Public Meetings

Number: AGO 71-32

Date: June 17, 2011

Subject:
Public Meetings

(See also AGO 071-32A)

To: Richard E. Gerstein, State Attorney, Miami
Prepared by: Stuart L. Simon, Deputy Attorney General

Re: PUBLIC MEETINGS--GOVERNMENT IN THE SUNSHINE--APPLICATION. s. 286.011, F.S.

QUESTIONS:

1. Is the election of the chairman of the district school board by secret ballot of the members of the board during a public meeting a violation of s. 286.011, F.S.?

2. Is the destruction of such ballots by the chairman of the school board or by any officer or employee of the board an invalid act?

3. Is a telephone conversation between two members of a board or commission relating to or bearing upon the public's business illegal per se?

4. Is conversation or discussion between two or more members of a board or commission at which no one else is present an illegal act?

5. Is a meeting of the members of a board or commission valid if the news media and public are not specifically excluded, or does validity require reasonable notice of the meeting to the news media and public?

6. Are the standards different in a case of criminal prosecution for violation of s. 286.011, F.S., than in a civil suit seeking to enjoin either the holding of a secret meeting by public officials or the implementation of an enactment adopted at such secret meeting?

7. Is a board member, who votes against specific conduct by secret procedure, but who then participates in that procedure after its approval by the board, absolved of criminal responsibility under s. 286.011, F.S.?

8. May the members of a public body or a single member of that body bargain or negotiate in secret with representatives of public employee groups over the terms of it labor contract without violating s. 286.011, F.S.?

9. May a public body employ a skilled negotiator to bargain or negotiate on its behalf in secret

with representatives of public employee groups over the terms of a labor contract without violating s. 286.011, F.S.?

10. What is the legal effect of actions taken by boards and commissions in violation of s. 286.011(1), F.S.?
11. To what public bodies does s. 286.011, F.S., pertain?

SUMMARY:

Election of a school board chairman by secret ballot is illegal, destruction of the secret ballots is illegal, and a telephone conversation between members of a public board is not illegal per se, but may be subject to scrutiny under the Sunshine or Public Records Law. Other questions on the Sunshine Law are answered in this opinion.

We will endeavor to answer these questions in the order set forth above.

AS TO QUESTION 1:

We answer this question in the affirmative. The relevant language of s. 286.011, F.S., is to be found in subsection (1) thereof which states: "All meetings of any board or commission . . . at which official acts are to be taken are . . . open to the public *at all times*. . . ." (Emphasis supplied.)

The phrase "at all times" indicates that the meeting shall be open to the public and the news media continuously during the period of the meeting. If at any time during the meeting the proceedings become covert, secret, or not wholly exposed to the view and hearing of the public and news media, then that portion of the meeting becomes violative of the statutory requirement imposed by the phrase "at all times." A secret ballot conducted at an otherwise open meeting constitutes a violation of the sunshine enactment, since the public and the news media are denied the right to know who voted for whom, and the meeting cannot therefore be regarded as "open to the public at all times."

AS TO QUESTION 2:

We answer this question in the affirmative. Our opinion is based on the language of s. 1l9.041, F.S., which states: "No public official may mutilate, destroy, sell, loan or otherwise dispose of any public record without the consent of the division of archives, history and records management of the department of state."

The written ballots taken to determine the chairmanship of the school board are public records as defined by s. 1l9.011(1), F.S., which states:

"'Public records' shall mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

The ballots are thus public records and their destruction constitutes a statutory violation, in our opinion. The fact that the act of destruction was performed by an employee of the board (assuming arguendo that the school board attorney is a mere employee and not a public officer or official) rather than a member of the school board would not modify this determination since the board's attorney, even if an employee, may not permit himself to serve as the instrumentality through which the board attempts to accomplish indirectly what it or its members may not do directly within either the Sunshine or the Public Records Laws.

At this juncture we would mention that any violation of either the Sunshine or Public Records Law by any member of a board or commission or any officer, official or employee in the service of the said board or commission, would not necessarily give rise to a criminal prosecution. The unintended violation of the statute involved throughout might well result in an illegal enactment or act by the board, or one of its officers or employees, but would not constitute an action that would permit the imposition of criminal penalties. An act would only give rise to a criminal prosecution if there were evidence of some deliberate or knowing intent to violate the statutory provision. In this connection we would recommend that this particular answer and the other answers set out in this opinion be read in the light of our answer to question 6 which has applicability to each of the other answers set forth in the opinion. In our view, criminal prosecutions for violation of either the Sunshine or the Public Records Law should be undertaken by a public prosecutor only if there is some clear evidence of actual scienter or deliberate intent to violate an enactment in the particular instance before him.

AS TO QUESTION 3:

In our opinion this question must be answered in the negative. Telephone conversations are frequently held during which beneficial and constructive ideas are exchanged in lively dialogue between policy-making officials to the great benefit of the public. We have no wish to inhibit or thwart these lively interchanges of ideas among our public officials; however, it is clear that telephone conversations between school board members on some aspects of the public's business are improper and violative of the law if conducted covertly or in secret. In this regard we would mention that the statute in question is limited in its effect to meetings "at which official acts are to be taken." Though this might seem on first reading to refer only to formal publicized meetings of a public body at which formal actions to be recorded in official minutes are contemplated, such an interpretation is not in accord with prevailing judicial construction. This view was specifically rejected by the Second District Court of Appeal in Times Publishing Company v. Williams, Fla. 2 D.C.A. 1969, 222 So.2d 470, wherein a unanimous court declared:

"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. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act.

We think then that the legislature was obviously talking about two different things by the use of these phrases, and we can't agree with appellee that 'official acts' are limited to 'formal action,' or

that they are synonymous. Clearly the legislature must have intended to include more than the mere affirmative formal act of voting on an issue or the formal execution of an official document. These latter acts are indeed 'formal,' but they are matters of record and easily ascertainable (though perhaps ex post facto), notwithstanding such legislation; and indeed the public has always been aware sooner or later of how its officials voted on a matter, or of when and how a document was executed. Thus, there would be no real need for the act if this was all the framers were talking about. It is also how and why the officials *decided* to so act which interests the public. Thus, in the light of the language in Turk, *supra*, and of the obvious purpose of the statute, the legislature could only have meant to include therein the *acts of deliberation, discussion* and *deciding* occurring prior and leading up to the affirmative 'formal action' which renders official the final decisions of the governing bodies.

It is our conclusion, therefore, that with one narrow exception which we will discuss later, the legislature intended the provisions of Chapter 67-356 to be applicable to every assemblage of a board or commission governed by the act at which any discussion, deliberation, decision, or formal action is to be had, made or taken relating to, or within the scope of, the official duties or affairs of such body . . . ." (Emphasis supplied.)

This same sentiment was expressed by our Supreme Court in Board of Public Instruction of Broward County v. Doran, Fla. 1969, 224 So.2d 693, when it wrote:

"Under the decision in Turk v. Richard, *supra*, it would have been unnecessary to include a provision declaring certain meetings as "public meetings" if the intent of the Legislature had been to include only formal assemblages for the transaction of official business. The obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board.

* * *

The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."

Thus, telephone conversations between public officials on aspects of the public's business are part of the process which ultimately leads up to final recorded action in a formal public meeting, and they may not be held covertly. These conversations come within the ambit of the Sunshine Law and must be subjected to the scrutiny of the public to the greatest extent possible. They may, therefore, not be held in secret, or in a place wholly inaccessible to members of the public or representatives of the news media for the specified purpose of and with clear intent to avoid the Sunshine Law's requirements.

In responding to this question we must determine the criterion which differentiates a telephone conversation open to public scrutiny and one held in secret. Two tests or criteria are possible. The first of these involves the physical exclusion of the public and the representatives of the news media who wish to listen to either participant in the telephone discussion arid who enter the room or office where either participant is conversing in order to do so. The second test, a more stringent one, involves giving a reasonable period of notice to the public and the representatives of the news media who might wish to be present at either of the places where the participants in the telephone conversation will be, and who are thus notified that the telephone conversation will occur.

In determining which of these two tests should be applicable, we must be governed by the rule of reason. In selecting the first criterion rather than the second in order to determine whether the telephone conversation is being conducted pursuant to the requirements of the Sunshine Law, we are mindful of the pragmatic requirements of governmental operation. To force public officials to give a period of notice to the press and public before making individual telephone calls or engaging in informal conversation with other members of the board or commission would slow the free and healthy conduct of the public's business to a standstill and thwart the interchange of ideas among public officials. This second test or criterion must therefore be rejected as unreasonable and unworkable on practical grounds and as one that would impose an impossible burden on energetic policy-making officials in the circumstances raised in the question posed.

It will be clear that public officials will or should be spending substantial portions of their time in offices furnished them in which to conduct public or official business. Members of the public and news media who wish to view the conduct of the public's business should feel free to enter these public offices provided at public expense and witness and listen to the conduct of their business. Thus, in our view, the telephone conversations envisaged by your question would become secret and unlawful if members of the public and press were deliberately excluded from the public offices furnished for the conduct of the public's business.

We also believe that the public and the representatives of the news media are entitled to be present at telephone conversations bearing on public business and occurring in places other than public offices. We realize that board members will inevitably carry on discussions of public matters, both telephonically and personally, with other board members in their homes, on golf courses, in restaurants, and in other places that are not public offices. It would be absurd to ban such constructive discussions or to hold them unlawful merely because they were not held in public offices. At the same time, however, we do not believe that the Sunshine Law can be frustrated by allowing board members to bar interested members of the press and public from the places where such conversations bearing on the public's business are taking place. We realize that in virtually all instances where discussions of public business occur outside of public offices, there will be no representative of the press or public present. Despite this, we believe that individual members of the public and press are legally entitled to be present if they wish to attend any discussion that falls within the ambit of the Sunshine Law.

We would also mention that when public officials who are subject to the requirements of the Sunshine Law leave their offices for the sole and specific purpose of discussing public business in the shade rather than in the sunshine and with a deliberate intent to avoid the law's requirement and frustrate the public's desire to observe and hear, they not only violate the law

but they do so knowingly and intentionally. We say this with full realization of the difficulty that would be involved in proving that a board member left his offices intentionally for the sole and specific purpose of discussing some aspect of public business in secret.

In concluding our answer to this question, we want to point out that nothing we have said in this opinion should be taken to indicate that members of boards or commissions or bodies with legislative powers are prohibited from receiving telephone calls from constituents by the provisions of the Sunshine Law. We believe that each constituent's right to contact and speak to his representative, whether elective or appointive, is part and parcel of our democratic system of government and is not limited or enjoined in any way by the provisions of s. 286.011, F.S. The Sunshine Law imposes a clear limitation on the right of public officials to conduct the public's business in secret. It imposes no such burden or limitation on members of the public who may wish to speak to their representatives. We therefore wish to make clear at this point that this opinion should not be construed or interpreted to require public officials falling within the ambit of the Sunshine Law to discontinue receiving and responding to telephone calls from their constituents.

AS TO QUESTION 4:

For reasons stated in the answer to question 3, we must also answer this question in the negative. Most of the substantive answer given to question 3 will also be applicable here and will not be repeated.

We would add however that, in our opinion, any meeting of commissioners or board members at which formal actions to be memorialized in minutes are contemplated, or at which legislation in the form of ordinances or resolutions are envisaged, or at which official reports are received, or at which a majority or quorum of the body is in attendance, will evoke the second and more stringent test for determining whether the meeting is being unlawfully conducted in secret. In such circumstances, we believe that a reasonable and ample period of notice must be furnished the public and representatives of the press so that they may attend this formal or quorum-attended meeting if they wish. In the situation we have described, we believe that both the period of notice of the meeting and the method of promulgating the notice to the public must be performed in strict accordance with legislative requirements when these requirements exist; where there is no legislative prescription, then the serving of notice and .the promulgation of the notice must be given in a reasonable manner calculated to timely inform the public.

AS TO QUESTION 5:

This question was answered in the responses to the last two questions and will not therefore be repeated.

AS TO QUESTION 6:

We must answer this question in the affirmative since the former requires proof of scienter, while the latter may be determined in a declaratory proceeding by one in doubt as to his rights. This is made clear in Board of Public Instruction of Broward Co. v. Doran, Fla. 1969, 224 So.2d 693, wherein the Supreme Court stated:

"Subsection (3) of Fla. Stat., s. 286.011, F.S.A., provides that any person who violates the provisions of the act 'by attending a meeting not held in accordance with the provisions hereof,' is guilty of a misdemeanor. Defendant complains because scienter was not made a specific element of the offense. We construe the statute to impliedly require a charge and proof of scienter. We can so construe the subject statute without being guilty of a 'judicial amendment of the statute.' Cohen v. State, 125 So.2d 560 (Fla. 1961)."

AS TO QUESTION 7:

We must answer this question in the negative. The statutory language contained in subsection (3) of the Sunshine Law [s. 286.011, F.S.], states:

"Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $500.00, or by imprisonment in the county jail for not more than 6 months, or by both such fine and imprisonment."

The act pronounced criminal by the foregoing is attendance at the meeting at which a secret or covert act occurs. We, therefore, do not believe that continuing participation in the secret proceeding, despite an initial vote against it, is permitted by the Sunshine Law. We hold the view that the statute requires the board member or commissioner to either leave the meeting or to refrain from continuing participation in it once the act of violation occurs. The initial vote against proceeding covertly will perhaps have a bearing on the guilt or innocence of a board member or commissioner who remains in the secret meeting as a participant in any criminal proceeding instituted.

AS TO QUESTION 8:

We answer this question in the negative. The recent decision of the Supreme Court of Florida (Jan. 27, 1971) in City of Miami Beach v. Berns, 245 So.2d 38, states:

"The next question to be determined is whether a city council can hold informal executive sessions at which the public is excluded for the discussion of condemnation matters, personnel matters, pending litigation or any other matter relating to city government.

* * *

Whether Fla. Stat. §286.011, F.S.A., should authorize secret meetings for privileged matter is the concern of the Florida Legislature and unless the Legislature amends Fla. Stat. s. 286.011, F.S.A., it should be construed as containing no exceptions.

A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public. When at such meetings officials mentioned in Fla. Stat. s. 286.011, F.S.A., transact or agree to transact public business at a future time in a certain manner they violate the

government in the sunshine law, regardless of whether the meeting is formal or informal."

Since there are no exceptions to the rule against secrecy set forth in the Sunshine Law, the attorney general is powerless to create one by implication through an official opinion. We can only conclude that the provisions of a labor contract in which teachers' salaries, hours of work and other conditions of employment are fixed, involve a substantial expenditure of the public moneys, and cannot by any stretch of the imagination be said not to be related to the public's business. Unless the legislature creates a specific exception for labor contract negotiations in the Sunshine Law, we must conclude that the bargaining sessions contemplated by the question fall within the ambit of this law's requirements.

AS TO QUESTION 9:

We must answer this question in the negative for the reasons set forth in our answer to question 8 and for the further reason that the board may not attempt to do indirectly what it is prohibited from doing directly. To transfer a legislative or school board policy prerogative involving the establishment of conditions of employment for faculty members to an administrator or employee would constitute the unlawful delegation of legislative powers to a nonelective official or perhaps even to an independent contractor. A legislative body may certainly employ others to assist in the drawing or phrasing of its proposed enactments, but it may not delegate its responsibility to enact or pass upon the wisdom of the legislation drawn at its direction and under its control. The setting of faculty standards or conditions of employment is a policy matter that the school board, in our opinion, may not shift or delegate to nonpolicy-making personnel. This is in accordance with s. 230.23(5), F.S., which appears to' require the school board, and no other body or person, to exercise all powers and perform all duties relating to the compensation, promotion, suspension and dismissal of instructional and noninstructional personnel of the county public school system. See Kelly v. Board of Public Instruction, Fla. 1930, 141 So. 311.

AS TO QUESTION 10:

Subsection (1) of the Sunshine Law [s. 286.011, F.S.], declares that no formal actions taken by any board or commission in violation of the statute "shall be considered binding." In our opinion, this does not require each and every violative action by every board and commission in the state to be deemed a nullity, wholly void ab initio and as though never enacted. It means rather that individual actions taken by boards and commissions in violation of the statutory inhibition are individually voidable and thus subject to challenge by persons with proper standing to sue in court cases. To hold otherwise would be to create public chaos.

We are mindful of the situation that arose several years ago in the many reapportionment cases pending, when state and federal courts across the nation were besieged with requests to hold all enactments of malapportioned legislatures unconstitutional, and as though never enacted. We are not aware of any court ever acceding to such a prayer for relief despite the soundness of legal arguments advanced in support of this position. Courts recognized, as do we, that an en masse declaration of unconstitutionality of thousands of enactments throughout the nation, without any consideration being given to the substantive content of the enactments, or the procedures involved in the enactment of any individual statute or ordinance, could serve no purpose but to throw organized societies of people and their local governments into panic and

confusion.

We therefore express the view that the formal enactments and actions by the various boards and commissions throughout the state are not null and void in toto even if violative of the Sunshine Law, but are subject to challenge on an individual basis in court cases ,brought by persons with standing to sue.

We would also add that, in our opinion, legislative enactments passed by a board or commission in violation of the Sunshine Law may be corrected and thus made legally effective if subsequently reenacted with *nunc pro tunc* effect, or reenacted together with a ratification of the initial enactment. These reenactments should be effected in accordance with the provisions of s. 286.011, F.S. Elections held by secret ballot as indicated in question 1 may be made lawful by conducting a new election in strict compliance with the Sunshine Law, and then having the board or commission ratify all actions taken since the initial voidable election.

AS TO QUESTION 11:

This question has recently been answered by the Supreme Court in City of Miami Beach v. Berns (1971), 245 So.2d 38, in this language: "The Legislature intended to extend application of the 'open meeting' concept so as to bind every 'board or commission' of the state, or of any county or political subdivision over which it has dominion or control. . . ."

This broad determination was limited by the Supreme Court in Canney v. Board of Public Instruction (Feb. 24, 1971) [case nos. 39473 and 39474 have been set for rehearing July 5th, 1972], --- So.2d ---, wherein the court incorporated in its opinion certain of the language of the First District Court of Appeal in the same cause (231 So.2d 34) as follows:

"Next, petitioner contends that the 'Government in the Sunshine Law,' Section 286.011, Florida Statutes, was violated by the School Board when it recessed the hearing on October 14 to reach a decision. The transcript of the proceedings discloses that petitioner's attorney stated at one point: 'I think that the School Board is in a position of being a *quasi-judicial administrative agency at this point*. . . .' The observation was correct. The School Board was acting in a quasi-judicial capacity, and the conference held by it was privileged and did not fall within the purview of the cited statute.

We are not unaware of the dicta set out in our sister court's opinion in Times Publishing Company v. Williams, in treating the application of the Government in the Sunshine Law wherein by footnote that Court observed that the performance of quasi-judicial functions were not excepted by the Legislature from the application of said statute. We are aware that there are three branches of government -- legislative, executive and judicial. We are further aware that the Legislature is not empowered, by statute or otherwise, to prescribe the conduct of. the internal government of the judicial branch. Such constitutional authority is vested solely and exclusively by the provisions of Article V [State Const.] in the judicial branch of the government. The Legislature is possessed of the authority to vest quasi-judicial functions in a county board of public instruction. . . . Neither the public nor the press has any more right to enter into the judicial deliberations of the members of a county board of public instruction than they have to enter into the conference room of the Supreme Court of Florida when the members of that Court are

deliberating upon a judicial question or into a petit jury room when those citizens are deliberating upon their verdict."

From the foregoing we conclude that the provisions of the Sunshine Law are not applicable to the judicial branch of government in Florida nor to legislative bodies performing quasi-judicial functions.

Since the separation of powers doctrine also has application to the executive branch of government, we do not believe that the Sunshine Law governs those executive divisions of state government established or created organically by Art. IV of our Constitution. We have specific reference here to the individual members of the cabinet enumerated in s. 4, Art. IV, State Const. However, when these executive officers of our state meet as a cabinet and as an executive body that performs quasi-legislative functions and tasks, it becomes subject to the requirements of the Sunshine Law in the same way that the legislature and the 67 county commissions are so subject. Those departments or boards authorized by s. 6 of Art. IV of the Constitution, which are part of the executive branch of state government but established by statute, and more particularly those defined at length in Ch. 20, F.S., (Governmental Reorganization Act), and which perform quasi-legislative functions in large measure, are subject in our view to the Sunshine Law provisions since they fall within the category of governmental agencies subjected thereto by the Supreme Court's language in City of Miami Beach v. Berns, *supra*: "The Legislature intended to extend application of the 'open meeting' concept so as to bind every 'board or commission' of the state, or of any county or political subdivision over which it has dominion or control."

This position is supported by both majority and minority opinions in the Canney case, *supra*. The majority opinion has already been quoted in substantial part; and the minority opinion likewise takes the view that the Sunshine Law applies only to the legislative branch of government. The dissent authored by Justice Adkins states in pertinent part:

"I agree, under the doctrine of separation of powers, that the Legislature is not empowered to prescribe the conduct of the internal government of the judicial or the executive branch. The question presented here is whether a county school board, acting in a quasi-judicial capacity, is a part of the legislative branch of government. If a county school board is a part of the legislative branch, then the Government in the Sunshine Law should be applicable, and any exception or amendment should be considered by the legislative, not the judicial branch."

Since the majority opinion differed essentially only from the last-quoted sentence, it will be apparent that both the majority and minority opinions in Canney accepted the view that the separation of powers concept made the Sunshine Law applicable to the legislative branch of government. The majority held that quasi-judicial functions of legislative bodies such as school boards were not within the ambit of the Sunshine Law, and presumably neither would quasi-executive functions be. In like manner, it would appear that quasi-legislative functions exercised by an executive board would fall within the Sunshine Law's requirements.

This opinion which modifies certain of the official opinions of my predecessor in office is based to a substantial extent on extremely recent Florida Supreme Court decisions. We now specifically recede from the following opinions in conflict with this opinion:

(a) GS 70-4 (Government in the Sunshine opinion) of October 12, 1970. This opinion raised the identical question posed in question 1 herein. It was answered by my predecessor with a statement that secret ballots were permissible in otherwise open meetings without violation of the Sunshine Law.

(b) Attorney General Opinion 070-37 of April 30, 1970. This opinion which held that conferences between city commissions and their attorneys relating to pending litigation were privileged and not within the ambit of the Sunshine Law appears to have been reversed by the Supreme Court of Florida holding in City of Miami Beach v. Berns (1971), 245 So.2d 38.

(c) GS 69-8 (Government in the Sunshine opinion) of December 11, 1969, which held that formal city commission meetings could be held in the town hall without notice to the public or press. We recede from the declaration that s, 286.011, F.S., has no notice requirements, express or implied.

(d) GS 69-6 (Government in the Sunshine opinion) of November 4, 1969, is reversed for the same reason stated in GS 69-8.

(e) GS 69-5 (Government in the Sunshine opinion) of November 4, 1969, is reversed because it held that the deliberations of a quasi-judicial board should be open to the public. The Supreme Court's recent opinion in Canney v. Board of Public Instruction of Alachua County, Florida (1971), - - - So.2d - - - , hold to the contrary.