

Overview of the Sunshine Law

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A. 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.

B. WHAT AGENCIES ARE COVERED BY THE SUNSHINE LAW?

1. *Are all public agencies subject to the Sunshine Law?*

The Government in the Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." The statute thus applies to public *collegial* bodies within this state, at the local as well as state level. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). It is equally applicable to elected and appointed boards or commissions. Op. Att'y Gen. Fla. 73-223 (1973). The judiciary and the Legislature are not subject to the Sunshine Law. See, *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); Op. Att'y Gen. Fla. 83-97 (1983).

Federal agencies, *i.e.*, agencies created under federal law, operating within the state do not come within the purview of the state Sunshine Law. Op. Att'y Gen. Fla. 71-191 (1971). *Cf.*, Inf. Op. to Markham, September 10, 1996 (technical oversight committee established by state agencies as part of settlement agreement in federal lawsuit subject to Sunshine Law).

Note: 2006 and 2007 additions are marked in bold text.

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

a. 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. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). See also, *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (Sunshine Law applies to a university's search and screening committee). And see, *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (Sunshine Law applies to site plan review committee created by county commission to serve in an advisory capacity to the county manager).

b. 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 a 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. *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985).

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

"Generally . . . the Government in the Sunshine Law does not apply to private organizations providing services to a state or local government, unless the private entity has been created by a public entity, there has been a delegation of the public entity's governmental functions, or the private organization plays an integral part in the decision-making process of the public entity." Op. Att'y Gen. Fla. 07-27 (2007). Thus, the Sunshine Law would not ordinarily apply to meetings of a homeowners' association. Inf. Op. to Fasano, June 7, 1996.

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. *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).

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. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 383 (Fla. 1999).

Accordingly, the Attorney General's Office has concluded that if a county commission dissolves its cultural affairs council and designates a nonprofit organization to fulfill that role for the county, the nonprofit organization would be subject to the Sunshine Law. Op. Att'y Gen.

Fla. 98-49 (1998). *And see*, Op. Att'y Gen. Fla. 99-53 (1999) (architectural review committee of a homeowners' association is subject to the Sunshine Law where the committee, pursuant to county ordinance, must review and approve applications for county building permits); and Op. Att'y Gen. Fla. 07-27 (2007) (Sunshine Law applies to local health councils established pursuant to section 408.033, Florida Statutes).

4. *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. *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). Thus, 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. *Baker v. Florida Department of Agriculture and Consumer Services*, 937 So. 2d 1161 (Fla. 4th DCA 2006). *And see*, *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), in which the court concluded that the Sunshine Law did not apply to informal meetings of staff where the meetings 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; *Knox v. District School Board of Brevard*, 821 So. 2d 311, 315 (Fla. 5th DCA 2002) ("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"); *Molina v. City of Miami*, 837 So. 2d 462, 463 (Fla. 3d DCA 2002) (police department discharge of firearms review committee, composed of three deputy chiefs is not subject to the 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"); *J.I. v. Department of Children and Families*, 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law does not apply to Department of Children and Families permanency staffing meetings conducted to determine whether to file petition to terminate parental rights); and *Jordan v. Jenne*, 938 So. 2d 526 (Fla. 4th DCA 2006) (Sunshine Law not applicable to a professional standards committee responsible for reviewing charges against a sheriff's deputy and making recommendations to the inspector general as to whether the charges should be sustained, dismissed, or whether the case should be deferred for more information).

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. *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983). *And see*, *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners*, 810 So. 2d 526 (Fla. 2d DCA 2002) (when public officials delegate their fact-finding duties and decision-making authority to a committee of staff members, those individuals no longer function as staff members but "stand in the shoes of such public officials" insofar as the Sunshine Law is concerned).

For example, in *Wood v. Marston*, *supra*, the 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. *And see, Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004) (meeting of pre-termination conference panel established pursuant to county ordinance is subject to Sunshine Law).

Similarly, in *Silver Express Company v. Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997), the district court determined that a committee (composed of staff and one outside person) that was created by a college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law. According to the court, the committee's job was to weed through the various proposals, to determine which were acceptable and to rank them accordingly. This function was sufficient to bring the committee within the scope of the Sunshine Law because "governmental advisory committees which have offered up structured recommendations such as here involved -- at least those recommendations which eliminate opportunities for alternative choices by the final authority, or which rank applications for the final authority -- have been determined to be agencies governed by the Sunshine Law." 691 So. 2d at 1101. *And see, Op. Att'y Gen. Fla. 05-06 (2005)* (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).

5. 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. *See, Op. Att'y Gen. Fla. 92-79 (1992)*.

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

1. 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. *Hough v. Stemberge*, 278 So. 2d 288 (Fla. 3d DCA 1973). *Cf., Op. Att'y Gen. Fla. 04-58 (2004)* ("coincidental unscheduled meeting of two or more county commissioners to discuss emergency issues with staff" during a declared state of emergency not subject to s. 286.011 if the issues do not require action by the county commission).

2. 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. *See, Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988) (requisite to application of the sunshine law is a meeting between two or more public officials); *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989); *Mitchell v. School Board of Leon County*, 335 So. 2d 354 (Fla. 1st DCA 1976).

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." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

a. Written correspondence between board members

A city commissioner may, outside a public meeting, send documents that the commissioner wishes other members of the commission to consider on matters coming before the commission for official action, provided that there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting. Op. Att'y Gen. Fla. 07-35 (2007). In such cases, the records, which are subject to disclosure under the Public Records Act, are not being used as a substitute for action at a public meeting as there is no interaction among the commissioners prior to the meeting. Op. Att'y Gen. Fla. 89-23 (1989).

If, however, a 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. Op. Att'y Gen. Fla. 90-3 (1990). *See also*, Op. Att'y Gen. Fla. 96-35 (1996), stating 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.

b. Meetings conducted over the telephone or using electronic media technology

As discussed previously, the Sunshine Law applies to 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. *See, State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per*

curiam affirmed, 886 So. 2d 229 (Fla. 1st DCA 2004) (telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law). Similarly, board members may not use computers to conduct private discussions among themselves about board business. Op. Att'y Gen. Fla. 89-39 (1989).

A related issue is whether a board is authorized to conduct *public* meetings via electronic media technology (e.g., telephone or video conferencing). The answer to this question depends upon whether the board is a state or local government agency.

In Op. Att'y Gen. Fla. 98-28 (1998), the Attorney General's Office concluded that section 120.54(5)(b)2., Florida Statutes, authorizes *state* agencies to conduct meetings via electronic means provided that the board complies with uniform rules of procedure adopted by the state Administration Commission. These rules contain notice requirements and procedures for providing points of access for the public. See, Rule 28-109, Florida Administrative Code.

As to *local* boards, the Attorney General's Office advised that the authorization in section 120.54(5)(b)2., Florida Statutes, to conduct meetings entirely through the use of communications media technology applies only to state agencies. Op. Att'y Gen. Fla. 98-28 (1998). Thus, since section 1001.372(2)(b), Florida Statutes, requires a district school board to hold its meetings at a "public place in the county," a quorum of the board must be physically present at the meeting of the school board. *Id.*

If a quorum of the local board is physically present, "the participation of an absent member by telephone conference or other interactive electronic technology [is] permissible when such absence is due to extraordinary circumstances such as illness[;] . . . [w]hether the absence of a member due to a scheduling conflict constitutes such a circumstance is a determination that must be made in the good judgement of the board." Op. Att'y Gen. Fla. 03-41 (2003). See also, Op. Att'y Gen. Fla. 02-82 (2002) (physically-disabled members of a city advisory committee may participate and vote by electronic means as long as a quorum of the committee members is physically present at the meeting site).

The physical presence of a quorum has not been required, however, where electronic media technology (such as video conferencing and digital audio) is used to allow public access and participation at *workshop* meetings where no formal action will be taken. Thus, the Attorney General's Office concluded that an advisory board composed of representatives from several county metropolitan planning organizations may use electronic media technology to link simultaneously held public meetings of citizens' advisory committees in each of its participating counties, so as to allow all members of the committees and the public to hear and participate at workshops. However, the use of electronic media technology does not satisfy quorum requirements necessary for official action to be taken. Op. Att'y Gen. Fla. 06-20 (2006). See also, Op. Att'y Gen. Fla. 01-66 (2001) (boards may use electronic media technology to conduct informal discussions and workshops over the Internet, provided proper notice is given, and interactive access by members of the public is provided). However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks violates the Sunshine Law by circumventing the notice and access provisions of that law. Op. Att'y Gen. Fla. 02-32 (2002). *Accord*, Inf. Op. to Chiochetti, March 23, 2006 and Inf. Op. to Tanner, March 19, 2007.

c. Delegation of authority to single individual

If a member of a public board is authorized only to explore various contract 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. Op. Att'y Gen. Fla. 93-78 (1993). 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. *And see, Leach-Wells v. City of Bradenton*, 734 So. 2d 1168 (Fla. 2d DCA 1999) (committee charged with evaluating proposals violated the Sunshine Law when the city clerk unilaterally tallied the results of the committee members' individual written evaluations and ranked them; the court held that the "short-listing was formal action that was required to be taken at a public meeting"). *Compare, Lee County v. Pierpont*, 693 So. 2d 994 (Fla. 2d DCA 1997) (authorization to county attorney to make settlement offers to landowners not to exceed appraised value plus 20%, rather than a specific dollar amount, did not violate the Sunshine Law).

It must be recognized, however, that the applicability of the Sunshine Law relates to the discussions of a single individual who has been delegated decision-making authority on behalf of a board or commission. If the individual, rather than the board, is vested by law, charter or ordinance with the authority to take action, such discussions are not subject to section 286.011, Florida Statutes. *See, City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989).

e. Use of nonmembers as liaisons between board 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 *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979), 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.

Not all decisions taken by staff, however, need to be made or approved by a board. Thus, the district court concluded in *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), that the decision to appeal made by legal counsel to a public board after discussions between the legal staff and individual members of the commission was not subject to the Sunshine Law.

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

1. *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. *Op. Att'y Gen. Fla. 74-84 (1974)*; *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973). 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. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

Section 119.07(7), Florida Statutes (2007), 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. *See, Ops. Att'y Gen. Fla. 04-44 (2004) (PRIDE)*, 95-65 (1995) (district case review committee), 93-41 (1993) (county criminal justice commission), and 91-88 (1991) (pension board).

2. *Legal matters*

In the absence of legislative exemption, discussions between a public board and its attorney are subject to section 286.011, Florida Statutes. *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (section 90.502, Florida Statutes, which provides for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings). *Cf.*, section 90.502(6), Florida Statutes, stating that a discussion or activity that is not a meeting for purposes of the Sunshine Law shall not be construed to waive the attorney-client privilege.

There are statutory exemptions, however, which apply to some discussions of pending litigation between a public board and its attorney.

a. **Attorney-client discussions**

Section 286.011(8), Florida Statutes, provides:

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. (e.s.)

(1) Is section 286.011(8), Florida Statutes, to be liberally or strictly construed?

It has been held that the Legislature intended a strict construction of section 286.011(8), Florida Statutes. *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995); *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99 (Fla. 1st DCA 1996).

(2) Who may call an attorney-client meeting?

While section 286.011(8), Florida Statutes, does not specify who calls the closed attorney-client meeting, it requires as one of the conditions that must be met that the governmental entity's attorney "shall advise the entity at a public meeting that he or she desires advice concerning the litigation."

The requirement that the board's attorney advise the board at a public meeting that he or she desires advice concerning litigation, is not satisfied by a previously published notice of the closed session. *Op. Att'y Gen. Fla. 04-35 (2004)*. Rather, such an announcement must be made at a public meeting of the board. *Id. Cf., Op. Att'y Gen. Fla. 07-31 (2007) (a board attorney's request for a section 286.011[8], Florida Statutes, meeting may be made at a special meeting of the board provided that the special meeting at which the request is*

made is open to the public, reasonable notice has been given, and minutes are taken).

(3) Who may attend?

Only those persons listed in the statutory exemption, *i.e.*, the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session. Other staff members or consultants are not allowed to be present. *School Board of Duval County v. Florida Publishing Company*. And see, *Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999) (rejecting city's argument that charter provision requiring that city clerk attend all council meetings authorized clerk to attend closed attorney-client meeting); and Op. Att'y Gen. Fla. 01-10 (2001) (clerk of court not authorized to attend).

However, because the entity's attorney is permitted to attend the closed session, if the school board hires outside counsel to represent it in pending litigation, both the school board attorney and the litigation attorney may attend a closed session. Op. Att'y Gen. Fla. 98-06 (1998). And see, *Zorc v. City of Vero Beach* (attendance of Special Counsel authorized).

(4) Is substantial compliance with the conditions established in the statute adequate?

In *City of Dunnellon v. Aran*, *supra*, the court said that a city council's failure to announce the names of the lawyers participating in a closed attorney-client session violated the Sunshine Law. The court rejected the city's claim that when the mayor announced that attorneys hired by the city would attend the session [but did not give the names of the individuals], his "substantial compliance" was sufficient to satisfy the statute. *Cf.*, *Zorc v. City of Vero Beach*, at 901, noting that deviation from the agenda at an attorney-client session is not authorized; while such deviation is permissible if a *public* meeting has been properly noticed, "there is no case law affording the same latitude to deviations in closed door meetings."

(5) What kinds of matters may be discussed at the attorney-client session?

Section 286.011(8) states that the subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures. Section 286.011(8)(b), Florida Statutes. If a board goes beyond the "strict parameters of settlement negotiations and strategy sessions related to litigation expenditures" and takes "decisive action," a violation of the Sunshine Law results. *Zorc v. City of Vero Beach*, at 900. And see, Op. Att'y Gen. Fla. 99-37 (1999).

Section 286.011(8), Florida Statutes, "simply provides a governmental entity's attorney an opportunity to receive necessary direction and information from the government entity. No final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings. The decision to settle a case, for a certain amount of money, under certain conditions is a decision which must be voted upon in a public meeting." *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 100 (Fla. 1st DCA 1996), *quoting* Staff of Fla.H.R.Comm. on Government Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement at 3.

Thus, "[t]he settlement of a case is exactly that type of final decision contemplated by the drafters of section 286.011(8) which must be voted upon in the sunshine." *Zorc v. City of Vero Beach*, at 901. See also, *Freeman v. Times Publishing Company*, 696 So. 2d 427 (Fla. 2d DCA 1997) (discussion of methods or options to achieve continuing compliance with a long-standing federal desegregation mandate [such as whether to modify the boundaries of a school zone to achieve racial balance] must be held in the Sunshine). Compare, *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 172 (Fla. 4th DCA 2002) (closed city commission meeting to discuss various options to settle a lawsuit involving a challenge to a city resolution, including modification of the resolution, authorized because the commission "neither voted, took official action to amend the resolution, nor did it formally decide to settle the litigation"); and *Brown v. City of Lauderhill*, 654 So. 2d 302, 303 (Fla. 4th DCA 1995) (closed-door session between city attorney and board to discuss claims for attorney's fees, authorized).

(6) When is an agency a "party to pending litigation" for purposes of the exemption?

In *Brown v. City of Lauderhill*, *supra*, the court said it could "discern no rational basis for concluding that a city is not a 'party' to pending litigation in which it is the real party in interest." And see, *Zorc v. City of Vero Beach*, at 900 (city was presently a party to ongoing litigation by virtue of its already pending claims in bankruptcy proceedings).

Although the *Brown* decision established that the exemption could be used by a city that was a real party in interest on a claim involved in *pending* litigation, that decision does not mean that an agency may meet in executive session with its attorney where there is only the *threat* of litigation. See, Op. Att'y Gen. Fla. 98-21 (1998) (section 286.011[8] exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable"). And see, Op. Att'y Gen. Fla. 06-03 (2006) (closed attorney-client session may not be held to discuss settlement negotiations on an issue that is the subject of mediation conducted pursuant to a partnership agreement between the agency and others).

(7) When is litigation "concluded" for purposes of section 286.011(8)(e)?

An action or lawsuit is "pending" from its inception until the rendition of a final judgment. Op. Att'y Gen. Fla. 06-03 (2006). Thus, litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of section 286.011(8), and a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until conclusion of the litigation. Op. Att'y Gen. Fla. 94-64 (1994). And see, Op. Att'y Gen. Fla. 94-33 (1994), concluding that to give effect to the purpose of section 286.011(8), a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run. Cf., Op. Att'y Gen. Fla. 96-75 (1996) (disclosure of medical records to a city council during a closed-door meeting under section 286.011[8], Florida Statutes, does not affect the requirement that the transcript of such a meeting be made a part of the public record at the conclusion of the litigation).

b. Risk management

Section 768.28(16)(c), Florida Statutes, states that portions of meetings and proceedings relating solely to the evaluation of claims or to offers of compromise of claims filed with a risk management program of the state, its agencies and subdivisions, are exempt from the Sunshine Law.

This exemption is limited and applies only to tort claims for which the agency may be liable under section 768.28, Florida Statutes. Op. Att'y Gen. Fla. 04-35 (2004). The exemption is not applicable to meetings held prior to the filing of a tort claim with the risk management program. Op. Att'y Gen. Fla. 92-82 (1992). Moreover, a meeting of a city's risk management committee is exempt from the Sunshine Law only when the meeting relates solely to the evaluation of a tort claim filed with the risk management program or relates solely to an offer of compromise of a tort claim filed with the risk management program. Op. Att'y Gen. Fla. 04-35 (2004).

Unlike section 286.011(8), Florida Statutes, however, section 768.28(16), Florida Statutes, does not specify the personnel who are authorized to attend the meeting. See, Op. Att'y Gen. Fla. 00-20 (2000), advising that personnel of the school district who are involved in the risk management aspect of the tort claim being litigated or settled may attend such meetings without jeopardizing the confidentiality provisions of the statute.

3. 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. *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), *disapproved in part on other grounds*, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985).

a. Collective bargaining discussions

A limited exemption from section 286.011, Florida Statutes, exists for discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining. Section 447.605(1), Florida Statutes. *Cf.*, Op. Att'y Gen. Fla. 99-27 (1999), noting that a committee (composed of the city manager and various city managerial employees) formed by the city manager to represent the city in labor negotiations qualifies as the "chief executive officer" and thus may participate in closed executive sessions conducted pursuant to this section.

Section 447.605(1), Florida Statutes, does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. Op. Att'y Gen. Fla. 03-09 (2003).

The section 447.605(1) exemption applies only when there are actual and impending collective bargaining negotiations. *City of Fort Myers v. News-Press Publishing Company, Inc.*, 514 So. 2d 408 (Fla. 2d DCA 1987). It does not apply to other nonexempt topics which may be

discussed during the course of the same meeting. Op. Att'y Gen. Fla. 85-99 (1985). Moreover, the collective bargaining negotiations between the chief executive officer and a bargaining agent are not exempt and, pursuant to section 447.605(2), Florida Statutes, must be conducted in the Sunshine.

Section 447.605, Florida Statutes, does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. Op. Att'y Gen. Fla. 03-09 (2003).

b. Complaint review boards, disciplinary hearings, and grievance committees

A complaint review board of a city police department is subject to the Government in the Sunshine Law. *Barfield v. City of West Palm Beach*, No. 94-2141-AC (Fla. 15th Cir. Ct. May 6, 1994). *Accord*, Op. Att'y Gen. Fla. 78-105 (1978) (police complaint review board) and Op. Att'y Gen. Fla. 80-27 (1980) (sheriff civil service board). Similarly, a meeting of a municipal housing authority commission to conduct an employee termination hearing is subject to the Sunshine Law. Op. Att'y Gen. Fla. 92-65 (1992).

The Sunshine Law applies to board discussions concerning grievances and other personnel matters. Op. Att'y Gen. Fla. 76-102 (1976). A staff grievance committee created to make nonbinding recommendations to a county administrator regarding disposition of employee grievances is also subject to section 286.011, Florida Statutes. Op. Att'y Gen. Fla. 84-70 (1984). *And see, Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County*, 411 So. 2d 1375 (Fla. 4th DCA 1982), in which the court affirmed the lower court's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance hearing. A collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in section 286.011, Florida Statutes. *Id.* at 1376.

Similarly, in *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that deliberations of pre-termination panel composed of the department head, personnel director and equal opportunity director should have been held in the Sunshine. *Cf., Deininger v. Palm Beach County*, 922 So. 2d 1102 (Fla. 4th DCA 2006) (reversing trial court's order denying class certification to plaintiffs who alleged that pre-termination panel meetings used by county to terminate or demote employees, violated the Sunshine Law). *Compare, Jordan v. Jenne*, 938 So. 2d 526 (Fla. 4th DCA 2006) (Sunshine Law not applicable to a professional standards committee responsible for reviewing charges against a sheriff's deputy and making recommendations to the inspector general as to whether the charges should be sustained, dismissed, or whether the case should be deferred for more information).

c. Interviews

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. Op. Att'y Gen. Fla. 89-37 (1989).

d. Screening advisory committees

In *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), a committee composed of staff which was created for the purpose of screening applications for the position of a law school dean and making recommendations to the faculty senate was held to be subject to section 286.011, Florida Statutes, since the committee 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.

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. Op. Att'y Gen. Fla. 80-20 (1980). *Accord*, Op. Att'y Gen. Fla. 80-51 (1980). 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. See, *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985); *Knox v. District School Board of Brevard*, 821 So. 2d 311 (Fla. 5th DCA 2002).

4. Quasi-judicial proceedings

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. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973).

5. Real property negotiations

In the absence of a statutory exemption, the negotiations by a public board or commission for the sale or purchase of property must be conducted in the sunshine. See, *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). In addition, if the authority of the public board or commission to acquire or lease property has been delegated to a single member, that member is subject to section 286.011, Florida Statutes, and is prohibited from negotiating the acquisition or lease of the property in secret. Op. Att'y Gen. Fla. 74-294 (1974).

E. DOES THE SUNSHINE LAW APPLY TO:

1. Members-elect or candidates

Members-elect of boards or commissions are subject to the Sunshine Law. See, *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973). The Sunshine Law does not apply to candidates for office, unless the candidate is an incumbent seeking reelection. Op. Att'y Gen. Fla. 92-05 (1992).

2. 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. *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984). *Accord*, Inf. Op. to McClash, April 29, 1992 (Sunshine Law generally not applicable to county commissioner meeting with individual member of metropolitan planning organization).

3. A mayor and a member of the city council

If the mayor is a member of the council or has a voice in decision-making through the power to break tie votes, meetings between the mayor and a member of the city council to discuss some matter which will come before the city council are subject to the Sunshine Law. Ops. Att'y Gen. Fla. 83-70 (1983) and 75-210 (1975).

Where, however, the mayor is *not* a member of the city council and does not possess any power to vote even in the case of a tie vote but only possesses the power to veto legislation, then the mayor may privately meet with an individual member of the city council without violating the Sunshine Law, provided he or she is not acting as a liaison between members and neither the mayor nor the council member has been delegated the authority to act on behalf of the council. Ops. Att'y Gen. Fla. 90-26 (1990) and 85-36 (1985). *And see*, Inf. Op. to Cassady, April 7, 2005 (meeting between a mayor and a council member to discuss prospective employees).

4. 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. Op. Att'y Gen. Fla. 88-45 (1988).

5. 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. Op. Att'y Gen. Fla. 05-18 (2005).

6. 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. Op. Att'y Gen. Fla. 92-5 (1992).

Similarly, in Op. Att'y Gen. Fla. 94-62 (1994), 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. *Id.*

See, Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974) (Sunshine Law is to be construed "so as to frustrate all evasive devices"). For example, in *State v. Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005), the 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.

7. Board members attending meetings of another public board

The Attorney General has advised that county commissioners who are also members of a regional planning council may take part in council meetings and express their opinions without violating the Sunshine Law. Op. Att'y Gen. Fla. 07-13 (2007). "However, these officials should not discuss or debate these issues with one another outside the Sunshine as either county commissioners or as regional planning council members." *Id.* See also, Op. Att'y Gen. Fla. 00-68 (2000) (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; however, city commissioners attending such meetings may not discuss those issues among themselves).

8. 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. Op. Att'y Gen. Fla. 92-79 (1992). 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. Op. Att'y Gen. Fla. 89-6 (1989).

F. WHAT ARE THE NOTICE AND PROCEDURAL REQUIREMENTS OF THE SUNSHINE LAW?

1. What kind of notice of the meeting must be given?

a. Reasonable notice required

A key element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. See, section 286.011(1), Florida Statutes. Although section 286.011 did not contain an express notice requirement until 1995, many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given. *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973). *Accord, Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. 1st DCA 1985). Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner. *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991). *And see, Baynard v. City of Chiefland*, No. 38-2002-CA-00078 (Fla. 8th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

The type of notice that must be given is variable, however, depending on the facts of the situation and the board involved. In some instances, posting of the notice in an area set aside for that purpose may be sufficient; in others, publication in a local newspaper may be necessary. In each case, however, an agency must give notice at such time and in such a manner as will enable interested members of the public to attend the meeting. Ops. Att'y Gen. Fla. 04-44 (2004) and 80-78 (1980). Cf., *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (where county attorney provided citizen with "personal due notice" of a committee meeting and its function, it would be "unjust to reward" the citizen by concluding that a meeting lacked adequate notice because the newspaper advertisement failed to correctly name the committee).

b. Notice requirements when quorum not present or when meeting adjourned to a later date

Reasonable public notice is required for all meetings subject to the Sunshine Law. Thus, notice is required for meetings between members of a public board even though a quorum is not present. Ops. Att'y Gen. Fla. 71-346 (1971) and 90-56 (1990): If a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed. Op. Att'y Gen. Fla. 90-56 (1990).

c. Effect of notice requirements imposed by other statutes, codes or ordinances

The Sunshine Law only requires that reasonable public notice be given. As stated above, the type of notice required is variable and will depend upon the circumstances. A public agency, however, may be subject to additional notice requirements imposed by other statutes, charter or code. In such cases, the requirements of that statute, charter, or code must be strictly observed. Inf. Op. to Michael Mattimore, February 6, 1996.

For example, a board or commission subject to Chapter 120, Florida Statutes, the Administrative Procedure Act, must comply with the notice requirements of that act. See, e.g., section 120.525, Florida Statutes.

d. Notice requirements when board acting as quasi-judicial body or taking action affecting individual rights

Section 286.0105, Florida Statutes, requires:

Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of section 286.0105, Florida Statutes. Op. Att'y Gen. Fla. 81-06 (1981).

2. 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. See, *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). And see, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary; public body not required to postpone meeting due to inaccurate press report which was not part of the public body's official notice efforts). Accord, *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) ("[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"). See, Inf. Op. to Mattimore, February 6, 1996 (notice of each item to be discussed at public meeting is not required under section 286.011, Florida Statutes, although other statutes, codes, or rules, such as Chapter 120, Florida Statutes, may impose such a requirement).

Thus, while Florida courts have recognized that notice of public meetings is a mandatory requirement of the Government in the Sunshine Law, the preparation of an agenda that reflects every issue that may come before the governmental entity at a noticed meeting is not. Op. Att'y Gen. Fla. 03-53 (2003). Therefore, the Sunshine Law does not prohibit a city commission from adding additional items to the agenda at a regularly noticed meeting and taking formal action on the added items. *Id.* However, the Attorney General's Office has advised a commission to "postpone formal action on controversial matters coming before the board at a meeting where the public has not been given notice that such an issue will be discussed." *Id.*

3. 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. *Bigelow v. Howze*, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974). For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. *Id.* 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. *Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st DCA 1994). And see, Op. Att'y Gen. Fla. 03-03 (2003) (municipality may not hold commission meetings at facilities outside its boundaries).

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. Section 286.011(6), Florida Statutes. 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. Op. Att'y Gen. Fla. 96-55 (1996).

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. Op. Att'y Gen. Fla. 76-141 (1976). *And see*, Op. Att'y Gen. Fla. 02-24 (2002) (two or more members of an advisory group created by a city code to make recommendations to the city council or planning commission on proposed development may conduct vegetation surveys without subjecting themselves to the notice and minutes requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations the committee may make to the council or planning commission, or comments on the proposed development that the committee may make to city officials).

4. 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. Op. Att'y Gen. Fla. 99-53 (1999). 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 *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169 (Fla. 4th DCA 1995), the appellate court affirmed a lower court ruling finding that a meeting of a procurement committee where each presenter was asked "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. Op. Att'y Gen. Fla. 79-01 (1979). 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. *Id.*

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. *Pinellas County School Board v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002). Similarly, a rule or policy that prohibits nondisruptive or silent tape recording devices at public meetings is invalid. Op. Att'y Gen. Fla. 77-122 (1977).

c. Identification

A city may not require persons wishing to attend public meetings to provide identification as a condition of attendance. Op. Att'y Gen. Fla. 05-13 (2005). 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. *Id.*

d. Public's right to participate in a meeting

A recent Attorney General's Opinion notes that "the courts of this state and this office have recognized the importance of public participation in open meetings." See, Op. Att'y Gen. Fla. 04-53 (2004) and cases cited at footnote 6. In providing an opportunity for public participation, the Attorney General's Office is of the view that 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, may be adopted by a board. For example, a rule which limits the amount of time an individual may address the board could be adopted provided that the time limit does not unreasonably restrict the public's right of access. *But see, Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners*, 810 So. 2d 526 (Fla. 2d DCA 2002) (county development review committee should have allowed public comment before making its decision on a project). *Compare, Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014 (Fla. 4th DCA 1996) (public does not have a right to speak on all issues prior to board's resolution of the issue); *Homestead-Miami Speedway, LLC. v. City of Miami*, 828 So. 2d 411 (Fla. 3d DCA 2002) (city did not violate the Sunshine Law where there was public participation and debate in some but not all of the meetings concerning a proposed contract).

Although not directly considering the Sunshine Law, the court in *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989), concluded that a mayor's actions in attempting to confine the speaker to the agenda item in the city commission meeting and having the speaker removed when the speaker appeared to become disruptive constituted a reasonable time, place and manner regulation and did not violate the speaker's First Amendment rights. *And see, Rowe v. City of Cocoa*, 358 F. 3d 800 (11th Cir. 2004) (city council's regulation limiting speech of nonresidents during its meetings is viewpoint-neutral and does not violate the First or Fourteenth Amendment rights of nonresidents).

5. 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. Op. Att'y Gen. Fla.74-62 (1974).

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. Op. Att'y Gen. Fla. 02-51 (2002). 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. Op. Att'y Gen. Fla. 91-26 (1991).

6. *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. Op. Att'y Gen. Fla. 82-47 (1982).

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. Op. Att'y Gen. Fla. 86-21 (1986).

7. *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. Op. Att'y Gen. Fla. 73-344 (1973).

By contrast, a secret ballot violates the Sunshine Law. See, Op. Att'y Gen. Fla. 73-264 (1973) (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee). Accord, Ops. Att'y Gen. Fla. 72-326 (1972) and 71-32 (1971) (board may not use secret ballots to elect the chairman and other officers of the board).

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

1. *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), Florida Statutes. Conduct which occurs outside the state which constitutes a knowing violation of the Sunshine Law is a second degree misdemeanor. Section 286.011(3)(c), Florida Statutes. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, Florida Statutes. The criminal penalties apply to members of advisory councils subject to the Sunshine Law as well as to members of elected or appointed

boards. Op. Att'y Gen. Fla. 01-84 (2001) (school advisory council members).

2. 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 official duties. Section 112.52, Florida Statutes. If convicted, the officer may be removed from office by executive order of the Governor. A person who pleads guilty or nolo contendere or who is found guilty is, for purposes of section 112.52, Florida Statutes, deemed to have been convicted, notwithstanding the suspension of sentence or the withholding of adjudication. *Cf.*, section 112.51, Florida Statutes, and article IV, section 7, Florida Constitution.

3. 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. *State v. Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). *Accord*, Op. Att'y Gen. Fla. 91-38 (1991).

4. 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. Section 286.011(4), Florida Statutes.

Section 286.011(4) also authorizes an award of appellate fees if a person successfully appeals a trial court order denying access. *School Board of Alachua County v. Rhea*, 661 So. 2d 331 (Fla. 1st DCA 1995), *review denied*, 670 So. 2d 939 (Fla. 1996). However, this statute "does not supersede the appellate rules, nor does it authorize the trial court to make an initial award of appellate attorney's fees." *Id.*, at 332. Thus, a person prevailing on appeal must file an appropriate motion in the appellate court in order to receive appellate attorney's fees.

5. 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." *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), *disapproved in part on other grounds*, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985).

Although a court cannot issue a blanket order enjoining any violation of the Sunshine Law on a showing that it was violated in particular respects, a court may enjoin a future violation that bears some resemblance to the past violation. *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1173 (Fla. 4th DCA 1995). The future conduct must be "specified, with such reasonable definiteness and certainty that the defendant could readily know what it must refrain from doing without speculation and conjecture." *Id.*, quoting from *Board of Public Instruction v. Doran*, 224 So. 2d 693, 699 (Fla. 1969).

6. 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*. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974), *cert. denied*, 307 So. 2d 448 (Fla. 1974); *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979) (resolutions made during meetings held in violation of section 286.011, Florida Statutes, had to be re-examined and re-discussed in open public meetings); and *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991) (contract for sale and purchase of real property voided because board failed to properly notice the meeting under section 286.011, Florida Statutes).

Where, however, a public board or commission does not merely perfunctorily ratify or ceremoniously accept at a later open meeting those decisions which were made at an earlier secret meeting but rather takes "independent final action in the sunshine," the decision of the board or commission will not be disturbed. *Tolar v. School Board of Liberty County*, 398 So. 2d 427, 429 (Fla. 1981). *Cf.*, *Zorc v. City of Vero Beach*, 722 So. 2d 891, 903 (Fla. 4th DCA 1998) (meeting did not cure the Sunshine defect because it was not a "full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision-making process").

8/29/07