Sunshine Law--polling members by memorandum

Number: INFORMAL

Date: January 30, 2003

Subject:
Sunshine Law--polling members by memorandum

Honorable John J. Blair
State Attorney
2070 Main Street
Sarasota, Florida 33577

Re: SUNSHINE LAW–-memorandum method of doing business; filing of information; s. 286.011(1) and (3), Fla. Stat.

Dear Mr. Blair:

This is in answer to your questions concerning whether a memorandum method of polling members of a public body as to official acts of the body, instead of having a public meeting or hearing is contrary to the Sunshine Law, and, if so, is the use of the memorandum method a violation which would be subject to the filing of an information against the members of the public body using it?

The situation you describe is as follows: A public body agreed that it would take official action on various official matters by a process wherein one of the members would initiate a memorandum reflecting his or her thoughts concerning a position. Appended to this memorandum would be an indication for other members to express their concurrence or disapproval of the position taken by the originator. The originator would then place the memorandum in an agreed upon receptacle at the offices of the public body. Upon completion of all signatures, the substance of the memorandum would have the effect of becoming the official action of the entire body, just as if it were adopted at a regular meeting.

Section 286.011, Florida Statutes, says essentially that any meeting of a public board or commission must be open to the public. The problem in the situation you mention arises since, by using memorandums, the board does not conduct any "meetings." AGO 071-32 deals in part with telephone conversations between members of a public body. A telephone conversation can be equated with the memorandum method of conducting business in the sense that neither is a "meeting" of public officials. In discussing the telephone calls, the opinion cites language in *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), and *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969). This philosophy is also applicable to the memorandum situation.

"Every thought, as well as every affirmation 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. This act

is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action.' within the meaning of the act.

"We think then that the legislature was obviously talking about two different things by the use of these phrases, and we can't agree with appellee that 'official acts' are limited to 'formal action,' or that they are synonymous. Clearly the legislature must have intended to include more than the mere affirmative formal act of voting on an issue or the formal execution of an official document. These latter acts are indeed 'formal,' but they are matters of a record and easily ascertainable (though perhaps ex post facto), notwithstanding such legislation; and indeed the public has always been aware sooner or later of how its officials voted on a matter, or of when and how a document was executed. Thus, there would be no real need for the act if this was all the framers were talking about. It is also how and why the officials *decided* to so act which interests the public. Thus, in the light of the language in Turk, *supra*, and of the obvious purpose of the statute, the legislature could only have meant to include therein the *acts of deliberation, discussion and deciding* occurring prior and leading up to the affirmative 'formal action' which renders official the final decisions of the governing bodies." *Times Publishing Company*, *supra,* at 473

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"The right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country. During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with 'hanky panky' in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." *Board of Public Instruction of Broward County*, *supra*, at 699.

The opinion then continues: "Thus, telephone conversations between public officials on aspects of the public's business are part of the process which ultimately leads up to final recorded action in a formal public meeting, and they may not be held covertly." It was held that such conversations had to be conducted under the provisions of the Sunshine Law. In so holding, it is clear that the word "meeting" is not limited to the physical coming together of the board members but, rather, includes the entire decision-making process of a public body. A memorandum containing policy suggestions passed around to members of a board for their approval, which approval gives the memorandum the effect of an official action, is not only a part of the process which leads up to final recorded action but *is final action.* Deliberations of the type you mention are part of the decision-making process, are of public interest and should be held in the sunshine. The memorandum method is an attempt to by-pass the Sunshine Law by not having meetings and is a violation of the intent and meaning of the law. In *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353 (Fla. 4th DCA 1973), which held that an advisory board to the town council fell under the purview of the Sunshine Law, the court said that "[i]t is axiomatic that

public officials cannot do indirectly what they are prevented from doing directly." *See also Green v. Galvin*, 114 So. 2d 187 (Fla. 1st DCA 1959). Public officials legally bound to conduct their business under the Sunshine Law cannot escape this duty by acting in secret on public matters by means of such memorandums.

Section 286.011(3), Florida Statutes, provides that any member of a board who violates section 286.011(1) by attending a meeting not held in accordance with its provisions is guilty of a misdemeanor of the second degree. To hold that this section does not apply to the memorandum method since it is not a "meeting" would also be contrary to the intent of the law. If telephone conversations and memorandums are considered "meetings" so as to fall under section 286.011(1), then they must be considered meetings under the misdemeanor section, section 286.011(3). Therefore, any board member participating in conducting public business by memorandum, in violation of the Sunshine Law, would be subject to a criminal action.

I trust that these comments will be of benefit to you.

Sincerely,

Robert L. Shevin
Attorney General

RLS/JD/sf