Sunshine Law – Search and Selection Committees

Number: AGO2023-04

Rachel Kamoutsas

General Counsel

Board of Governors, State University System of Florida

325 W. Gaines Street

Tallahassee, FL 32301

Dear Ms. Kamoutsas:

This office received your letter, dated September 18, 2023, requesting a legal opinion pursuant to section 16.01(3), Florida Statutes. You ask substantially the following question:

Does Florida's Government in the Sunshine Law permit members of a university presidential search and selection committee to use a search firm to survey the committee's members anonymously and subsequently use the survey results to "summarize preferences" and rank the applicants for consideration at a future committee meeting?[1]

In sum:

Unless and until judicially or legislatively determined otherwise, I conclude that the Government in the Sunshine Law (hereinafter, "Sunshine Law") applies to a university presidential search and selection committee and that the Law does not permit such members to use a search firm to anonymously rank candidates to affect which candidates the committee will consider at a future meeting. While an exemption is available for portions of certain meetings of the search committee, this exemption applies only when the committee fulfills all criteria of the exemption, such as recording the entire portion of the exempt meeting.[2]

Background

You indicate that the Board of Governors currently intends to modify Board of Governors Regulation 1.002, which sets forth the process for each Board of Trustees that selects a president of a state university or Florida College System institution, subject to confirmation by the Board of Governors. The regulation currently states that a Board of Trustees must conduct a search and selection process to identify a candidate. As part of that process, the Chair of the Board of Trustees, in consultation with the Chair of the Board of Governors, appoints a search committee of no more than 15 members.[3] Among other things, the search committee is responsible for "vetting applicants" and "recommending an unranked list of applicants who are qualified."[4] The Board of Trustees then selects a "final qualified candidate . . . as president-elect for recommendation to the Board of Governors for confirmation."[5]

While the regulation states that a Board of Trustees and its search committee may use the services of a search firm or consultant for the search and selection process, it lacks a specific procedure for ensuring compliance with the Sunshine Law.[6] In your request, you state that, in some instances, search committees have used search firms to "conduct a preference survey from committee members, outside of a meeting and off the record, in order to rank and narrow the pool of applicants, and streamline the discussion of applicants, at a future meeting." You describe a "survey process" wherein committee members anonymously rank applicants, after which the search firm "privately" collects the rankings, determines which candidates are the top candidates, and presents the order of ranked applicants at a future meeting. You question whether such a practice is consistent with the Sunshine Law.

Legal Framework

The Florida Constitution states as follows:

All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public.[7]

These provisions give Floridians a right of access to governmental proceedings. For decades, courts have recognized that meetings of public bodies must occur in public, as such meetings should be "a marketplace of ideas."[8] For this reason, the Sunshine Law applies to any gathering of two or more members of the same board to discuss any matter that might foreseeably come to that board for action.[9]

Advisory Boards

The Sunshine Law may apply to advisory boards or committees that a public agency creates. The primary test to employ when determining whether the Sunshine Law applies to such boards is whether the board has been delegated "decision-making authority," or only possesses mere "information-gathering or fact-finding authority."[10] Importantly, the power to make recommendations may qualify as decision-making authority even though the entity delegating that authority has the power to reject the recommendation.[11] In 2021, for example, the Second District Court of Appeal determined that textbook evaluation committees, which a superintendent had created pursuant to school board policy concerning recommendations of textbooks, possessed sufficient decision-making authority even though only the school board could make the final decision to approve textbooks.[12] While this broad approach to the Sunshine Law may seem counter-intuitive, courts have concluded that "the potential for rubber-stamping" and "circumvention of the Sunshine Law" may justify treating a body authorized to make recommendations as if it has received a delegation.[13]

Exemptions

The Legislature is authorized to establish, by general law passed by two-thirds vote of each house, exemptions from the Sunshine Law's open meeting requirements.[14] Any such legislation must state with specificity the public necessity that justifies the exemption, which must not be broader than necessary to accomplish its stated purpose.[15] Pursuant to the fundamental principle that the Sunshine Law requires openness, each exemption expires after five years unless the Legislature enacts an extension of it.[16]

To apply an exemption and hold a meeting outside the public domain, the entity holding the meeting must comply with all conditions specified in the exemption.[17]

When an exemption does not apply due to lack of compliance with its conditions, the requirement to hold meetings in a public domain and pursuant to the requirements of the Sunshine Law remains effective: when compliance with an exemption is lacking, boards must proceed as though the exemption does not exist.

Evasive Devices

Courts consistently interpret the Sunshine Law to prohibit “evasive devices” designed to circumvent open government.[18] In Blackford v. School Board of Orange County, for example, the Fifth District Court of Appeal held that the Sunshine Law applied to a series of meetings between a school superintendent and individual members of a school board because the meetings occurred in succession in order to avoid public deliberation.[19] The single meetings, the court held, amounted to “de facto meetings” of the school board.[20] The court recognized that the school board had not engaged in a “willful violation” of the Sunshine Law, but rather “an attempt [n]ot to violate it”; regardless of this lack of intent, the court held the board violated the Sunshine Law because the individual discussions resulted in de facto meetings by two or more members of the board at which official action was taken.[21] Similarly, in Leach-Wells v. City of Bradenton, the Second District Court of Appeal held that a committee’s task to “short-list” vendors’ responses to a request for proposal was a meeting to which the Sunshine Law applied.[22] The court recognized that the committee did not intend to evade the Sunshine Law and that committee members “never discussed [the] task with one another and never held any secret meetings” but that, because committee members’ individual evaluations were tallied and acted upon, the action of winnowing down proposals should have occurred at a public meeting under the Sunshine Law.[23]

Analysis

The Sunshine Law applies to the search committees that you describe in your request for an opinion. The Board of Governors’ regulations provide as much. For example, they require a search firm hired by such a committee to “demonstrate its ability to become familiar . . . with Florida’s Sunshine laws.”[24] Moreover, according to the regulations, search committees evaluate various candidates for leadership positions and recommend, after “vetting” each applicant, the qualified applicants the board should consider.[25] Under the authorities discussed above, this process renders search committees an advisory committee subject to the Sunshine Law.

Similarly, because the Sunshine Law applies to matters that could foreseeably come before the decision-making body, it applies to a search committee's deliberations regarding the ranking of candidates. The penultimate action of vetting and ranking candidates or options foreseeably, and likely inevitably, leads directly to the search committee's ultimate recommendations of certain candidates. Such a conclusion is consistent with how courts have treated analogous issues. For example, the Fourth District Court of Appeal held in Transparency for Florida, Inc. v. City of Port St. Lucie that the Sunshine Law applied when the city attorney polled city council members about a severance agreement "leading up to [a] meeting" at which members reached a decision to approve the agreement.[26] The court explained that the frustration of all evasive devices "can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion … relates to any matter on which foreseeable action will be taken."[27] Similarly, the Third District Court of Appeal held in 1997 that the Sunshine Law applied to a purchasing director's act of "weed[ing] through the various proposals, to determine which were acceptable and rank them accordingly."[28] This conclusion is consistent with Leach-Wells, in which the Second District Court of Appeal held that the task of creating a short list of vendors' proposals was an action to which the Sunshine Law applied, as it led to the ultimate decision.[29]

It follows from the above that the process you describe in your request violates the Sunshine Law. Specifically, you describe a survey process wherein committee members anonymously rank applicants by providing their feedback to a search firm. The search firm then collects the rankings and presents the order of ranked applicants at a meeting in order to eliminate or curtail discussion at the meeting. As a result, committee members do not disclose to one another their preferences for candidates in response to the survey. This process is inconsistent with the Sunshine Law because it uses an evasive device to circumvent public deliberation. In fact, it appears that the very purpose of the process you describe is to inject secrecy into the deliberative process.

To be sure, section 1004.098, Florida Statutes, which the Legislature enacted in 2022, contains an exemption that permits state universities and Florida College System institutions to hold closed-door meetings in limited circumstances, pursuant to certain conditions. With regard to the open meetings requirements of the Sunshine Law, the statute provides that any portion of a meeting held for identifying or vetting applicants for the position of president of such university or institution is exempt from the requirement to hold a meeting open to the public.[30] But the statute specifically requires recording any closed portion of any such

meeting and provides an exemption from public records disclosure requirements for the recording.[31] In other words, the statute assumes discussion will occur when a search committee begins to consider applicants and treats that discussion as subject to the Sunshine Law. It merely provides that such discussion may occur outside public view so long as it occurs on the record.[32]

Conclusion

Based on the foregoing, unless and until judicially or legislatively determined otherwise, I conclude that the acts of members of a presidential search and selection committee evaluating and ranking candidates are actions to which the Sunshine Law applies. Florida's Government in the Sunshine Law does not permit members to use anonymous communications with an intermediary search firm about their preferences for certain candidates when such communications are subject to the Sunshine Law and the search firm gathers such input in lieu of the members' discussion. Overall, in the absence of an applicable exemption, the Sunshine Law prohibits ranking that occurs by way of anonymously surveying and organizing members' input, even if those rankings are not a final vote and are only used to replace or limit discussion at a future meeting.

Sincerely,

Ashley Moody

Attorney General

[1] You included the Office of the Attorney General Certification of Counsel form with your request for opinion. With the form, you explained that an Inspector General investigation pertaining to possible anomalies in the search process for a university president was ongoing at the time of your request. You do not request an opinion related to that investigation.

[2] § 1004.098, Fla. Stat. (2023) ("Applicants for president of a state university or Florida College System institution; public records exemption; public meetings exemption").

[3] Florida Board of Governors Regulation 1.002(1)(a), Presidential Search and Selection (2023).

[4] Florida Board of Governors Regulation 1.002(1)(c), Presidential Search and Selection (2023).

[5] Florida Board of Governors Regulation 1.002(1)(d)(iii), Presidential Search and Selection (2023).

[6] Florida Board of Governors Regulation 1.002(1)(b)(ii) states that, after the search committee is formed, a Board of Trustees may retain the services of an executive search firm or consultant and that such firm or consultant should be familiar, or demonstrate its ability to become familiar, with "Florida's Sunshine laws in chapters 119 and 286, Florida Statutes." The regulation generally indicates that the search firm or consultant may provide "assistance" to the search committee in its performance of certain responsibilities. Florida Board of Governors Regulation 1.002(1)(c), (d), Presidential Search and Selection (2023).

[7] Art. I, § 24(b), Fla. Const.; *see also* § 286.011(1), Fla. Stat. (2023).

[8] *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 475 (Fla. 1974); *see also Transparency for Fla. v. City of Port St. Lucie*, 240 So. 3d 780, 784 (Fla. 4th DCA 2018) (stating that the Sunshine Law "aims to prevent '[t]he evil of closed door operation of government without permitting public scrutiny and participation'" (quoting *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971))).

[9] Op. Att'y Gen. Fla. 96-35 (1996) (explaining that a city manager could not ask each commissioner to state his or her position on a specific matter that "will foreseeably be considered by the commission at a public meeting").

[10] *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010).

[11] *Sarasota Citizens*, 48 So. 3d at 762; *see also id.* at 763 (explaining that the critical inquiry concerning whether a delegation is one of decision-making authority is "the nature of the act performed" rather than "the make-up of the committee or the proximity of the act to the final decision" (quoting *Wood v. Marston*, 442 So. 2d 934, 939 (Fla. 1983))).

[12] *Fla. Citizens All., Inc. v. Sch. Bd. of Collier Cnty.*, 328 So. 3d 22 (Fla. 2d DCA 2021).

[13] *Sarasota Citizens*, 48 So. 3d at 762 (quoting *Wood*, 442 So. 2d at 939–40).

[14] Article I, Section 24(c), Fla. Const.

[15] *Id.*

[16] § 286.0111, Fla. Stat. (declaring applicable the provisions codified at section 119.15, Fla. Stat., concerning legislative review of exemptions on a periodic basis).

[17] *Zorc v. City of Vero Beach*, 772 So. 2d 891, 896–97 (Fla. 4th DCA 1998) (discussing *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99 (Fla. 1st DCA 1996), and Florida Attorney General Opinions 98-06 (1998) and 95-06 (1995)).

[18] *Gradison*, 296 So. 2d at 477 (stating the Sunshine Law is to "be construed so as to frustrate all evasive devices"); *see also Canney v. Bd. of Pub. Instruction of Alachua Cnty.*, 278 So. 2d 260, 264 (Fla. 1973) (stating that boards and agencies had "obviously attempted to read exceptions into the Government in the Sunshine Law which do not exist" and that, regardless of "sincere" intentions, "such boards and agencies should not be allowed to circumvent the plain provisions of the statute").

[19] 375 So. 2d 578 (Fla. 5th DCA 1979).

[20] *Id.* at 580–81 (explaining that the court's "duty is to interpret this law as it is written and, if possible, do so in a manner to prevent its circumvention" (quoting *Berns*, 245 So. 2d at 40)).

[21] *Id.* at 580–81 (acknowledging that the superintendent insisted that he only obtained general feedback and denied telling any one board member the opinions of any of the others but holding that the discussions were "in contravention of the Sunshine Law").

[22] 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999).

[23] *Id.*

[24] Board of Governors Regulation 1.002(1)(b)(ii), Presidential Search and Selection (2023).

[25] Board of Governors Regulation 1.002(1)(c), Presidential Search and Selection (2023).

[26] 240 So. 3d 780, 785 (Fla. 4th DCA 2018).

[27] *Id.* at 784 (quoting *Gradison*, 296 So. 2d at 477).

[28] *Silver Express Co. v. Dist. Bd. of Lower Tribunal Trs.*, 691 So. 2d 1099, 1100 (Fla. 3d DCA 1997).

[29] 734 So. 2d at 1171; *accord Wood*, 442 So. 2d at 938 (stating that the rejection of certain candidates was a policy-based, decision-making function to which the Sunshine Law applies).

[30] § 1004.098, Fla. Stat. (2023).

[31] § 1004.098(2)(b), Fla. Stat. (2023).

[32] § 1004.098(2)(a), (b), Fla. Stat. (2023) (discussing "[a]ny portion of a meeting held for the purpose of identifying or vetting applicants").