



SANTA ROSA COUNTY BOARD OF COMMISSIONERS

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MEMORANDUM

FROM: ROY V. ANDREWS, COUNTY ATTORNEY

DATE: JANUARY 25, 2016

RE: FLORIDA'S SUNSHINE LAW

This memo is for the purpose of insuring that all board members are advised of the basic principles of the Florida sunshine law. If any board member has any questions, please contact my office at 983-1857.

I. AGENCIES COVERED BY THE SUNSHINE LAW.

The Government-in-the-Sunshine Law applies to "any board or commission of any . . . county". Florida courts have held that the Sunshine Law extends to bind every board over which a county has dominion and control.

II. ACTIONS OR ACTIVITIES OF A PUBLIC BOARD COVERED BY THE SUNSHINE LAW.

The Sunshine Law extends to discussions and deliberations as well as formal actions taken by a public board. There is no requirement that a quorum be present for a meeting of members of a public board in order to be subject to the Sunshine Law. Rather, **the law is applicable to any gathering, whether formal or casual, of two or more members of the same board to discuss some matter on which "foreseeable action" may be taken by the public board.**

Investigative Trips. Investigative trips are not considered to be covered by the sunshine law so long as board members do not discuss between themselves issues that may come before the committee for action.

Telephone/Email Conversations. The Sunshine Law applies to any deliberation and discussion between two or more members of a board on some matter that may foreseeable come before that board for action. Thus, the use of a telephone or email to conduct such discussions does not remove the conversation from the requirements of the Sunshine Law. Members of a board seeking to discuss board business should insure that the requirements of the Sunshine Law have been satisfied by providing notice and access to the public.

Meetings of Members of Different Boards. The Sunshine Law does not apply to a meeting between individuals who are members of different boards. An individual county commissioner may, therefore, meet privately with an individual member of the advisory board to discuss issues coming before the advisory board.

Members of the Same Board Meeting Together Socially. Members of a public board are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board are not discussed at such gathering.

III. PROCEDURAL REQUIREMENTS OF THE SUNSHINE LAW.

A. Notice Requirements. The Sunshine Law itself does not specify any particular notice requirements. However, courts of this state have indicated that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given. The notice must be given in such a manner as will enable interested members of the public to attend the meeting.

B. Public's Right to Attend Meeting. The Sunshine Law requires that meetings of all public boards be "open to the public." This phrase means open to all persons who choose to attend. Furthermore, the courts have recognized the rights of the public to participate in open meetings and to present their views. Legislation was recently passed allowing a member of the public to have input on any proposition under consideration by local government.

C. Secret Ballots. As stated previously, the Sunshine Law requires that meetings of public boards be open to the public at all times. Thus, any portion of the meeting that becomes covert, secret or not wholly exposed to the view and hearing of the public would be a violation of the Sunshine Law. Accordingly, secret ballots as a means of voting are not allowed.

D. Abstention from Voting. Florida Statutes specifically provide that no member of a board may abstain from voting except when, with respect to such member, there is or appears to be a possible conflict of interest. A vote is to be recorded for each member present. The exception, for a conflict of interest, arises with respect to any matter that may inure to the board member's pecuniary gain. If such a conflict of interest exists, the board member is to refrain from voting and must complete a disclosure form that will be provided by staff.

E. Minutes of Meetings. The Sunshine Law specifically requires that minutes of a meeting of a public board be promptly recorded and open to public inspection. The minutes need not be verbatim or in detail, rather a brief summary or series of brief notes reflecting the events of the meeting will suffice.

IV. CONSEQUENCES OF FAILURE TO COMPLY WITH THE SUNSHINE LAW.

Penalties can be imposed for violations of the Sunshine Law. A board member who knowingly violates the Sunshine Law may be found guilty of a misdemeanor of the second degree. Such member may be removed from office. The Sunshine Law also imposes noncriminal penalties for unintentional violations, punishable by a fine not to exceed \$500.00. Moreover, reasonable attorney's fees can be assessed against one found to have violated the Sunshine Law.

The Sunshine Law provides that no resolution, rule, regulation, or formal action shall be considered binding except as taken or made at an open meeting.

recommendations

lic agencies may be subject to the Sunshine including upon the entities that create them. tee has been delegated "decision-making ering or fact-finding authority." *Sarasota*, 48 So. 3d 755, 762 (Fla. 2010). "Where uthority, the committee's meetings must be ocedures eventually used by the traditional

ion, 296 So. 2d 473 (Fla. 1974), a citizen assist in revision of zoning ordinances was ision court, concluding that the committee ative decisions, stated that "any committee e of advisory capacity would be subject to aw." *Id.* at 476. *See also Spillis Candella o* 694, 695 (Fla. 3d DCA 1988) (committee epted by the board made a significant ruling)s. 286,011; an "ad hoc advisory board, even s to a public agency and even if it possesses ect to the Sunshine Law"); and *Lyon v Lake ine Law* applies to site plan review committee ry capacity to the county manager). *Accord* ed by city council to make recommendations ervices), and 01-84 (school advisory council .4521, FS).

standard for members of advisory committees *re County v. Pigeon Key Historical Park, Inc.*, e Sunshine Law equally binds all members of members or elected officials". Accordingly, in of two or more members to discuss any matter open to the public, noticed to the public, and

e public official

nmines appointed by a single public official For example, in *Wood v. Marston*, 442 So. 2d ecommended that the Sunshine Law applied to niversity president to screen applications and hool dean, because the committee, in deciding ion, performed a policy-based, decision-making *iet Board of Lower Tribunal Trustees*, 691 So. 2d l by agency purchasing director to consider and ne Law). *Accord* AGOs 05-05 (fact that advisory y commission and its recommendations were om ambit of the Sunshine Law); 85-76 (ad hoc aking recommendations concerning legislation), to meet with Chamber of Commerce and deal Op. to Lamar, August 2, 1993 (transition team regarding governmental reorganization).

of the Sunshine Law to advisory committees has shed for fact-finding only. "[A] committee is not has only been delegated information-gathering

or fact-finding authority and only conducts such activities." *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010). *See also Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985). *Accord* AGO 95-06 (when a group, on behalf of a public entity, functions solely as a fact-finder or information gatherer with no decision-making authority, no "board or commission" subject to the Sunshine Law is created).

"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 decision-making function by sorting through options and making recommendations to the governmental body." *Inf. Op.* to Randolph, June 10, 2010. Thus, if an advisory committee has a decision-making function in addition to fact-finding, the Sunshine Law is applicable. *See Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983), recognizing that while a "search and screen" committee 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.

Similarly, in AGO 94-21, the Attorney General's Office advised that the Sunshine Law governed the meetings of a negotiating team (composed of the mayor, the city manager's designee, and a person designated by the sports authority) that was created by a city commission to negotiate with a sports organization on behalf of the city. Even though the resolution creating the team provided that the negotiations were subject to ratification and approval by the city commission, the team was authorized to do more than mere fact-finding in that it would be "participating in the decision-making process by accepting some options while rejecting others for presentment of the final negotiations to the city commission." *Id.*

Moreover, the "fact-finding exception" applies only to advisory committees and not to boards that have "ultimate decision-making governmental authority." *Finch v. Seminole County School Board*, 995 So. 2d 1068, 1071-1072 (Fla. 5th DCA 2008). In *Finch*, the court held that the "fact-finding exception" did not apply to a school board as the ultimate decision-making body; thus the board could not take a fact-finding bus tour without complying with the Sunshine Law even though school board members were separated from each other by several rows of seats, did not discuss their preferences or opinions, and no vote was taken during the trip.

d. Staff committees

The Sunshine Law applies to meetings of elected or appointed boards; it does not ordinarily apply to staff committees or meetings. *See, e.g., Occidental Chemical Company v. Mayo*, 351 So. 2d 336 (Fla. 1977), *disapproved in part on other grounds, Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992); *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996); and AGO 89-39.

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. *Bennett v. Wardens*, 333 So. 2d 97 (Fla. 2d DCA 1976) (meetings of committee appointed by public college president to report on employee working conditions not subject to Sunshine Law). *Gf. AGO 08-63* (Although Sunshine Law does not apply to orientation sessions held by counties for special magistrates hired to hear value adjustment board petitions, "nothing would preclude a county from allowing the public to attend such orientations in order to enhance the knowledge of citizens who appear before value adjustment boards").

Accordingly, a state agency did not violate the Sunshine Law when agency employees conducted an investigation into a licensee's alleged failure to follow state law, and an assistant director made the decision to file a complaint as "[c]ommunication among administrative staff in fulfilling investigatory, advisory, or charging functions does not constitute a 'Sunshine' Law violation." *Baker v. Florida Department of Agriculture and Consumer Services*, 937 So. 2d 1161 (Fla. 4th DCA 2006), *review denied*, 954 So. 2d 27 (Fla. 2007). *And see Knox v. District School Board of Broward*, 821 So. 2d 311, 315 (Fla. 5th DCA 2002), holding that the Sunshine Law did not apply to a group of school board employees meeting with an area superintendent to review applications, which were then sent by the area superintendent to the school superintendent with

her recommendation: “[A] Sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties.”

Similarly, the court in *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), ruled that the 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 at the meetings. See also *Malina v. City of Miami*, 837 So. 2d 462, 463 (Fla. 3d DCA 2002) (police discharge of firearms committee not subject to Sunshine Law because the committee “is nothing more than a meeting of staff members who serve in a fact-finding advisory capacity to the chief”); and *J.I. v. Department of Children and Families*, 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law not applicable to Department of Children and Families permanency staffing meetings conducted to determine whether to file a petition to terminate parental rights).

However, if a staff committee has been delegated decision-making authority as opposed to mere fact-finding or information-gathering, the Sunshine Law applies to the committee. See *Wood v. Manston*, 442 So. 2d 934, 938 (Fla. 1983). 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. *Id.* See *News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 548 (Fla. 2d DCA 1982), concluding that it would be “judicious” to hold that “a certain committee is governed by the Sunshine Law when it consists of members of the public, who are presumably acting for the public, but hold a committee may escape the Sunshine Law if it consists of individuals who owe their allegiance to, and receive their salaries from, the governing authority,” and *Evergreen the Tree Treasures of Charlotte County, Inc. v. Charlotte County Board of County Commissioners*, 810 So. 2d 526, 531-532 (Fla. 2d DCA 2002) (staff committee members delegated decision-making authority from public officials no longer function as staff members but “stand in the shoes of such public officials” insofar as the Sunshine Law is concerned).

Thus, in *Sliver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099 (Fla. 3d DCA 1997), the district court determined that a committee composed primarily of staff that was created by a college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law. The committee’s job to “weed through the various proposals, to determine which were acceptable and to rank them accordingly” was sufficient to bring the committee within the scope of the Sunshine Law. See also *Roscow v. Albrecht*, No. 03-CA-1833 (Fla. 2d Cir. Ct. August 6, 2004) (committee created by the state department of transportation and composed of officials from state, local and federal agencies was subject to the Sunshine Law because the committee was responsible for screening and evaluating potential corridors and alignments for a possible expansion of the Suncoast Parkway); AGO 05-06 (city development review committee, composed of several city officials and representatives of various city departments to review and approve development applications, is subject to the Sunshine Law); and AGO 86-51 (land selection committee appointed by water management district and delegated decision-making authority to consider projects for inclusion on a list of proposed acquisition projects 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 district’s governing board”).

Similarly, in *Dacott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that a meeting of a pre-termination conference panel established pursuant to a county ordinance and composed of a department head, personnel director and equal opportunity director should have been held in the Sunshine. Even though the county administrator had the sole authority to discipline employees, that authority had been delegated to the department head who in turn chose to share that authority with the other members of the panel.

By contrast, in *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 763 (Fla. 2010), the Court found that a county administrator’s discussions with staff and consultants while negotiating a memorandum of understanding with a baseball team did not violate the Sunshine Law because the administrator’s “so-called negotiations team only served an

informational role.” According to the Court, “[t]his is not a situation where [the administrator] and the individuals he consulted made joint decisions. Cf. *Dacott v. Palm Beach County*, [supra].” See also *McDowgall v. Cahlers*, 3 So. 3d 391 (Fla. 2d DCA 2009) and *Jordan v. Jenne*, 938 So. 2d 526 (Fla. 4th DCA 2006).

3. Are private organizations subject to the Sunshine Law?

The Attorney General’s Office has recognized that private organizations generally are not subject to the Sunshine Law unless the private organization has been created by a public entity, has been delegated the authority to perform some governmental function, or plays an integral part in the decision-making process of a public entity. AGO 07-27.

However, as discussed below, the Sunshine Law applies to private entities created by law or by public agencies, and to private entities providing services to governmental agencies and acting on behalf of those agencies in the performance of their public duties.

a. 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.” *City of Miami Beach v. Berry*, 245 So. 2d 38, 40 (Fla. 1971).

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. See AGO 00-08 (“a board or commission created by a public agency or entity is subject to section 286.011, Florida Statutes”). For example, in AGO 04-44, the Attorney General advised that a nonprofit corporation established by state law to manage corrections work programs of the Department of Corrections, was subject to the Sunshine Law. *And see* AGOs 98-42 (association legislatively designated as the governing organization of athletics in Florida public schools), 97-17 (not-for-profit corporation created by a city redevelopment agency to assist in the implementation of its redevelopment plan), and 98-01 (board of trustees of an insurance trust fund created pursuant to collective bargaining agreement between a city and the employee union). Cf. s. 20.41(6) and (8), F.S., providing that area agencies on aging, described as “nongovernmental, independent, not-for-profit corporations” are “subject to [the Public Records Act], and, when considering any contracts requiring the expenditure of funds, are subject to ss. 286.011-286.012, relating to public meetings.”

b. Private entities providing services to public agencies

Much of the litigation regarding the application of the open government laws to private organizations doing business with public agencies has been in the area of public records, and the courts have often looked to Ch. 119, F.S., in determining the applicability of the Sunshine Law. See *Cape Coral Medical Centers, Inc. v. News-Press Publishing Company, Inc.*, 390 So. 2d 1216, 1218n.5 (Fla. 2d DCA 1980) (inasmuch as the policies behind Ch. 119, F.S., and s. 286.011, F.S., are similar, they should be read together); *Wood v. Manston*, 442 So. 2d 934, 938 (Fla. 1983); and *Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979).

As the courts have emphasized in analyzing the application of Ch. 119, F.S., to entities doing business with governmental agencies, the mere receipt of public funds by private corporations, is not, standing alone, sufficient to bring the organization within the ambit of the open government requirements. See, e.g., *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992) (records of private architectural firm not subject to Ch. 119, F.S., merely because firm contracted with school board).

Similarly, a private corporation performing services for a public agency and receiving compensation for such services is not by virtue of this relationship alone subject to the Sunshine Law unless the public agency’s governmental or legislative functions have been delegated to it. *McCoy Restaurants, Inc. v. City of Orlando*, 392 So. 2d 252 (Fla. 1980) (airlines are not by virtue of their lease with the aviation authority public representatives subject to the Sunshine Law); and AGO 98-47 (Sunshine Law does not apply to private nongovernmental organization when the