

# **GOVERNMENT IN THE SUNSHINE LAW**

- Florida's Government in the Sunshine Law, s. 286.011, F.S., commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels.
- The law is equally applicable to elected and appointed boards, and applies 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 the Sunshine Law:
- (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 and promptly recorded.

- The Sunshine Law applies to public collegial bodies within this state, at the local as well as state level. The Sunshine Law does NOT apply to the legislature or judiciary.
- Advisory boards and committees created by public agencies may be subject to the Sunshine Law, even though their recommendations are not binding upon the entities that create them.
- The “dispositive question” is whether the committee has been delegated “decision-making authority,” as opposed to mere “information-gathering or fact-finding authority.”

# **Advisory Committees Appointed by a Single Public Official**

- The Sunshine Law applies to advisory committees appointed by a single public official as well as those appointed by a collegial board.

- Examples:
- The Sunshine Law applied to an ad hoc advisory committee appointed by a university president to screen applications and make recommendations for the position of law school dean, because the committee, in deciding which applicants to reject from further consideration, performed a policy-based, decision-making function.

- A committee established by agency purchasing director to consider and rank various contract proposals subject to Sunshine Law.
- The fact that advisory group was created by chief of police and not city commission and its recommendations were made to police chief would not remove group from ambit of the Sunshine Law.

# 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.
- A committee is not subject to the Sunshine Law if the committee has only been delegated information-gathering or fact-finding authority and only conducts such activities.



- In determining whether a committee is subject to the Sunshine Law, the actual function of the committee must be scrutinized to determine whether it is exercising part of the decisionmaking function by sorting through options and making recommendations to the governmental body.
- Example:
- A “search and screen” committee that had a fact-gathering role in soliciting and compiling applications, the committee also “had an equally undisputed decision-making function in screening the applicants” by deciding which of the applicants to reject from further consideration, and thus was subject to the Sunshine Law.

# Staff Committees

- The Sunshine Law applies to meetings of elected or appointed boards; it does not ordinarily apply to staff committees or meetings.
- Thus, a committee composed of staff that is responsible for advising and informing the decision-maker through fact-finding consultations is not subject to the Sunshine Law.

# Private Entities Created Pursuant to Law or by Public Agencies

- The Supreme Court has stated that “[t]he Legislature intended to extend application of the ‘open meeting’ concept so as to bind every ‘board or commission’ of the state, or of any county or political subdivision over which [the Legislature] has dominion or control.”
- Thus, if a private entity has been created by law or by a public agency to perform a public function, the Sunshine Law generally applies

## **DOES THE SUNSHINE LAW APPLY TO COMMUNICATIONS BETWEEN BOARD MEMBERS WHO ARE NOT PRESENT IN THE SAME ROOM?**

- Application of the Sunshine Law to telephone conversations, written correspondence and electronic communications media:
- Telephone conversations:
- Private telephone conversations between board members to discuss matters which foreseeably will come before that board for action violate the Sunshine Law.
- A private telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law.

## **Written correspondence, e-mails, and other electronic communications between board members:**

- The Sunshine Law requires boards to meet in public; boards may not take action on or engage in private discussions of board business via written correspondence, e-mails or other electronic communications.
- Therefore, members of a public board may not use computers to conduct private discussions among themselves about board business.

- Members of a city board or commission may not engage on the city's Facebook page in an exchange or discussion of matters that foreseeably will come before the board or commission for official action.
- However, a commissioner may send a written report to other commissioners on a subject that will be discussed at a public meeting without violating the Sunshine Law, if prior to the meeting, there is no interaction related to the report among the commissioners and the report, which must be maintained as a public record, is not being used as a substitute for action at a public meeting.

- E-mail communication of information from one council member to another is a public record but does not constitute a meeting subject to the Sunshine Law when it does not result in the exchange of council members' comments or responses on subjects involving foreseeable action by the council.
- If, on the other hand, 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 the Sunshine Law.

- **Authorization to conduct public meetings via telephone or video conferencing, computer, or other electronic media.**
- Can a member call in to a meeting? Yes, where a quorum is required and absent a statute to the contrary, the requisite number of members must be physically present at a meeting in order to constitute a quorum.



# DOES THE SUNSHINE LAW APPLY TO A SINGLE INDIVIDUAL OR TO A MEETING BETWEEN A BOARD MEMBER AND A NON-BOARD MEMBER?

- The statute does not ordinarily apply to an *individual* member of a public board or commission or to public officials who are not board or commission members.
- However, if a board has delegated its decision-making authority to a single individual, or a nonboard member is being used a liaison between or to conduct a *de facto* meeting of board members, the Sunshine Law may apply.

- **Delegation of authority to single individual.**
- “The Sunshine Law does not provide for any ‘government by delegation’ exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego.
- Thus, the Attorney General’s Office has concluded that a single member of a board who has been delegated the authority to negotiate the terms of a lease on behalf of the board “is subject to the Sunshine Law and, therefore, cannot negotiate for such a lease in secret.”

- However, when a board member or designee has been authorized only to gather information or function as a fact-finder, the Sunshine Law does not apply.
- On the other hand, if 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.

- **Use of nonboard members or staff to act as liaisons or to conduct a *de facto* meeting of the board.**
- As a general rule, individual board members may call upon staff members for factual information and advice without being subject to the Sunshine Law's requirements.
- However, the Sunshine Law is applicable to meetings between a board member and an individual who is not a board member when that individual is being used as a liaison between, or to conduct a *de facto* meeting of, board members.

# WHAT TYPES OF DISCUSSIONS ARE COVERED BY THE SUNSHINE LAW?

- **Selection and screening committees:**
- The Sunshine Law applies to advisory committees created by an agency to assist in the selection process.

- Examples:
- A committee created to screen applications and make recommendations for the position of a law school dean was held to be subject to s. 286.011, F.S. 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.

- Sunshine Law governs advisory group created by city manager to assist in screening applications and to recommend several applicants for the position of chief of police.
- However, if the sole function of the screening committee is simply to gather information for the decision-maker, rather than to accept or reject applicants, the committee's activities are outside the Sunshine Law.

- Example:
- The Sunshine Law was not violated when the city manager, who was responsible for selecting the new police chief, asked several people to sit in on the interviews as the only function of this group was to assist the city manager in acquiring information on the applicants he had chosen by asking questions during the interviews and then discussing the qualifications of each candidate with the city manager after the interview.



- **Purchasing committees:**
- A committee appointed by a public college's purchasing director to consider proposals submitted by contractors was held to be subject to the Sunshine Law because its function was to “weed through the various proposals, to determine which were acceptable and to rank them accordingly.”

# DOES THE SUNSHINE LAW APPLY TO:

- Candidates or members-elect;
- Meetings between members of different boards;
- Meetings between a mayor and a member of the city council;
- Meetings between a board member and his or her alternate;
- Ex officio board members;
- Board members attending meetings or serving as members of another public board;
- Staff and public officials also serving as members of a public board;
- Community forums sponsored by private organizations;
- Social events; or
- A husband and wife serving on the same board?

- Candidates:
- The Sunshine Law does not apply to candidates for office, unless the candidate is an incumbent seeking reelection.
- Members-elect:
- The requirements of the Sunshine Law apply not only to meetings of covered boards or commissions but also to “meetings with or attended by any person elected to such board or commission, but who has not yet taken office.” Section 286.011(1), F.S. Thus, members-elect are subject to the Sunshine Law in the same manner as board members who are currently in office.

- Meetings between 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 or her board. *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984).

- Meetings between a board member and his or her alternate:
- Since the alternate is authorized to act only in the absence of a board or commission member, there is no meeting of two individuals who exercise independent decision-making authority at the meeting. There is, in effect, only one decision-making official present. Therefore, a meeting between a board member and his or her alternate is not subject to the Sunshine Law.

- *Ex officio* board members:
- An *ex officio* board member is subject to the Sunshine Law regardless of whether he or she is serving in a voting or non-voting capacity.

- Board members attending meetings or serving as members of another public board:
- The Attorney General's Office has stated that the Sunshine Law does not prohibit city commissioners from attending other city board meetings and commenting on agenda items that may subsequently come before the commission for final action, provided the city commissioners attending such meetings do not discuss those issues among themselves.

- 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.



- However, the Attorney General has concluded that a public forum hosted by a city council member with city council members invited to attend and participate in the discussion would be subject to the Sunshine Law.
- 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.

- 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.
- Therefore, a luncheon meeting held by a private organization for members of a public board or commission at which there is no discussion among such officials on matters relating to public business would not be subject to the Sunshine Law merely because of the presence of two or more members of a covered board or commission.

- A husband and wife serving on the same board:
- 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 the Sunshine Law.

# What Are the Notice and Procedural Requirements of the Sunshine Law?

- What kind of notice of the meeting must be given?:
- Reasonable public notice is required for all meetings subject to the Sunshine Law and is required even though a quorum is not present.
- Notice is required even though meetings of the board are “of general knowledge” and are not conducted in a closed door manner.

- The type of notice that must be given is variable, however, depending on the facts of the situation and the board involved. In each case, an agency must give notice at such time and in such a manner as will enable the media and the general public to attend the meeting.

- While the Attorney General's Office cannot specify the type of notice which must be given in all cases, the following notice guidelines are suggested:
- The notice should contain the time and place of the meeting and, if available, an agenda, or if no agenda is available, a statement of the general subject matter to be considered.

- The notice should be prominently displayed in the area in the agency's offices set aside for that purpose, e.g., for cities, in city hall, and on the agency's website, if there is one.
- Except in the case of emergency or special meetings, notice should be provided at least 7 days prior to the meeting. Emergency sessions should be afforded the most appropriate and effective notice under the circumstances.

- Special meetings should have no less than 24 and preferably at least 72 hours reasonable notice to the public.
- The use of press releases, faxes, emails, and/or phone calls to the news media is highly effective. Additionally, while not *required* by the Sunshine Law, paid advertising in the local newspaper of general circulation would be appropriate for matters of critical public concern such as rezoning, budgeting, taxation, appointment of public officers, if not already required by law for that matter.



- These should be considered as suggestions which will vary depending upon the circumstances of each particular situation.
- For example, a court held that a complaint alleging that members of the local news media were contacted about a special meeting of the city commission one and one-half hours before the meeting stated a sufficient cause of action that the Sunshine Law had been violated.

## **Does the Sunshine Law Require that an Agenda be Made Available Prior to Board Meetings or Restrict the Board from Taking Action on Matters Not on the Agenda?**

- The Sunshine Law does not *mandate* that an agency provide notice of each item to be discussed via a published agenda although the Attorney General's Office has recommended the publication of an agenda, if available. The courts have rejected such a requirement because it could effectively preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body. *See Hough v. Stemberge*, 278 So. 2d 288 (Fla. 3d DCA 1973); and *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary and public body not required to postpone meeting due to inaccurate press report which was not part of the public body's official notice efforts).

- Thus, the Sunshine Law does not require boards to consider only those matters on a published agenda. “[W]hether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature.” *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996). *And see Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010).

# Does the Sunshine Law Limit Where Meetings of a Public Board or Commission May be Held?

- Luncheon meetings:
- Public access to meetings of public boards or commissions is the key element of the Sunshine Law, and public agencies are advised to avoid holding meetings in places not easily accessible to the public.

- Out-of-town meetings:
- 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.

## Can Restrictions be Placed on the Public's Attendance at, or Participation in, a Public Meeting?

- Size of meeting facilities:
- For meetings where a large turnout of the public is expected, the Attorney General's Office has recommended that public boards and commissions take reasonable steps to ensure that the facilities where the meeting will be held will accommodate the anticipated turnout.

- A board or commission may adopt reasonable rules and policies which ensure the orderly conduct of a public meeting and require orderly behavior on the part of those persons attending a public meeting.

- Public participation: Reasonable Opportunity to be heard.
- Effective October 1, 2013, the law now requires that the public be allowed to speak.
- For purposes of this section, “board or commission” means a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.



- Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision-making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action.

- This section does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting. The opportunity to be heard is subject to rules or policies adopted by the board or commission.

- Exemptions:
- (a) An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;
- (b) An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations;
- (c) A meeting that is exempt from [s. 286.011](#); or
- (d) A meeting during which the board or commission is acting in a quasi-judicial capacity. This paragraph does not affect the right of a person to be heard as otherwise provided by law.

- Rules or policies of a board or commission which govern the opportunity to be heard are limited to those that:
- (a) Provide guidelines regarding the amount of time an individual has to address the board or commission;
- (b) Prescribe procedures for allowing representatives of groups or factions on a proposition to address the board or commission, rather than all members of such groups or factions, at meetings in which a large number of individuals wish to be heard;

- (c) Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses; or
- (d) Designate a specified period of time for public comment.

- If a board or commission adopts rules or policies in compliance with this section and follows such rules or policies when providing an opportunity for members of the public to be heard, the board or commission is deemed to be acting in compliance with this section.
- A circuit court has jurisdiction to issue an injunction for the purpose of enforcing this section upon the filing of an application for such injunction by a citizen of this state.

- Whenever an action is filed against a board or commission to enforce this section, the court shall assess reasonable attorney fees against such board or commission if the court determines that the defendant to such action acted in violation of this section.
- Whenever a board or commission appeals a court order that has found the board or commission to have violated this section, and such order is affirmed, the court shall assess reasonable attorney fees for the appeal against such board or commission.

- An action taken by a board or commission which is found to be in violation of this section is not void as a result of that violation.



- 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, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act.

- Are board members authorized to abstain from voting?
- Section 286.012, F.S., provides:
- No member of any state, *county or municipal* governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting . . . a vote *shall* be recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under . . . s. 112.311, s. 112.313, or s. 112.3143, [F.S.]. (e.s.)

- Must written minutes be kept of all sunshine meetings, including workshops?
- Scope of minutes requirement:
- Section 286.011(2), F.S., requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection. Workshop meetings are not exempted from this requirement.

- Content of minutes:
- The term “minutes” in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting; accordingly a verbatim transcript is not required.

- Tape recording or internet archive as minutes:
- The Sunshine Law does not require that public boards and commissions tape record their meetings. However, other statutes may require that certain proceedings be recorded.
- However, while a board is authorized to tape record the proceedings if it chooses to do so, the Sunshine Law also requires written minutes. Similarly, while a board may archive the full text of all workshop discussions conducted on the internet, written minutes of the workshops must also be prepared and promptly recorded.

- Attendance at closed meetings – “shade meetings:”
- In some cases, a statutory exemption specifies the persons who are permitted to attend a closed session. For example, s. 286.011(8), F.S., establishing an open meetings exemption for certain discussions pertaining to pending litigation, provides that only the entity, the entity’s attorney, the entity’s chief administrative officer, and a court reporter may attend the closed meeting.

## What Are the Consequences if a Public Board or Commission Fails to Comply with the Sunshine Law?

- 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. Section 286.011(3)(b), F.S. A person convicted of a second degree misdemeanor may be sentenced to a term of imprisonment not to exceed 60 days and/or fined up to \$500.

- Noncriminal infractions:
- Section 286.011(3)(a), F.S., imposes noncriminal penalties for violations of the Sunshine Law by providing that any public officer 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 such actions on behalf of the state.



- Attorney's fees:
- Reasonable attorney's fees will be assessed against a board or commission found to have violated the Sunshine Law.

- Validity of action taken in violation of the Sunshine Law and subsequent corrective action:
- Actions taken in violation of the Sunshine Law are void *ab initio*.
- It may be possible to “cure” the violation. However, only a full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine.