

Sunshine Law, meetings of mayor/ city council member

Number: INFORMAL

Date: April 07, 2005

Subject:

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Ms. Virginia Cassady
Edgewood City Attorney
Post Office Box 4848
Sanford, Florida 32772-4848

Dear Ms. Cassady:

On behalf of the Edgewood City Council and Mayor, you ask whether the Government-in-the-Sunshine Law is applicable to a meeting of the mayor with a prospective board or committee member, or prospective staff member/consultant, in furtherance of the mayor's duties as chief executive officer of the city, to make recommendations for appointment of such person by the city council. You also inquire about the applicability of the Sunshine Law to a meeting of the mayor with an individual city council member regarding a prospective board or committee member or prospective staff member/consultant, and to a meeting of a city council member with a non-council member regarding the dismissal of a non-elected appointed official, employee, or consultant by the city council. Attorney General Crist has asked me to respond to your letter.

Section 286.011, Florida Statutes, the Government-in-the-Sunshine Law, provides in pertinent part:

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

Section 286.011, Florida Statutes, thus applies to public *collegial* bodies. The statute has been held to be applicable to meetings of two or more members of a public board or commission,[1] and has been interpreted to encompass informal discussions and deliberations as well as formal action taken by a public body.[2]

Your first question concerns a meeting between the mayor and a prospective board or committee member or a prospective staff member/consultant. You have advised this office that the mayor is not a member of the city council and cannot vote on such appointments even in the case of a tie vote of the city council. The mayor, however, is responsible, as the chief executive officer of the city, for making recommendations to the city council on the appointment of various board or commission members as well as staff and consultants to the city.

The Government-in-the-Sunshine Law applies to meetings of two or more members of the same public board or commission, *i.e.*, a collegial body, when discussing some matter that will foreseeably come before that board or commission. Thus, the statute does not ordinarily apply to meetings of public officials who are not board or commission members unless such officials have been delegated the authority to act on behalf of a board or commission.[3]

No evidence has been presented to this office that the city council has delegated its decision-making authority to the mayor. Rather, under the charter, the mayor, as chief executive officer, has the responsibility to make a recommendation to the city council regarding such appointments. In meeting with prospective appointees, the mayor would appear to be carrying out such duties.

Accordingly, since the mayor is not a member of the city council and has not been delegated the authority to act on behalf of the city council, it does not appear that meetings between the mayor and a prospective council, board or committee member or prospective staff member/consultant are "meetings" subject to section 286.011, Florida Statutes.

Your second question concerns meetings between the mayor and an individual city council member regarding prospective appointments of staff or members of city boards or commissions.

Clearly, when two or more members of the city council meet to discuss some matter that will come before the council for action, such a meeting is subject to the Sunshine Law. However, whether the provisions of section 286.011, Florida Statutes, are applicable to meetings between a mayor and an individual member of the city council turns on the nature of the relationship between the mayor and the council.

In those municipalities where the mayor is a member of the city council, discussions between the mayor and another member of the council clearly would be subject to the Sunshine Law. This office has also stated that where the mayor is not a member of the council but has a voice in the decision-making process through the authority to break a tie vote, the mayor is subject to the requirements of the Sunshine Law when discussing matters that could come before the entire council and possibly involve the mayor through his or her power to break ties.[4]

For example, in Attorney General Opinion 75-210 this office concluded that since the mayor, under the municipal charter, had the power to vote in the case of a tie, the Sunshine Law was applicable to conversations between the mayor and members of the city council when discussing matters that could come before the city council and could involve him directly through his power to break ties. In Attorney General Opinion 90-26, however, this office considered the applicability of the Sunshine Law to meetings between the mayor and an individual city council member where the mayor had no voting power and could not break tie votes, but was permitted to speak during council meetings and possessed the veto power. This office concluded that the mayor could meet privately with the individual council member provided he was not acting as a liaison between council members and neither he nor the council member had been delegated the authority to act on behalf of the council.[5]

You have advised this office that under the city charter and code, the mayor is not a member of the city council and cannot vote on the matters under consideration in the instant inquiry,

although he or she may participate in the discussion regarding the appointment.[6] While you state that it is your opinion that the mayor may meet with an individual member of the city commission to discuss the mayor's recommendation of appointed personnel, you reference Attorney General Opinion 75-210 and note that this office stated:

"On the other hand, the mayor may discuss matters with city councilmen which concern his administrative functions *and* which would not come before the council for consideration and further action *or* which involve his executive prerogative to veto any ordinance or resolution." (e.s.)

Since the mayor's recommendation will come before the city council for a vote, you ask whether the above opinion would prohibit the mayor from meeting privately with an individual council member. In Attorney General Opinion 75-210 the mayor possessed the authority not only to veto actions by the city council, but also to vote on any measure in the event of a tie vote. This office therefore concluded that since the mayor had a voice in city decision making through the power to break tie votes, the mayor should not confer privately with members of the city council regarding matters of pending business if such matters will come before the council for consideration *and could require the mayor to exercise his power to break tie votes*. In the instant inquiry, however, your letter indicates that the mayor does not possess the authority to vote on the appointment even in the event of a tie vote. Nor is there any evidence that the mayor or the individual council member has been delegated the authority to act on behalf of the council or that the mayor is acting as a liaison between board members.[7]

Accordingly, based upon the information provided to this office, it appears that the mayor may meet privately with an individual council member to discuss the mayor's recommendation to the city council of appointed personnel.

Finally, you ask whether a city council member (or the mayor) may meet with a person who is not a member of the city council to discuss whether an appointed official, employee or consultant should be dismissed by the council. According to your letter, the mayor or a member of the city council may propose the dismissal of any appointed official, employee, or consultant to the city council, which is then responsible for deciding whether to dismiss the individual. The recommendation to dismiss is not a joint decision, but rather is made individually by the mayor *or* an individual council member. In determining whether to make such a recommendation, the individual council member (or the mayor) may meet with a non-council member on the issue of whether to recommend dismissal.

The Sunshine Law does not ordinarily apply to discussions between a single member of a board and a non-board member unless there has been a delegation of the decision-making process to the single member.[8] Thus, this office has stated that a meeting between the chairman of a private industry council created pursuant to federal law and the chairman of a five-county employment and training consortium created pursuant to state law was not subject to section 286.011, Florida Statutes, unless a delegation of decision-making to the chairman of the consortium was present.[9]

Similarly, Attorney General Opinion 87-34 concluded that an individual city council member could meet privately with an individual member of the municipal planning and zoning board to

discuss a recommendation made by the board since fewer than two members of each body would be present. Such a conclusion was dependent upon a finding that no delegation of decision-making authority had been made to the city council member present and that the member was not acting as a liaison for the council or its members in these discussions.

Moreover, as discussed in the response to your first question, section 286.011, Florida Statutes, does not ordinarily apply to meetings of public officials who are not board or commission members unless such official has been delegated the authority to act on behalf of a board or commission. No evidence has been presented to this office that either the city council member or the mayor, in meeting with a non-council member to discuss a possible recommendation for the dismissal of an officer, employee, or consultant of the city, has been delegated the authority to act on behalf of the city council. Rather, such a meeting would appear to be related to the council member's or mayor's individual responsibility to make such recommendations to the city council.

You have referred to the decision of the Fourth District Court of Appeal in *Dascott v. Palm Beach County*,^[10] in which a pre-termination conference panel convened pursuant to a county ordinance and consisting of an employee's department head, representatives of the Personnel Director, and the Director of the Office of Equal Opportunity, was held to be subject to the Sunshine Law. Although the notice provided to the employee stated that the panel would make a joint decision as to whether to uphold discharge, the county argued that it was the department head who made that decision and thus, under the Fourth District Court's opinion in *City of Sunrise v. News and Sun-Sentinel Company*,^[11] the conference panel meeting was not subject to the Sunshine Law. In the *City of Sunrise* case, the court held that the mayor, who had the exclusive authority to remove city employees, was not subject to the Sunshine Law when meeting with an employee concerning the employee's discipline. The court in *City of Sunrise* stated:

"Notwithstanding the broad public policy underlying section 286.011 it is apparent that not all meetings involving government officials are affected by the statute. For instance, this court has held that there must be a meeting between two or more public officials of a board, a commission or similar body in order for the Sunshine Law to apply Since the mayor is not a board or commission, nor acting for such a board, meetings between him and city employees in regard to his duties, unrelated to those of a board or commission, are not "meetings" under section 286.011(1). In addition, it is apparent that no meeting between two or more public officials is involved."^[12]

The *Dascott* court, however, determined that the conference panel assisted in determining whether to terminate an employee and, therefore, participated in the decision-making authority delegated to the department head. Thus, the court held that the meeting of the panel was subject to the Sunshine Law.

Even prior to the *Dascott* decision, the courts recognized that an individual not subject to the Sunshine Law could create a "board or commission" that would be subject to the requirements of section 286.011, Florida Statutes. For example, in *Krause v. Reno*^[13] the city manager appointed a citizens advisory group to meet to jointly review applications for the position of chief of police and to recommend the names of four or five applicants. The city manager, who was

authorized to make the hiring decision, was not bound to select the police chief from among the candidates recommended to him. The *Krause* court recognized that the city manager had delegated a portion of the decision-making process to the citizens advisory committee, which made that committee a board within the meaning of the Sunshine Law.[14]

In the instant inquiry, however, there is no evidence that the city council member (or the mayor) has created a collegial body to advise the council member (or the mayor), or that the council member (or mayor) was meeting with the non-council member to make a joint decision. Accordingly, this does not appear to be a situation similar to that presented in either *Dascott* or *Krause*. To conclude otherwise would make the Sunshine Law applicable to virtually any meeting of a public officer with another person to discuss some matter within the decision-making authority of the officer. Accordingly, the Government-in-the-Sunshine Law would not appear to be applicable to a meeting of a city council member (or the mayor) with a non-council member regarding the dismissal of a non-elected appointed official, employee, or consultant by the city council.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tfl

[1] See, e.g., *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3rd DCA 1973); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).

[2] See, e.g., *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).

[3] See Op. Att'y Gen. Fla. 84-16 (1984) in which this office stated that for s. 286.011, Fla. Stat., to apply to a particular meeting, two or more members of a body or other entity or group to which the Sunshine Law applies, must be present, or there must have been delegation of decision-making by such a body to either a single member thereof or to an advisory group or committee used by the covered entity. And see *Hough v. Stembridge*, *supra*; *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984) (meeting of individual members of different boards not subject to Sunshine Law unless the member has been delegated the authority to act on behalf of his or her board); *Blackford v. School Board of Orange County, Florida*, 375 So. 2d 578 (Fla. 5th DCA 1979) (superintendent of schools is not subject to s. 286.011).

[4] See Ops. Att'y Gen. Fla. 75-210 (1975) and 85-36 (1985).

[5] And see Op. Att'y Gen. Fla. 74-47 (1974) stating that "[i]t is not a violation of the Sunshine Law for a city manager to meet individually with members of the city council to discuss city business provided that he does not act as a liaison for board members by circulating information and thoughts of individual councilmen to the rest of the board."

[6] This office does not generally interpret the provisions of local charters or codes. Thus, the conclusions reached herein are based upon the representations made by the city attorney regarding the office of mayor and the city council under the city charter and code.

[7] See *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) the Sunshine Law is to be construed "so as to frustrate all evasive devices." And see *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353 (Fla. 4th DCA 1973), *certified questions answered sub. nom.*, *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (public body cannot escape application of Sunshine Law by undertaking to delegate the conduct of public business through an alter ego); *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979) (series of scheduled successive meetings between superintendent and individual school board members were subject to Sunshine Law as these meetings held in "rapid-fire succession" in order to avoid a public airing of a controversial subject amounted to a de facto meeting of the school board).

[8] See *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988) (requisite to application of Sunshine Law is meeting between two or more board members).

[9] See Op. Att'y Gen. Fla. 84-16 (1984).

[10] 877 So. 2d 8 (Fla. 4th DCA 2004).

[11] 542 So. 2d 1354 (Fla. 4th DCA 1989).

[12] *Id.* at 1355-1356.

[13] 366 So. 2d 1244 (Fla. 3rd DCA 1979).

[14] *Id.* at 1251-52. And see *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983); *Silver Express Company v. District Board of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3rd DCA 1997) (committee established by community college purchasing director to consider and rank various contract proposals must meet in the Sunshine); Op. Att'y Gen. Fla. 85-76 (1985) (ad hoc committee appointed by mayor for purpose of making recommendation to mayor concerning legislation is subject to Sunshine Law).