Sunshine, publication of anticipated vote

Number: INFORMAL

Date: October 09, 2009

Subject:
Sunshine, publication of anticipated vote

Mr. David Jove
Hallandale Beach City Attorney
400 South Federal Highway
Hallandale Beach, Florida 33009-6422

Dear Mr. Jove:

You ask whether a city council member may publish his anticipated vote on an issue before the city council to the public on an internet blog or in a newspaper with copies to his fellow council members and if so, whether the other members of the council may also do so. You also ask whether the city may enact an ordinance prohibiting council members from publishing their vote through the identified media.

Section 286.011, Florida Statutes, Florida's Government in the Sunshine Law, has three requirements: (1) meetings of public boards or commissions must be open to the public; (2) reasonable notice of such meetings must be given; and (3) minutes of the meetings must be taken and promptly recorded. While the Sunshine Law generally applies to meetings of "two or more" members of the same board or commission,[1] the Florida Supreme Court has stated that the Sunshine Law is to be construed "so as to frustrate all evasive devices."[2] As the courts of this state have recognized, it is the how and the why officials decided to so act which interests the public, not merely the final decision. Thus, the court in *Times Publishing Company v. Williams*[3] recognized:

"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." (emphasis supplied in original)

Accordingly, the courts and this office have found that there are instances where the physical presence of two or more members is not necessary in order to find the Sunshine Law applicable. For example, this office has concluded that the use of memoranda among members of a board or commission to avoid a public meeting may be a violation of the Sunshine Law, even though two members of the board or commission are not physically present. In such a situation, if a memorandum reflecting the views of a board member is circulated among the other board members with each indicating his or her approval or disapproval, upon completion of the members signing off, the memorandum has the effect of becoming official action of the board in violation of the Government in the Sunshine Law.[4]

In Attorney General Opinion 01-21, this office stated that while this office would strongly discourage such activity, it would appear that a city council member could prepare and distribute a position statement to other council members without violating the Government in the Sunshine Law so long as the council members avoid any discussion or debate among themselves on the statement. Such a position statement would be subject to disclosure under Chapter 119, Florida Statutes, the Public Records Law. This office cautioned, however, that to the extent that any such communication is a response to another commissioner's statement, it may constitute a violation of the Government in the Sunshine Law to circulate the responsive statement. This office noted that this issue was problematical and it would be a better practice to discuss commissioners' individual positions on matters coming before the board during the course of an open meeting.[5]

Subsequently, in Attorney General Opinion 07-35, this office noted that while members of a commission may exchange documents that they wish other members of the commission to consider on matters coming before the commission for official action, provided there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting, if the commissioners intended to exchange individual position papers *on the same subject*, this office would express the same concerns as discussed in Attorney General Opinion 01-21.

More recently, this office in Attorney General Opinion 08-07 concluded that the use of a website blog or message board to solicit comment from other members of the board or commission by their response on matters that would come before the board would trigger the requirements of the Sunshine Law. As stated in that opinion, such action would amount to a discussion of public business through the use of the electronic format without appropriate notice, public input, or statutorily required recording of the minutes of the meeting. While as noted above, the mere posting of a position does not implicate the Sunshine Law, it would appear that any subsequent postings by other commission members on the subject of the initial posting could be construed as a response which would be subject to the statute.

Such comments would appear to be equally applicable to the situation you present. While the use of a website blog by a city council member or comments made by such member to a newspaper to express his or her views would not necessarily constitute a violation of the Sunshine Law, to the extent that such methods are being used to circumvent the requirements of the Government in the Sunshine Law, a violation of that statute would occur. Moreover, as this office stated in Attorney General Opinion 08–07, while the mere posting of a position does not implicate the Sunshine Law, it would appear that any subsequent postings by other commission members on the subject of the initial posting could be construed as a response which would be subject to the statute. As the Florida Supreme Court stated in *Town of Palm Beach v. Gradison* ,[6] has stated that the Sunshine Law is to be construed "so as to frustrate all evasive devices."

As to your inquiry whether the city may pass an ordinance prohibiting council members from posting their vote through the media, I must advise you that any consideration of whether a particular ordinance may be violative of constitutional guarantees, such as first amendment rights, would require an examination of the actual terms of such ordinance and the history related to its enactment. I would note that, for example, in *Cooper v. Dillon*,[7] the 11th Circuit Court of Appeals ruled that section 112.533(4), Florida Statutes, which prohibits a participant in

an investigation of a law enforcement officer from disclosing information regarding the investigation, was unconstitutional. The court stated that "[b]ecause the curtailment of First Amendment freedoms by Fla. Stat. ch. 112.533(4) is not supported by a compelling state interest, the statute fails to satisfy strict scrutiny and unconstitutionally abridges the rights to speak, publish, and petition government."

I trust that the above informal comments may be of assistance to you in resolving these matters.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tsh

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[1] *See, e.g.*, *Hough v. Stembridge,* 278 So. 2d 288 (Fla. 3d DCA 1973). *And see City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989); *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988) (requisite to application of the Sunshine Law is a meeting between two or more public officials); and *Mitchell v. School Board of Leon County*, 335 So. 2d 354 (Fla. 1st DCA 1976).

[2] *See, e.g., Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974); *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979).

[3] 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).

[4] *See* Inf. Op. to The Honorable John Blair, May 29, 1973. *And see* Ops. Att'y Gen. Fla. 90-03 (1990) (proposed contract may not be circulated among board members for comments to be provided to other members, as this would be communication among the members on an issue upon which the board will take official action subject to the Sunshine Law) and 93-90 (1993) (board responsible for assessing the performance of its chief executive officer should conduct the review and appraisal process in a proceeding open to the public, 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 chief executive officer).

[5] *See also* Ops. Att'y Gen. Fla. 96-35 (1996) (written memorandum sent by one school board member to other school board members informing them that the individual member intended to recommend certain action at a school board meeting did not violate the Sunshine Law, where no response from other board members was solicited and no discussion among the members concerning the memorandum occurred prior to the school board meeting); 02-32 (2002); 01-66 (2001); and Inf. Ops. to The Honorable Jack Tanner, Chair, Lee Soil and Water Conservation District, March 19, 2007, and Mr. Michael Ciocchetti, Attorney for the Town of Ponce Inlet, March 23, 2006. *And see* Op. Att'y Gen. Fla. 81-42 (1981) (the fact that a city council member has

expressed his or her views or voting intent on an upcoming matter to a news reporter prior to the scheduled public meeting does not violate the Sunshine Law so long as the reporter is not being used by the member as an intermediary in order to circumvent the requirements of s. 286.011, F.S.).

[6] 296 So. 2d 473, 477 (Fla. 1974).

[7] 403 F.3d 1208, 1218-1219 (11th Cir. 2005). *Cf. Los Angeles Police Department v. United Reporting Publishing Corporation*, 120 S.Ct. 483 (1999) (California statute that imposes conditions on public access to addresses of arrestees is not facially unconstitutional; the law does not abridge anyone's right to engage in speech, but simply regulates access to information in the hands of the police department). *And see Butterworth v. Smith*, 110 S.Ct. 1376 (1990) (provisions of s. 905.27, F.S., which prohibit "a grand juror . . . reporter . . . or any other person" appearing before a grand jury from ever disclosing testimony before the grand jury except pursuant to a court order were unconstitutional insofar as they prohibit a grand jury witness from disclosing his own testimony after the term of the grand jury has ended).