . . . *except as otherwise provided in the constitution* . . . are declared to be public meetings. . . ." (Emphasis added.)

grants employees the right to bargain collectively.[34] Relying on uncontroverted testimony of national authorities on collective bargaining that full publicity at each step of the negotiations would destroy effective collective bargaining,[35] the court concluded that the constitutional right of the public's representatives to bargain collectively would be unduly impaired by total exposure.[36]

Additionally, the court recognized that the tentative agreements were not binding on the school board and that the negotiator's recommendations had received full consideration in a public meeting.[37] The pragmatic aspect of applying the open meeting requirement to these preliminary negotiations was also considered. Noting that most of the work product of the executive process is generated beyond the veil of "actual meetings,"[38] the court found that an imposition of the sunshine requirement on this level of deliberation would impair efficient governmental operation: "To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government."[39]

While deciding on constitutional grounds that the school board's labor negotiators could lawfully meet in private with representatives of the teachers' association, the court also found it significant that no meeting of the school board was involved. The foreseeable action test[40] established in *Doran* to determine the existence of a meeting implicitly involves a gathering of some of the members of the public agency involved. Yet, the board did not meet privately with the teachers' representatives and no "meeting by proxy" occurred, since the board's negotiators had no authority to bind the board.

In deciding whether private meetings of the school board with its negotiators for purposes of instruction and consultation violated the sunshine law, the court again relied upon the constitutionally established right of employees to bargain collectively.[41] Since the teachers' representatives would not be reciprocally required to disclose acceptable limits of settlement, the court concluded that the school board's position would be severely compromised by complete candor.[42]

---

34. FLA. CONST. art. I, §6 provides: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

35. 262 So. 2d at 426.

36. *Id.* at 427.

37. *Id.*

38. *Id.*

39. *Id.* at 428.

40. The court defined "meeting" to include any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board. Board of Pub. Instruction v. Doran, 224 So. 2d 693, 698 (Fla. 1969).

41. 262 So. 2d at 428.

42. *Id.*

While the court appears to base its decision primarily on constitutional grounds, most of the court's reasoning is devoted to policy arguments of pragmatism and fairness. Although the constitutional provision protecting the right to bargain collectively applies to employees, the court glossed over any explanation of how the public's representatives (school board's labor negotiators) qualify as employees.[43]

On the other hand, the dissent argued that the constitutional prohibition of strikes by public employees[44] would negate any bargaining advantage gained by the teachers' association through detailed knowledge of the board's bargaining strategy.[45] Unpersuaded, the majority concluded that the public's interest in obtaining the best bargain for the public schools outweighed the benefit to the public derived from opening meetings of the board and its negotiators.[46] Since such strategy meetings foreseeably could result in formal action by the school board, the position taken by the court retreats from the unqualified foreseeable action test established in *Doran*.[47]

The instant case signals a retreat from the broad construction previously established. While recognizing that the primary purpose of the sunshine law is to maintain the public's faith in governmental agencies through open meetings,[48] the instant decision precludes unnecessary interference with efficient governmental operation by limiting the foreseeable action test, espe-

43. It appears that the constitution contemplates the right of employees to collectively bargain for their own remuneration and working conditions as distinguished from the right to collectively bargain as a vocation (labor negotiators). However, a special attorney to a city council, whose duties were to advise and counsel with the city council, was found to be an "employee." Pace v. King, 38 So. 2d 823, 826 (Fla. 1959).

44. FLA. CONST. art. I, §6 provides in part: "Public employees shall not have the right to strike."

45. 262 So. 2d at 430.

46. *Id.* at 428.

47. A subsidiary issue dealt with summarily by the court involved the election of the chairman and vice chairman of the school board by secret written ballot. The result was unanimously affirmed by election in open meeting, but the outcome of the secret vote was never made public. While the court held that any initial violation of the sunshine requirement was cured by the subsequent public vote, this result appears aberrational in light of *Doran* and should not be expected to recur in future cases. *Id.* at 428-29. Substantially similar activities by a school board had been enjoined by the court in *Doran*, where the board had employed the device of identifying items to be voted on only by a code number and letter. 224 So. 2d 693 (Fla. 1969). In the instant case the court's failure to require the school board to reveal the results of the straw ballot and to record such results in the minutes of the meeting seems unsupported, since the public had an interest in how each board member voted in selecting the new officers. FLA. STAT. §286.011 (2) (1971) provides in part: "The minutes of a meeting of any such board or commission of any such state agency or authority shall be properly recorded and such records shall be open to public inspection."

48. The court stated: "During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies." Board of Pub. Instruction v. Doran, 224 So. 2d 693, 699 (Fla. 1969).