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MEMORANDUM

TO: **JEA Board Members**

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FROM: **Jason R. Gabriel, General Counsel**

RE: **Florida's Sunshine Laws**

DATE: **October 9, 2015**

I. Executive Summary

Brief History

More than 200 years ago James Madison recognized the importance of open government when he said, "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own governors, must arm themselves with the power which knowledge gives."

Florida's Sunshine Laws were implemented in 1967 when Florida first established its open public meeting requirements – right around the same time that the City of Jacksonville was in the process of becoming consolidated – a time that was just preceded by a series of allegations of malfeasance on the part of several public officials whom, after the consolidation movement was in full swing were ultimately indicted by a county grand jury.

The obligations of public officials in connection with open meetings have expanded by both legislative and judicial interpretations ever since. In 1992, this notion was adopted by Florida voters into the State's Constitution[1].

[1] Article 1, Section 24(b) of the Constitution of the State of Florida, reads as follows: "All meetings of any collegial public body of . . . a county, municipality . . . 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 . . ."

The basic law, known as the Sunshine Law, is found in Chapter 286, Florida Statutes and its main theme is this, all meetings of any board, commission, agency or authority, where official acts are taken are declared to be public meetings open to the public at all times.

The Frustration of Evasive Devices

Over the course of the past several months there have been a couple of incidents reported in the news with respect to the JEA's handling of the executive evaluation as well as the more recent coordination of detailed scripts and their respective interplay with the Sunshine Laws.

A Grand Jury Report filed on January 17, 2008 by the State Attorney at the time which undertook a review of the City's open government laws and compliance found, among other things, that the General Counsel's Office should assume additional promotional responsibilities supplemental to mere education to ensure that Jacksonville's officials act in a manner that is both legal and thoughtful of the public's interest.

In that spirit, the Office of General Counsel takes very seriously not only the technical requirements of Florida's very liberally construed Sunshine Laws, but, due to the enhanced citizen interest in matters of public treasury, trust and affairs, a high premium is placed on strict adherence to the principles of both the spirit and intent of such laws. The Sunshine Law mandates that not only are the final decisions of a governmental collegial body to be made in the open with full public access and participation, but in fact, the decision-making process itself is required to be conducted in the public.

In the realm of Sunshine Law, it does *not* always take two to tango. It has been concluded at times that the presence of two individuals from a collegial body is not always necessary to trigger the application of the Sunshine Law. The use of a third party messenger to communicate between two members (i.e., a liason) can be found to be violative. Likewise, the delegation of collegially-held authority to one person to execute a proposition can also subject that one person to conducting that execution in a manner that complies with all Sunshine laws. As the Florida Supreme Court has stated, the Sunshine Law is to be construed "so as to frustrate all evasive devices."[2]

Liberally Construed Laws

It cannot be overemphasized how Florida's Sunshine Laws are some of the most broad-based and liberally construed rules in the country. In other words, often times, when the government is defending its actions before a court of law, it finds itself in an upward climb and on the exhaustive defensive to overcome the allegation. Put another way, government's often times lose when attempting to articulate a defense as to why it acted in a manner that may have obstructed a discussion, debate or discourse involving a public interest.

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[2] Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974).

Consequences for Violation

A corollary to this is the reminder that a violation of the Sunshine Law carries with it not only the potential for severe civil penalties, but in fact, if the violation were found to be intentional, the potential for criminal sanctions.

A knowing violation of the law is a misdemeanor of the second degree. Such a violation could result in up to 60 days in jail for the offender.[3] All other violations are considered non-criminal with fines not to exceed $500.00.[4] Additionally, removal from office is an option for the Governor.[5] Civil actions for injunctive or declaratory relief may be filed with the result being a court order: a. declaring the violation; b. enjoining future violations; c. invalidating action taken by the Council or Committee; d. awarding attorneys' fees and costs in the event a violation is found even against the individual in violation.

Purpose

Accordingly, this memo presents a brief summary of interpretations of Sunshine Law principles that are offered to you for contemplation, consideration and incorporation into everyday governmental practice and operations.

II. Summary of Pertinent Sunshine Law Issues

Government in the Sunshine

Florida's Government in the Sunshine Law, s. 286.011, F.S., commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings of public boards. The law is equally applicable to elected and appointed boards, and applies to any gathering of two or more members to the same board to discuss some matter which will foreseeably come before that board for action. The Sunshine Law requires all such meetings to: (1) be open to the public; (2) be reasonably noticed; and (3) have minutes taken and transcribed.

Materials circulated prior to open meetings

While the unilateral dissemination of information (ie, the forwarding of a newspaper article or a position piece) pertinent to an issue with instruction for no one to reply in and of itself may not be a Sunshine Law violation, engaging in such a practice is a slippery slope that can easily lead into a bilateral conversation and hence a Sunshine Law violation. It is a far safer and better practice to not provide other members of the Board with any communications outside of a duly noticed, public meeting.

● The Attorney General's Office has expressed concern that a process whereby board members distribute their own position papers on the same subject to other members is "problematical" and should be discouraged. *See* AGO 01-21 (city council's discussions and

[3] Sec. 286.011(3)(b), F.S.
[4] Sec. 286.011(3)(a), F.S.
[5] Sec. 112.52, F.S.

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). *Accord* AGO 07-35. *And see* AGO 08-07 (city commissioner may post comment regarding city business on blog or message board; however, any subsequent postings by other commissioners on the subject of the initial posting could be construed as a response subject to the Sunshine Law); and Inf. Op. to Jove, January 22, 2009 (posting of anticipated vote on blog).

● A procedure whereby a board takes official action by circulating a memorandum for each board member to sign whether the board member approves or disapproves of a particular issue, violates the Sunshine Law. Inf. Op. to Blair, May 29, 1973. *And see Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999).

● A city commissioner may, prior to a public meeting, send to members of the commission documents relating to matters coming before the commission for official action, provided that there is no response from, or interaction related to, such documents by the commissioners prior to the public meeting. Florida Op.Atty.Gen., 2007-35, August 28, 2007 (2007 WL 2461925).

● It is permissible prior to a meeting to circulate drafts of proposals of actions to be taken so that members may have the opportunity to study the proposals prior to the time of the formal meeting. Florida Op.Atty.Gen., 074-294, Sept. 24, 1974.

Hiring and appointment recommendations

Pursuant to the JEA Charter, the JEA Board "shall employ and fix the compensation of the managing director, who shall manage the affairs of the utilities system under the supervision of JEA." As illustrated below, all decisions of the JEA Board related to the selection, employment, compensation, and supervision of the managing director are to be conducted in the Sunshine.

● A search-and-screen committee, appointed by University of Florida president to solicit and screen applications for deanship of law school and to submit a list of best qualified applicants for faculty approval before forwarding list to the president for final selection, was "board or commission," within provisions of sunshine law, whose meetings were improperly closed to the public, in that committee performed policy-based, decision-making function in deciding which applicants to reject from further consideration for deanship, and review by faculty was mere secondhand retrospective reflection upon such decision-making function by committee. Wood v. Marston, 442 So.2d 934 (1983), on remand 444 So.2d 1141 (1984).

● The committee of a public body can interview others privately concerning the subject matter of the committee's business or discuss among itself in private those matters necessary to carry out the investigative aspects of the committee's responsibility, but at the point where the members of the committee who are also members of the public body make decisions with respect to the committee's recommendation, such discussion must be conducted at a public meeting, following notice. Bigelow v. Howze, App. 2 Dist., 291 So.2d 645 (1974).

● Meetings of individual school board members with the superintendent to discuss the individual member's evaluations did not violate statute, when such evaluations did not become the board's evaluation until they were compiled and discussed at a public meeting by the school board for adoption by the board. Florida Op.Atty.Gen. 97-23, April 15, 1997 (1997 WL 194290).

● The review and appraisal process for assessing the performance of a chief executive officer must be conducted by hospital district's board of commissions in a proceeding open to the public as prescribed by statute. Florida Op.Atty.Gen. 93-90, Dec. 13, 1993 (1993 WL 532328).

Meetings

The Sunshine Law requires that meetings between two or more members of the JEA Board be open to the public; be reasonably noticed; and have minutes taken and transcribed. The JEA pre-Board, Board meetings, and committee meetings are noticed, open to the public and minutes are taken in accordance with the Sunshine Law. In some instances the JEA Board is asked to participate in meetings outside of these regular meetings, i.e. workshops, conferences, luncheons, ceremonies, and workshops. In those instances where two or more Board members attend, they must be mindful of the Sunshine Law and if the meeting is not duly noticed and the public is precluded in any way, JEA business may not be discussed.

● The balancing of interests rather than a bright-line test determines legality under the Sunshine Law of meetings that are distant from the usual meeting place; the interest of the public in having a reasonable opportunity to attend the meeting must be balanced against government board's need to conduct a meeting at distant site; and the distance from the usual meeting place is significant factor, and the burden is on the board to demonstrate a need for alternative site increases, as the distance increases. Rhea v. School Bd. of Alachua County, App. 1 Dist., 636 So.2d 1383 (1994).

● The fact that a meeting is held in public does not make it “public” within meaning of Sunshine Law; for a meeting to be public, it is essential that the public be given advance notice and a reasonable opportunity to attend. Rhea v. School Bd. of Alachua County, App. 1 Dist., 636 So.2d 1383 (1994).

● The meeting of a committee which included two of five county commissioners and which constituted a continuation of committee's deliberations with respect to a recommendation for action by the commission was not “public” for purposes of this section merely by reason of fact that it took place in a public room at an inn, where there was no advance notice and reasonable opportunity for the public to attend. Bigelow v. Howze, App. 2 Dist., 291 So.2d 645 (1974).

● Unless it can be clearly demonstrated that informal luncheon meetings between individual school board members and administrative staff members are purely social in nature

and thus are not being used by the board as a vehicle by which to circumvent this section by secretly discussing matters pending before the board, such meetings should be immediately discontinued. Florida Op.Atty.Gen., 074-197, July 10, 1974. Though, in another context luncheon meetings held by a private organization for city, county and school board officials, members of organizations, and other members of the public at which there was no discussion among officials of any official action is not a "secret meeting" of public bodies represented in meeting within the purview of this section. Florida Op.Atty.Gen., 072-158, May 11, 1972.

● The law is applicable to *any* gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable* action will be taken by the public board or commission. *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 764 (Fla. 2010). *And see City of Miami Beach v. Berns,* 245 So. 2d 38 (Fla. 1971); and *Board of Public Instruction of Broward County v. Doran,* 224 So. 2d 693 (Fla. 1969).

● The Sunshine Law is 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. "[T]he Sunshine Law does not provide that cases be treated differently based upon their level of public importance." *Monroe County v. Pigeon Key Historical Park, Inc.,* 647 So. 2d 857, 868 (Fla. 3d DCA 1994). *See, e.g.,* Inf. Op. to Nelson, May 19, 1980 (meeting with congressman 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").

● The "fact-finding exception" to the Sunshine Law does not apply to a board with "ultimate decision-making authority." *See Finch v. Seminole County School Board*, 995 So. 2d 1068 (Fla. 5th DCA 2008), holding that a district school board, as the ultimate decision making body, violated the Sunshine Law when the board, together with school officials and members of the media, took a bus tour of neighborhoods affected by the board's proposed rezoning even though board members were separated from each other on the bus, did not express any opinions or their preference for any of the rezoning plans, and did not vote during the trip. *See also Citizens for Sunshine, Inc. v. School Board of Martin County*, 125 So. 3d 184 (Fla. 4th DCA 2013) (three school board members violated the Sunshine Law when they visited an adult education school and talked with a school administrator, teachers and students, because the "undisputed evidence showed that the defendant board members, without providing notice, conducted a meeting at the adult education school relating to matters on which foreseeable action would have been taken.").

Non-board members or staff as liaisons

As a general rule, individual board members "may call upon staff members for factual information and advice without being subject to the Sunshine Law's requirements." *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 764 (Fla. 2010). However, the Sunshine Law is applicable to meetings between a board member and an individual who is not a board member when that individual is being used as a liaison between, or

to conduct a *de facto* meeting of, board members. *See* AGO 74-47 (city manager is not a member of the city council and thus may meet with individual council members; however, the manager may not act as a liaison for board members by circulating information and thoughts of individual council members). *See also* Inf. Op. to Goren, October 28, 2009 (while individual city commissioners may seek advice or information from staff, city should be cognizant of the potential that commissioners seeking clarification by follow-up with staff with staff responses provided to all commissioners could be considered to be a *de facto* meeting of the commissioners by using staff as a conduit between commissioners). *Compare Sarasota Citizens for Responsible Government v. City of Sarasota, supra* at 765 (private staff meetings with individual county commissioners in preparation for a public hearing on a proposed memorandum of understanding [MOU] did not violate the Sunshine Law because the meetings were "informational briefings regarding the contents of the MOU" and "[t]here is no evidence that [county] staff communicated what any commissioner said to any other commissioner").

Text Messaging

The Sunshine Law requires boards to meet in public; boards may not take action on or engage in private discussions of board business via written correspondence, e-mails, text messages or other electronic communications. *See* AGO 89-39 (members of a public board may not use computers to conduct private discussions among themselves about board business).

III. CONCLUSION

In light of the several recent events that have implicated the Sunshine Laws, I believe it is important to provide the JEA Board with detailed guidance on how the Sunshine Law is interpreted by the courts and the Florida Attorney General. This memo was intended to serve as a general primer on Sunshine Law with a focus on current issues. While there may be times where a technical violation of the law may not have occurred, in the realm of Sunshine Laws and Public Records Laws, the courts, the Attorney General, and my office, underscore and emphasize at every turn, the paramount importance of the spirit and intent of the law.

Accordingly, the behaviors and practices employed by public officers, employees and agencies must adhere to a strict compliance with the law. Playing this particular field of law close to the line is completely dangerous. If there is ever any doubt in whether there could be a Sunshine Law issue, please consult with the Office of General Counsel. I am available to discuss these important matters with you at any time.

Thank you.