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Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977)

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Sunshine Law—COURT WILL NOT FIND VIOLATION OF LAW WHERE “AN APPEARANCE OF PREJUDGMENT” EXISTS BUT NO EVIDENCE OF SECRET MEETINGS APPEARS IN THE RECORD; MEMBERS OF A PUBLIC BODY MAY CONSULT THEIR STAFF IN PRIVATE FOR ADVICE ON PENDING ISSUES—*Occidental Chemical Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977).

On July 22, 1975, the Florida Public Service Commission granted a rate increase to Florida Power Corporation.¹ The commission's order followed fifteen days of public hearings and oral argument, during which one of the primary issues discussed was the manner in which a rate hike would be levied against customers if approved. Occidental Chemical Company, an intervening highload factor customer of Florida Power,² argued that any rate hike should be divided among customer classes in direct proportion to the cost of delivering electricity to those classes.³ Florida Power, however, contended that the increase should be divided ratably among customer classes—that is, in proportion to the rates which were then in effect.⁴ This ratable division was more costly to Occidental.

At the close of all the evidence on June 19, 1975, Florida Power and Occidental each requested that they be furnished copies of the commission staff's recommendations before submitting their respective briefs.⁵ The commission denied this motion but did agree not to receive a copy of the recommendations until an agenda conference on July 22. At that time, all interested parties would also be given a copy of the recommendations.⁶

No public meetings were held between the close of all the evidence on June 19 and the agenda conference one month later. At that conference, the commission and all parties received for the first time a copy of the staff's recommendations, which were in the form of a twenty-two and one-half page proposed order.⁷ This proposal discussed virtually all the issues which had been raised during the public hearings and recommended granting Florida Power a rate

1. Florida Power Corp., No. 74807-EU (Fla. PSC July 22, 1975) (Order No. 6794).

2. The commission granted Occidental leave to intervene in the rate hike hearings on January 7, 1975, by Order No. 6440.

3. Brief for Petitioner at 13. Such a plan would have resulted in a smaller rate hike for Occidental. The cost of delivery of a specified amount of electricity to a single site is less than the cost of delivery of the same amount to many sites.

4. Brief for Intervenor Florida Power Corp. at 26. Florida Power argued that the cost of service would be too difficult to determine and that dividing up the rate increase in this way would place too great a burden on the residential customer. *Id.*

5. Brief for Petitioner at 32.

6. *Id.* at 34.

7. *Id.*

increase and allocating it ratably among customer classes.⁸ The commission adopted the proposed order verbatim after a scant ninety minutes of consideration.⁹ The next day, the commission issued an order granting Florida Power a rate hike to be apportioned ratably.¹⁰ The allocation question by itself had not been discussed at the agenda conference, where only commissioners and their staff were entitled to speak.¹¹

Occidental filed for a writ of certiorari in the Florida Supreme Court.¹² The company alleged that the Public Service Commission had violated Florida's "government in the sunshine law" ("Sunshine Law") in promulgating the rate increase order.¹³ Occidental maintained that the commission had violated the Sunshine Law either by meeting secretly to decide how it would handle the rate hike request or by delegating decisionmaking authority to its staff.¹⁴ The petitioner therefore asked the court to invalidate the order.¹⁵ The commission replied that, on the record before the court, it was reasonable to assume that the commissioners had reached

8. *Id.*

9. Two inconsequential language changes were made. *Occidental Chem. Co. v. Mayo*, 351 So. 2d 336, 339 n.3 (Fla. 1977).

10. The final order was 28 pages long. The commission did not adopt the last five pages of the order at the agenda conference, and it is not clear when they were added. The court noted this difficulty but did not resolve the question, stating that the parties had not properly presented the issue. *Id.* at 342-43. However, Occidental raised this point in its brief and labeled the contents of these last five pages a "focal point" of its objections. Brief for Petitioner at 36.

11. Brief for Petitioner at 35.

12. 351 So. 2d at 338 n.1.

13. FLA. STAT. § 286.011 (1977). The statute 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 any 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, regulation, or formal action shall be considered binding except as taken or made at such meeting.

(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) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who 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 s. 775.082 or s. 775.083.

Id.

14. Reply Brief for Petitioner at 20.

15. 351 So. 2d at 338. No formal action of a state board or commission is binding unless the body complied with the Sunshine Law in taking the action. FLA. STAT. § 286.011(1) (1977).

independent judgments individually on the many issues involved in ratemaking and that in so doing the commissioners were privileged to call on staff members for legal advice or for an amplification of facts.¹⁶

The court held for the Public Service Commission in a four to two decision. The court concluded that, although the circumstances surrounding adoption of the staff's proposed order "created an appearance of pre-judgment," no specific evidence in the record showed a deliberate violation of the Sunshine Law.¹⁷ Moreover, the court did not disapprove of the role that the commission's staff played in the proceedings, even though the staff actually wrote the body of the final order and arrived at its conclusions during private, closed meetings.¹⁸

To appreciate fully the significance of *Occidental Chemical Co. v. Mayo*,¹⁹ it is necessary to look at the history of judicial interpretation of Florida's Sunshine Law. The result in *Occidental* is surprising in the light of that history, for Florida courts previously have consistently construed the statute in broad and comprehensive terms. Florida's open-government law has become possibly the strongest in the nation since its enactment in 1967, primarily because of judicial decisions.²⁰

The statute itself is vague and very broad.²¹ Thus, the first few court tests were crucial to its validity. The first appellate decision concerning the scope of the statute was rendered in 1969 in *Times Publishing Co. v. Williams*.²² The Second District Court of Appeal held in *Times* that the legislature intended to enact a very broad statute, applicable to "every board or commission."²³ Actually, this is little more than a recitation of the words of the statute. The importance of the *Times* decision lies in the judicial finding that the legislation was aimed at the decisionmaking process itself, and not

16. 351 So. 2d at 342.

17. *Id.* at 341-42.

18. *Id.* at 342.

19. 351 So. 2d 336 (Fla. 1977).

20. See Annot., 38 A.L.R.3d 1070 (1971); Wickham, *Let the Sun Shine In!*, 68 Nw. U.L. Rev. 480, 491 (1973).

21. For the text of the statute, see note 13 *supra*. Because of its vagueness and breadth, there has been criticism of the draftsmanship. See, e.g., Kalil, *Florida Sunshine Law*, 49 FLA. B.J. 72 (1975); Note, *Government in the Sunshine: Judicial Application and Suggestions for Reform*, 2 FLA. ST. U.L. REV. 537 (1974). These articles suggest that the statute should contain a definition of its terms and a specific list of exceptions.

22. 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969).

23. *Id.* at 473. The judge in the case, Woodie Liles, was later public counsel for the citizens of the State of Florida in rate hearings before the Public Service Commission. In that capacity, he filed a brief in *Occidental* adopting the petitioner's position on the sunshine issue.

merely at "formal action" such as voting.²⁴

The *Times* court found that any "acts of deliberation, discussion and deciding" were covered by the statute.²⁵ Therefore, the court held that the Pinellas County School Board was "without power" to hold even "informal" meetings which were closed to the public.²⁶ In so doing, the court rejected the school board's argument that it could meet behind closed doors to discuss personnel matters or to consult its attorney on all legal matters.²⁷ The court noted that the Sunshine Law provided for no exceptions and held that this mandate would stand in the absence of a constitutional impediment.²⁸

The Florida Supreme Court adopted the essence of the *Times* holding later that same year in *Board of Public Instruction v. Doran*.²⁹ This case involved routine closed-door gatherings of a county school board in which the board received information and began to formulate opinions about matters to be considered at later formal meetings. In upholding the Sunshine Law against constitutional attack, the *Doran* court held that any gathering of members of a board or commission is a meeting covered by the statute if, at the gathering, the members "deal with" any matter on which the board or commission might foreseeably act.³⁰ The court enjoined the school board from holding any further private meetings.³¹

Together, *Doran* and *Times* require that all gatherings of a board or commission be open to the public if the board or commission

24. *Id.*

25. *Id.* at 474.

26. *Id.*

27. *Id.* at 474-75.

28. *Id.* at 474; see FLA. STAT. § 286.011(1) (1977). The court found that a narrow exception to the Sunshine Law existed, based on such a constitutional infringement. The court stated that since the Florida constitution gives the Florida Supreme Court exclusive jurisdiction over the disciplining of attorneys, an attorney has no duty to obey the statute when obedience would clearly conflict with a specific ethical canon. 222 So. 2d at 475.

29. 224 So. 2d 693 (Fla. 1969).

30. *Id.* at 698-99. The defendant board contended that the statute was so vague and ambiguous that it violated the board's due process rights. To meet this challenge, the court looked to *Turk v. Richard*, 47 So. 2d 543 (Fla. 1950), a case construing an earlier and very limited open-government law. In *Turk*, the court had defined the term "all meetings" to include only formal assemblages. The *Doran* court noted that the legislature is charged with a knowledge of case law. Thus, the court reasoned that the Sunshine Law, enacted 17 years after *Turk* was decided, would only have spoken to "all meetings" if only formal assemblages were meant to be covered. Instead, the court observed, the Sunshine Law also included the term "public meetings." Since this language would be unnecessary (in light of *Turk*) if only formal action was meant to take place in the sunshine, its inclusion was an indication of legislative intent and so made the law sufficiently clear to avoid violations of due process. This strained reasoning is an obvious example of the judiciary's zealous protection of the Sunshine Law.

31. 224 So. 2d at 699-700.

takes any step toward deciding a matter on which formal action might foreseeably be taken at some future date. In 1971, the Florida Supreme Court reviewed this standard in *City of Miami Beach v. Berns*.³² The *Berns* court fully embraced the *Doran* "foreseeable action" test and reinforced its position that the law was intended to be both broad and comprehensive. The court then affirmed the district court of appeal's decision to enjoin the Miami Beach City Council from holding private meetings about such sensitive issues as personnel matters and pending litigation.³³ The court noted that the legislature had not amended the Sunshine Law to limit the comprehensive application given it by the courts and proceeded to "emphasize" the "foreseeable action" test.³⁴ In addition, the *Berns* court reiterated the principle announced in *Doran* that no exceptions to the law existed other than those based on constitutional provisions.³⁵

The supreme court finally recognized an exception to the Sunshine Law in 1972 in *Bassett v. Braddock*.³⁶ *Bassett* involved private meetings between labor negotiators and a teachers' association, and between the negotiators and the school board. The *Bassett* court observed that the right to bargain collectively is guaranteed to public employees by the Florida constitution and that such preliminary meetings are essential to the exercise of that right.³⁷ Since public attendance could diminish the effectiveness of such meetings, the court held that they were exempt from the Sunshine Law. Nevertheless, the court also discussed the practical aspects of applying the Sunshine Law,³⁸ and it has been suggested that the *Bassett* decision

32. 245 So. 2d 38 (Fla. 1971).

33. The sensitive nature of meetings at which personnel problems are considered has been cited as an argument against the Sunshine Law, and there have been proposals to exempt meetings dealing with such problems for open-government statutes.

The Jacksonville City Council also had problems with the law. In *Jones v. Tanzler*, 238 So. 2d 91 (Fla. 1970), the Florida Supreme Court discharged a writ of certiorari as improvidently issued and let stand a lower court decision that the Sunshine Law was not violated by an alleged secret meeting of some members of the city council. Concurring, Justices Roberts and Adkins noted that the meeting in question concerned an assessment which was involved in a bond validation proceeding. Both justices said that the proper forum for adjudication of the question raised on appeal was in the validation case which was being decided by a lower tribunal when the *Jones* case came before the court. In his special concurrence, Justice Adkins stressed that the substantive defenses raised by the city would not circumvent the law; specifically, he stated that mere absence of a quorum could not legitimize a private meeting of public officials. *Id.* at 92-93. (The case has little precedential value, though, because of the unusual circumstances surrounding the dismissal of the writ of certiorari.)

34. 245 So. 2d at 40.

35. *Id.* at 41.

36. 262 So. 2d 425 (Fla. 1972).

37. *Id.* at 426; see FLA. CONST. art. I, § 6.

38. Every action emanates from thoughts and creations of the mind and ex-

was based primarily on policy grounds.³⁹

Any thought that *Bassett* signaled a general retreat from the court's hard-line stand on the Sunshine Law was put to rest the following year in *Canney v. Board of Public Instruction*.⁴⁰ The *Canney* court refused to carve out another major exception to the law and reversed a district court of appeal's holding that boards acting in a "quasi-judicial" capacity need not open their meetings to the public. *Canney* dealt with private deliberations of a school board concerning disciplinary action against a student. The lower court had reasoned that, once a board began to function as a quasi-judicial body, it was just as exempt from the Sunshine Law as any court in the state.⁴¹ The supreme court, however, held that the legislature could freely prescribe the procedures to be followed by a legislatively created quasi-judicial body. The court was apparently concerned that the "quasi-judicial" exception, if allowed to stand, would be the subject of abuse. As Justice Adkins stated for the majority, "A county school board should not be authorized to avoid the Government in the Sunshine Law by making its own determination that an act is quasi-judicial."⁴² So, after *Canney*, any legislatively created board was subject to the Sunshine Law, regardless of its function.⁴³

changes with others. These are perhaps "deliberations" in a sense but hardly demanded to be brought forward . . . at a public meeting. To carry matters to such an extreme approaches the ridiculous; it would defeat any meaningful and productive process of government.

262 So. 2d at 428.

39. Kalil, *supra* note 21, at 75; Comment, *Government in the Sunshine: Another Cloud on the Horizon*, 25 U. FLA. L. REV. 603 (1973). For a lengthy discussion of cases involving the Sunshine Law and collective bargaining, see a forthcoming article, McHugh, *The Florida Experience in Public Employee Collective Bargaining, 1974-1978: Bellwether for the South*, 6 FLA. ST. U.L. REV. ____ (1978).

40. 278 So. 2d 260 (Fla. 1973).

41. *Canney v. Board of Pub. Instruction*, 231 So. 2d 34, 39 (Fla. 1st Dist. Ct. App. 1970), *rev'd*, 278 So. 2d 260 (Fla. 1973). The attorney general had taken essentially the same position. 1971 FLA. OP. ATT'Y GEN. 071-32.

42. 278 So. 2d at 263.

43. *But see State Dep't of Pollution Control v. State Career Serv. Comm'n*, 320 So. 2d 846 (Fla. 1st Dist. Ct. App. 1975), which is in direct conflict with *Canney*. The Career Service Commission is a body to which state employees may appeal disciplinary decisions by their employers. The district court of appeal noted that the commission has 30 days in which to decide a case after a public hearing on the merits. The court held that the commission acts as a quasi-judicial body in such matters and that, as such, its deliberations are exempt from the Sunshine Law. The fact situation in *State Career Serv. Comm'n* was similar to that in *Canney*, in which the school board recessed to deliberate in private after holding a public hearing. Yet the district court of appeal totally ignored *Canney*. Perhaps the court simply felt that matters coming before the Career Service Commission were too sensitive to be open to public scrutiny. At any rate, *Canney* is still the rule. *Occidental Chem. Co. v. Mayo*, 351 So. 2d at 341 n.7; 1976 FLA. OP. ATT'Y GEN. 076-225, at 10.

Obviously, the holding in *Occidental* is contrary to this pattern of strong judicial support for a very broad interpretation of the Sunshine Law. Before looking at *Occidental* in detail, however, it is important to examine the line of decisions which deal specifically with the applicability of the Sunshine Law to advisory bodies.

Bigelow v. Howze presented the first such decision in 1974.⁴⁴ In *Bigelow*, two of the five members of the Charlotte County Commission were appointed to a four-member fact-finding committee. The committee was supposed to investigate the previous work of two firms in order to facilitate the selection of one of the firms to do reappraisal work for the county. The committee traveled to Tennessee on its fact-finding mission. While there, the two commissioners discussed what recommendation they would make to the full commission. The Second District Court of Appeal held this discussion to be a violation of the Sunshine Law even though the full commission considered the recommendation later in a public meeting. The two commissioners should only have discussed possible recommendations in a public meeting, the court concluded. *Bigelow* marked some progress toward applying the Sunshine Law to advisory boards. But the precedential value of the case was unclear because of the dual roles of the two committee/commission members.

In 1974, the applicability of the Sunshine Law to advisory bodies was extended in *Town of Palm Beach v. Gradison*.⁴⁵ *Gradison* involved a town council's attempt to revise local zoning ordinances. The council appointed a committee of lay citizens to aid professional planners in devising a new comprehensive zoning plan. The citizen's committee was to make tentative decisions as an "element" of the zoning commission and guide the professional planners in their efforts to produce a plan consistent with the overall land use goals of the town. This committee, however, had no authority to bind either the zoning commission or the town council by its decisions.⁴⁶ The committee's meetings were closed to the public.⁴⁷ Its recommendations were submitted to the zoning authority and subjected to public debate for five days. The zoning authority adopted the recommendations of the committee and later sent the entire comprehensive plan to the town council. After six days of hearings, the council approved the plan.⁴⁸

44. 291 So. 2d 645 (Fla. 2d Dist. Ct. App. 1974).

45. 296 So. 2d 473 (Fla. 1974).

46. *Id.* at 474-75.

47. *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353, 355 (Fla. 4th Dist. Ct. App. 1973), *aff'd sub nom.* *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

48. *Id.* at 359.

A group of citizens sought to have the comprehensive plan invalidated on the ground that the citizen's committee was subject to the Sunshine Law. The trial court refused, emphasizing the purely advisory status of the committee. The Fourth District Court of Appeal reversed, holding that the recommendations of the committee were one step of the decisionmaking process, and, as such, were within the *Doran* "foreseeable action" test.⁴⁹ The Florida Supreme Court affirmed. For the majority, Chief Justice Adkins explained:

Few, if any, governmental boards or agencies deliberately attempt to circumvent the government in the sunshine law. We feel that the Town Council of Palm Beach acted in good faith, but any committee established by the Town Council to act in any type of advisory capacity would be subject to the provisions of the government in the sunshine law.⁵⁰

The *Gradison* court noted that the committee had been delegated functions which were normally exercised by the town council itself.⁵¹ Presumably, the court was speaking of the committee's suggestions to the professional zoners relating to the overall land use goals of the Town of Palm Beach. According to the court, this delegation raised the committee's status to that of a board or commission and subjected the committee to the Sunshine Law.⁵² The court seemed to be straining to find legal ground upon which it could base a decision it deemed important for policy reasons.⁵³

One other case on this issue was decided at the appellate level before *Occidental* reached the supreme court. In 1967, the Second District Court of Appeal decided *Bennett v. Warden*, which involved closed meetings between the president of St. Petersburg Junior College and representatives of career employees at the college.⁵⁴ The president also served as executive officer of the Board of Trustees. In that capacity, he selected the representatives to act as his

49. *Id.* at 357.

50. 296 So. 2d at 476.

51. *Id.* at 475.

52. *Id.*

53. No governmental board is infallible and it is foolish to assume that those who are elected or appointed to office have any superior knowledge concerning any governmental problem. Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons. As more people participate in governmental activities, the decision-making process will be improved.

Id. at 476. In addition, the court cited cases from five other jurisdictions which dealt with what the scope of open-government laws *should* be. *Id.* at 476-77.

54. 333 So. 2d 97 (Fla. 2d Dist. Ct. App. 1976).

advisors on issues relating to working conditions at the college. Any recommendations made by the president had to be approved first by an administrative council and then by the Board of Trustees. Both these groups met "in the sunshine" as a matter of course.⁵⁵ The court held that the meetings between the president and the career employees' representatives were not subject to the Sunshine Law because these meetings were too far removed from the decisionmaking process to play an important role in shaping final decisions relating to working conditions at the college.⁵⁶

Occidental followed. The petitioner there asserted that the Public Service Commission must have violated the Sunshine Law in one of two ways: (1) the commissioners had held secret meetings to decide how to dispose of the rate hike request; or (2) they had delegated decisionmaking authority to the commission staff, and thus, under *Gradison*, raised the status of the staff to that of a board or commission subject to the Sunshine Law. Otherwise, *Occidental* contended, the commission could not have passed on a twenty-two and one-half page document covering such complex issues after a mere ninety minutes of consideration.⁵⁷

Discussing the first point, the court acknowledged that the evidence created "an appearance of pre-judgment" but refused to invalidate the commission's order for that reason alone.⁵⁸ The court noted that the record contained no evidence of secret meetings or other attempts to circumvent the Sunshine Law and concluded that in such circumstances it would not speculate as to what had occurred.⁵⁹ This reasoning presents a major hurdle to effective enforcement of the law. Quite often, no evidence of secret meetings will exist. Obviously, officials at such meetings will attempt to avoid documenting their deeds. They will try to keep their secret meetings secret. As Justice Adkins said in his dissent in *Occidental*:

The fact that no specific meeting date of the Commission and/or its staff appears in the record does not preclude this Court's finding a lack of compliance with the government in the sunshine law. It is sufficient that the surrounding circumstances clearly indicate that action tantamount to finalization was taken out of the sunshine.⁶⁰

55. *Id.* at 100.

56. *Id.*

57. 351 So. 2d at 341.

58. *Id.*

59. *Id.* at 341-42.

60. *Id.* at 344.

This problem is compounded by the fact that the supreme court refuses to look beyond the record when considering a case by means of certiorari.⁶¹ Yet the record is prepared by the agency which has allegedly violated the law.⁶² In *Occidental*, the petitioning company asked the Public Service Commission to complete the record with minutes, notes, or summaries of all communications between commissioners and between the commissioners and their staff.⁶³ The commission denied this motion.⁶⁴ *Occidental* then asked the supreme court for an order requiring the commission to submit such evidence to the court. In a footnote to the opinion, the court denied this motion, stating that the rule under which *Occidental* had moved was not intended "to cure record omissions fatal to the points urged on appeal, or to broaden the scope of review to matters not considered by the lower tribunal."⁶⁵

Thus, one who complains that a commission has held secret meetings may be trapped in a "Catch 22" situation: the court requires proof of the meetings, but the court will not look beyond the record to find the needed proof if review is by certiorari. And, if the commission refuses to include in the record evidence that may prove a violation of the Sunshine Law, the court will not compel it to do so.⁶⁶

The *Occidental* court initially rejected the notion that all meetings between commissioners and their staff must be open to the public. Citing *Bennett*, the court stated flatly, "[t]he Commission's staff is not subject to the law."⁶⁷ Apparently, however, this

61. *Id.* at 342 n.11. Certiorari is the correct method of obtaining review of a Public Service Commission order. FLA. CONST. art. V, § 3(b)(3); FLA. STAT. §§ 120.68(2), 366.10 (1977); see *Citizens of Fla. v. Mayo*, 324 So. 2d 35, 37 (Fla. 1975) (listing authority for the Florida Supreme Court's jurisdiction to review orders of the Public Service Commission in utility rate cases). Section 366.10 was repealed by Act of June 17, 1976, ch. 76-168, § 3, 1976 Fla. Laws 295 (uncodified), effective July 1, 1980.

62. FLA. STAT. § 120.68(5) (1977); see *Mick v. Florida State Bd. of Dentistry*, 338 So. 2d 1297 (Fla. 1st Dist. Ct. App. 1976) (suggesting that an agency "should" include in the record the materials which petitioner suggests be included).

63. Petitioner's Motion to Complete Record, Florida Power Corp., No. 74807-EU (Fla. PSC Aug. 22, 1975).

64. Denial of Motion to Complete Record (Oct. 20, 1975).

65. 351 So. 2d at 341 n.9. The court incorrectly states: "We denied this motion." *Id.* The court actually had not previously ruled on the motion, and "denied" should read "deny." Of course it is foolish to speak of the issue of violation of the Sunshine Law as not being considered by the lower tribunal in this case: *Occidental* could not have known that the commission might have violated the Sunshine Law until the summary disposition of the rate hike request at the agenda conference. The proceedings were then closed, giving *Occidental* no opportunity to raise the issue before the "lower tribunal."

66. The court noted that communications between staff and commissioners can presumably be challenged as violating the Sunshine Law at the administrative level by appropriate motion or petition. *Id.* But if the court will not require the commission to comply, these challenges, as in *Occidental*, will be completely ineffectual.

67. *Id.* at 341.

broad edict does not mean that a staff would *never* be subject to the law: Occidental's delegation argument was rejected on *evidentiary* grounds. If *Bennett* is to be used as a guide, the statement probably means that the staff may be used as fact-finders and legal advisers so long as the staff is sufficiently removed from the decisionmaking process. This is precisely the role that the Public Service Commission suggested its staff played in promulgation of the order in *Occidental*. Since the court does not disapprove of this role, it must be assumed that a staff's exemption from the Sunshine Law covers at least this kind of activity. Indeed, the *Occidental* court stated that members of a collegial body need not avoid their staffs when considering an issue.⁶⁸ Few would disagree with this proposition. But Occidental's argument was that the commissioners either met privately (with or without their staff present) or delegated their decisionmaking authority to the staff. Thus, the precedential value of the court's pronouncement on this issue is difficult to discern.

After rejecting Occidental's "broad brush" argument that all meetings between the commission and its staff were subject to the Sunshine Law, the court proceeded to discuss Occidental's more narrow argument: that on these facts some delegation of authority must have taken place, thus subjecting the staff to the Sunshine Law under the *Gradison* rule. The court noted that the staff actually wrote twenty-two and one-half pages of the proposed order and apparently agreed that some delegation did occur. But, instead of addressing the issue squarely, the court merely stated that *Gradison* did not control.⁶⁹

The only reason the court gave for this conclusion was that in *Gradison* the "record adequately established that the town council had created a citizens committee to serve as its alter ego, and that the council later gave summary approval to the committee's recommendations in a purely ceremonial public meeting."⁷⁰ But it can easily be argued that the Public Service Commission staff was as much an "alter ego" of the commission in *Occidental* as the citizens committee was of the town council in *Gradison*. And surely the approval was no less ceremonial in *Occidental* than in *Gradison*. In *Gradison*, the committee's proposals were subjected to five days of public debate in front of the zoning authority and then to six more days of hearings before the town council. In *Occidental*, no public debate was allowed on the proposed order, and the hearing lasted

68. *Id.* at 342.

69. *Id.*

70. *Id.*

only ninety minutes. Yet the *Occidental* court made no other attempt to distinguish the cases.

The court's failure to follow the *Gradison* rule in *Occidental* may have the effect of limiting *Gradison* to its facts. Once again the court failed to set a standard for determining when an advisory body will become subject to the Sunshine Law.⁷¹

One other troublesome aspect of *Occidental* is the court's implication that even the long-standing *Doran-Berns* "foreseeable action" test might be abrogated in the near future. In a footnote, the court stated that "[t]his case does not present a proper occasion . . . for us to determine whether all private collegial discussions among commissioners become decision-making acts which must occur in public."⁷² Is this not precisely what the "foreseeable action" test was meant to determine? It is interesting to note that the court invites the reader to "contrast" *Times* with *Gradison* on this issue but ignores the two leading supreme court cases on point: *Doran* and *Berns*.⁷³ Has the "foreseeable action" test been abandoned? The answer, apparently, will come at the first "proper occasion."

The decision in *Occidental* has certainly damaged the effectiveness of the Sunshine Law. By requiring proof of alleged secret meetings, the court has made enforcement of the law much more difficult in cases of intentional violations. Perhaps few officials will risk the criminal penalties which may result from such violations.⁷⁴ If so, the importance of this aspect of the decision may not be great. But more extensive damage was done by the court's retreat from *Gradison*. Advisory bodies may now meet in private, even if they play a substantial role in the decisionmaking process. At what point they become subject to the Sunshine Law is totally unclear. Finally, the court hinted that it may soon allow members of an administrative body to meet behind closed doors when discussing matters under official consideration. *Occidental* may only be a partial and temporary eclipse. But it may also be that shadows are creeping into Florida's government in the sunshine.

BOB RICE

71. Certainly no valid distinction can be made of the fact that *Gradison* involved a citizens committee and *Occidental* involved a full-time staff: both served as advisory bodies. The court did not discuss this issue.

72. 351 So. 2d at 342 n.10.

73. Is the court implying by the word "contrast" that *Times* and *Gradison* somehow travel different roads on this issue? The cases appear to be in complete harmony.

74. See FLA. STAT. § 286.011(3) (1977).