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Board members clash over secrecy of records

Sunshine Law getting more rulings in court

By JEAN MANEKE
MPA Legal Consultant

(Jean Maneke, MPA's Legal Hotline attorney, can be reached at (816) 753-9000; jmaneke@manekelaw.com.)

The Eastern District Court of Appeals recently issued an interesting Sunshine Law decision. This is the second decision out of that court in recent months dealing with Sunshine Law issues, and it makes one wonder about the basic principles of the law that the eastern district considers fundamental.

A few months ago, some of you may remember, that court issued a ruling in a case filed by a member of the public. In part of its ruling, the court held that because that member of the public did not properly address the request to the custodian of records, the Sunshine Law did not apply to that citizen, and the body's failure to properly respond did not constitute a Sunshine Law violation. This ruling seemed quite a blow to the ability of the public to in good faith obtain information from a public body under situations that are often difficult, at best.

Now the court has concluded that a purposeful violation of the law occurred in a case involving a board of education. However, the court gives us not a clue as to what evidence it believed supported this holding, so it will be extremely difficult to use this case as precedent in future situations.

The newest case arose out of a school board budget meeting where the budget was approved. Several board members, thinking the budget could still be amended, were disseminating additional budget recommendations.

Others on the board were upset by this action and sought an investigation into the board members' actions. Several reports, titled "Confidential Investigation," were disseminated to some of the board members. Later, during a closed meeting for a discussion of legal and personnel matters, the board decided to investigate the conduct and character of the board members attempting these additional budget changes. That investigation triggered a suit being filed by the board members against the others on the board, seeking to have the investigation stopped and claiming a Sunshine Law violation.

The Sunshine Law allegation was based upon the Board's refusal to release to the board members the letters between the board president and the board's attorney, and the fact that the board had no custodian of records as is required by the Sunshine Law.

After trial, the court declared that the Sunshine Law was violated and awarded the plaintiffs $11,200 in attorneys' fees and fined the president of the school board $100 for a purposeful violation of the law.

On appeal, the Eastern District Court of Appeals decided that the letters between the board president and the board's attorney were indeed closed public records. The court detailed again that the board president alone did not constitute a public governmental body and that the letters he held were not subject to the Sunshine Law. owever, since other letters were retained by the board, those letters became subject to the Sunshine Law.

The court goes into a detailed discussion about some of the letters and whether they constitute legal work product and thereby are properly subject to being a closed record under Section 610.021 (1). Because legal work product "shall" be considered a closed record under that section, the appellate court concluded that the lower court decision finding that the board and the board's attorney had violated the Sunshine Law was wrong.

The appellate court then considered the issue of whether a custodian of records had been appointed by the school board. While the plaintiffs' petition did not allege that the board had failed to appoint a custodian of records, there was testimony at the trial on this issue and it was clear to the trial court that no custodian of records had been appointed.

Further, the trial court had considered actions by the board at a meeting in which the board selected legal

counsel and discussed a preliminary investigation letter relating to the dissident board members. The act of hiring an attorney "relates to legal actions, causes of actions or litigation," the appellate court concluded. Therefore, this meeting was properly closed. Similarly, the vote was proper to close the meeting to discuss the preliminary investigative letter because it related to a potential cause of action by the board against the board members who were continuing to agitate about the budget and who eventually filed this lawsuit against the other board members.

The appellate court further addresses the fines and penalties allegations by stating first that since the letters held by the board attorney were not public records, the fact that he refused to produce them and the fact that the board supported his actions in refusing to release them does not constitute a purposeful violation and therefore the fine assessed by the trial court was improper. However, the court concludes that there was sufficient evidence to support a finding that the board purposely violated the law by failing to appoint a custodian of records. Based upon this finding, the court concluded that the award of attorneys fees to the plaintiffs was justified. What do we learn from this case?

Well, perhaps we learn that public bodies that fail to appoint a custodian of records may have purposely violated the law, although this court does not give us a standard as to what evidence will support that conclusion.

Clearly, the eastern district bench believes that the duties of the custodian are critical, inasmuch as we have one decision where failure to appoint a custodian resulted in a finding of a purposeful violation, and another decision where failure to make the request of the custodian resulted in the court finding that no Sunshine Law violation occurred for the body's failure to produce documents.

Well, inasmuch as it's been too hot of a summer to think too heavily about these issues, let's turn our thoughts to cooler months, when the legislative session gears up next January. What happened in August along the east coast should be an eye-opener to all of us. Yes, I am talking about the power outage and no, I am not talking about your newspapers losing power. I'm talking about the public utility companies and their persistent efforts to close some of their records under the Sunshine Law.

Whenever a mass failure occurs such as happened in August, the public has a right to question the causes and what actions might be taken to prevent such a devastating event. Clearly, this right of access to information lies even more heavily when a utility is publicly owned. Public utilities need to be reminded of this accountability to the public and the problems that arise in terms of this accountability when they seek to close their records.