



Sunshine Law, Public Records and Ethics Issues

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Town of Lauderdale-By-The-Sea, Florida
April 3, 2012



Sunshine Law

Section 286.011, Fla. Stat.

o What is a “Meeting”?

- Two or more members of collegial body
 - One member if delegated collegial authority to act or negotiate a resolution to an issue – more than a fact-finding or liaison role
- Quorum not required
- Of the same board – commissioner can talk with board member without creating a meeting



Sunshine Law

o What is a “Meeting”?

- Location and formality irrelevant
 - Chance encounter at grocery
 - Discussion over coffee in the kitchen
 - Discussion on the dais that is not audible and recorded as part of the meeting
- Can be in writing – Email, Facebook
- Can be indirect – No polling allowed
 - Constituents
 - Staff



Sunshine Law

- **What is an “Agency”?**
 - Decision-making authority: Commission
 - Advisory Boards
 - Planning and Zoning Board
 - Board of Adjustment
 - Charter Review Board
 - Ad hoc committees - evaluation of bids



Sunshine Law

o What is Not an “Agency”?

- Not Town staff, unless delegated a policy-making function or part of a committee ranking or recommending an action
- Not an individual Commissioner or Board Member, unless delegated authority to act
- Not private entities receiving public money, unless delegated governmental power
- Not if the board is purely for factfinding, to explore various options, and does not reject options



Sunshine Law

- **What Scope of Subject Matter for a “Meeting”?**
 - Any matter which foreseeably could come before that board for consideration
 - Applications for Town approval
 - Revisions to Town Code, Town Charter or Town Plan
 - Special Events planned or approved by Town
 - Not a discussion of who will win the game this weekend, where your son is going to college, or how your vacation was

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- **What's Required if the Meeting is Covered by the Law?**
 - **Notice**
 - Posting
 - More elaborate notice is required for certain kinds of agenda items and meetings
 - Attorney General recommends 24 hour minimum
 - **Place must be open and reasonably accessible to the public**
 - **Minutes must be taken – recording is optional**

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○ What are the statutory exceptions?

- Litigation – “shade” or executive sessions
 - Attorney must publicly announce advice is sought
 - Must post, and must start and end meeting in public
 - Court reporter transcript released after lawsuit ends
 - Only manager, attorneys and commissioners listed in notice can attend – no department heads
 - Limited subject matter: Advice on
 - Settlement negotiations
 - Strategy regarding litigation expenditures



Sunshine Law

- **What are the Consequences for Violation?**
 - Invalidation of the action taken
 - Knowing violation is criminal - Second Degree Misdemeanor (Up to 60 days imprisonment, Up to \$500 Fine)
 - Unknowing violation is non-criminal (Fine up to \$500)
 - Removal from office by Governor if convicted (includes guilty or nolo contendere plea)



Sunshine Law

o What are the Consequences for Violation?

- Payment of attorney's fees by individual board members, unless followed advice of counsel
- Town may provide an attorney (or shall pay legal fees) to defend you, if acting within the scope of your employment or position, serving a public purpose, and not acting in bad faith (e.g., not sexually harassing an aide)
- Harsher penalty if occurs out of Town

Memo

To: Town Commission and Advisory Board Members, Lauderdale-By-The-Sea
From: Susan L. Trevarthen, Town Attorney
Date: April 3, 2012
Re: **Sunshine Law**

This memorandum is respectfully submitted for your guidance as a newly elected Commissioner or newly appointed advisory board member of the Town of Lauderdale-By-The-Sea.

SUNSHINE LAW

A. **The Provisions of the Law**

The Florida Sunshine Law is provided by Section 286.011, Fla. Stat., entitled "Public Meetings and Records; Public Inspection; Criminal and Civil Penalties" and provides in subsection 1 thereof as follows:

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 all such meetings. (emphasis added)

B. **Applicability**

The Town Commission, as well as advisory boards or committees created by the Commission or by the Town, must comply with the Sunshine Law. The Sunshine Law prohibits two or more members of the same commission, committee, board or body from discussing (i.e., any interchange of ideas) any item or matter of public business which may come before the body upon which those two or more members both serve, except in an open public meeting, duly

noticed, for which minutes are kept. Compliance with the Sunshine Law requires that reasonable notice of the meeting be given; that the meeting be open to the public; and that minutes of the meeting be kept and provided.

It should be noted that the Sunshine Law also applies to advisory boards and to ad hoc committees which are created for particular purposes. For example, if a screening committee were established and composed of risk management directors from adjoining communities to help select a risk management director for the Town, the Sunshine Law would apply to such ad hoc committee, unless the committee was confined to performing strictly a fact-finding role. Once an ad hoc committee is given the authority to make recommendations, screen candidates or create a short list, it is considered that the committee has gone beyond a fact-finding status and must comply with the Sunshine Law. See Krause v. Reno, 366 So. 2d 1244 (Fla. 3d DCA 1979)

The wide sweep of the Sunshine Law forbids government board members from taking actions which may seem perfectly reasonable and be done with the best of intentions. For example, two or more members of the same board may attend a social function, if any discussion of any item which may come before the board is strictly avoided by such members, or the social function complies with the Sunshine Law requirements of public notice, public access and the provision of minutes of the meeting. Likewise, members of the same commission may attend a seminar or lecture as members of the audience, without complying with the Sunshine Law provisions, so long as any interchange of ideas between commissioners upon any matter which may come before the board is strictly avoided.

C. **Example of Situations Which May Arise**

An illustrative example may be helpful. If two or more members of the Commission were to attend a meeting of a civic association, it would not be advisable for either of the Commissioners to engage in a discussion or presentation at such meeting (upon any matter which may come before the Commission) in the presence of the other Commissioner, unless the meeting complies with the requirements of the Sunshine Law. If Commissioners attend such a meeting which has not been duly noticed, and one Commissioner proceeds to make a speech concerning matters of Town business (which are within the jurisdiction of the Commission) to the audience, the other Commissioners should absent themselves from the room in order to avoid a potential prohibited interchange of ideas between Commissioners.

D. **Recommendations**

The following recommendations are respectfully offered in an effort to assist in continued compliance with the Sunshine Law.

1. Do not pass around a memorandum from one Commissioner to another for signature, initial or check-off indicating approval or disapproval of a proposal. This may be viewed as an unlawful meeting. Communications by phone, email, text or other such technologies may also constitute a meeting.

2. Do not hold a social luncheon or other social gathering of two or more Commissioners, which is not open to the public and duly noticed, unless any discussion of the business of the Commission is strictly avoided.

3. Do not utilize a staff person or any third party to create an indirect discussion or interchange between two or more Commissioners on Commission business.

4. Do not privately poll or canvas other Commissioners by telephone or otherwise to obtain their approval or lack of objection to the business of the Commission. (Staff should also avoid this, since Commissioners may ask what other Commissioners said and the staff response may create an indirect discussion of the public business by two or more Commissioners. Nor should staff use this approach to obtain a piece-by-piece decision of the Commission.)¹

5. Even if only giving or seeking information, a Commissioner cannot talk to or communicate with another member of the same Commission about any Town matter which is within the scope of the business of such Commission that may come before such Commissioners, except at a duly-noticed public meeting. One Commissioner should not write to or copy another Commissioner on a matter within the jurisdiction of the body, since this may invite a prohibited interchange of ideas if the recipient who serves on the same body replies. (A Commissioner may prepare a memorandum for inclusion in a public meeting agenda).

6. A Commissioner may generally discuss Commission business with an individual member of a **different** Town board not composed of members of the Commission on which he or she serves, so long as he or she does not go from one member of that different board to another member of that different board communicating what has been said by other members.

7. Please do not proceed when in doubt about whether a proposed action is allowed under the Sunshine Law. Request the Town Attorney's opinion. Leave the room, if necessary, and protect yourself and the Town.

8. Avoid making inspection trips with other Commissioners, unless adequate provisions are made by Town staff for accommodating the attendance of the public. Because discussion may easily ensue, reasonable public notice and access must be provided.

9. Do not forget that for all required public meetings, reasonable notice must be given, public access must be allowed, and minutes must be made for public inspection.

¹ This does not preclude the Town Manager or Town Attorney from separately asking each Commissioner his or her position on an issue, so long as such process is not a substitute for any required consideration as a body and the thoughts of the Commissioners are not circulated through a liaison approach

E. **Necessity for Compliance**

Compliance with the Sunshine Law is vital. Aside from potential invalidation of the municipal action taken, the statute contains sanctions for non-compliance. A knowing violation is punishable as a misdemeanor of the second degree by imprisonment for 60 days and a fine of up to \$500. Even an unknowing and unintentional violation may result in a non-criminal infraction punishable by a fine not exceeding \$500.

The goal of the Sunshine Law is to forbid members of a government board from secretly dealing with the public business. The statute has been broadly interpreted by the courts so as to achieve that goal. Commissioners must utilize great caution, lest their public service be rewarded with fines, penalties and unnecessary aggravation.

**CONSTITUTION OF THE STATE OF FLORIDA
AS REVISED IN 1968 AND SUBSEQUENTLY AMENDED**

ARTICLE I DECLARATION OF RIGHTS

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SECTION 24. Access to public records and meetings.--

- (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

- (b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

- (c) This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

- (d) All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

History.--Added, C.S. for C.S. for H.J.R.'s 1727, 863, 2035, 1992; adopted 1992; Am. S.J.R. 1284, 2002; adopted 2002.

The 2009 Florida Statutes
Title XIX PUBLIC BUSINESS
Chapter 286 PUBLIC BUSINESS: MISCELLANEOUS PROVISIONS

286.012 Voting requirement at meetings of governmental bodies.--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 in regard to any such decision, ruling, or act; and 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 the provisions of s. 112.311, s. 112.313, or s. 112.3143. In such cases, said member shall comply with the disclosure requirements of s. 112.3143.

History.--s. 1, ch. 72-311; s. 9, ch. 75-208; s. 2, ch. 84-357; s. 13, ch. 94-277.

The 2009 Florida Statutes
Title XIX PUBLIC BUSINESS
Chapter 286 PUBLIC BUSINESS: MISCELLANEOUS PROVISIONS

286.011 Public meetings and records; public inspection; criminal and civil penalties.--

- (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 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 all such meetings.
- (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)
 - (a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.
 - (b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly 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.
 - (c) Conduct which occurs outside the state which would constitute a knowing violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.
- (4) Whenever an action has been filed against any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision to enforce the provisions of this section or to invalidate the actions of any such board, commission, agency, or authority, which action was taken in violation of this section, and the court determines that the defendant or defendants to such action acted in violation of this section, the court shall assess a reasonable attorney's fee against such agency, and may assess a reasonable attorney's fee against the individual filing such an action if the court finds it was filed in bad faith or was frivolous. Any fees so assessed may be assessed against the individual member or members of such board or commission; provided, that in any case where the board or commission seeks the advice of its attorney and such advice is followed, no such fees shall be assessed against the individual member or members of the board or commission. However, this subsection shall not apply to a state attorney or his or her duly authorized assistants or any officer charged with enforcing the provisions of this section.
- (5) Whenever any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision appeals any court order which has found said board, commission, agency, or authority to have violated this section, and

such order is affirmed, the court shall assess a reasonable attorney's fee for the appeal against such board, commission, agency, or authority. Any fees so assessed may be assessed against the individual member or members of such board or commission; provided, that in any case where the board or commission seeks the advice of its attorney and such advice is followed, no such fees shall be assessed against the individual member or members of the board or commission.

(6) All persons subject to subsection (1) are prohibited from holding meetings at any facility or location 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.

(7) Whenever any member of any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision is charged with a violation of this section and is subsequently acquitted, the board or commission is authorized to reimburse said member for any portion of his or her reasonable attorney's fees.

(8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation.

History.--s. 1, ch. 67-356; s. 159, ch. 71-136; s. 1, ch. 78-365; s. 6, ch. 85-301; s. 33, ch. 91-224; s. 1, ch. 93-232; s. 210, ch. 95-148; s. 1, ch. 95-353.