Government in the Sunshine -- Out-of-State Meetings

Number: INFORMAL

Date: August 06, 2015

Subject:
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Mr. Robert A. Sugarman
Sugarman & Susskind
100 Miracle Mile, Suite 300
Coral Gables, Florida 33134

Dear Mr. Sugarman:

On behalf of the Board of Trustees (board) of the City of Boca Raton Police and Firefighters' Retirement System, you have asked for this office's assistance in determining whether four members of the board may travel to Massachusetts and Connecticut to conduct interviews of investment consultants and their teams without violating the Government in the Sunshine Law.

Pursuant to sections 175.071 (applicable to firefighter pensions) and 185.06 (applicable to municipal police pensions), Florida Statutes, the board is required at least once every three years to engage a "professionally qualified independent consultant" to evaluate the performance of the fund's existing money manager and to make recommendations to the board of trustees for the selection of the money manager for the next investment term.[1] The statutes provide:

"For purposes of this subsection, the term "professionally qualified independent consultant" means a consultant who, based on education and experience, is professionally qualified to evaluate the performance of professional money managers, and who, at a minimum:
1. Provides his or her services on a flat-fee basis.
2. Is not associated in any manner with the money manager for the pension fund.
3. Makes calculations according to the American Banking Institute method of calculating time-weighted rates of return. All calculations must be made net of fees.
4. Has 3 or more years of experience working in the public sector."[2]

You state that the board would provide notice of the trip, set up live interactive audio/visual feeds of the interviews and that board members would refrain from expressing impressions, taking any votes or taking other formal action. You indicate that the board members would ask questions of the consultants and that the public in attendance at the live feed in Boca Raton would have the opportunity to observe the interchange, as well as ask questions. While you have questioned whether such a trip would constitute an extraterritorial exercise of the board's powers, you state that the board would not be taking any official action on the trip.

Section 286.011, Florida Statutes, the "Government in the Sunshine Law," provides a right of access to governmental proceedings of public boards or commissions at both state and local levels and applies to any gathering of two or more members of the same board or commission to

discuss some matter which will foreseeably come before that board for action. There is no question that the actions of the board under the above-described scenario would be subject to the requirements of the Government in the Sunshine Law.

Florida's Government in the Sunshine Law requires that meetings of public boards or commissions be open to the public, that reasonable notice of such meetings be given, and that minutes of the meetings be taken.[3] The courts have recognized that for a meeting to be public, the public must be given advance notice and provided a reasonable opportunity to attend.[4]

Initially, I would note that a limited exception to the Sunshine Law has been recognized for advisory committees established for fact-finding only; however, the exception only applies to advisory committees and not to the board or commission which has ultimate decision-making authority.[5] Thus, this exception would not be applicable to the situation you have outlined.

On a number of occasions this office has opined regarding the practice of conducting public business by electronic means. In Attorney General Opinion 92-44, the issue was whether a county commissioner who was physically unable to attend a commission meeting because of her medical treatment could vote in commission meetings by using an interactive video and telephone system. This system allowed the commissioner to see and hear the other members of the board and the audience at the meeting and the board and audience could see and hear her. Of particular concern in resolving this matter was the statutory requirement that meetings of the county commission be held in a public place in the county and that this requirement necessitated the attendance of a quorum of the commission at the designated public forum. With assurances that a quorum of the members of the county commission would be present at the public place, this office concluded that a county commissioner who was unable to attend a commission meeting because of a serious medical condition could participate and vote in commission meetings by using an interactive video and telephone system without violating the Sunshine Law.

Subsequently, in Attorney General Opinion 94-55, this office received a request from a city and the board of trustees of a public museum asking whether an out-of-state member of the board of trustees could participate in public meetings through the use of a telephone. Again, the situation involved a quorum being present at the public meeting, although no statute required the presence of a quorum at these meetings. Further, the member who was requesting to participate by telephone had health problems. Under these circumstances this office determined that an out-of-state member of the board of trustees of this public body could participate in board meetings by telephone and comply with the requirements of the Government in the Sunshine Law.

In Attorney General Opinion 98-28, the question was whether a school board member could attend and participate in board meetings by use of electronic media. The opinion noted that state agencies and their boards and commissions are authorized by Chapter 120, Florida Statutes, to adopt rules providing procedures for conducting public meetings, hearings, and workshops, in person and by means of communications media technology. Although school boards are agencies for purposes of Chapter 120, Florida Statutes, they are not “state agencies” and may not rely on the terms of section 120.54(5)(b)2., Florida Statutes, for authority to conduct meetings by means of communications media technology. The opinion recognized the rationale

behind statutory authorization for state agency use, as contrasted with local agency utilization, of communications media technology for conducting meetings:

“Allowing state agencies and their boards and commissions to conduct meetings via communications media technology under specific guidelines recognizes the practicality of members from throughout the state participating in meetings of the board or commission. While the convenience and cost savings of allowing members from diverse geographical areas to meet electronically might be attractive to a local board or commission such as a school board, the representation on a school board is local and such factors would not by themselves appear to justify or allow the use of electronic media technology in order to assemble the members for a meeting.”

In addition to the consideration of local representation, the opinion recognized that school boards operate under a quorum requirement analogous to the requirement in Chapter 125, Florida Statutes, that meetings of the county commission be held at an appropriate place in the county. The opinion concludes that a school board may use electronic media technology in order to allow a physically absent member to attend a public meeting if quorum requirements are otherwise met.

This office has never suggested that a board or commission was authorized to conduct a meeting in absentia using electronic media technology. Rather under extreme conditions, such as the physical disability or health issue of a single member, could an absent member participate in a meeting which was otherwise held in an appropriate place with a quorum physically present.

This office has also considered whether an airport authority could conduct discussions over the Internet when such discussions are noticed to the general public, viewable by the general public, open to input by the general public, and recorded for public inspection. This office found that the authority members could conduct informal discussions and workshops over the Internet, provided proper notice is given and interactive access by members of the public is provided.[6] Such interactive access must include not only public access via the Internet, but also 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. Notice of such discussions and workshops should include the locations where such computers with Internet access will be located. For meetings where a quorum is necessary for action to be taken, physical presence of the members making up the quorum would be required in the absence of a statute providing otherwise. Internet access to such meetings, however, could still be offered to provide greater public access.

Finally, in Attorney General Opinion 2006-20, this office addressed the use of electronic media technology to connect simultaneous metropolitan planning organization meetings in various counties. While the use of such technology would increase public participation and the ability of members to attend, the ability of a board or commission to convene a quorum by such means remained problematic. The opinion concluded that use of electronic media technology does not satisfy quorum requirements necessary for official action.

It is clear from the discussion above, that the use of electronic media technology for official meetings has limitations when there is a quorum requirement or when a meeting must be held at

a designated location. For workshops and special meetings at which no formal action will be taken, it would appear that such technology may be used, with the caveat that reasonable notice be provided and public access not be compromised. This office has found, however, that in the case of a “local” board, such as a pension or retirement board, the convenience and cost savings of allowing members to meet electronically does not by itself justify or allow the use of electronic media technology in order to assemble the members of a meeting.[7] There is no apparent authority for the use of electronic media technology to allow members of a board or commission to remove a workshop or meeting from within the jurisdiction in which the board or commission is empowered to carry out its functions and claim compliance with the Sunshine Law by providing the public electronic access to the remote meeting.

In this instance, the board may not avail itself of the “fact-finding” exception to the Sunshine Law for members of the board to travel to Massachusetts and Connecticut to meet with financial consultants. Moreover, while you indicate that the board members would not express their opinions, make decisions, or cast votes, it appears that there would be discussions between the board members and the potential consultants as a group on matters that would come before the board for foreseeable action. While there is no final action to be taken at the meetings you describe, it would appear that the meetings with the consultants would be an integral part of the decision-making process which should comply with the requirements of the Government in the Sunshine Law. Finally, I would note that Chapters 175 and 185, Florida Statutes, create the firefighters’ and police officers’ pension plans “[i]n each municipality[,]” thus contemplating that meetings of the boards will take place within the local jurisdiction for which the plan is created.

I trust that these informal comments will be helpful in further plans to coordinate a meeting of the pension board with financial consultants in Massachusetts and Connecticut.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See* ss. 175.071(6)(a) and 185.06(5)(a), Fla. Stat.

[2] Sections 175.071(6)(b) and 185.06(5)(b), Fla. Stat.

[3] *See* s. 286.011, Fla. Stat., and Art. I, s. 24, Fla. Const.

[4] *See, e.g., Bigelow v. Howze*, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974). *Cf. Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st DCA 1994) (school board workshop held outside county limits over 100 miles away from board's headquarters violates Sunshine Law).

[5] *See Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010), and *Finch v. Seminole County School Board*, 995 So. 2d 1068, 1071-1072 (Fla. 5th

DCA 2008) (“fact-finding exception” did not apply to school board as the ultimate decision-making body; the board could not take fact-finding bus tour without complying with the Sunshine Law even though school board members were separated from each other, did not discuss preferences or opinions, and no votes were taken during the trip).

[6] Attorney General Opinion 2001-66.

[7] *See* Op. Att’y Gen. Fla. 98-22 (1998).