# Sunshine Law -- Litigation -- Mayor

**Number:** AGO 2015-13

**Date:** September 18, 2015

**Subject:**
Sunshine Law -- Litigation -- Mayor

Ms. Pam E. Booker
City Attorney
Office of the City Attorney
City of Port St. Lucie
121 Southwest Port St. Lucie Boulevard
Port St. Lucie, Florida 34984

RE: SUNSHINE LAW – LITIGATION – MAYOR – applicability to mayor of exception for meetings between city council and its attorney to discuss settlement and litigation expenditures. s. 286.011(8), Fla. Stat.

Dear Ms. Booker:

As City Attorney for the City of Port St. Lucie, you have asked for my opinion on the following question:

1. Pursuant to section 286.011(8), Florida Statutes, is the mayor, who is a named defendant in two lawsuits filed against the City and various City officials, prohibited from attending “shade meetings” with counsel to discuss the litigation?
2. If the mayor is statutorily permitted to attend shade meetings, would provisions within Florida’s Ethics Code, Part III, Chapter 112, Florida Statutes, prohibit him from participating in discussions at such meetings, and from voting on decisions relating to the litigation during Sunshine meetings?

In sum:

1. Section 286.011(8), Florida Statutes, does not prohibit the mayor, who is a voting member of the city council, from attending meetings between the city council and its attorney to discuss settlement negotiations and/or strategy related to litigation expenditures in connection with the pending lawsuits in which the council is a party.
2. This office will not comment on your questions pertaining to prohibitions that may exist in the Ethics Code. Pursuant to section 112.322(3), Florida Statutes, the Ethics Commission is responsible for issuing advisory opinions on questions regarding application of the Ethics Code. [1]

As you acknowledge, meetings between members of the city council to conduct city business are public meetings under section 286.011(1), Florida Statutes, which requires governmental entities, including municipalities, to conduct their business at open meetings “in the sunshine.”[2]

Subsection (1) provides:

“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, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, 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.”

Meetings between members of the city council and the council’s attorney to discuss pending litigation in which the city council is a party are also public meetings subject to section 286.011(1), Florida Statutes.[3] The Legislature has created a narrow exception in subsection (8), however, to allow meetings “in the shade” between the same governmental entities enumerated in subsection (1), along with chief administrative or executive officers, and their attorney for the purpose of discussing certain limited issues related to pending litigation:[4]

“(8) 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:

* * *

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.”

This exception gives an attorney who is representing the governmental entity in a lawsuit or administrative action the opportunity to obtain information and direction regarding “two narrowly prescribed areas”: settlement negotiations and strategy sessions regarding litigation expenditures.[5] Final action to approve a settlement or litigation expenditure must still be voted upon in a public meeting.[6]

You report that two lawsuits have been filed in St. Lucie County Circuit Court, each naming as defendants, among others, the City of Port St. Lucie and the then-City Manager, who is now the mayor, in both his official and individual capacities. Your concern is whether the mayor may attend shade meetings under section 286.011(8), Florida Statutes, which applies to “any board or commission of any state agency or authority or *any agency or authority of any* county, *municipal corporation*, or political subdivision[.]” (e.s.) The Florida Supreme Court has characterized city councils as municipal agencies under section 286.011, Florida Statutes.[7] The Charter of the City of Port St. Lucie, Florida,[8] provides in Article III, section 3.01: “There shall be a city council with all legislative powers of the city vested therein consisting of one member residing in each of the council districts, and a mayor[.]” Section 3.05 provides, in part: “The mayor shall be a voting member of the city council[.]”[9] This office has observed that when the mayor is a member of the city council, the Sunshine Law applies to discussions between the

mayor and other members of the council.[10] Because the mayor of the City of Port St. Lucie is a voting member of the city council, which is a party in the ongoing litigation, he is not precluded from attending shade meetings with the council regarding the suits under subsection (8).[11]

The fact that the plaintiffs in these lawsuits have also sued the mayor in his individual capacity, alleging "willful and wanton" conduct toward the plaintiffs, does not take him outside the scope of section 286.011(8), Florida Statutes. Personal liability of a public official is not determined until a case has been finally terminated on the merits.[12] By its terms, section 286.011(8) allows a government official who is "presently a party" to "pending litigation" to discuss settlement and expenditures during the pendency of the action. This office has previously construed "pending" in subsection (8) as referring to a lawsuit that has been filed and is ongoing and not yet completed.[13] Hence, the possibility that the mayor will be found individually liable after the merits of the case are decided does not preclude him from attending shade meetings while the case is active pursuant to section 286.011(8), Florida Statutes.

In conclusion, it is my opinion that section 286.011(8), Florida Statutes, does not prohibit the mayor from attending meetings between the city council and its attorney to discuss settlement negotiations and/or strategy regarding litigation expenditures in connection with the pending lawsuits in which the council is a party. I am unable to comment on your questions regarding possible prohibitions within the Ethics Code as to the mayor's participation in meetings about the litigation. These questions may instead be directed to the Florida Commission on Ethics.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* Op. Att'y Gen. Fla. 89-18 (1989); Op. Att'y Gen. Fla. 87-17 (1987).

[2] *See City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971).

[3] *See Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985).

[4] *See Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521, 523 (Fla. 2d DCA 2014).

[5] *See* Op. Att'y Gen. Fla. 04-35 (2004).

[6] *See Zorc v. City of Vero Beach*, 722 So. 2d 891, 901 (Fla. 4th DCA 1998); Op. Att'y Gen. Fla. 08-17 (2008).

[7] *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971).

[8] https://www.municode.com/library/fl/port_st._lucie/codes/code_of_ordinances?nodeId=CHPOSTLUFL

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[9] *Id.*

[10] *See* Op. Att'y Gen. Fla. 90-26 (1990) (concluding that a mayor who was not a member of the city council and had no voting power on the council was not subject to the Government-in-the-Sunshine Law). *Accord* Ops. Att'y Gen. Fla. 85-36 (1985), 75-210 (1975).

[11] In contrast, a governmental entity in Op. Att'y Gen. Fla. 09-52 (2009) – the school superintendent – was not a party to the pending administrative action and thus could not attend a shade meeting with the school board, which was a party.

[12] *See Nuzum v. Valdes*, 407 So. 2d 277, 279 (Fla. 3d DCA 1981).

[13] *See* Op. Att'y Gen. Fla. 06-03 (2006).