

OVERVIEW OF THE SUNSHINE LAW
DATE: JANUARY 6, 2003
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The best source material for the Sunshine Law and Public Records Laws is the Government-In-The-Sunshine-Law-Manual (the "Manual") published each year by the First Amendment Foundation and Prepared by the Florida Attorney General. It costs \$13.95.

Rather than republishing that **Manual** in full in this memo, I will focus on those issues, which are of particular concern to our practice and will do so in a question and answer format.

1.

QUESTION What is the Sunshine Law?

ANSWER The Sunshine Law is found in Section 286.011, Fla. Stat. and Art I, s. 24, Fla. Const. It states: "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 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, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of such meetings." S. 286.011, Fla. Stat.

2.

QUESTION What exceptions, if any, are there to the Sunshine Law?

ANSWER There are no common law or non-statutory exceptions. No exceptions are provided for in the Constitution. There are a number of statutory exceptions, all of which are set out in the **Manual**. The one which we will deal with are primarily the litigation exception contained in s. 286.011(8)(1), the risk management exemption contained in s. 768.28(15)(d), Fla. Stat. and the exemption for meetings of the governing board of a private corporation leasing a public hospital or health care facility provided for in s.155.40 (5), Fla. Stat.

PRACTICE POINTS:

a. The exceptions are narrowly construed in favor of the Constitutional and Statutory policy in favor of open government. If there is any deviation from the statutory exception it is normally fatal to the exception. Zorc v. City of Vero Beach, 722 So2d 891 (Fla 4th DCA 1998) (City charter provision requiring clerk to attend all council meetings did not allow clerk to attend closed attorney client session.). Freeman v. Times Publishing Company, 696 So2d 427 (Fla. 2d DCA 1997). (Discussion of methods or options to achieve continuing compliance with a long-standing federal desegregation mandate must be held in the sunshine.)

QUESTION What bodies are subject to the Sunshine Law?

ANSWER Any collegial body which is elected or appointed, even if ad hoc and not formally appointed, whether or not pursuant to specific law, by any of the collegial bodies described in the Sunshine Law or by a public official of any of those bodies and which exercises any portion of the decision making power or the appointing collegial body or official is subject to the Sunshine Law.

The law also applies to advisory boards, which possess no final decision making authority. Town of Palm Beach v. Gradison, 296 So2d 473 (Fla. 1974). The law applies to advisory committees appointed by a single individual as well as by a collegial board. Wood v. Marston, 442 So2d 934 (Fla. 1983). (Sunshine law applied to an ad hoc advisory committee appointed by a university president to screen applications and make recommendations for the position of dean of the law school.) AGO 87-42 (Ad hoc committee appointed by mayor to meet with the Chamber of Commerce to discuss a proposed transfer of property was a "Sunshine Committee.")

There is a limited exception for purely fact-finding committees, which can take no final action and make no recommendation. Cape Publications, Inc. v. City of Palm Bay, 473 So2d 222 (Fla. 5th DCA 1985); Bennett v. Warden, 333 So2d 97 (Fla. 2d DCA 1976). (Fact-finding committee appointed by a college president to report to him on employee working conditions was not subject to the Sunshine Law.) Later in Wood v. Marston, the Supreme Court approved the holding in Bennett. Lyon v. Lake County, 765 So2d 785, (Fla. 5th DCA 2000) (Sunshine law did not apply to informal meetings of staff where the discussions were "merely informational"; where none of the individuals attending the meetings had any decision making authority during the meetings; and where no formal action was taken or could have been taken during the meeting.").

Normally the Sunshine Law requires that two or more members of the public body be present. According to the **Manual**, however:

"Certain factual situations, however, have arisen where, in order to assure public access to the decision-making process of public boards or commissions, it has been necessary to conclude that the presence of two or more individuals of the same board or commission is not necessary to trigger application of s. 286.011, F.S. As stated by the Supreme Court, the Sunshine Law is to be construed "so as to frustrate all evasive devices. Town of Palm Beach v. Gradison, 296 So2d 473 (Fla. 1974)." **Manual** at p. 14.

PRACTICE POINTS.

a. It is necessary when considering the lawfulness of a delegation to staff or to outside individuals to ask the two questions: First, has the staff been delegated any "decision making authority" of the body or individual subject to the Sunshine Law or making the delegation, such as the power to make recommendations to that body or the power to narrow the field of choices for the body delegating. Second, is

the delegation such that it could be reasonably construed to be an "evasive device"? If the answer to either is yes, there is a potential Sunshine Law problem.

b. If the public body, which is itself subject to the Sunshine Law or a public official, has delegated to a committee any of its or his or her decision making power the committee receiving the delegation must comply with the Sunshine Law. For example, a negotiating team that was created by a city commission to negotiate with a sports organization on behalf of the City was required to comply with the Sunshine Law. Even though the decisions of the negotiating committee were subject to ratification, modification or rejection by the City Commission. AGO 94-21. The same should also hold true were the committee created by a City Manager to negotiate on his behalf. AGO 84-70. (Staff grievance committee created to make non-binding recommendations to county administrator subject to the Sunshine Law). Silver Express Company v. District Board of Lower Tribunal Trustees, 691 So2d 1099 (Fla. 34d DCA 1997), (Committee composed of one staff person and one outside person created by college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law.)

c. If the purpose of the delegation could be construed to be an "evasive device" there is also a problem. As stated by the Supreme Court, the Sunshine Law is to be construed "so as to frustrate all evasive devices. Town of Palm Beach v. Gradison, 296 So2d 473 (Fla. 1974)." See for example Times Publishing Company v. City of St Petersburg, 558 So2d 487 (Fla.2d DCA 1990) (yours truly was held to have created an evasive device by crafting with the lawyers for the White Sox a means of avoiding receipt of draft stadium leases while negotiating in order to avoid them being public records. The result was the exact opposite. It is my personal belief that in order to protect the public's right to know, the Courts will lean over backwards to punish one who uses an "evasive device" and do so by finding a violation of the Sunshine Law or the Public Records Law, as the case may be.) See also Blackford v. School Board of Orange County, 375 So2d 578 (Fla. 5th DCA 1979).

4.
QUESTION When does the Sunshine Law apply to the Board of Directors of private company acting on behalf of a collegial body or entity subject to the Sunshine Law?

ANSWER The Sunshine Law applies to private entities created by law and by public entities and also to private entities providing services to governmental entities and acting on behalf of those entities.

See for example, AGO 97-17 in which the Sunshine Law was held to apply to a not-for-profit corporation created by a city redevelopment agency to assist in the implementation of the agency's redevelopment plan. Merely by contracting to provide services to a public entity, a private company is not subject to the Sunshine Law. McCov Restaurants, Inc. v. City of Orlando, 392 So2d 252 (Fla. 1980). If, however, the public body has delegated any of its public function to the private company, then, in the performance of those delegated functions, the company is subject to the Sunshine Law. See AGO 85-55 in which a downtown development

task force, even though not appointed by the City Commission, was held to be subject to the Sunshine Law when analyzing methods for downtown improvements. See also AGO 00-08 in which the Lee County Fire Commissioners Forum, a nonprofit entity created by fire districts for purposes of networking was held to be subject to the Sunshine Law when operated as a collegial body for "incipient decision making."

5.

QUESTION When does the Sunshine Law apply to staff?

ANSWER The Sunshine Law applies to staff when staff steps out of its purely staff role and is delegated any of the decision making power of the entity or an individual acting for the entity so that the staff is either undertaking a decision making or an "incipient decision making" role.

AGO 84-70 (Staff grievance committee created to make non binding recommendations to county administrator subject to the Sunshine Law.) Silver Express Company v. District Board of Lower Tribunal Trustees, 691 So2d 1099 (Fla. 34d DCA 1997), (Committee composed of one staff person and one outside person created by college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law.) See AGO 84-70. (Land selection committee appointed by water management district to evaluate and recommend projects for acquisition must comply with Sunshine Law even though such committee may be composed entirely of district staff and its decisions and recommendations are subject to further action by the districts governing board.)

6.

QUESTION When can the Sunshine Law be violated by the use of computer or written communication?

ANSWER If the communication results de facto, in action which otherwise would be taken in a meeting of the collegial body or constitutes decision making outside of the public meeting, it is a Sunshine Law violation.

In Leach-Wells v. City of Bradenton, 734 So2d 1168 (Fla.2d DCA 1999) the court held that when a city clerk formally ranked proposals based upon written evaluations of committee members, there was a violation because the action of the Clerk was formal action required to be taken in compliance with the Sunshine Law

7.

QUESTION When can the Sunshine Law be violated by actions which have the effect of chilling or inhibiting the public's right to have access?

ANSWER The Court will take a dim view of a public body attempting to do indirectly what it cannot do directly.

In Port Everglades Authority v. International Longshoreman's Association, Local 1922-1, 652 So2d 1169 (Fla. 4th DCA 1995) the Court held that by requesting

that bidders "voluntarily" excuse themselves from each others presentation, the body had transgressed the Sunshine Law.

7.

QUESTION Does the public have a right to speak at a meeting subject to the Sunshine Law?

ANSWER The law has not been yet construed to give UN unbridled right to speak at all meetings. The Manual states that the Sunshine Law is intended, however, to "participate in the decision making process" and has advised that in legislative proceedings, the public should be afforded a meaningful opportunity to participate at each stage of the decision making process, including workshops. Inf. Op. to Thrasher, January 27, 1994, Inf.Op. To Conn, May 19, 1987. In quasi-judicial proceedings, there will be a right to speak by virtue of the nature of the proceeding.

8.

QUESTION What are the consequences of a violation of the Sunshine Law?

ANSWER The consequences are criminal conviction, removal from office, non-criminal civil penalty, attorney's fees and a judgment declaring void action taken in violation.

Of primary concern to this office is the consequence of declaring void action taken in violation. See TSI Southeast v. Royals, 588 So2d 309, (Fla. 1st DCA 1991) (contract for sale and purchase of real property voided because board failed to properly notice the meeting under s. 286.011, F.S.) The defect may be cured but only by "independent final action" in the sunshine. Tolar v. School Board of Liberty County, 398 So2d 427 (Fla. 1st DCA 1981). A perfunctory meeting to ratify the void action will not suffice. There must be a full reexamination of the issues in the sunshine. Zorc v. City of Vero Beach, 722 So2d 891 (Fla. 4th DCA 1998).

9.

QUESTION Does an estoppel certificate concerning the Sunshine Law help Bond Counsel or prevent the bonds from being declared void if approved in violation of the Sunshine Law?

ANSWER The estoppel certificate will not keep the bonds valid or tax-exempt but is a due diligence item which will offer protection to counsel issuing opinions.

QUESTION What should we be careful of in drafting resolutions for Bond Issues?

ANSWER We should avoid creating a "sunshine committee ." Stated another way, we should avoid delegating to an individual (who might constitute a committee of one) or a group any of the decision making power of the Board or Commission which will issue the Bonds.

It is a different proposition to delegate power during the decision making process than after the decision of the Board or Commission has been made. The first sort of delegation is problematic in terms of the Sunshine Law. The second is not a Sunshine Law problem .

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