OVERVIEW OF THE SUNSHINE LAW (by Kelly Samek, OGC)

Open Meetings

The law set forth in Chapter 286 of the Florida Statutes that requires the government to allow public access to meetings is known as The Government in the Sunshine Law. It 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. It is equally applicable to elected and appointed boards or commissions. 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 entities that create them. Advisory committees that have been found by the Attorney General's Office to be subject to the Sunshine Law include land planning or property acquisition advisory bodies.

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 s. 286.011, Fla. Stat. 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.**

Written correspondence between board members

The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting is not a violation of the Sunshine Law if prior to the meeting, there is no interaction related to the report among the commissioners. In such cases, the report, which is subject to disclosure under the Public Records Act, is not being used as a substitute for action at a public meeting as there is no response from or interaction among the commissioners prior to the meeting. If, however, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members that is subject to s. 286.011, F.S.

Telephone conversations and meetings

The Sunshine Law applies to the deliberations and discussions between two or more members of a board or commission on some matter that foreseeably will come before that board or commission for action, including discussions made by telephone.

Use of computers

The use of computers to conduct public business is becoming increasingly commonplace. While there is no provision generally prohibiting the use of computers to carry out public business, their use by members of a public board or commission to communicate among themselves on issues pending before the board is subject to the Sunshine Law. A *one-way* e-mail communication from one member to another, when it does not result in the exchange of members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law; however, such e-mail communications are public records and must be maintained by the records custodian for public inspection and copying.

Delegation of authority

Case law has determined that "The Sunshine Law does not provide for any 'government by delegation' exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego." Thus, a single member of a board who has been delegated the authority to act on behalf of the board in negotiating a lease "is subject to the Sunshine Law and, therefore, cannot negotiate for such a lease in secret." Similarly, when an individual member of a public board, or a board member and the executive director of the board, conducts a hearing or investigatory proceeding on behalf of the entire board, the hearing or proceeding must be held in the sunshine. On the other hand, if a board member or designee has been authorized only to gather information or function as a fact-finder, the Sunshine Law does not apply. For example, 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.

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.

Voting requirement at meetings of governmental bodies

No member of any state, county, or municipal governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may

abstain from voting in regard to any such decision, ruling, or act; and a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under the provisions of Chapter 112, Fla. Stat. (the Code of Ethics for Public Officers and Employees). State public officers, however, are not required to abstain from voting because of a conflict of interest. The Florida Statutes state that, "No state public officer is prohibited from voting in an official capacity on any matter. However, any state public officer voting in an official capacity upon any measure which would inure to the officer's special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom the officer is retained or to the parent organization or subsidiary of a corporate principal by which the officer is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the public officer shall, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes."

Public Records

Chapter 119, Fla. Stat., defines "public records" to include: 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 law or ordinance or in connection with the transaction of official business by any agency. All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure.

Handwritten notes

The Florida Supreme Court has interpreted the definition above to encompass all materials made or received by an agency in connection with official business that are used to perpetuate, communicate or formalize knowledge. However, "under chapter 119 public employees' notes to themselves which are designed for their own personal use in remembering certain things do not fall within the definition of 'public record.'" Nevertheless, so-called "personal" notes can constitute public records if they are intended to communicate, perpetuate or formalize knowledge of some type. Handwritten notes of agency staff, "utilized to communicate and formulate knowledge within [the agency], are public records subject to no exemption." Similarly, handwritten notes prepared by a council member regarding research on a matter under discussion by the council and used at a workshop meeting as a reference in discussing the member's position are public records.

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