



BREVARD COUNTY
BOARD OF COUNTY COMMISSIONERS

**INTER-OFFICE
MEMORANDUM**

TO: Members of the Flood Hazard Area and Wetlands Working Groups

FROM: Christine Lepore, Assistant County Attorney

SUBJECT: Government in the Sunshine/Florida's Public Meetings Law and Code of Ethics for Public Officers and Employees

DATE: July 22, 2010

Thank you for donating your time and effort to serve on an advisory board. Citizen participation is vital to a successful policy development process. As an advisory board member, some of the Florida's Government-in-the Sunshine Law requirements affect your activities throughout this process. The public policy behind the Sunshine Law is to have all deliberations by a public body conducted in public meetings of which the public and the media have received reasonable notice. The following is an overview the Sunshine Law requirements that apply to you.

1) What are the requirements of the Sunshine Law?

The Florida Government in the Sunshine Law, Section 286.011, Florida Statutes, contains three basic requirements:

- a) meetings of public boards or commissions must be open and accessible to the public;
- b) reasonable notice of such meetings must be given; and
- c) minutes of the meeting must be taken.

2) Who does it apply to?

All boards or commissions of Brevard County are subject to the Sunshine Law. The law is equally applicable to advisory boards such as yours.

3) What is a "meeting" which is subject to the Sunshine Law?

Florida courts apply the Sunshine Law to the entire decision-making process and not merely to a formal assemblage of a public body at which voting to ratify an official decision is carried out. This means that all discussions and deliberations between two or more advisory board members about business currently before the advisory board or business that would reasonably be discussed by the advisory board in the foreseeable future are subject to the Sunshine Law. The term "meeting" is defined as any circumstance where two or more members of the same advisory board communicate in person, by phone, or by any written form, including e-mail, texting, instant messaging. Again, any communication that falls within this definition must occur a meeting satisfying the three requirements addressed in section 1 above.

The most common opportunity for Sunshine Law violations is the time just before a public meeting starts and right after one concludes. There is a natural tendency for people to make conversation by discussing what the upcoming meeting is about and recapping the events of a just-concluded meeting. This same concern applies to comments whispered between advisory board members during a public meeting. Please be mindful that these conversations are not on the record and are considered Sunshine Law violations.

EXCEPTION: There is one exception for written communication and that is for sharing factual information and statements referred to as "position papers". The latter is a written statement of a board member that explains a certain position or opinion on an issue for future discussion by the entire board. Here's the caveat, any response to factual information or position paper must occur during a public meeting. A response outside of a public meeting is considered a violation of the Sunshine Law. Should you wish to distribute factual information or a position paper to fellow advisory board members, please submit it to county staff for dissemination. Please also include on the following statement on the document: "Do not respond to this communication except in a public meeting."

Please note that you are permitted to discuss advisory board business with any members of other government boards who are not members of your advisory board. You may also speak to your alternate outside a public meeting since both of you will never serve as a voting advisory board member at the same time.

4) Public Meetings

a) Notice and Recording:

Procedurally, the Sunshine Law requires the giving of notice to members of the public as to the time and place of the proposed advisory board meeting and a statement of the subject matter to be discussed. The notice should include, among other things, the time, place, and if available, an agenda

of the subject matter. Section 286.011(2), Florida Statutes, states that all public meetings must be "recorded" and the record made available for public inspection. County staff is responsible for noticing all advisory board meetings and preparing meeting minutes for the public record

b) Voting:

The use of secret ballot at public meetings is not acceptable. If a vote is required by the advisory board, a vote must be cast by each voting member unless there is a bona fide conflict of interest as described below.

c) Voting Conflicts of Interest:

As an advisory board member, the State's conflict of interest laws apply to you. All members must keep in mind the possibility of a voting conflict of interest arising as to any item that might come before the board based not only on their employment relationship, but upon other situations.

Section 112.3143(3), Florida Statutes, provides that:

"No...local public officer shall vote in his official capacity upon any measure which would inure to his special private gain or loss; which he knows would inure to the special private gain or loss of any principal by whom he is retained or to the parent organization or subsidiary of a corporate principal by which he is retained, other than an agency as defined in s. 112.312(2); or which he knows would inure to the special private gain or loss of a relative or business associate of the public officer."

"Relative," for purposes of the voting conflicts law, means any father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law or daughter-in-law.

For a voting conflict to arise, "special private gain" must inure to the board member, a principal or parent organization or subsidiary of a corporate principal by whom he/she is retained, a relative, or a business associate. The test formulated by the Commission on Ethics is based in part on the size of the class of persons who stand to benefit from the measure and also based upon the remote and speculative test. Where the class of persons is large, a special gain will result only if there are circumstances unique to the member to gain more than the other members of the class. Where the class of person benefitting from the measure is extremely small, the possibility of special gain is much more likely. Additionally, if the gain is of a questionable nature or magnitude, or is too remote or speculative, then there may not be "special private gain." Board members must vote on an item unless a situation exists that falls within the above-described conflict. Section 286.012, Florida Statutes.

In addition to abstaining from the vote, if the member with a conflict intends to "participate" in the decision prior to the meeting, the appointed board member should file a memo stating the conflict prior to the meeting. County staff will provide a copy of the voting conflict form. Section 112.3143(4). "Participate" means "any attempt to influence the decision by oral or written communication, whether made by the officer or at his direction." The memo shall be incorporated into the minutes of the meeting and read publicly at the meeting. If the member is participating in the discussion at the meeting, then the conflict should be disclosed orally at the meeting before participating, and a memo should be filed within 15 days after the vote. No member may participate, i.e., attempt to influence the vote, without making this disclosure prior to the discussion on the issue.

5) Public Records

As an advisory board member, any documents you create or receive regarding advisory board business are subject to the Florida Public Records Act and must be preserved. This requirement includes e-mails you send or receive on your personal computer regarding advisory board business. Copies of any such documents that were not generated or received by County staff should be forwarded to staff for preservation in the public record. Texting and instant messaging should be avoided unless you have the capability to print them. Please also be mindful that hand written notes passed during meetings are public records and avoid writing anything you would want read to the entire room.

6) Does this mean we can't have lunch?

The Attorney General's Office urges public boards or commissions to avoid the use of "luncheon meetings" to discuss board or commission business. These meetings may have a "chilling" effect upon the public's willingness or desire to attend. People who would otherwise attend such a meeting may be unwilling or reluctant to enter a public dining room without purchasing a meal and may be financially or personally unwilling to do so. Discussions at such meetings by members of the board or commission which are audible only to those seated at the table may violate the "openness" requirement of the law. Public boards or commissions are, therefore, advised to avoid meetings at which the public and the press are effectively excluded.

Members of a public board of commission are not, however, 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.

Members of a public board or commission are also not prohibited under the Sunshine Law from conducting inspection trips. However, if discussions relating to the business of the advisory board will occur between board members, advance notice must be given; the public must be afforded a reasonable opportunity to attend, and minutes must be promptly recorded and made available for inspection. In some cases, it may not be possible to invite the general public to attend such trips. In these instances, inspection trips made by members of a public board, together with staff and officials of other organizations and members of the press, are not secret meetings in violation of §286.011

even though the general public is not invited to participate. However, members of the public board should avoid discussions with fellow board members regarding public business while on such trips.

7) Beware of the Consequences!

Section 286.011(3), Florida Statutes, provides that any person knowingly violating the law may be guilty of a misdemeanor of the second degree, punishable by up to 60 days in jail and/or a \$500 fine. All other violations are subject to a \$500 fine. In addition, attorneys' fees may be assessed against a party found in violation if a civil action is brought to enforce the law.

8) Conclusion.

In summary, advisory board members should not communicate with each other, directly or indirectly, regarding items that will or could foreseeably be discussed and acted on outside a properly noticed advisory board meeting public meeting where meeting minutes are being recorded. This is only a brief summary of the Sunshine Law and Public Records Law. It is not inclusive of all the areas when the law applies. If you have questions concerning specific application, please seek guidance from the County Attorney's Office. If you know of a particular factual situation that may constitute a conflict of interest and some doubt exists whether the conflict exists, an advisory opinion from the Commission on Ethics can be obtained.

Reference: A valuable source in this area is the Government in the Sunshine Manual – 2010 Edition.

Should you have any questions, please do not hesitate to contact me at 633-2090 or Christine.Lepore@brevardcounty.us