**INTRODUCTION TO THE**

**FLORIDA SUNSHINE LAW**

*An Informative Discussion of the Laws Regulating*

*Public Officials and the Pitfalls to Avoid*

**Key Largo Fire, Rescue and EMS District**

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**GOVERNMENT IN THE SUNSHINE**

***I. INTRODUCTION***

The following is a general discussion of the Florida Sunshine Law, Florida Statute §286.011. The following discusses various aspects of the Florida Sunshine Law as it applies to FKCC Foundation Board members in general including penalties, scope of coverage of the Statute, and pitfalls to avoid.

***II. THE STATUTE***

Florida Statute §286.11(1) provides as follows:

1) All meetings, any board or any commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, which official acts are to be taken, are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice off all such meetings.

2) The minutes of a meeting of any such board or commission of any state agency shall be promptly recorded and such record shall be open to public inspection. Superior courts of the state shall have jurisdiction to issue injunctions that enforce the purpose of the section upon application by any citizen of the state.

*Generally, the above Statute is interpreted to prohibit any two public office members from discussing anywhere, except at public meetings, anything which may foreseeably come before that public office.*  While the Statute appears to read much narrower than this, it has been provided that the Sunshine Law is afforded to all members of the public no matter what the context, and that all members of the public should be afforded notice and the opportunity to attend any meeting of public office, commissions or authorities. This principle has also been echoed in Florida’s Constitution, Article I, Section 24.

***III. WHO IS COVERED BY THE SUNSHINE LAW***

***A. Elected Officials***

*Certainly, all members of the elected public office are covered twenty-four (24) hours a day, seven (7) days a week.*  Certain questions may arise if a public office member serves in more than one capacity, such as an administrator for another governmental entity, who would have contact with other public office members as a matter of simply doing business within the district. The rule with regard to such a situation is simply to avoid any discussion of anything that is foreseeably coming before the mutual public office. *Otherwise, two members of the public office speaking on any issue, which may foreseeably come before the public office, almost certainly could be assailable as a violation of the Sunshine Law.*

***B. Staff***

Generally, staff are not considered members of public offices or commissions unless they have been given some authority to take some action by the public office. The delegation of authority to a single individual or a single public office member or board member and staff member is something that would be subject to the Sunshine Law. For example, if the President and a staff member were given authority to review a list of products or services (in excess of $35,000.00), interview potential providers, and enter into a contract, those negotiations and discussions would have to be open to the public.

***C. Advisory Committees***

Many times elected public officers seeking public input will appoint members to a committee who either have technical experience or are actively involved in the political process and decision making process. This is a fantastic way to encourage involvement of the public in situations where there is interest. It is also a great way to utilize expertise of members of the public, members of the board, or technical experts willing to get involved in the project.

*However, to the extent the delegation of authority involves providing recommendations, rankings, and evaluations, the meetings of the committee would be subject to §286.11 and require public notice.*

The way to handle this type of situation if, indeed, the desire is not to hinder the committees with public meetings and yet, at the same time, comply with the Florida Sunshine Law, would be to have the committees as composed undertake fact finding exclusively outside of the public meetings and then have the discussion, ranking and evaluations desired at either the public office’s regular meeting or a special meeting or workshop*.*  Thus undertaken, a committee can gather information, review, analyze and bring forth factually everything gathered (thus, preventing exhausting and sometimes tedious information gathering) at the public meeting. Again, the decision making and evaluating must be done at the public meeting, however, the fact finding and information gathering is not.

***IV. PENALTIES FOR VIOLATION***

***A. Generally***

A public office member who violates the Sunshine Law may face several repercussions. The range of charges includes as severe as criminal prosecution and as minor as a *de minimis* fine depending upon the nature of the violation.

Perhaps the worst is, of course, an intentional violation of the Sunshine Law where two or more public office members intentionally discuss something foreseeable as an item before the public office. A knowing violation of the Sunshine Law is punishable to up to sixty (60) days in jail and a fine not to exceed $500.00.

For an unintentional violation of the Sunshine Law, the public office member is guilty of a “non-criminal infraction” which is punishable by a fine not to exceed $500.00. An unintentional violation of the Sunshine Law typically has worse consequences for the board as a whole than an individual commissioner because the unintentional discussion between two or more public office members outside of a publically noticed meeting could serve to undo several months or years’ worth of work by that board on a major project.

So the consequences of an unintentional violation of the Sunshine Law may also be an attack to void the action. Additionally, a successful litigant in a Sunshine Law case will be entitled to recover attorney’s fees from the entity for pursuing the Sunshine violation.

***B. Cure of Sunshine Violations***

While violations of the Sunshine Law carry consequences of a serious nature whether they are intentional or not, all is not lost in the case of a Sunshine violation threatening a project of a public office or commission. *Sunshine Law violations are curable by meaningful public input and opportunity to discuss and appropriately approve, at a public meeting, the alleged in appropriate action.*  In other words, a subsequent public meeting where everything is aired out, including the alleged Sunshine problems, and appropriate public input is taken and meaningful opportunity to participate is provided, can serve to cure the Sunshine defect threatening the project.

No decision has been rendered addressing whether the cure of a violation wipes out the individual commissioner’s charge. It appears that the criminal side has not addressed the issue of cure directly.

***V. LITIGATION ISSUES/CLOSED SESSIONS WITH COUNSEL***

***A. Methods of Handling Issues with Counsel***

Florida Sunshine Law provides an exception to §286.11 for attorney/client closed sessions concerning legal matters. The exception is very narrow and not always necessarily helpful in resolving litigation.

***1) Pending Cases Only***

The exception applies to pending litigation only (thus, cases which are not filed in court, but threatened in letters and so forth are part of the exception and cannot be discussed in a closed session).

***2) Attorneys Only Can Call***

*The exception applies only to cases where the attorney representing desires advice concerning the litigation.*  Therefore, none of the public office members can call a closed session meeting. The meeting has to be called by the attorney and the attorney is the one who has to desire the advice under the Statute. Only matters and the litigation concerning settlement options and litigation expenditures or strategy can be discussed. In other words, decisions involving whether to settle a case or spend more resources and money defending it are the crux of the discussions so that the attorney can understand the public office’s position without alerting his opponents in the case.

***3) Limited Attendance***

*No one is permitted to attend other than the public office members, the director, the entity’s attorney and, the entity’s litigation counsel.*  Therefore, no outside experts can attend, no parties can attend, no parties’ attorneys can attend and no mediator, judge, or other members of the public can attend the closed session meeting, plus it is hard to bring public comment into the meeting when the meeting is, of course, private.

***4) Written Record Required***

The entire meeting must be transcribed by a certified court reporter without interruption, breaks or any other discussions which are not involving the closed session. Everything must be written down and immediately filed with the district’s clerk. Therefore, whatever transpires in a closed session is forever written down for everyone to review after the fact. Many times commissioners can feel passionate about a subject and have those passions recorded in the form of a written transcript for all posterity and quotation by the media. Tempers should be controlled in closed sessions and counsel should remind commissioners and public office members that the court reporter will take down everything they say.

***5) Meetings Not Generally Available Quickly***

The meeting must be called at a public meeting and, therefore, involves two meetings to get one closed session accomplished.

***6) No Voting Allowed***

No vote or final action may be taken at the meeting. This is really the core of much of the controversy involving a closed session. Obviously, opinions will be expressed as to settlement options and litigation expenditures because that is the purpose of the meeting. In expressing those opinions to the public officer’s attorneys, commissioners tend to make known their opinions concerning the lawsuit. However, the meeting is for the benefit of the attorney to do the job that he/she has been hired to do for the board. Thus, the advice given is solely that desired by the attorneys. Therefore, discussions extraneous to the advice desired could potentially result in Sunshine violations.

***7) Keys to Effective Closed Sessions***

The key to an appropriate closed session meeting for a commissioner is to answer the questions asked without extraneous comment and discuss the points raised without interjecting issues not before the commissioners as brought by the public office attorneys.

A way to avoid any controversy, with regard to settlement offers in particular, is not to ask the public office members and have the public office members decide that the settlement offer is a good one or not, but, rather is to ask the public office members whether the settlement offer is one which they would like to be brought before them in a public meeting open to discussion. Thus, the public office members can indicate to the public office attorneys their desire to have it discussed or not in a public forum while not indicating whether they are for or against the proposed settlement. There is no final action taken in such a survey and it really does preserve the spirit of the Sunshine Law.

In fact, it is probably one of the best ways to decide if, strategically, any settlement offer should be put on the agenda for consideration. The public office can be reminded that, if discussions open up around the settlement agreement proposed, that issues in the public meeting of a non-attorney/client nature can be discussed and remind the public office members which issues to preserve should the settlement proposal fail.

***VII. PUBLIC RECORDS***

Florida Statute §119.011(1) provides as follows:

“All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material regardless of the physical form, characteristics, or means of transmission, made or received pursuant to the law or ordinance or in conjunction with the transaction of official business by an agency.”

*Computer records* such as calendars, databases, and files stored on agency computers, can all constitute public records if made or received in the course of official business.

*E-mail* or *Texts* sent or received by the Board or staff in connection with official business is a public record unless specifically exempt. Personal e-mail does not automatically become public record if stored on the Board’s system. Still, it is not a good idea to commingle personal and official e-mails.

*Personnel Records* are open to public inspection with limited exceptions. Some exemptions include social security numbers, medical information, and home addresses and phone numbers of certified firefighters.

Any material prepared in connection with official agency business intended to perpetuate, communicate, or formalize knowledge is a public record.

***VIII. PITFALLS TO AVOID***

The following is a summary of pitfalls based upon experience and review of Attorney General Opinions and case law conducted over the last several years in response to some intense scrutiny in the past.

***A. Discussions after a Meeting has Adjourned***

Inaudible discussion after a meeting is adjourned between public office members lends itself to attack based upon the contemporaneous nature of the discussion with discussions of a business nature of the public office. It is only natural to think that public office members would continue discussing what they previously were after the meeting was adjourned; at least most members of the media could think so. However, carefully instructed councilmen know that, once the meeting is adjourned, the discussion should focus on anything but the business of the public office.

***B. Other Government Meetings***

Elected public office members are politicians and most frequently find themselves in front of other elected public officers or other commissions. In fact, more than one member of an elected public office or commission would find themselves in front of another public office or commission. While generally there is some basis to argue that, since the meeting was publically noticed for the other public office or commission, that any discussion that occurs of a public nature at the meeting by one or more public office members would not be a violation. However, like anything else, it appears to be a gray area. *One thing is for certain, that any discussion that occurs should be over the microphone and loud enough for everyone to hear. Sitting next to another commissioner at such meeting and discussing whatever is going on could arguably turn into to an accusation of violation.*

***C. Writings***

*The only writings between public office members allowed are one directional communications*. In other words, an e-mail to another public office member advising of issues or proposals to be discussed at the next public office meeting is fine, as long as it remains unanswered. Same goes for a letter. As long as the communication between one public office member to the other is strictly one-way and unanswered, there is no discussion or information sharing that the public does not have access to and the process of discussing the issues in the communication is preserved for the public meeting. Even so, a one-way communication is half of a two-way communication and should be used with caution.

***D. Conversations with the Director or Public Office Attorney***

Asking a staff member or attorney what commissioner “A” thinks about issue “X” and receiving an answer potentially subjects both commissioners and the staff member or attorney to liability for Sunshine Law violations. This is called acting as a liaison and is one of the exceptions to the general rule that only public office members can violate the Sunshine Law.

***E. Delegation***

If the attorney or staff member is given authority to negotiate a contract or lease at a public meeting and then so undertakes, the negotiations of that individual are subject to the Sunshine Law. *Thus, it is important to not delegate such authority but, rather, have the negotiations occur subject to public office approval and then the public office discusses and requests further negotiations and ratifies the contract or agreement.*

***VII. CONCLUSION***

The Sunshine Law is a law to embrace, for failure to do so can subject a public officer to liability, not only for its members, but for the office as a whole and also serve to cripple the good works done by the public entity. Simply avoiding discussion with other public office members is obviously the place to start. Remember, once a meeting is over; confine your questions to those of a social or non-business nature. Above all, whenever you are in doubt feel free to contact myself or our office at any time. Another available option is to contact the Attorney General’s office whose telephone number for advisory opinions is (850) 487-1963.