

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION #07-011

TO: Honorable Mayor and Members of the City Commission
FROM: Jorge L. Fernandez, City Attorney
DATE: June 5, 2007
RE: Exemptions to Sunshine Law Requirements
Matter ID No.: 07-1030

You have requested a legal opinion asking:

**UNDER WHAT CIRCUMSTANCES CAN A MEETING BE CLOSED TO
THE PUBLIC WITHOUT VIOLATING FLORIDA'S SUNSHINE LAWS?**

ANSWER

Although the Sunshine Law^{1/} states that "all meetings" of any board or commission subject to the law are to be open to the public, the Sunshine law has been held to apply only to a meeting of two or more public officials at which decision making of significance, as opposed to fact-finding, investigation or information gathering, will occur.^{2/}

A limited number of exemptions exist that would allow a public body to hold a closed meeting.^{3/} These include: 1) meetings with legal counsel addressing settlement negotiations, litigation strategy, pending litigation and imminent litigation matters^{4/}; 2) strategy sessions connected with the negotiation of a collective bargaining agreement; 3) specific portions of

^{1/} Section 286.011, F.S. (2007).

^{2/} *Spillis Candela & Partners, Inc. v. Centrust Sav. Bank*, 535 So. 2d 694 (Fla. 3d DCA 1988); *Cape Publications v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985) (holding that a closed meeting dedicated to fact-finding regarding employment qualifications did not violate the Sunshine law).

^{3/} *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (holding that the public's right of access to administrative proceedings is not absolute and, therefore, the Sunshine laws are not intended to interfere with the ability of public officials to perform their duties in a reasonable manner).

^{4/} Op. Att'y Gen. Fla. (informal), July 11, 2001; Op. Att'y Gen. Fla. 93-53 (1993); 070 Op. Att'y Gen. Fla. 37 (1970); *Molina v. City of Miami*, 837 So. 2d 462 (Fla. 3d DCA 2002) (holding that unpublicized meetings or investigations between agency members and their advisors, consultants, or staff who assist the agency member in the discharge of his or her duties are not "meetings" within the contemplation of the sunshine law; *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978) and; *Bennett v. Warden*, 333 So. 2d 97 (Fla. 2d DCA 1976) (It is unrealistic to require a city to hold public meetings for every discussion with its counsel or with anyone from whom the executive officers of the city seek consultation).

meetings in which an agency makes probable cause determinations or reviews confidential records; 4) meetings where the matter involves subjects that tend to prejudice the reputation and character of a person; 5) personnel matters; 6) political caucuses; 7) fact-finding sessions^{5/}; 8) sessions for officials to express their concerns and opinions, which do not constitute deliberations; 9) social gatherings; 10) advisory committee meetings where the committee has no decision making ability addition^{6/}; 11) discussions of technical violations of applicable open meeting laws; 12) informal discussions where no deliberation or decision is made^{7/}; and 13) meetings between single members of a commission and non-commission members.^{8/}

The only *statutory* exemptions recognized under Florida law, however, are section 447.605(1), Florida Statutes, which addresses collective bargaining strategy sessions, and section 286.011(8), Florida Statutes, which addresses meetings with legal counsel concerning litigation and settlement strategy.

ANALYSIS

The exemption under Fla. Stat. §286.011(8) is especially limited. Under the exemption, a public body may meet in private with its attorney only to discuss pending litigation, provided that certain conditions are satisfied and certain restrictions are observed.^{9/} Accordingly one of the conditions that must be met prior to holding a closed attorney-client meeting is that the city attorney must indicate to the city council at a public meeting that he or she wishes the advice of the city council regarding the pending litigation to which the City is presently a party.^{10/} Additionally, only those persons listed in the statutory exemption, i.e. the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session.^{11/}

^{5/} *Cape Publications, supra.*

^{6/} *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (when an advisory committee has been established for and conducts only information gathering and reporting, the activities and meetings of that committee are not subject to the Sunshine Law).

^{7/} *Board of County Commissioners of Sarasota County v. Weber*, 658 So. 2d 1069 (Fla. 2d DCA 1995) (private discussion between members of Board of Count Commissioners regarding voting procedures for zoning variance did not violate "Government in the Sunshine Law").

^{8/} Op. Att'y Gen. Fla. (informal), April 7, 2005; Op. Att'y Gen. Fla. 84-16 (1984) and; *Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988).

^{9/} Op. Att'y Gen. Fla. (informal), July 11, 2001.

^{10/} *Id.*

^{11/} *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996); *Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998) (city charter provision requiring that city clerk attend all council meetings does not authorize clerk to attend closed attorney-client session; municipality may not authorize what the legislature has expressly forbidden).

§ 286.011(8) states in pertinent part:

(8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) **The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.**

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

(d) **The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session.** The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation.

CONCLUSION

In construing the Government in the Sunshine Law, courts have recognized that the exemption established under §286.011(8) should be narrowly construed and that strict compliance is required with its procedures and terms.^{12/} Accordingly, the exemption is not

^{12/} Op. Att'y Gen. Fla. 95-06, 4 (1995); *City of Dunellon v. Aran*, 662 So. 2d 1026 (Fla. 5th DCA 1995)(holding that city council's failure to announce the names of the attorneys participating in the closed attorney-client session did not comply with the requirements of section 286.011(8) and thus violated the Sunshine Law and; *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 699 (Fla. 1969)).

expansive and does not extend to legal advice unrelated to settlement or litigation matters.^{13/} Section 286.011(8) permits an entity to use the exemption only if the entity is presently a party before a court or administrative agency or is involved in already pending litigation, not the mere threat of litigation.^{14/} Moreover, legislative history of the exemption indicates that it applies only to discussions, rather than final action, relating to settlement negotiations or litigation expenditures.^{15/}

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^{13/} Op. Att'y Gen. Fla. 95-06, 4 (1995). The Attorney General concluded that "based on the rule of statutory construction recognizing that if a statute specifically sets forth those things upon which it is to operate, it is to be construed as excluding from its operation all things not expressly mentioned." Op. Att'y Gen. Fla. 99-37 (closed meeting exemption may be used only when the attorney for a governmental entity seeks advice on settlement negotiations or strategy relating to litigations expenditures; Op. Att'y Gen. Fla. 04-35 (such meetings should not be used to finalize action or discuss matters outside these two narrowly prescribed areas); *Zorc v. City of Vero Beach*, 722 So. 2d 891, 900 (Fla. 4th DCA 1998).

^{14/} Op. Att'y Gen. Fla. 04-35 (s. 286.011(8) exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable). *Bruckner v. City of Dania Beach*, 823 So. 2d 167 (Fla. 4th DCA 2002); *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996) (section 286.011(8) does not create a blanket exception to the open meeting requirement of the Sunshine Law for all meetings between a public board or commission and its attorney); *Brown v. City of Ft. Lauderdale*, 654 So. 2d 302 (Fla. 4th DCA 1995) (city is a party to pending litigation only where it is a real party in interest).

^{15/} Staff of Fla. H.R. Comm. On Gov't Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement 2 (Fla. State Archives), noting at p. 3: "No final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings. The decision to settle a case, for a certain amount of money, under certain conditions is a decision which must be voted upon in a public meeting."