Sunshine Law, State Fair Authority

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Date: July 22, 2009

Subject:
Sunshine Law, State Fair Authority

Mr. Joseph R. Martelli
Inspector General
Florida Department of Agriculture
and Consumer Services
2005 Apalachee Parkway, Suite E
Tallahassee, FL 32399-6500

Dear Mr. Martelli:

As Inspector General for the Florida Department of Agriculture and Consumer Services, you have asked for this office's comments on a situation which has occurred involving the Florida State Fair Authority. Initially, I must note that this office does not investigate or prosecute violations of the Government in the Sunshine Law. That role is assigned by statute to the various State Attorneys throughout Florida.[1] However, the following general comments are offered in an effort to assist you in advising the Commissioner and the Fair Authority.

The Florida State Fair Authority (the authority) is created in Part III, Chapter 616, Florida Statutes.[2] The authority is a public corporation charged with "the responsibility of staging an annual fair to serve the entire state."[3] The fair authority "shall be considered an instrumentality of the state, subject to the jurisdiction of the state" and operates under the supervision of the Commissioner of Agriculture.[4] The Commissioner of Agriculture or his or her designee serves as a voting member of the authority which is composed of 21 members.[5] It is the Commissioner of Agriculture who appoints and sets the compensation of the executive director of the fair authority and the executive director serves at the pleasure of the Commissioner.[6]

According to information you have supplied to this office, the Chairman of the Fair Authority was authorized by the members of the fair authority to conduct a survey of jobs similar to that of the Executive Director of the Florida State Fair Authority in regards to salary. Based on this survey, the chairman sent a letter to the Commissioner of Agriculture and Consumer Services regarding the compensation of the Executive Director including his thoughts in this regard. All members of the authority were copied with this correspondence. Subsequently, a letter was received by the Commissioner from another fair authority member expressing his thoughts on this matter and copies were sent to all authority members. Finally, a third letter was sent to Commissioner Bronson from the Chairman of the authority making a reference to the second letter and stressing that his purpose was to make recommendations from his personal perspective and mentioning the next board meeting of the authority.

You have asked whether a series of written communications between members of the Florida

State Fair Authority violate the Government in the Sunshine Law. While this office cannot comment on the actions of the authority members, the following informal comments may be helpful in counseling the members regarding their responsibility to comply with the Government in the Sunshine Law.

The Government in the Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." Thus, the statute applies to public collegial bodies at both the local and state level.[7] It is applicable to elected and appointed boards or commissions.[8] Florida courts have stated that it was the intent of the Legislature to extend application of the Sunshine Law so as to bind "every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control."[9]

The Sunshine Law applies to any gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter upon which foreseeable action will be taken by the public board or commission.[10] The Sunshine Law is, therefore, applicable to all functions of covered boards and commissions, whether formal or informal, which relate to the affairs and duties of the board or commission.[11]

I would note that this office, in a 1983 Attorney General Opinion, stated that the Florida State Fair Authority is a state governmental agency for purposes of certain statutes.[12] With regard to the Government in the Sunshine Law it appears that the authority is, as a legislatively created "board or commission" of the state, an entity over which the Legislature has dominion and control and thus would be subject to the provisions of section 286.011, Florida Statutes.[13]

The use of written correspondence between board members may be problematical in terms of the Government in the Sunshine Law. The following is a discussion of this issue contained in the 2009 Edition of the Government in the Sunshine Manual:

"a. Written correspondence between board members

The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting is not a violation of the Sunshine Law if prior to the meeting, there is no interaction related to the report among the commissioners. In such cases, the report, which is subject to disclosure under the Public Records Act, is not being used as a substitute for action at a public meeting as there is no response from or interaction among the commissioners prior to the meeting. AGO 89-23. *And see,* AGO 01-20 (e-mail communication of factual background information from one city council member to another is a public record and should be maintained by the records custodian for public inspection and copying; however, such communication of information, when it does not result in the exchange of council members' comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law).

If, however, the report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to s. 286.011, F.S. AGO 90-03. *See also,* AGO 96-35, stating that a school board member may prepare and circulate an informational memorandum or position paper to other

board members; however, the use of a memorandum to solicit comments from other board members or the circulation of responsive memoranda by other board members would violate the Sunshine Law. *And see,* AGO 08-07 (use of private website blog or message board to solicit comments from other members of board or commission by their responses on matters that would come before the board would trigger requirements of Sunshine Law).

Thus, if a memorandum reflecting the views of a board member on a pending board issue is circulated among the board members with each indicating his or her approval or disapproval and, upon completion of the signatures, the memorandum has the effect of becoming the official action of the board, there is a violation of the Sunshine Law. Inf. Op. to Blair, June 29, 1973. *And see,* AGO 01-21, noting that a process whereby city council members distribute their own position papers to other council members is "problematical" and would violate the Sunshine Law to the extent that any such communication is a response to another council member's statement. Thus, the city council's discussions and deliberations on matters coming before the council must occur at a duly noticed city council meeting and the circulation of position statements must not be used to circumvent the requirements of the statute. *Id. Accord* AGO 07-35.

Similarly, a board that is responsible for assessing the performance of its chief executive officer (CEO) should conduct the review and appraisal process in a proceeding open to the public as prescribed by s. 286.011, F.S., instead of using a review procedure in which individual board members evaluate the CEO's performance and send their individual written comments to the board chairman for compilation and subsequent discussion with the CEO. AGO 93-90."

Section 286.011, Florida Statutes, provides:

"(3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding $500.
(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083."

As I have indicated, the State Attorney’s Office is responsible for investigating and prosecuting any violations of the Government in the Sunshine Law. Whether the correspondence among and between the Florida State Fair Authority members constitutes a meeting that should have been conducted pursuant to section 286.011, Florida Statutes, is not a matter that this office can resolve. However, it would appear that the authority is subject to the Government in the Sunshine Law and that, in the future, business of the agency should be discussed at publicly noticed meetings rather than in a series of letters between authority members.

I trust that these informal comments will be helpful to the Department in its role in supervising and advising the Florida State Fair Authority.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* s. 286.011(3)(b), Fla. Stat., prescribing civil and criminal penalties for violations of the Government in the Sunshine Law.

[2] *See* s. 616.251, Fla. Stat.

[3] Section 616.251(1) and (3), Fla. Stat.

[4] Section 616.251(1) and (2), Fla. Stat.

[5] Section 616.252(1)(a), Fla. Stat.

[6] *Id.*

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

[8] *See* Op. Att'y Gen. Fla. 73-233 (1973).

[9] *Times Publishing Company v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969), *disapproved in part on other grounds, Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985). *And see, Turner v. Wainwright*, 379 So. 2d 148, 155 (Fla. 1st DCA 1980), *affirmed and remanded*, 389 So. 2d 1181 (Fla. 1980) (rejecting a board's argument that a legislative requirement that certain board meetings must be open to the public implies that the board could meet privately to discuss other matters).

[10] *See Town of Palm Beach v. Gradison*, 296 So. 2d 474, 477 (Fla. 1974).

[11] *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 868 (Fla. 3d DCA 1994). *And see* Inf. Op. to Nelson, May 19, 1980 (meeting with congressmen and city council members to discuss "federal budgetary matters which vitally concern their communities" should be held in the sunshine because "it appears extremely likely that discussion of public business by the council members [and perhaps decision making] will take place at the meeting").

[12] *See* Op. Att'y Gen. Fla. 83-20 (1983), discussing the status of the Florida State Fair Authority as a state agency for purposes of acquiring state surplus property, purchasing equipment or constructing buildings and for purposes of publishing notice of its meetings in the Florida Administrative Weekly.

[13] *Cf.* Op. Att'y Gen. Fla. 95-17 (1995), in which this office determined that the South Florida Fair and Palm Beach Expositions, Inc., created pursuant to Part I, Ch. 616, Fla. Stat., is subject to the Public Records Law.