Florida's Sunshine Laws and Florida College System District Boards of Trustees
(adapted from the 2009 Government in the Sunshine Manual)
State College of Florida, Manatee-Sarasota
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❑ 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. Florida courts have stated that it was the Legislature's intent to extend application of the Sunshine Law so as to bind every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control. 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. (Note: A community college direct-support organization, as defined in s. 1004.70, F.S., is subject to the Sunshine Law.) There are three basic requirements of s. 286.011, F.S.:

(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, s. 24, Fla. Const., 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.

❑ 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, F.S. 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.

❑ Public access to meetings of public boards or commissions is the key element of the Sunshine Law and public agencies are advised to avoid holding meetings in places not easily accessible to the public. In addition, discussions at such meetings by members of the board or commission which are audible only to those seated at the table may violate the "openness" requirement of the law. AGO 71-159. Public boards or commissions are, therefore, advised to avoid holding meetings at places where the public and the press are effectively excluded. AGO 71-295.

❑ It is the how and the why officials decided to so act which interests the public, not merely the final decision.

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

❑ Advisory boards whose powers are limited to making recommendations to a public agency and which possess no authority to bind that agency in any way are subject to the Sunshine Law.

❑ There is no "government by delegation" exception to the Sunshine Law, and public agencies may not avoid their responsibilities or conduct the public's business in secret by use of an alter ego.

Fact-finding committees

❑ A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for 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 s. 286.011, F.S. However, when a committee has a decision-making function in addition to fact-finding, the Sunshine Law is applicable.

What types of discussions are covered by the Sunshine Law?

❑ 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, F.S. 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.

❑ The use of a written report (or email) by one member of a public body to inform other members 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 board members. 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 members prior to the meeting. If, however, the report (or email) 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 s. 286.011, F.S.

❑ 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.

❑ Meetings of staff of boards or commissions covered by the Sunshine Law are not ordinarily subject to s. 286.011,F.S. However, when a staff member ceases to function in a staff capacity and is appointed to a committee which is given "a policy-based decision-making function," the staff member loses his or her identity as staff while working on the committee and the Sunshine Law applies to the committee. On the other hand, a committee composed of staff which is merely responsible for informing the decision-maker through fact-finding consultations is not subject to the Sunshine Law.

Can the members of a public board vote by secret ballot or use of coded letters or numbers or may a member abstain from voting?

❑ Section 286.011, F.S., requires that meetings of public boards or commissions be "open to the public at all times." If at any time during the meeting the proceedings become covert, secret or not wholly exposed to the view and hearing of the public, then that portion of the meeting violates that portion of s. 286.011, F.S., requiring that meetings be "open to the public at all times."

❑ Section 112.3143(3)(a), F.S., prohibits a county, municipal, or other local public officer from voting on any measure which inures to his or her special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal or parent organization or subsidiary of a corporate principal, other than a public agency, by whom he or she is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the officer. Prior to the vote being taken, the local officer must publicly state the nature of his or her interest in the matter from which he is abstaining. Within 15 days of the vote, the officer must disclose the nature of his or her interest in a memorandum filed with the person responsible for recording the minutes of the meeting who shall incorporate the memorandum in the minutes. Section 112.3143(3)(a), F.S.

❑ When a member of a *local* board is *required* to abstain pursuant to s. 112.3143(3), F.S., the local board member is disqualified from voting and may not be counted for purposes of determining a quorum.

❑ If you have any questions regarding the applicability of Florida's Sunshine Law or the Public Records Law, please contact the Office of the President.

Circumstances in which the Sunshine Law may apply to a single individual or where two board members are not physically present

❑ Certain factual situations 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 s. 286.011, F.S. As stated by the Supreme Court, the Sunshine Law is to be construed "so as to frustrate all evasive devices."

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 which is subject to s. 286.011, F.S. AGO 90-03. *See also*, AGO 96-35, 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 comments from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law.

Authority of boards to conduct public meetings via electronic media technology (e.g., telephone or video conferencing)

❑ As to *local* boards, the Attorney General's Office has noted that the authorization in s. 120.54(5)(b)2., to conduct workshop and official meetings entirely through the use of communications media technology applies only to state agencies. AGO 98-28. Thus, since s. 1001.372(2)(b), F.S., 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. If a quorum of a 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 judgment of the board." AGO 03-41.

❑ 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.

Delegation of authority

❑ "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, this office has concluded that 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." AGO 74-294. A meeting between representatives of a private organization and a city commissioner appointed by the city commission to act on its behalf in considering the construction and funding of a cultural center and performing arts theater would also be subject to s. 286.011, F.S. AGO 84-54.

❑ 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. AGO 95-06. 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. AGO 93-78.

❑ 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. AGOs 95-06 and 93-78. For example, in AGO 90-17, this office stated that it is not a violation of the Sunshine Law for a city council member to meet with a private garbage contractor if the purpose of the meeting is essentially information gathering. But, if the board member has been authorized, formally or informally, to exercise any decision-making authority on behalf of the board, such as approving or rejecting certain contract provisions, the board member is acting on behalf of the board and the meetings are subject to s. 286.011, F.S.

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.

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). A luncheon meeting held by a private organization for members of a public board or commission at which there is no discussion among such officials on matters relating to public business would not be subject to the Sunshine Law merely because of the presence of two or more members of a covered board or commission. AGO 72-158.

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. AGO 05-18.

What kind of notice of the meeting must be given?

❑ The Sunshine Law requires only that *reasonable* public notice be given. A public agency, however, may be subject to additional notice requirements imposed by other statutes, charters or codes. For instance, Florida College System boards are subject to Ch. 120, F.S., the Administrative Procedure Act, must comply with the notice requirements of that act. Section 120.525, F.S. states in part, "[e]xcept in the case of emergency meetings, each agency shall give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly (FAW) and on the agency's website not less than 7 days before the event. The notice shall include a statement of the general subject matter to be considered." *Note: Colleges may publish in local newspapers rather than the FAW pursuant to an exception contained in s. 120.81, F.S.*

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). The Attorney General's Office has concluded that the minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting. AGO 82-47. The Sunshine Law does not require that public boards and commissions tape record their meetings. AGO 86-21.

❑ 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).

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

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).

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.

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. Op. Att'y Gen. Fla. 91-38 (1991).

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. Reasonable attorney's fees may be assessed *against* the individual filing an action to enforce the provisions of s. 286.011, F.S., if the court finds that it was filed in bad faith or was frivolous.

❑ 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.

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."

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*.

❑ 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"). It must be emphasized that only a full open hearing will cure the defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside of the sunshine.

Damages

❑ In *Dascott v. Palm Beach County*, 988 So. 2d 47 (Fla. 4th DCA 2008) the court held that an employee who had prevailed in her lawsuit alleging that her termination violated the Sunshine Law was not entitled to recover back pay as an equitable remedy since the only remedies provided for in the Sunshine Law Act were a declaration of the wrongful action as void and reasonable attorney fees.

WHAT MATERIALS ARE PUBLIC RECORDS?

❑ Section 119.011(11), Florida Statutes, 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.

❑ The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. Therefore, any document meeting the above criteria set forth by the Court is a public record regardless of whether it is in final form or is designated by the agency as a "draft," "working copy," or "preliminary version." The term "public record" is not limited to traditional written documents.

❑ If an agency has circulated a "draft" document for review, comment or informational purposes, that document is a public record. 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.'

Computer records

❑ In 1982, the Fourth District Court of Appeal stated that information stored in a public agency's computer "is as much a public record as a written page in a book or tabulation in a file stored in a filing cabinet . . . ." *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla.

1983). Thus, the Public Records Act includes computer records as well as paper documents, tape recordings, and other more tangible materials.

❑ Thus, computerized public records are governed by the same rule as written documents and other public records -- the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure.

E-Mail

❑ E-mail messages are public records when they are created or received in the transaction of official business and retained as evidence of official policies, actions, decisions, or transaction. E-mail messages that are kept because they contain valuable information content are also records. E-mail messages which constitute public records must be identified, accessible and retained just like records in other formats.

❑ E-mail messages are not public records when they consist of uncirculated materials and are merely preliminary or precursors to future documents, and which are not in and of themselves intended to serve as final evidence of the knowledge to be recorded. This includes internal and external personal communications or announcements of a non-business nature and personal notes included for one's personal use.

❑ The nature of information -- that is, that it is electronically generated and transferred -- has been determined not to alter its character as a public record under the Public Records Act. Op. Att'y Gen. Fla. 01-20 (2001). Thus, the e-mail communication of factual background information and position papers from one official to another is a public record and should be retained in accordance with the retention schedule for other records relating to performance of the agency's functions and formulation of policy. *Id.*

❑ However, private email stored in government computers does not automatically become a public record by virtue of that storage. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003). "Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of 'public records,' . . . private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer."