

Overview of the Sunshine Law

Patricia R. Gleason
April 2, 2008

I. WHAT IS THE SCOPE OF THE SUNSHINE LAW?

Florida's Government in the Sunshine Law, commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings at both the state and local levels. The law is equally applicable to elected and appointed boards and has been applied to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. There are three basic requirements of section 286.011, Florida Statutes:

- (1) meetings of public boards or commissions must be open to the public;
- (2) reasonable notice of such meetings must be given; and
- (3) minutes of the meetings must be taken.

A right of access to meetings of collegial public bodies is also recognized in the Florida Constitution. Article I, section 24, Florida Constitution, was approved by the voters in the November 1992 general election and became effective July 1, 1993. Virtually all collegial public bodies are covered by the open meetings mandate of the open government constitutional amendment with the exception of the judiciary and the state Legislature which has its own constitutional provision requiring access. The only exceptions are those established by law or by the Constitution.

Boards or commissions created by law or by a public agency are clearly subject to the provisions of section 286.011, Florida Statutes. A public officer may be an "agency" for purposes of creating a board or commission subject to section 286.011, Florida Statutes. For example, in one case, the court held that when a city manager utilized an advisory group to assist him in screening applications and making recommendations for the position of chief of police, he *created* a "board" to which the Sunshine Law was applicable. Similarly, the Attorney General has concluded that an advisory group created by a chief of police to make recommendations regarding various issues affecting the police department is subject to the Sunshine Law.

A. Are advisory boards which make recommendations or committees established for fact-finding only subject to the Sunshine Law?

1. Publicly created advisory boards which make recommendations

Advisory boards created pursuant to law or ordinance or otherwise established by public agencies are subject to the Sunshine Law, even though their recommendations are not binding upon the agencies that create them. For example, the Sunshine Law applies to a

university's search and screening committee. In another case, the court ruled that the Sunshine Law applies to a site plan review committee created by the county commission to serve in an advisory capacity to the county manager.

2. Fact-finding committees

A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for advisory committees established for fact-finding only. When an advisory committee has been established strictly for, and conducts only, fact-finding activities, *i.e.*, strictly information gathering and reporting, the activities of that committee are not subject to section 286.011, Florida Statutes.

B. Are private organizations providing services to public agencies subject to the Sunshine Law?

Private organizations which are not state or local governmental agencies or subject to the control of the Legislature and which do not serve in an advisory capacity to state or local governmental agencies, are generally not subject to section 286.011, Florida Statutes. For example, the Sunshine Law would not generally apply to meetings of a homeowners' association.

Similarly, a private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone necessarily subject to the Sunshine Law unless the public agency's governmental or legislative functions have been delegated to it.

However, although private organizations are generally not subject to the Sunshine Law, open meetings requirements can apply if the public entity has delegated "the performance of its public purpose" to the private entity. For example, in one case, the Supreme Court held that a private nonprofit corporation which entered into a lease with a public hospital authority to operate a hospital was subject to open meetings requirements.

Accordingly, the Attorney General has advised that a community college direct support organization, as defined in section 1004.70, Florida Statutes, is subject to the Sunshine Law. In another opinion, the John and Mable Ringling Museum of Art Foundation, Inc., established pursuant to statute as a not-for-profit corporation to assist the museum in carrying out its functions by raising funds for the museum, was advised to comply with the Sunshine Law.

C. Does the Sunshine Law apply to staff?

Meetings of staff of boards or commissions covered by the Sunshine Law are not ordinarily subject to section 286.011, Florida Statutes.

However, when a staff member ceases to function in a staff capacity and is appointed to a committee which is delegated authority normally within the public board or commission, the staff member loses his or her identity as staff while working on the

committee and the Sunshine Law is applicable to the committee. It is the nature of the act performed, not the makeup of the committee or the proximity of the act to the final decision, which determines whether a committee composed of staff is subject to the Sunshine Law.

For example, in a 1983 case, the Florida Supreme Court concluded that a committee composed of staff which was created for the purpose of screening applications and making recommendations for the position of a law school dean was subject to section 286.011, Florida Statutes, since the committee members performed a decision-making function outside of their normal staff activities. By screening applicants and deciding which applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university. Similarly, an appellate court noted that a meeting of a pre-termination conference panel established pursuant to county ordinance is subject to Sunshine Law.

D. Does the Sunshine Law apply to members of public boards who also serve as administrative officers or employees?

There may be occasions in which members of public boards also serve as administrative officers or employees. The Sunshine Law is not applicable to discussions of those individuals when serving as administrative officers or employees, provided such discussions do not relate to matters which will come before the public board on which they serve. Thus, a board member who also serves as an employee of an agency may meet with another board member on issues relating to his duties as an employee *provided* such discussions do not relate to matters that will come before the board for action.

II. WHAT IS A MEETING SUBJECT TO THE SUNSHINE LAW?

A. Number of board members required to be present

The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission. There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to section 286.011, Florida Statutes. Instead, the law is applicable to *any* gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable action* will be taken by the public board or commission.

B. Circumstances in which the Sunshine Law may apply to a single individual or where two board members are not physically present

The Sunshine Law applies to public boards and commissions, *i.e.*, collegial bodies. As discussed *supra*, section 286.011, Florida Statutes, applies to meetings of "two or more members" of the same board or commission when discussing some matter which will foreseeably come before the board or commission.

Therefore, section 286.011, Florida Statutes, would not ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members.

Certain factual situations, however, have arisen where, in order to assure public access to the decision-making processes of public boards or commissions, it has been necessary to conclude that the presence of two individuals of the same board or commission is not necessary to trigger application of section 286.011, Florida Statutes. As stated by the Supreme Court, the Sunshine Law is to be construed "so as to frustrate all evasive devices."

1. Written correspondence between board members

The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting is not a violation of the Sunshine Law if prior to the meeting there is no interaction related to the report among the commissioners. In such cases, the report, which is subject to disclosure under the Public Records Act, is not being used as a substitute for action at a public meeting as there is no interaction among the commissioners prior to the meeting.

If, however, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to section 286.011, Florida Statutes. Thus, the Attorney General advised that a school board member may prepare and circulate an informational memorandum or position paper to other board members; however, the use of a memorandum to solicit comment from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law.

2. Telephone conversations and meetings

As discussed previously, the Sunshine Law applies to the deliberations and discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action. The use of a telephone to conduct such discussions does not remove the conversation from the requirements of section 286.011, Florida Statutes.

3. Use of computers

While there is no provision generally prohibiting the use of computers to carry out public business, their use by members of a public board or commission to communicate among themselves on issues pending before the board, is subject to the Sunshine Law.

A recent Attorney General's Opinion concluded that airport authority members may conduct informal discussions and workshops over the Internet, provided proper notice is given, and interactive access by members of the public is provided. Such interactive access must include not only public access via the Internet but also designated places within the authority boundaries where the airport authority makes computers with Internet access available to members of the public who may not otherwise have Internet access. For meetings, however, where a quorum is necessary for action to be taken, physical presence of the members making up the quorum would

be required in the absence of a statute providing otherwise. Internet access to such meetings, however, may still be offered to provide greater public access.

However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks, which does not permit the public to participate online, violates the Sunshine Law by circumventing the notice and access provisions of that law.

4. Delegation of authority to single individual

If a member of a public board is authorized only to explore various contracts proposals with the applicant selected for the position of executive director, with such proposals being related back to the governing body for consideration, the discussions between the board member and the applicant are not subject to the Sunshine Law. If, however, the board member has been delegated the authority to reject certain options from further consideration by the entire board, the board member is performing a decision-making function that must be conducted in the sunshine.

5. Use of nonmembers as liaisons between boards members

The Sunshine Law is applicable to meetings between a board member and an individual who is not a member of the board when that individual is being used as a liaison between, or to conduct a de facto meeting of, board members. For example, in one case, the court held that a series of scheduled successive meetings between the school superintendent and individual members of the school board were subject to the Sunshine Law. While normally meetings between the school superintendent and an individual school board member would not be subject to section 286.011, Florida Statutes, these meetings were held in "rapid-fire succession" in order to avoid a public airing of a controversial redistricting problem. They amounted to a de facto meeting of the school board in violation of section 286.011, Florida Statutes.

III. WHAT TYPES OF DISCUSSIONS ARE COVERED BY THE SUNSHINE LAW?

A. Investigative meetings or meetings to consider confidential material

The Sunshine Law is applicable to investigative inquiries of public boards or commissions. The fact that a meeting concerns alleged violations of laws or regulations does not remove it from the scope of the law. The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, section 286.011, Florida Statutes, should be construed as containing no exceptions.

Section 119.07(8), Florida Statutes, provides that an exemption from section 119.07, Florida Statutes, "does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided." Thus, exemptions from the Public Records Act, do not by implication allow a public agency to close a meeting in which

exempted material is to be discussed in the absence of a specific exemption from the Sunshine Law.

B. Legal matters

In the absence of legislative exemption, discussions between a public board and its attorney are subject to section 286.011, Florida Statutes.

There are statutory exemptions, however, which apply to some discussions of pending litigation between a public board and its attorney. *However*, these exemptions are narrow in scope and are initiated only by the board's attorney for the purpose of seeking advice on settlement or expenses in pending litigation.

C. Personnel matters

Meetings of a public board or commission at which personnel matters are discussed are not exempt from the provisions of section 286.011, Florida Statutes, in the absence of a specific statutory exemption.

For example, the Sunshine Law applies to meetings of a board of county commissioners when interviewing applicants for county positions appointed by the board, when conducting job evaluations of county employees answering to and serving at the pleasure of the board, and when conducting employment termination interviews of county employees who serve at the pleasure of the board.

Similarly, a selection committee appointed to screen applications, and rank selected applicants for submission to the city council was determined to be subject to the Sunshine Law even though the city council was not bound by the committee's rankings.

The Florida Supreme Court has stated that there is no exception to the Sunshine Law which would allow closed-door hearings or deliberations when a board or commission is acting in a "quasi-judicial" capacity.

IV. DOES THE SUNSHINE LAW APPLY TO:

A. Members-elect or candidates

Members-elect of boards or commissions are subject to the Sunshine Law. The Sunshine Law does not apply to candidates for office, unless the candidate is an incumbent seeking reelection.

B. Members of different boards

The Sunshine Law does not apply to a meeting between individuals who are members of *different* boards *unless* one or more of the individuals has been delegated the authority to act on behalf of his board.

C. Meetings between an ex officio, non-voting board member and a voting member of the board

Meetings between a voting member of a board and a non-voting member who serves as a member of the board in an ex officio, non-voting capacity, are subject to the Sunshine Law.

D. Community forums sponsored by private organizations

A "Candidates' Night" sponsored by a private organization at which candidates for public office, including several incumbent city council members, will speak about their political philosophies, trends, and issues facing the city, is not subject to the Sunshine Law unless the council members discuss issues coming before the council among themselves.

Similarly, the Attorney General's Office concluded that the Sunshine Law does not apply to a political forum sponsored by a private civic club during which county commissioners express their position on matters that may foreseeably come before the commission, so long as the commissioners avoid discussions among themselves on these issues. However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements. For example, a circuit court rejected the argument that a private breakfast meeting at which the sheriff spoke and city commissioners individually questioned the sheriff but did not direct comments or questions to each other did not violate the Sunshine Law. The court denied the commissioners' motion for summary judgment and held that a discussion is subject to the Sunshine Law where there is a common facilitator who is receiving comments from each commissioner in front of other commissioners.

E. Social events

Members of a public board or commission are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board or commission are not discussed at such gatherings. Thus, there is no *per se* violation of the Sunshine Law for a husband and wife to serve on the same public board or commission so long as they do not discuss board business without complying with the requirements of section 286.011, Florida Statutes.

V. DOES THE SUNSHINE LAW LIMIT WHERE MEETINGS OF A PUBLIC BOARD OR COMMISSION MAY BE HELD?

A. Out-of-town meetings

The courts have recognized that the mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law. For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. Accordingly, a school board workshop held outside county limits over 100 miles away from the board's headquarters violated the Sunshine Law where the only advantage to the board resulting from the out-of-town gathering (elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend.

B. Meetings at facilities that discriminate or unreasonably restrict access prohibited

Section 286.011, Florida Statutes, prohibits boards or commissions subject to its provisions from holding their meetings at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access to such a facility. Thus, a police pension board should not hold its meetings in a facility where the public has limited access and where there may be a "chilling" effect on the public's willingness to attend by requiring the public to provide identification, to leave the such identification while attending the meeting and to request permission before entering the room where the meeting is held.

C. Inspection trips

Members of a public board or commission are not prohibited under the Sunshine Law from conducting inspection trips. However, if discussions relating to the business of the board will occur between board members during an inspection trip, then the requirements of section 286.011, Florida Statutes, must be met.

VI. CAN RESTRICTIONS BE PLACED ON THE PUBLIC'S ATTENDANCE AT OR PARTICIPATION IN, A PUBLIC MEETING?

A. Exclusion of certain members of the public

The term "open to the public" as used in the Sunshine Law means open to all who choose to attend. A board's request that certain members of the public "voluntarily" leave the room during portions of a public meeting is not authorized. For example, in one case, the appellate court affirmed a lower court ruling finding that a meeting of a procurement committee in which the chairman asked each presenter "as a courtesy" to leave the meeting room while the committee considered competing presentations violated the Sunshine Law.

Staff of a public agency clearly are members of the public as well as employees of the agency; they cannot, therefore, be excluded from public meetings. Section 286.011, Florida Statutes, however, does not preclude the reasonable application of ordinary personnel policies, for example, the requirement that annual leave be used to attend meetings, provided that such policies do not frustrate or subvert the purpose of the Sunshine Law.

B. Cameras and tape recorders

Reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending a public meeting may be adopted by the board or commission. However, a board may not ban videotaping of an otherwise public meeting. Similarly, a rule or policy that prohibits nondisruptive or silent tape recording devices at public meetings is invalid.

C. Identification

A city may not require persons wishing to attend public meetings to provide identification as a condition of attendance. This is not to say that an agency may not impose certain security measures on members of the public entering a public building, such as requiring the public to go through metal detectors.

VII. MUST WRITTEN MINUTES BE KEPT OF ALL SUNSHINE MEETINGS?

Section 286.011, Florida Statutes, specifically requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection. The minutes required to be kept for "workshop" meetings are not different than those required for any other meeting of a public board or commission.

Draft minutes of a board meeting may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes. The minutes are public records when the person responsible for preparing the minutes has performed his or her duty even though they have not yet been sent to the board members or officially approved by the board.

VIII. IN ADDITION TO MINUTES, DOES THE SUNSHINE LAW ALSO REQUIRE THAT MEETINGS BE TRANSCRIBED OR TAPE RECORDED?

Minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in section 286.011, Florida Statutes, contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting.

There is no requirement that tape recordings be made by the public board or commission at each public meeting. However, once made, such recordings are public records and their retention is governed by the Public Records Act and the schedules established by the Division of Library and Information Services of the Department of State.

IX. MAY MEMBERS OF A PUBLIC BOARD VOTE BY WRITTEN OR SECRET BALLOT?

Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act.

By contrast, a secret ballot violates the Sunshine Law.

X. WHAT ARE THE CONSEQUENCES IF A PUBLIC BOARD OR COMMISSION FAILS TO COMPLY WITH THE SUNSHINE LAW?

A. Criminal penalties

Any member of a board or commission or of any state agency or authority of a county, municipal corporation, or political subdivision who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second degree. Conduct which occurs outside the state which constitutes a knowing violation of the Sunshine Law is a second degree misdemeanor. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. The criminal penalties apply to members of advisory councils subject to the Sunshine Law as well as to members of elected or appointed boards.

B. Removal from office

When a method for removal from office is not otherwise provided by the Constitution or by law, the Governor may suspend an elected or appointed public officer who is indicted or informed against for any misdemeanor arising directly out of his or her official duties. If convicted, the officer may be removed from office by executive order of the Governor.

C. Noncriminal infractions

Section 286.011(3) (a), Florida Statutes, imposes noncriminal penalties for violations of the Sunshine Law by providing that any public official violating the provisions of the Sunshine Law is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. The state attorney may pursue actions on behalf of the state against public officials for violations of section 286.011, Florida Statutes, which result in a finding of guilt for a noncriminal infraction.

D. Attorney's fees

Reasonable attorney's fees will be assessed against a board or commission found to have violated section 286.011, Florida Statutes. Such fees may be assessed against the individual members of the board except in those cases where the board sought, and took the advice of its attorney, such fees may not be assessed against the individual members of the board.

E. Civil actions for injunctive or declaratory relief

Section 286.011 (2), Florida Statutes, states that the circuit courts have jurisdiction to issue injunctions upon application by any citizen of this state. The burden of prevailing in such actions has been significantly eased by the judiciary in sunshine cases. While normally irreparable injury must be proved by the plaintiff before an injunction may be issued, in Sunshine Law cases the *mere showing* that the law has been violated constitutes "irreparable public injury."

F. Validity of action taken in violation of the Sunshine Law and subsequent corrective action

Section 286.011, Florida Statutes, provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting.

Recognizing that the Sunshine Law should be construed so as to frustrate all evasive devices, the courts have held that action taken in violation of the law was void *ab initio*.

