



FLORIDA'S SUNSHINE MANUAL
SUBPART 1-C: WHAT MEETINGS OF MEMBERS OF BOARDS ARE
COVERED? APPLICATION OF THE SUNSHINE LAW TO...

Official Handbook on Public Records Laws

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Subpart 1-C

What Meetings of Members of Boards are Covered? Application of the
Sunshine Law to...

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FLORIDA SUNSHINE MANUAL

PART 1

GOVERNMENT IN THE SUNSHINE LAW



FLORIDA'S SUNSHINE MANUAL

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DATE: March 9, 2023

PART: 1 GOVERNMENT IN THE SUNSHINE LAW

SUBPART: C WHAT MEETINGS OF MEMBERS OF BOARDS ARE
COVERED? APPLICATION OF THE SUNSHINE LAW TO

SECTIONS: 1-C-1 through 1-C-16

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1-C-1 | BOARD MEMBERS ATTENDING MEETINGS OR SERVING AS MEMBERS OF ANOTHER PUBLIC BOARD

a. Board Members Attending Meetings of Another Public Board

Several Attorney General Opinions have considered whether one or more members of a board may attend or participate in a meeting of another public board. For example, in AGO 99-55, the Attorney General's Office said that a school board member could attend and participate in the meeting of an advisory committee appointed by the school board without prior notice of his or her attendance. However, the opinion cautioned that "if it is known that two or more members of the school board are planning to attend and participate, it would be advisable to note their attendance in the advisory committee meeting notice."

Moreover, while recognizing that commissioners may attend meetings of a second public board and comment on agenda items that may subsequently come before the commission for final action, the Attorney General Opinions have also advised that if more than one "commissioner is in attendance at such a meeting, no discussion or debate may take place among the commissioners on those issues." AGO 00-68. Accord AGO 98-79 (city commissioner may attend a public community development board meeting held to consider a proposed city ordinance and express his or her views on the proposed ordinance even though other city commissioners may be in attendance; however, the city commissioners in attendance may not engage in a discussion or debate among themselves because "the city commission's discussions and deliberations on the proposed ordinance must occur at a duly noticed city commission meeting"). See also AGOs 05-59 and 77-138.

b. Board Members Serving as Members of Another Public Board

Board members who also serve on a second public board may participate in the public meetings of the second board held in accordance with s. 286.011, F.S., and express their opinions without violating the Sunshine Law. AGO 07-13. In other words, "when two county commissioners are presently serving on [a regional planning] council this does not turn a meeting of the planning council into a county commission meeting, and the Sunshine Law does not require any additional or different notice of planning council meetings because of the presence of these county commission members." Id.



Similarly, AGO 98-14 concluded that membership of three city council members on the metropolitan planning organization did not turn a council meeting into a metropolitan planning organization meeting that required separate notice. Because, however, the discussion of metropolitan planning organization matters was planned for the council meeting, the city council had properly included mention of such items in its notice of the council meeting.

Additionally, in AGO 91-95, the Attorney General's Office concluded that a county commissioner may attend and participate in the discussion at a public meeting held by the governing board of a county board on which another commissioner serves. However, "in an effort to satisfy the spirit of the Sunshine Law," the opinion also recommended that the published notice of the county board "include mention of the anticipated attendance and participation of county commission members in board proceedings." Id.

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1-C-2 | BOARD MEMBER MEETING WITH 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. AGO 88-45.

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1-C-3 | 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. AGO 92-05. Compare Inf. Op. to Jove, January 12, 2009, concluding that a public forum hosted by a city council member with city council members invited to attend and participate in the discussion would be subject to s. 286.011, F.S.

Similarly, in AGO 94-62, 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. And see AGO 08-18 (participation by two city council members in a citizens police academy does not violate the Sunshine Law; "[t]he educational course is not changed into a meeting of a board or commission . . . by the attendance and participation of members of the city council in the course work of the academy").

However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements. AGO 94-62. See *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) (Sunshine Law must 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 city commissioners' argument that the Sunshine Law permitted them to attend a private breakfast meeting at which the sheriff spoke and the commissioners individually questioned the sheriff but did not direct comments or questions to each other. Instead, the court denied the commissioners' motion for summary judgment and ruled that the discussion should have been held in the Sunshine because the sheriff was a "common facilitator" who received comments from each commissioner in front of the other commissioners.

More recently, members of a city planning and zoning commission violated the Sunshine Law when they participated in discussions at meetings of a community improvement organization which involved planning and zoning matters. *City of Bradenton Beach v. Metz*, No. 2017 CA 003581 (Fla. 12th Cir. Ct. August 9, 2019), available online in the Cases database at the open government site at



myfloridalegal.com. The trial judge found that the commissioners' participation in the discussions was particularly troubling because they continued to attend, despite Sunshine Law concerns expressed by the city attorney.

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1-C-4 | CONFIDENTIAL RECORDS DISCUSSIONS

The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, s. 286.011, F.S., should be construed as containing no exceptions. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

The Public Records Act was amended in 1991 after several district courts held that certain proceedings could be closed when considering confidential material. Section 119.07(7), F.S., provides that an exemption from s. 119.07, F.S., "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 where exempt records are to be discussed in the absence of a specific exemption from the Sunshine Law. See AGOs 10-04 and 91-75 (school board), 04-44 (PRIDE), 93-41 (county criminal justice commission), and 91-88 (pension board).

For example, while s. 288.075(2), F.S., allows a private corporation to request confidentiality for certain records relating to a planned corporate relocation to Florida, this exemption "applies only to records and does not constitute an exemption from the provisions of the Government in the Sunshine Law...." AGO 04-19. Accord AGO 80-78 and Inf. Op. to Rooney, June 8, 2011.

In AGO 05-03, the Attorney General advised that a federal law prohibiting disclosure of certain identifying information did not authorize a state committee to close its meetings, although the committee should take steps to ensure that identifying information is not disclosed at such meetings. And see AGO 12-20 (county transportation board designated as "appropriate local official" authorized by statute to receive and investigate whistle-blower complaints must comply with the open meetings requirements in the Sunshine Law; however, the board must also "protect the confidential information it is considering at a meeting and must not disclose the name of the whistle-blower unless one of the specific circumstances listed in the statute is present). Cf. AGO 96-40 (town may not require a complainant to sign a waiver of confidentiality before accepting a whistle-blower's complaint for processing since the Legislature has provided for confidentiality of the whistle-blower's identity).



Similarly, in AGO 96-75, the Attorney General's Office advised that since under s. 286.011(8), F.S., the transcript of a closed attorney-client session is open to public inspection once the litigation is concluded, the city and its attorney should be sensitive to any discussions of confidential medical reports during such a meeting and take precautions to protect the confidentiality of such medical reports so that when the transcript is opened for inspection, the privacy of the employee will not be breached. Compare *Everglades Law Center, Inc. v. South Florida Water Management District*, 290 So. 3d 123 (Fla. 4th DCA 2019), noting that the statements made in AGO 96-75, regarding taking steps to protect confidentiality and privacy applied to "an individual's medical record in the context of a workers' compensation claim," and did not address "the confidentiality of mediation communications involving information regarding multiple persons," these mediation communications are confidential pursuant to ss. 44.102(3) and 44.405(3), F.S., and should be redacted from the full public transcript. [Emphasis supplied by the court].

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1-C-5 | E-MAIL, TEXT MESSAGES, AND OTHER WRITTEN COMMUNICATIONS BETWEEN BOARD MEMBERS

The Sunshine Law requires boards to meet in public; boards may not take action on or engage in private discussions of board business via written correspondence, e-mails, text messages, or other electronic communications. Thus, members of an advisory committee created to make recommendations to the superintendent on school attendance boundaries violated the Sunshine Law when they exchanged private electronic communications (emails and Facebook messages) relating to committee business. *Linares v. District School Board of Pasco County*, No. 17-00230 (Fla. 6th Cir. Ct. January 10, 2018), available online in the Cases database at the open government site at myfloridalegal.com. See also AGO 89-39 (members of a public board may not use computers to conduct private discussions among themselves about board business).

Similarly, city commissioners may not use an electronic newsletter to communicate among themselves on issues that foreseeably may come before the commission. *Inf. Op. to Syrkus*, October 31, 2000. And see AGO 09-19 (members of a city board or commission may not engage on the city's Facebook page in an exchange or discussion of matters that foreseeably will come before the board or commission for official action); and *Inf. Op. to Martelli*, July 20, 2009 (authority should discuss business at publicly noticed meetings "rather than in a series of letters between authority members"). Cf. *Inf. Op. to Galaydick*, October 19, 1995 (school board members may share laptop computer even though computer's hard drive contains information reflecting ideas of an individual member as long as computer is not being used as a means of communication between members).

Thus, a procedure whereby a board takes official action by circulating a memorandum for each board member to sign whether the board member approves or disapproves of a particular issue, violates the Sunshine Law. *Inf. Op. to Blair*, May 29, 1973. And see *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members' individual written evaluations; the court held that "the short-listing was formal action that was required to be taken at a public meeting"); *Schweickert v. Citrus County Port Authority*, No. 12-CA-1339 (Fla. 5th Cir. Ct. September 30, 2013), available online in the Cases database at the open government site at



myfloridalegal.com (ad hoc committee appointed by board violated the Sunshine Law when the members submitted individual written evaluations of the proposals to the staff, which then compiled the scores and ranked the proposals for submission to the board; the committee should have ranked the proposals at a public meeting); and AGO 93-90 (board not authorized to use employee evaluation procedure whereby individual board members send their individual written comments to the board chair for compilation and subsequent private discussion with the employee). Compare *Carlson v. Department of Revenue*, 227 So. 3d 1261 (Fla. 1st DCA 2017) (state agency "evaluation team" members who individually evaluated competing proposals, individually assigned scores, and individually submitted their scores for consideration by others, did not take "formal action" and thus were not obligated to conduct a meeting subject to the Sunshine Law).

However, a commissioner may send a written report to other commissioners on a subject that will be discussed at a public meeting without violating the Sunshine Law, if prior to the meeting, there is no interaction related to the report among the commissioners and the report, which must be maintained as a public record, is not being used as a substitute for action at a public meeting. AGO 89-23. And see AGO 01-20 (e-mail communication of information from one council member to another is a public record but does not constitute a meeting subject to the Sunshine Law when it does not result in the exchange of council members' comments or responses on subjects involving foreseeable action by the council). Cf. Inf. Op. to Kessler, November 14, 2007 (procedural rule requiring county commissioner to make a written request to commission chair to withdraw an item from the consent agenda does not violate the Sunshine Law).

If, on the other hand, 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. Similarly, in AGO 96-35, the Attorney General's Office concluded that while a school board member may prepare and circulate an informational memorandum or position paper to other board members, 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. "Such action would be equivalent to private meetings discussing the public business through the use of memoranda without allowing an opportunity for public input." *Id.*



In addition, the Attorney General's Office stated that while it is not a "direct violation" of the Sunshine Law for members to circulate their own written position papers on the same subject as long as the board members avoid any discussion or debate among themselves except at an open public meeting, this practice is "strongly discourage[d]." AGO 07-35. See also AGO 01-21 (city council's discussions and deliberations on matters coming before the council must occur at a duly noticed city council meeting and the circulation of position statements must not be used to circumvent the requirements of the statute); AGO 08-07 (city commissioner may post comment regarding city business on blog or message board; however, any subsequent postings by other commissioners on the subject of the initial posting could be construed as a response subject to the Sunshine Law); and Inf. Op. to Jove, January 22, 2009 (posting of anticipated vote on blog).

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1-C-6 | FACT-FINDING OR INSPECTION TRIPS

The Sunshine Law does not prohibit advisory boards from conducting inspection trips provided that the board members do not discuss matters which may come before the board for official action. See *Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974); and AGO 02-24 (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 requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations or comments the committee may make).

The "fact-finding exception" to the Sunshine Law, however, does not apply to a board with "ultimate decision-making authority." See *Finch v. Seminole County School Board*, 995 So. 2d 1068 (Fla. 5th DCA 2008), holding that a district school board, as the ultimate decision-making body, violated the Sunshine Law when the board, together with school officials and members of the media, took a bus tour of neighborhoods affected by the board's proposed rezoning even though board members were separated from each other on the bus, did not express any opinions or their preference for any of the rezoning plans, and did not vote during the trip. See also *Citizens for Sunshine, Inc. v. School Board of Martin County*, 125 So. 3d 184 (Fla. 4th DCA 2013) (three school board members violated the Sunshine Law when they visited an adult education school and talked with a school administrator, teachers, and students, because the "undisputed evidence showed that the defendant board members, without providing notice, conducted a meeting at the adult education school relating to matters on which foreseeable action would have been taken."). Cf. *Citizens for Sunshine v. City of Sarasota*, No. 2013 CA 007532 (Fla. 12th Cir. Ct. July 8, 2016), *aff'd sub nom. Citizens for Sunshine, Inc. v. Chapman*, 225 So. 3d 810 (Fla. 2d DCA 2017), available online in the Cases database at the open government site at myfloridalegal.com, in which the trial judge held that a city commissioner did not violate the Sunshine Law when she spoke about city commission issues at a private event organized by local merchants even though another commissioner was in the audience.

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1-C-7 | INFORMAL DISCUSSIONS, WORKSHOPS, ORGANIZATIONAL SESSIONS, ELECTION OF OFFICERS

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 or that an item be listed on a board agenda in order for a meeting of members of a public board or commission to be subject to s. 286.011, F.S. As the Florida Supreme Court said, "collective inquiry and discussion stages" are embraced within the terms of the statute. *Town of Palm Beach v. Gradison*, 296 So. 2d 474, 477 (Fla. 1974).

Accordingly, 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. *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 764 (Fla. 2010). And see *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); and *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).

It is the how and the why officials decided to so act which interests the public, not merely the final decision. As the court recognized in *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), disapproved in part on other grounds, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985):

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute before us.

Thus, two members of a civil service board violated the Sunshine Law when they held a private discussion about a pending employment appeal during a recess of a board meeting. *Citizens for Sunshine, Inc. v. City of Sarasota*, No. 2010CA4387NC (Fla. 12th Cir. Ct. February 27, 2012), available online in the Cases database at the open government site at myfloridalegal.com. Similarly, the Attorney General's Office advised that the following gatherings are subject to the Sunshine Law: a public forum hosted by a city council member with city council members invited to attend and participate in the discussion, Inf. to Jove, January 12, 2009; "executive work sessions" held by a board of commissioners of a housing authority to discuss policy matters, AGO 76-102; "workshop



meetings" of a planning and zoning commission, AGO 74-94; and "conference sessions" held by a town council before its regular meetings, AGO 74-62. Cf. AGO 04-58 ("coincidental unscheduled meeting of two or more county commissioners to discuss emergency issues with staff" during a declared state of emergency is not subject to s. 286.011 if the issues do not require action by the county commission); and Inf. Op. to Spencer, April 23, 2003 (where city charter provides that special meeting of the council may be called by three members of the council, Sunshine Law is not violated if three members call a special meeting; "[t]he members must, however, be mindful not to discuss substantive issues which may come before the council in their consideration of whether a special meeting is necessary").

The Sunshine Law applies to an organizational session of a board. *Ruff v. School Board of Collier County*, 426 So. 2d 1015 (Fla. 2d DCA 1983). Discussions between two members of a three-member complaint review board regarding their selection of a third member are subject to s. 286.011, F.S. AGO 93-79. Additionally, the Sunshine Law is applicable to meetings held to elect officers of the board. AGOs 72-326 and 71-32 (boards may not use secret ballots to elect officers).

The Sunshine Law is, therefore, applicable to all functions of covered boards and commissions, whether formal or informal, which relate to the affairs and duties of the board or commission. "[T]he Sunshine Law does not provide that cases be treated differently based upon their level of public importance." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 868 (Fla. 3d DCA 1994). See, e.g., Inf. Op. to Nelson, May 19, 1980 (meeting with congressman and city council members to discuss "federal budgetary matters which vitally concern their communities" should be held in the sunshine because "it appears extremely likely that discussion of public business by the council members [and perhaps decision making] will take place at the meeting").

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1-C-8 | INVESTIGATIVE MEETINGS

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. AGO 74-84; and *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973).

A number of statutory exemptions to the Sunshine Law have been enacted to close meetings of some agencies (usually state agencies) when those agencies are making investigatory determinations. For example, s. 112.324(2)(c)(d) and (e), F.S., provides that any proceeding related to a complaint, referral, or preliminary investigation conducted by the Commission on Ethics or other specified entities is exempt from open meetings requirements until the complaint is dismissed as legally insufficient, the alleged violator requests in writing that the proceedings be made public, the Commission on Ethics determines that it will not investigate a referral, or until the Commission or other specified entity determines whether probable cause exists to believe that a violation has occurred. Compare ss. 455.225(4) and 456.073(4), F.S. (meetings of probable cause panels of the Department of Business and Professional Regulation and Department of Health exempt from Sunshine Law until 10 days after probable cause is found to exist or until confidentiality is waived by subject of investigation).

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1-C-9 | LITIGATION MEETINGS

In the absence of a legislative exemption, discussions between a public board and its attorney are subject to s. 286.011, F.S. *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (s. 90.502, F.S., providing for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings; application of the Sunshine Law to such discussions does not usurp Supreme Court's constitutional authority to regulate the practice of law, nor is it at odds with Florida Bar rules providing for attorney-client confidentiality).

However, 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 established in s. 90.502, F.S. Section 90.502(6), F.S. See *Collier County Public Schools v. Mason Classical Academy, Inc.*, 342 So. 3d 753 (Fla. 2d DCA 2022), in which the court observed that s. 90.502(6), F.S., permits school district employees to claim the attorney-client privilege if they can establish that their conversations with counsel were protected by the privilege.

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

a. Settlement Negotiations or Strategy Sessions Related to Litigation Expenditures

Section 286.011(8), F.S., 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) Strict Compliance with Statutory Conditions

It has been held that the Legislature intended a strict construction of s. 286.011(8), F.S. *City of Dunnellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995). "The clear requirements of the statute are neither onerous nor difficult to satisfy." *Id.* at 1027. *Accord School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99 (Fla. 1st DCA 1996).

While section 286.011(8), F.S., does not specify who calls the closed attorney-client meeting, it requires



that the governmental entity's attorney "shall advise the entity at a public meeting that he or she desires advice concerning the litigation." Thus, the exemption merely provides a governmental entity's attorney an opportunity to receive necessary direction and information from the governmental entity regarding pending litigation. AGO 04-35. Accordingly, one of the conditions that must be met prior to holding a closed attorney-client meeting is that the city attorney must indicate to the city council at a public meeting that he or she wishes the advice of the city council regarding the pending litigation to which the city is presently a party before a court or administrative agency. Inf. Op. to Vock, July 11, 2001. "If the city attorney does not advise the city council at a public meeting that he or she desires the council's advice regarding the litigation, the city council is not precluded from providing such advice to the city attorney but it must do so at a public meeting." Id.

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; such an announcement must be made at a public meeting of the board. AGO 04-35. The request may be made during a special meeting 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. AGO 07-31.

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*, 722 So. 2d 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."

(2) Permitted Discussions During Closed Session

Section 286.011(8)(b), F.S., states that the subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures. 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*, 722 So. 2d at 900. And see AGO 99-37 (closed-meeting exemption may be used only when the attorney for a governmental entity seeks advice on settlement negotiations or strategy relating to litigation expenditures; such meetings should not be used to finalize action or discuss matters outside these two narrowly prescribed areas). Accord AGO 04-35.

Section 286.011(8), F.S., "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 Gov't Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement 2 (Fla. State Archives), 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*, 722 So. 2d at 901. Accord AGO 08-17 (any action to approve a settlement or litigation expenditures must be voted on in a public meeting).

Accordingly, a court found that a city did not comply with s. 286.011(8), F.S., when it held closed meetings that "covered a wide range of political and policy issues not connected to" settlement of pending litigation regarding a comprehensive plan amendment or litigation expenses relating to the pending cases which at that point were on appeal. "While some of the discussion at

these meetings did in fact involve the costs associated with the pending litigation, by and large the meetings pertained to finding a way to readopt the comprehensive plan amendment that had been invalidated by the court and to avoid future litigation regarding the readopted amendment." *Anderson v. City of St. Pete Beach*, 161 So. 3d 548, 553 (Fla. 2d DCA 2014).

Similarly, a city council violated the Sunshine Law where the "great majority" of the discussion at an attorney-client session concerned the specifics of a proposed amendment to the city's trespass ordinance which was designed to address concerns expressed in a federal court decision finding the ordinance to be unconstitutional. *City of St. Petersburg v. Wright*, 241 So. 3d 903 (Fla. 2d DCA 2018). The participants at the closed meeting "did not limit themselves to discussing settlement or litigation expenditures" in the federal litigation. *Id.* 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").

(3) Entity Involved in Pending Litigation

Section 286.011(8) permits an entity to use the exemption if the entity "is presently a party before a court or administrative agency...." For example, a city council and its attorney may hold a closed-door meeting pursuant to this statute to discuss settlement negotiations or strategy related to litigation expenditures for pending litigation involving a workers' compensation suit against the city because the system prescribed in ch. 440, F.S., "operates as a means of adjudicating workers' compensation claims and would be

considered litigation before an administrative agency." AGO 96-75.

In *Brown v. City of Lauderdale*, 654 So. 2d 302 (Fla. 4th DCA 1995), 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*, 722 So. 2d at 900 (city was presently a party to ongoing litigation by virtue of its already pending claims in bankruptcy proceedings); and AGOs 09-15 (exemption applicable when city is real party in interest of a pending lawsuit despite not being a named party at the time of the meeting), and 08-17 (health care district may hold a closed attorney-client meeting to discuss settlement negotiations and strategies related to litigation expenditures for pending litigation in which its wholly-owned subsidiary holding company is the named party).

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 AGOs 04-35 and 98-21 (s. 286.011[8] exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable").

Similarly, s. 286.011(8), F.S. "may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a court or before an administrative agency." AGO 13-17. And see AGOs 06-03 (exemption not applicable to pre-litigation mediation proceedings), 09-14 (exemption not applicable to discussion of terms of mediation in conflict resolution proceedings under the "Florida Governmental Conflict Resolution Act," ss. 164.101-164.1061, F.S.), and 09-25 (town council which received pre-suit notice letter under the Bert J. Harris Act, s. 70.001, F.S., is not a party to pending litigation for purposes of s. 286.011[8], F.S.); and Inf. Op. to Barrett, February 17, 2016 (board not authorized to use exemption to discuss pending investigation and subpoena

where there is no ongoing judicial or administrative proceeding).

(4) Persons Authorized to Attend Closed Session

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. Thus, other staff members, consultants, or officials are not allowed to be present. *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d at 101. See *Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), review denied, 735 So. 2d 1284 (Fla. 1999) (city charter provision requiring that city clerk attend all council meetings does not authorize clerk to attend closed attorney-client session; municipality may not authorize what the Legislature has expressly forbidden); AGO 01-10 (clerk of court not authorized to attend); and AGO 09-52 (attorneys representing superintendent not authorized to attend closed session to discuss settlement of administrative action in which school board is the named party). Cf. AGO 95-06 (s. 286.011(8), F.S., does not authorize the temporary adjournment and reconvening of meetings in order for members who are attending such a session to leave the room and consult with others outside the meeting).

Since 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. AGO 98-06. See *Zorc v. City of Vero Beach*, 722 So. 2d at 898 (attendance of special counsel authorized). And see AGO 08-42 (qualified interpreters for the deaf are treated by the Americans with Disabilities Act as auxiliary aids in the nature of hearing aids and other assistive devices and may attend litigation strategy meetings of a board or commission to interpret for a deaf board member without violating section 286.011(8), F.S.). Cf. AGO 15-13 (mayor who is a voting member of the city council is not precluded from attending closed session relating to pending litigation

in which city council is a party, even though plaintiffs have also sued the mayor in his individual capacity).

(5) Determination of "conclusion" of the litigation

Section 286.011(8)(e), F.S., provides that transcripts of closed meetings "shall be made part of the public record upon conclusion of the litigation." See AGO 15-03 (transcript of a litigation strategy session which was closed to the public while the litigation was ongoing became a public record once the litigation was concluded). Cf. *Everglades Law Center, Inc. v. South Florida Water Management District*, 290 So. 3d 123 (Fla. 4th DCA 2019), noting that the mediation communications disclosed by a governmental agency during a closed session must be redacted from the transcript of the meeting when it becomes public record; the exemptions from disclosure for mediation communications in ss. 44.102(1) and 44.405(1), F.S., are not inconsistent with the requirements of s. 286.011(8)(e), F.S.

The statute does not recognize a continuation of the exemption for "derivative claims" made in separate, subsequent litigation. AGO 13-13. For example, a transcript of a closed meeting to discuss settlement of a quiet title lawsuit became a public record upon the entry of a final judgment in that case, even though the same parties were now embroiled in an inverse condemnation lawsuit. *Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521 (Fla. 2d DCA 2014). Similarly, a claim for payment of attorney's fees does not extend the application of the exemption after a final judgment has been entered and a mandate issued. Inf. Op. to Boutsis, December 13, 2012.

Accordingly, a dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement operates as a conclusion of the litigation. AGO 15-03. By contrast, litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of s. 286.011(8), F.S., 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. AGO 94-64. And see AGO 94-

33 (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); and Inf. Op. to Boutsis, supra (legislative history of s. 286.011[8], F.S., indicates "that the Legislature intended the exemption to continue through the appeals segment of the litigation"). Cf. Wagner v. Orange County, 960 So. 2d 785 (Fla. 5th DCA 2007), concluding that the phrase "conclusion of the litigation or adversarial administrative proceedings" for purposes of the attorney work product exemption from the public records law found in s. 119.071(1)(d), F.S., encompasses postjudgment collection efforts such as a legislative claims bill.

In AGO 13-21, the Attorney General's Office observed that s. 286.011(8)(e), F.S., "should be seen as a tool which governmental boards or commissions may employ in their discretion but the statute should not be read as a prohibition against the release of such records prior to the conclusion of... litigation." Therefore, a city council, as the collegial body to which the exemption applies, may waive the exemption and release transcripts of meetings held pursuant to s. 286.011(8), F.S., prior to the conclusion of litigation. Id.

b. Risk Management Exemption

Section 768.28(16)(c), F.S., 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 s. 286.011, F.S. The minutes of such meetings and proceedings are also exempt from public disclosure until the termination of the litigation and settlement of all claims arising out of the same incident. Section 768.28(16)(d), F.S.

This exemption is limited and applies only to tort claims for which the agency may be liable under s. 768.28, F.S. AGO 04-35. The exemption is not applicable to meetings held prior to the filing of a tort claim with the risk management program. AGO 92-82. 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. AGO 04-35.

Unlike s. 286.011(8), F.S., s. 768.28(16), F.S., does not specify the personnel who are authorized to attend the meeting. See AGO 00-20, 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.

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1-C-10 | PERSONNEL MATTERS

In the absence of a specific statutory exemption, meetings of a public board or commission to discuss personnel matters are subject to the Sunshine Law. *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**(1) Strategy Sessions**

A limited exemption from s. 286.011, F.S., exists for discussions between the chief executive officer of the public employer, or his or her representative, and the legislative body of the public employer relative to collective bargaining. Section 447.605(1), F.S. A similar exemption is contained in s. 110.201(4), F.S., for discussions between the Department of Management Services and the Governor, between the department and the Administration Commission or agency heads, or between any of their respective representatives, relative to collective bargaining.

A duly-appointed labor negotiating committee of a city that does not have a city manager or city administrator qualifies as the "chief executive officer" for purposes of s. 447.605(1), F.S., and may use the exemption when meeting with the city council to discuss collective bargaining. AGO 85-99. And see AGO 99-27, concluding that a committee formed by the city manager to represent the city in labor negotiations may participate in closed executive sessions conducted pursuant to s. 447.605(1), F.S. The exemption also extends to meetings of the negotiating committee itself which are held to discuss labor negotiation strategies, including when the committee adjourns during negotiations to hold a caucus among its members to determine the strategy to be employed in ongoing negotiations. *Id.*

If a school superintendent's responsibility to conduct collective bargaining on behalf of the school board has been completely delegated to a separate labor negotiating committee and the superintendent does not participate in the collective bargaining negotiations, the exemption afforded by s. 447.605(1), F.S., applies



to discussions between the committee and the school board only and does not encompass discussions among the committee, school board and superintendent. AGO 98-06.

The exemption afforded by s. 447.605(1), F.S., applies only in the context of actual and impending collective bargaining negotiations. AGO 85-99. It does not allow private discussions of a proposed "mini-PERC ordinance" or the stance a public body intends to adopt in regard to unionization and/or collective bargaining. AGO 75-48. Moreover, a public body may not conduct an entire meeting outside the Sunshine Law merely by discussing one topic during the course of that meeting which may be statutorily exempt from s. 286.011, F.S. AGO 85-99.

Section 447.605(1), F.S., does not directly address the dissemination of information that may be obtained at the closed meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure. AGO 03-09.

(2) Negotiations

The collective bargaining negotiations between the chief executive officer and a bargaining agent are not exempt and pursuant to s. 447.605(2), F.S., must be conducted in the sunshine. Once the collective bargaining process begins, when one side or its representative, whether before or after the declaration of an impasse, meets with the other side or its representative to discuss anything relevant to the terms and conditions of the employer-employee relationship, the meeting is subject to the Sunshine Law. *City of Fort Myers v. News-Press Publishing Company, Inc.*, 514 So. 2d 408, 412 (Fla. 2d DCA 1987). *Accord Brown v. Denton*, 152 So. 3d 8 (Fla. 1st DCA 2014), review denied, No. SC 16-2490 (Fla. February 24, 2016). See also AGO 99-27. As with other meetings subject to s. 286.011, F.S., minutes of the negotiation meeting must be kept. Inf. Op. to Fulwider, June 14, 1993.

The Legislature has, therefore, divided Sunshine Law policy on collective bargaining for public employees into two parts: when the public employer is meeting with its own side, it is exempt from the Sunshine Law; when the public employer is meeting with the other side, it

is required to comply with the Sunshine Law. *City of Fort Myers v. News-Press Publishing Company, Inc.*, 514 So. 2d at 412. And see *Brown v. Denton*, 152 So. 3d at 12 (By holding closed-door negotiations that resulted in changes to public employee pension benefits, "the [city and pension board] ignored an important party who also had the right to be in the room -- the public."). Cf. *Palm Beach County Classroom Teachers' Association v. School Board of Palm Beach County*, 411 So. 2d 1375, 1376 (Fla. 4th DCA 1982) (collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in s. 286.011, F.S.).

b. Disciplinary, Grievance, and Complaint Review Proceedings

Meetings of a board or commission to conduct disciplinary proceedings are subject to the Sunshine Law. See, e.g., AGO 92-65 (employee termination hearing conducted by housing authority commission). And see *News-Press Publishing Company v. Wisher*, 345 So. 2d 646, 647-648 (Fla. 1977), in which the Court disapproved of a county's use of "pseudonyms or cloaked references" during a county commission meeting held to reprimand an unnamed department head.

Thus, two members of a civil service board violated the Sunshine Law when they held a private discussion about a pending employment appeal during a recess of a board meeting. *Citizens for Sunshine, Inc. v. City of Sarasota*, No. 2010CA4387NC (Fla. 12th Cir. Ct. February 27, 2012), available online in the Cases database at the open government site at myfloridalegal.com. And see *Barfield v. City of West Palm Beach*, No. CL94-2141-AC (Fla. 15th Cir. Ct. May 6, 1994), available online in the Cases database at the open government site at myfloridalegal.com. (complaint review board of a city police department is subject to the Sunshine Law); AGO 80-27 (sheriff civil service board created by special act is subject to the Sunshine Law). Cf. AGO 93-79 (discussions between two members of a three-member complaint review board regarding their selection of the third member of the board must be conducted in accordance with s. 286.011, F.S.).

Similarly, in *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that a meeting of



a pre-termination conference panel established pursuant to county ordinance and composed of a department head, personnel director, and equal opportunity director should have been held in the Sunshine. Even though the county administrator had the sole authority to discipline employees, that authority had been delegated to the department head who in turn chose to share that authority with the other members of the panel. See also AGO 10-14 (team created by charter school board of directors to review employment decisions is subject to the Sunshine Law). Cf. AGO 77-132 (personnel council composed of citizens appointed by members of county commission to hear appeals from county employees who have been disciplined not authorized to deliberate in secret).

A grievance committee established as "the final hearing body for all matters determined to be grievances and [authorized] to uphold, modify, or deny any grievance" is subject to the Sunshine Law "because the [committee] clearly exercises decision-making authority." *Dascott v. Palm Beach County*, supra at 13. And see AGO 84-70 (Sunshine Law applies to staff grievance committee created to make a determination of "all facts and circumstances" and nonbinding recommendations to a county administrator regarding disposition of employee grievances). Cf. *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 tribunal's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance arbitration hearing. A collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in s. 286.011, F.S. Id. at 1376.

By contrast, in *Jordan v. Jenne*, 938 So. 2d 526, 530 (Fla. 4th DCA 2006), the court determined that the Sunshine Law did not apply to a professional standards committee responsible for reviewing charges against a sheriff's deputy and making recommendations to the inspector general, because the inspector general made the "ultimate decision" on discipline and did not deliberate with the committee. See also *McDougall v. Culver*, 3 So. 3d 391 (Fla. 2d DCA 2009) (Internal Affairs

memorandum containing findings and recommendations circulated to senior officials for review and comment before submission to the sheriff for a decision on disciplinary action did not constitute a meeting under the Sunshine Law since officials only provided a recommendation but did not deliberate with the sheriff or have decision-making authority).

Similarly, if the mayor as chief executive officer, rather than the city council, is responsible under the city charter for disciplining city employees, meetings between the mayor and a city employee concerning discipline of the employee are not subject to the Sunshine Law. *City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989). And see AGO 07-54 (while post-termination hearings before city manager are not subject to the Sunshine Law, hearings before a three-member panel appointed by the city manager should be open).

c. Evaluations

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. AGO 89-37.

A board that is responsible for assessing the performance of its chief executive officer (CEO) should conduct the review and appraisal process in a proceeding open to the public as prescribed by s. 286.011, F.S., instead of using a review procedure in which individual board members evaluate the CEO's performance and send their individual written comments to the board chair for compilation and subsequent discussion with the CEO. AGO 93-90. However, meetings of individual school board members with the superintendent to discuss the individual board members' evaluations do not violate the Sunshine Law when such evaluations do not become the board's evaluation until they are compiled and discussed at a public meeting by the school board for adoption by the board. AGO 97-23.

d. Selection and Screening Committees

The Sunshine Law applies to advisory committees created by an agency to assist in the selection process. In *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), a committee created to screen applications and make recommendations for the position of a law school dean was held to be subject to s. 286.011, F.S. 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. See also *Krause v. Reno*, 366 So. 2d 1244 (Fla. 3d DCA 1979) (Sunshine Law governs advisory group created by city manager to assist in screening applications and to recommend several applicants for the position of chief of police), and AGO 77-43 (Sunshine Law applies to committee selected by a county bar association on behalf of the school board to screen applicants and make recommendations for the position of school board attorney). Cf. *Dore v. Sliger*, No. 90-1850 (Fla. 2d Cir. Ct. July 11, 1990), available online in the Cases database at the open government site at myfloridalegal.com. (faculty of university law school prohibited from conducting secret ballots on personnel hiring matters).

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), holding that the Sunshine Law was not violated when the city manager, who was responsible for selecting the new police chief, asked several people to sit in on the interviews, as the only function of this group was to assist the city manager in acquiring information on the applicants he had chosen by asking questions during the interviews and then discussing the qualifications of each candidate with the city manager after the interview. And see *Knox v. District School Board of Brevard*, 821 So. 2d 311, 314 (Fla. 5th DCA 2002), holding that an interview team composed of staff was not subject to s. 286.011, F.S., even though the team made recommendations since "all the applications went to the superintendent and he decided

which applicants to interview and nominate to the school board.”

Moreover, s. 1004.098(2)(a), F.S., provides that any portion of a meeting held for the purpose of identifying or vetting applicants for president of a state university or a Florida College System institution, including any portion of a meeting which would disclose personal identifying information of applicants which is otherwise confidential under s. 1004.098(1), F.S., is exempt from disclosure requirements. Section 1004.28(1), F.S., establishes confidentiality for personal identifying information of these applicants. The age, race, and gender of applicants who met the minimum qualifications for the position who were considered and the personal identifying information of applicants included in the final group of applicants are no longer confidential beginning at the earlier of the date the final group of applicants is established or 21 days before the date of a meeting at which an interview of an applicant will be conducted or at which final action or a vote is to be taken on the offer of employment of an applicant. A complete recording is required of any portion of the closed meeting. The recording is exempt from disclosure requirements.

Section 1004.098(2)(a), F.S., does not apply to any portion of a meeting held to establish qualifications for the position or establishing a compensation framework to be offered to an applicant. The exemption also does not apply to meetings held after a final group of applicants for the position has been established. Section 1004.098(2)(c).

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1-C-11 | PURCHASING MEETINGS**a. Application of Sunshine Law**

A committee appointed by a public college's purchasing director to consider proposals submitted by contractors was held to be subject to the Sunshine Law because its function was to "weed through the various proposals, to determine which were acceptable and to rank them accordingly." *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099, 1100 (Fla. 3d DCA 1997). Accord *Inf. Op. to Lewis*, March 15, 1999 (panels established by state agency to create requests for proposals and evaluate vendor responses are subject to the Sunshine Law), and AGO 80-51 (Sunshine Law applicable to city selection committee screening proposals from consultants and audit firms). And see *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members' individual written evaluations; the court held that "the short-listing was formal action that was required to be taken at a public meeting"); and *Schweickert v. Citrus County Port Authority*, No. 12-CA-1339 (Fla. 5th Cir. Ct. September 30, 2013), , available online in the Cases database at the open government site at myfloridalegal.com (ad hoc committee appointed by board violated the Sunshine Law when the members submitted individual written evaluations of the proposals to the staff, which then compiled the scores and ranked the proposals for submission to the board; the committee should have ranked the proposals at a public meeting). Compare *Carlson v. Florida Department of Revenue*, 227 So. 3d 1261 (Fla. 1st DCA 2017) (state agency "Evaluation Team" members who individually evaluated the competitors' proposals, individually assigned scores, and individually submitted their scores for consideration by the "Negotiation Team" were not required to conduct a public meeting to perform these functions because "the Evaluation Team [or more accurately, its individual members] neither ranked the competitors nor excluded any from consideration of the ultimate decider, the Negotiation Team").

In *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995), the court ruled that a board's selection and



negotiation committee violated the Sunshine Law when competing bidders were requested to excuse themselves from the public committee meeting during presentations by competitors. Cf. *Pinellas County School Board v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002) (school board violated the Sunshine Law when it refused to permit videotaping of a public meeting held to evaluate general contractor construction proposals). See now s. 286.0113(2)(b), F.S., discussed below, providing an exemption from the Sunshine Law for portions of certain competitive solicitation meetings and requiring a complete recording of the exempt portions.

b. Recording Requirement for Exempt Meetings

Section 286.0113(2)(b)1. and 2., F.S., provide that any portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation, is exempt from the Sunshine Law. In addition, any portion of a team meeting at which negotiation strategies are discussed is also exempt. See *Carlson v. Florida Department of Revenue*, 227 So. 3d 1261 (Fla. 1st DCA 2017), in which the court rejected the agency's argument that the exemption applies to the entirety of any meeting at which negotiation strategies are discussed, even those portions that have nothing to do with procurement. However, the court also said that "the exempted 'portion' includes not only the negotiation-strategies discussions themselves, but also meeting activities inextricably intertwined with those discussions." *Id.* at 1269. Cf. s. 255.0518, F.S. (sealed bids received pursuant to a competitive solicitation for construction or repairs of a public building or public work must be opened at a public meeting conducted in compliance with the Sunshine Law).

The term "[c]ompetitive solicitation" means "the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement." Section 286.0113(2)(a)1., F.S.

The term "team" means a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation. Section 286.0113(2)(a)2., F.S.

A complete recording must be made of the exempt meeting; no portion of the exempt meeting may be held off the record. Section 286.0113(2)(c), F.S. Cf. AGO 10-42 (where statute required that closed proceedings of state committee be recorded and that no portion be off the record, audio recording of the proceedings "would appear to be the most expedient and cost-efficient manner to ensure that all discussion is recorded").

The recording and any records presented at the exempt meeting are exempt from public disclosure until the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever occurs earlier. Section 286.0113(2)(c)1. and 2., F.S. And see s. 286.0113(2)(c)3., F.S. (exempt status of recording if the agency rejects all bids, proposals, or replies, and concurrently provides notice of its intent to reissue a competitive solicitation).

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1-C-12 | QUASI-JUDICIAL MATTERS, PROCEEDINGS, OR HEARINGS

The Sunshine Law does not authorize boards to conduct closed-door hearings or deliberations simply because the board is acting in a "quasi-judicial" capacity. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973). And see *Occidental Chemical Company v. Mayo*, 351 So. 2d 336, 340n.7 (Fla. 1977), disapproved in part on other grounds, *Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992) (characterization of the Public Service Commission's decision-making process as "quasi-judicial" did not exempt it from s. 286.011, F.S.); and *Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County*, 411 So. 2d 1375 (Fla. 4th DCA 1982), affirming the lower court's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance hearing.

Thus, in the absence of statutory exemption, "[t]he fact that a board or commission is acting in a quasi-judicial capacity does not remove it from the reach of section 286.011, Florida Statutes." AGO 10-04. And see AGOs 92-65, 83-43 and 77-132. Cf. AGO 10-15 (special magistrate subject to the Sunshine Law when exercising the delegated decision-making authority of the value adjustment board).

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1-C-13 | 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, 40 (Fla. 1971) (city commission not authorized to hold closed sessions to discuss condemnation issues). 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 s. 286.011, F.S., and is prohibited from negotiating the acquisition or lease of the property in secret. AGO 74-294. Cf. AGO 95-06 (statutory exemption from Ch. 119, F.S., for certain records relating to the proposed purchase of real property does not authorize a city or its designee to conduct negotiations for purchase of property outside the Sunshine Law).

Advisory committees charged with land acquisition responsibilities are also subject to the Sunshine Law. See AGOs 87-42 (ad hoc committee appointed by mayor to meet with the Chamber of Commerce to discuss a proposed transfer of city property), and 86-51 (land selection committee appointed by water management district to evaluate and recommend projects for acquisition). Cf. *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d DCA 1994) (committee established by county commission to negotiate lease agreement subject to s. 286.011).

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1-C-14 | SECURITY MEETINGS

While there is no general exemption from open meetings requirements that applies to all discussions relating to "security," s. 281.301(1), F.S., provides an exemption for portions of meetings relating directly to or that would reveal the security or fire-safety systems for any property owned by or leased to the state or any of its political subdivisions or for any privately owned or leased property which is in the possession of an agency.

Similarly, s. 286.0113(1), F.S., states that the portion of a meeting that would reveal a security or fire-safety system plan or portion thereof made confidential and exempt by s. 119.071(3)(a), F.S. (providing an exemption from the Public Records Act for a "security or fire-safety system plan") is exempt from open meetings requirements. See Inf. Op. to Sherman, July 2, 2018, noting that the phrasing of s. 286.0113(1), F.S., and the statement of legislative intent included in the session law show that the exemption applies to any portion of a meeting in which a record as defined in s. 119.071(3)(a) would be revealed.

Section 119.0725(2), F.S., discussed more fully on page 157 provides confidentiality for specified cybersecurity information held by an agency. Any portion of a meeting that would reveal cybersecurity information made confidential in s. 119.0725(2), F.S., is exempt from open meetings requirements. Section 119.0725(3), F.S. An exempt portion may not be off the record and must be recorded and transcribed; the recording and transcript are confidential. Id. See also s. 282.318(6) (portions of meetings held to discuss specified cybersecurity records held by state agencies are exempt); s. 286.0113(3)(a), F.S. (exemption for portions of meetings held by local government owned utilities that would reveal information technology security records made exempt under s. 119.0713(5), F.S.); s. 1004.0962(5), F.S. (exemption for portions of meetings held to discuss a postsecondary educational institution's "campus emergency response"); and s. 1004.055(2), F.S. (exemption for portions of meetings held to discuss specified information technology security records maintained by postsecondary educational institutions). Cf. s. 286.0113(4)(b), F.S. (exemption for portions of meetings that would reveal building plans or geographical maps indicating the actual or proposed location of 911, E911, or public safety radio communication system infrastructure).

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1-C-15 | 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. AGO 92-79. Accord Inf. Op. to Batchelor, May 27, 1982.

Therefore, 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. Cf. AGO 71-295, cautioning that "[p]ublic bodies should avoid secret meetings, from which the public and the press are effectively excluded, preceding official meetings, even though such secret meetings are held ostensibly for purely social purposes only and with the understanding that the members of the public body will, in good faith, attempt to avoid any discussion of official business."

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1-C-16 | TELEPHONE CONVERSATIONS AND VIRTUAL MEETINGS**a. Private Telephone Conversations**

Private telephone conversations between board members to discuss matters which foreseeably will come before that board for action violate the Sunshine Law. 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), available online in the Cases database at the open government site at myfloridalegal.com (private telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law). See also the discussion on pages 23-24 regarding the application of the Sunshine Law to emails, text messages, and other written communications between board members.

b. Authorization to Conduct and Participate in Public Meetings via Telephone, Video Conferencing, or Other Electronic Media**(1) Sunshine Law**

Although both the Florida Constitution and the Sunshine Law require that, unless exempt by law, meetings of a government board must be "public meetings" that are "open to the public," neither provision requires that members of the public board be physically present during the meeting. AGO 20-03. Instead, the Attorney General's Office has observed that a board's use of electronic media technology to increase public participation in meetings and the use of such media to allow members of a board or commission to participate in a duly noticed public meeting does not necessarily raise Sunshine Law issues, "but rather implicates the ability of a board or commission to conduct public business with a quorum." See Inf. Op. to Stebbins, December 1, 2015.

(2) In-Person Quorum Requirements

The Attorney General's Office has advised that if a quorum is required to conduct official business, boards may only conduct meetings by teleconferencing or other technological means if they are authorized to do so by law or the in person requirement for constituting a quorum is lawfully suspended during a state of



emergency. AGO 20-03. And see Executive Order 20-69, issued by Governor DeSantis on March 20, 2020 (recognizing that public boards should be able to use technology to conduct meetings in light of the declared public health emergency resulting from the COVID-19 pandemic, and suspending Florida Statutes requiring that a quorum be physically present during the state of emergency). Executive Order 20-69 (which expired on November 1, 2020), stipulated that boards holding virtual meetings must still comply with the Sunshine Law. See also AGO 20-03, noting that if "meetings are conducted by teleconferencing or other technological means, public access must still be afforded which permits the public to attend the meeting. That public access may be provided by teleconferencing or technological means."

Similarly, "[a]s an administrative arm of the city's governing body... it would appear that the same legislative requirement for the physical presence of a quorum in order to conduct municipal business would apply when the retirement board is carrying out its delegated duties." AGO 10-34. Thus, in January 2021, the Attorney General's Office concluded that in the absence of legislation providing otherwise, the same physical presence quorum requirement that governs school board meetings would apply to meetings of school board advisory committees. Inf. Op. to Myrick, January 28, 2021. See now s. 1001.43(10), F.S., effective July 1, 2021, providing that members of school district "special committees and advisory committees may attend meetings in person or through the use of telecommunications networks such as telephonic and video conferencing."

(a) State Boards

In AGO 98-28, the Attorney General's Office concluded that s. 120.54(5)(b)2., F.S., authorizes state boards to conduct public meetings via entirely 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, F.A.C. And see AGO 20-03, noting that state

boards have been conducting meetings using "communications media technology" since 1997.

(b) Local Boards

(1) Meetings

As to local boards, the Attorney General's Office has noted that the authorization in s. 120.54(5)(b)2., to conduct meetings entirely through the use of electronic media technology applies only to state agencies. AGOs 20-03 and 98-28. Thus, unless the in-person requirement to constitute a quorum has been waived by law or lawfully suspended during a state of emergency, a quorum of the board must be physically present. AGO 20-03.

For example, 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. *Id.* And see AGOs 09-56 (where a quorum is required and absent a statute to the contrary, the requisite number of members must be physically present at a meeting in order to constitute a quorum). and 10-34 (city may not adopt an ordinance allowing members of a city board to appear by electronic means to constitute a quorum). Cf. s. 120.525(4), F.S., allowing a voting member of a regional planning council that covers three or more counties who participates via telephone or videoconferencing to be counted towards a quorum, provided that at least one third of the voting members are present at the meeting location and that notice of intent to participate remotely is given at least 24 hours prior to the meeting; s. 163.01(18), F.S., authorizing certain entities created by interlocal agreement to conduct public meetings and workshops by means of communications media technology; and Ch. 17-214, Laws of Florida, authorizing the Monroe County School Board, Monroe County Commission,

or any political subdivision thereof, to adopt rules and procedures for using communications media technology for meetings at which no final action is taken.

However, 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.

For example, if a quorum of a local board is physically present at the public meeting site, a board may allow a member with health problems to participate and vote in board meetings through the use of such devices as a speaker telephone that allow the absent member to participate in discussions, to be heard by other board members and the public and to hear discussions taking place during the meeting. AGO 94-55. And see AGOs 92-44 (participation and voting by ill county commissioner), and 02-82 (physically-disabled city advisory committee members participating and voting by electronic means).

(2) Workshops

The physical presence of a quorum has not been required 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. The use of electronic media technology, however, does not satisfy quorum requirements necessary for official action to be taken. See Inf. Op. to Stebbins, December 1, 2015 (approval of board meeting minutes constitutes official action; vote to approve minutes not exempted from

quorum requirements). Moreover, as discussed above, boards conducting workshop meetings electronically must still comply with the Sunshine Law.

For example, the Attorney General's Office advised that airport authority members may conduct informal discussions and workshops over the Internet, provided proper notice is given, and interactive access by members of the public is provided. AGO 01-66. Such interactive access must include not only public access via the Internet but also at designated places within the authority boundaries where the airport authority makes computers with Internet access available to members of the public who may not otherwise have Internet access. *Id.* For meetings, however, where a quorum is necessary for action to be taken, the physical presence of the members making up the quorum would be required in the absence of a statute providing otherwise. *Id.* Internet access to such meetings, however may still be offered to provide greater public access. *Id.* Cf. AGO 08-65, noting that a city's plan to provide additional public access to on-line workshop meetings by making computers available at a public library "should ensure that operating-type assistance is available at the library where the computers are located."

However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks, which does not permit the public to participate online, violates the Sunshine Law by circumventing the notice and access provisions of that law. AGO 02-32. And see Inf. Op. to Ciocchetti, March 23, 2006 (even though the public would be able to participate online, a town commission's proposed use of an electronic bulletin board to discuss matters that foreseeably may come before the commission over an extended period of time would not comply with the spirit or

letter of the Sunshine Law because the burden would be on the public to constantly monitor the site in order to participate meaningfully in the discussion). Compare AGO 08-65 (city advisory boards may conduct workshops lasting no more than two hours using an on-line bulletin board if proper notice is given and interactive access to members of the public is provided).

Moreover, there is no apparent authority for the use of electronic media technology to allow board members to remove a workshop or meeting from within the jurisdiction in which the board is empowered to carry out its functions and claim compliance with the Sunshine Law by providing the public electronic access to the remote meeting. Inf. Op. to Sugarman, August 5, 2015.

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APPENDIX



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