

Appendix D: Related Statutes and Rules

What exactly do the laws and regs say?



1. Chapter 23 Code of Federal Regulations 450 (excerpts)

Following are excerpts of the federal regulations that relate to the public involvement process for metropolitan transportation planning. Formatting to show key words in **bold** has been added.

§ 450.316 Interested parties, participation, and consultation.

(a) The MPO shall develop and use a documented **participation plan** that defines a process for providing citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with **reasonable opportunities to be involved** in the metropolitan transportation planning process.

- (1) The participation plan shall be developed by the MPO in consultation with all interested parties and shall, at a minimum, describe explicit procedures, strategies, and desired outcomes for:
 - (i) Providing **adequate public notice** of public participation activities and time for public review and comment at key decision points, including but not limited to a **reasonable opportunity to comment** on the proposed metropolitan transportation plan and the TIP;
 - (ii) Providing timely notice and **reasonable access to information** about transportation issues and processes;
 - (iii) Employing **visualization techniques** to describe metropolitan transportation plans and TIPs;
 - (iv) Making public information (technical information and meeting notices) available in **electronically accessible formats** and means, such as the World Wide Web;
 - (v) Holding any public meetings at **convenient and accessible locations and times**;
 - (vi) Demonstrating explicit **consideration and response to public input** received during the development of the metropolitan transportation plan and the TIP;
 - (vii) Seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as **low-income and minority households**, who may face challenges accessing employment and other services;
 - (viii) Providing an additional opportunity for public comment, if the final metropolitan transportation plan or TIP **differs significantly** from the version that was made available for public comment by the MPO and raises new material issues which interested parties could not reasonably have foreseen from the public involvement efforts;

- (ix) Coordinating with the statewide transportation planning public involvement and consultation processes under subpart B of this part; and
 - (x) Periodically **reviewing the effectiveness** of the procedures and strategies contained in the participation plan to ensure a full and open participation process.
- (2) When significant written and oral comments are received on the draft metropolitan transportation plan and TIP (including the financial plans) as a result of the participation process in this section or the interagency consultation process required under the EPA transportation conformity regulations (40 CFR part 93), **a summary, analysis, and report on the disposition of comments** shall be made as part of the final metropolitan transportation plan and TIP.
- (3) A minimum **public comment period of 45 calendar days** shall be provided before the initial or revised **participation plan** is adopted by the MPO. Copies of the approved participation plan shall be provided to the FHWA and the FTA for informational purposes and shall be posted on the World Wide Web, to the maximum extent practicable.
- (b) In developing metropolitan transportation plans and TIPs, the MPO should **consult with agencies and officials responsible for other planning activities** within the MPA that are affected by transportation (including State and local planned growth, economic development, environmental protection, airport operations, or freight movements) or coordinate its planning process (to the maximum extent practicable) with such planning activities. In addition, metropolitan transportation plans and TIPs shall be developed with due consideration of other related planning activities within the metropolitan area, and the process shall provide for the design and delivery of transportation services within the area that are provided by:
- (1) Recipients of assistance under title 49 U.S.C. Chapter 53;
 - (2) Governmental agencies and non-profit organizations (including representatives of the agencies and organizations) that receive Federal assistance from a source other than the U.S. Department of Transportation to provide non-emergency transportation services; and
 - (3) Recipients of assistance under 23 U.S.C. 204.
- (c) When the MPA includes Indian Tribal lands, the MPO shall appropriately involve the Indian **Tribal government(s)** in the development of the metropolitan transportation plan and the TIP.
- (d) When the MPA includes Federal public lands, the MPO shall appropriately involve the Federal **land management agencies** in the development of the metropolitan transportation plan and the TIP.
- (e) MPOs shall, to the extent practicable, develop a documented **process(es) that outlines roles, responsibilities, and key decision points for consulting with other governments and agencies**, as defined in paragraphs (b), (c), and (d) of this section, which may be included in the agreement(s) developed under §450.314.

§ 450.322 Development and content of the metropolitan transportation plan. (Excerpts)

- (g) The MPO shall **consult**, as appropriate, with State and local agencies responsible for land use management, natural resources, environmental protection, conservation, and historic preservation concerning the development of the transportation plan. The consultation shall involve, as appropriate:
- (1) Comparison of transportation plans with State conservation plans or maps, if available; or
 - (2) Comparison of transportation plans to inventories of natural or historic resources, if available.
- (i) The MPO shall provide citizens, affected public agencies, representatives of public transportation employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transportation, representatives of users of pedestrian walkways and bicycle transportation facilities, representatives of the disabled, and other interested parties with a **reasonable opportunity to comment** on the transportation plan using the participation plan developed under §450.316(a).
- (j) The metropolitan transportation plan shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the **World Wide Web**.

§ 450.324 Development and content of the transportation improvement program (TIP).
(Excerpts)

- (b) The MPO shall provide all interested parties with a **reasonable opportunity to comment** on the proposed TIP as required by §450.316(a). In addition, in non-attainment area TMAs, the MPO shall provide at least **one formal public meeting** during the TIP development process, which should be addressed through the participation plan described in §450.316(a). In addition, the TIP shall be published or otherwise made readily available by the MPO for public review, including (to the maximum extent practicable) in electronically accessible formats and means, such as the **World Wide Web**, as described in §450.316(a).

§ 450.326 TIP revisions and relationship to the STIP. (excerpts)

- (a) An MPO may revise the TIP at any time under procedures agreed to by the cooperating parties consistent with the procedures established in this part for its development and approval. In non-attainment or maintenance areas for transportation-related pollutants, if a TIP amendment involves non-exempt projects (per 40 CFR part 93), or is replaced with an updated TIP, the MPO and the FHWA and the FTA must make a new conformity determination. In all areas, changes that affect fiscal constraint must take place by amendment of the TIP. **Public participation procedures consistent with §450.316(a) shall be utilized in revising the TIP, except that these procedures are not required for administrative modifications.**

2. Florida Statutes: Public Transportation Finance & Planning (excerpts)

*Following are excerpts of the state laws that relate to the public involvement process for metropolitan transportation planning. Formatting to show key words in **bold** has been added.*

339.175 Metropolitan planning organization

- (6) POWERS, DUTIES, AND RESPONSIBILITIES.--The powers, privileges, and authority of an M.P.O. are those specified in this section or incorporated in an interlocal agreement authorized under s. [163.01](#).
- (c) **Represent all the jurisdictional areas** within the metropolitan area in the formulation of transportation plans and programs required by this section;
- (d) Each M.P.O. shall appoint a **technical advisory committee**, the members of which shall serve at the pleasure of the M.P.O. The membership of the technical advisory committee must include, whenever possible, planners; engineers; representatives of local aviation authorities, port authorities, and public transit authorities or representatives of aviation departments, seaport departments, and public transit departments of municipal or county governments, as applicable; the school superintendent of each county within the jurisdiction of the M.P.O. or the superintendent's designee; and other appropriate representatives of affected local governments. In addition to any other duties assigned to it by the M.P.O. or by state or federal law, the technical advisory committee is responsible for considering safe access to schools in its review of transportation project priorities, long-range transportation plans, and transportation improvement programs, and shall advise the M.P.O. on such matters. In addition, the technical advisory committee shall coordinate its actions with local school boards and other local programs and organizations within the metropolitan area which participate in school safety activities, such as locally established community traffic safety teams. Local school boards must provide the appropriate M.P.O. with information concerning future school sites and in the coordination of transportation service.
- (e) 1. Each M.P.O. shall appoint a **citizens' advisory committee**, the members of which serve at the pleasure of the M.P.O. The membership on the citizens' advisory committee must reflect a broad cross-section of local residents with an interest in the development of an efficient, safe, and cost-effective transportation system. Minorities, the elderly, and the handicapped must be adequately represented.
2. Notwithstanding the provisions of subparagraph 1, an M.P.O. may, with the approval of the department and the applicable federal governmental agency, adopt an alternative program or mechanism to ensure citizen involvement in the transportation planning process.
- (7) LONG-RANGE TRANSPORTATION PLAN.--Each M.P.O. must develop a long-range transportation plan that addresses at least a 20-year planning horizon. ... In the development of its long-range transportation plan, each **M.P.O. must provide the public, affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties with a reasonable opportunity to comment on the long-range transportation plan.**

(8) TRANSPORTATION IMPROVEMENT PROGRAM.--Each M.P.O. shall, in cooperation with the state and affected public transportation operators, develop a transportation improvement program for the area within the jurisdiction of the M.P.O. In the development of the transportation improvement program, each **M.P.O. must provide the public, affected public agencies, representatives of transportation agency employees, freight shippers, providers of freight transportation services, private providers of transportation, representatives of users of public transit, and other interested parties with a reasonable opportunity to comment on the proposed transportation improvement program.**

(b) Each M.P.O. annually shall prepare a list of project priorities and shall submit the list to the appropriate district of the department by October 1 of each year; however, the department and a metropolitan planning organization may, in writing, agree to vary this submittal date. The list of project priorities must be formally **reviewed by the technical and citizens' advisory committees**, and approved by the M.P.O., before it is transmitted to the district.

(h) The M.P.O. shall annually **publish or otherwise make available for public review** the annual listing of projects for which federal funds has been obligated in the preceding year.

(13) VOTING REQUIREMENTS.--Each long-range transportation plan required pursuant to subsection (7), each annually updated Transportation Improvement Program required under subsection (8), and each amendment that affects projects in the first 3 years of such plans and programs **must be approved by each M.P.O. on a recorded roll call vote**, or hand-counted vote, of a majority of the membership present.

3. “Government in the Sunshine Manual” (excerpts)

Following is a chapter of the “Government in the Sunshine Manual” available from the Florida Office of the Attorney General (AGO), describing statutory requirements and case law relating to notice and procedures for public meetings subject to the Government in the Sunshine law.

Public meetings subject to this law are briefly described by the AGO in this way: “The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission. There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to s. 286.011, F.S. Instead, 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.”

1. What kind of notice of the meeting must be given?

a. Reasonable notice required

A vital element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. See, s. 286.011(1), F.S. Although s. 286.011, F.S., did not contain an express notice requirement until 1995, many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given. *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973). *Accord, Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. 1st DCA 1985).

Reasonable public notice is required for all meetings subject to the Sunshine Law. Thus, notice is required for meetings between members of a public board even though a quorum is not present. AGOs 90-56 and 71-346. *And see, Baynard v. City of Chiefland, Florida*, No. 38-2002-CA-000789 (Fla. 8th Cir. Ct. July 8, 2003) (reasonable notice required even if subject of meeting is "relatively unimportant").

Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner. *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309, 310 (Fla. 1st DCA 1991). "Governmental bodies who hold unnoticed meetings do so at their peril." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 869 (Fla. 3d DCA 1994).

The type of notice that must be given is variable, however, depending on the facts of the situation and the board involved. In each case, however, an agency must give notice at such time and in such a manner as will enable the media and the general public to attend the meeting. AGOs 04-44, 80-78 and 73-170. *And see, Rhea v. City of Gainesville*, 574 So. 2d 221, 222 (Fla. 1st DCA 1991), citing to AGO 73-170, and stating that the purpose of the notice requirement is to apprise the public of the pendency of

matters that might affect their rights, afford them the opportunity to appear and present their views, and afford them a reasonable time to make an appearance if they wish. *Cf., Lyon v. Lake County*, 765 So. 2d 785, 790 (Fla. 5th DCA 2000) (where county attorney provided citizen with "personal due notice" of a committee meeting and its function, it would be "unjust to reward" the citizen by concluding that a meeting lacked adequate notice because the newspaper advertisement failed to correctly name the committee). *And see, Suncam, Inc. v. Worrall*, No. CI97-3385 (Fla. 9th Cir. Ct. May 9, 1997) (Sunshine Law requires notice to the general public; agency not required to provide "individual notice" to company that wished to be informed when certain meetings were going to occur).

While the Attorney General's Office cannot specify the type of notice which must be given in all cases, it has suggested the following notice guidelines:

1. The notice should contain the time and place of the meeting and, if available, an agenda (or if no agenda is available, subject matter summations might be used);
2. The notice should be prominently displayed in the area in the agency's offices set aside for that purpose, e.g., for cities, in city hall;
3. Except in the case of emergency or special meetings, notice should be provided at least 7 days prior to the meeting. Emergency sessions should be afforded the most appropriate and effective notice under the circumstances and special meetings should have at least 24 hours reasonable notice to the public; and
4. The use of press releases and/or phone calls to the wire services and other media is highly effective. **On matters of critical public concern such as rezoning, budgeting, taxation, appointment of public officers, etc., advertising in the local newspapers of general circulation would be appropriate.**

The notice procedures set forth above should be considered as suggestions which will vary depending upon the circumstances of each particular situation. See, AGO 73-170 ("If the purpose for notice is kept in mind, together with the character of the event about which notice is to be given and the nature of the rights to be affected, the essential requirements for notice in that situation will suggest themselves.").

Thus, in *Rhea v. City of Gainesville*, 574 So. 2d 221 (Fla. 1st DCA 1991), the court held that a complaint alleging that members of the local news media were contacted about a special meeting of the city commission one and one-half hours before the meeting stated a sufficient cause of action that the Sunshine Law had been violated. Compare, *Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (three days' notice of special meeting deemed adequate); and *News and Sun-Sentinel Company v. Cox*, 702 F. Supp. 891 (S.D. Fla. 1988) (no Sunshine Law violation occurred when on March 31, a "general notice" of a city commission meeting scheduled for April 5 was posted on the bulletin board outside city hall); and *Lozman v. City of Riviera Beach*, no. 502008Ca027882 (Fla. 15th Cir. Ct. December 8, 2010), appeal pending, no. 4D11-27 (Fla. 4th DCA, filed January 5, 2011) (no violation of Sunshine Law where notice of

special meeting held on Monday September 15 was posted at city hall and faxed to the media on Friday September 12, and members of the public [including the media] attended the meeting). *And see, Yarbrough v. Young, supra*, at 517n.1 (Sunshine Law does not require city council to give notice "by paid advertisements").

The determination as to who will actually prepare the notice or agenda is essentially "an integral part of the actual mechanics and procedures for conducting that meeting and, therefore, aptly relegated to local practice and procedure as prescribed by . . . charters and ordinances." *Hough*, 278 So. 2d at 291.

b. Effect of notice requirements imposed by other statutes, codes or ordinances

While the Sunshine Law requires only that reasonable public notice be given, a public agency may be subject to additional notice requirements imposed by other statutes, charters or codes. See, e.g., s. 166.041, F.s. (notice requirements for adoption of municipal ordinances); s. 189.417(1), F.s. (notice requirements for meetings of the governing bodies of special districts); and s. 1001.372(2) (c), F.s. (school board meetings). In such cases, the requirements of that statute, charter, or code must be strictly observed. *Inf. Op. to Mattimore*, February 6, 1996. Cf. *Yarbrough v. Young*, 462 so. 2d 515, 517n.1 (Fla. 1st DCA 1985) (Sunshine Law does not require city council to give notice "by paid advertisements" of its intent to take action regarding utilities system improvements, although the legislature "has required such notice for certain subjects," e.g., 166.041[3][c], F.S.).

Thus, a board or commission subject to Ch. 120, F.S., the Administrative Procedure Act, must comply with the notice requirements of that act. See, e.g., s. 120.525, F.S., which provides for publication in the Florida Administrative Weekly and on the agency's website not less than 7 days before the event. Those requirements, however, are imposed by Ch. 120, F.S., not s. 286.011, F.S., although the notice of a board or commission published in the Florida Administrative Weekly pursuant to Ch. 120, F.s., also satisfies the notice requirements of s. 286.011, F.s. *Florida Parole and Probation Commission v. Baranko*, 407 so. 2d 1086 (Fla. 1st DCA 1982).

b. Notice requirements when meeting adjourned to a later date

If a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed. AGO 90-56.

But see *State v. Adams*, No. 91-175-CC (Fla. Sumter Co. Ct. July 15, 1992), the county court holding that s. 286.011, F.S., was not violated by a brief discussion as to whether commission members could make an inspection trip when the discussion took place immediately after the adjournment of a duly noticed commission meeting, the room remained open during the discussion, no member of the public relied to their detriment on the adjournment by leaving the proceedings, and there was no allegation that the alleged adjournment was utilized as a tool to avoid the public scrutiny of governmental

meetings. *And see, Greenberg v. Metropolitan Dade County Board of County Commissioners*, 618 So. 2d 760 (Fla. 3d DCA 1993) (no impropriety in county commission continuing its meeting until the early morning hours).

c. Notice requirements when board acting as quasi-judicial body or taking action affecting individual rights

Section 286.0105, F.S., requires:

Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of s. 286.0105, F.S. AGO 81-06.

2. Does the Sunshine Law require that an agenda be made available prior to board meetings or restrict the board from taking action on matters not on the agenda?

The Sunshine Law does not *mandate* that an agency provide notice of each item to be discussed via a published agenda although the Attorney General's Office has recommended the publication of an agenda, if available. The courts have rejected such a specific requirement has been rejected because it could effectively preclude access to meetings by members of the general public who wish to bring specific issues before a governmental body. *See, Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973). *And see, Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary; public body not required to postpone meeting due to inaccurate press report which was not part of the public body's official notice efforts).

Thus, the Sunshine Law does not require boards to consider only those matters on a published agenda. "Whether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature." *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996). *And see Grapski v. City of Alachua*, 31 so. 3d 193 (Fla. 1st DCA 2010), review denied, 47 so. 3d 1288 (Fla. 2010) (Sunshine Law

does not prohibit use of consent agenda procedure).

Even though the Sunshine Law does not prohibit a board from adding topics to the agenda of a regularly noticed meeting, the Attorney General's Office has advised boards to postpone formal action on any added items that are controversial. AGO 03-53. "In the spirit of the Sunshine Law, the city commission should be sensitive to the community's concerns that it be allowed advance notice and, therefore, meaningful participation on controversial issues coming before the commission."

While the Sunshine Law requires notice of meetings, not of the individual items which may be considered at that meeting, other statutes, codes or ordinances may impose such a requirement and agencies subject to those provisions must follow them. see Inf. Op. to Mattimore, February 6, 1996. For example, s. 120.525(2), F.S., requires that agencies subject to the Administrative Procedure Act must prepare an agenda in time to ensure that a copy may be received at least 7 days before the event by any person in the state who requests a copy and who pays the reasonable cost of the copy. After the agenda has been made available, changes may be made only for good cause. *Id.* Therefore, agencies subject to the Administrative Procedure Act must follow the requirements in that statute.

3. Does the Sunshine Law limit where meetings of a public board or commission may be held?

a. Inspection trips

The Sunshine Law does not prohibit *advisory* boards from conducting inspection trips provided that board members do not discuss matters which may come before the board for official action. See, *Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974) AGO 02-24 (two or more members of an advisory group created by a city code to make recommendations to the city council or planning commission on proposed development may conduct vegetation surveys without subjecting themselves to the requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations the committee may make to the council or planning commission, or comments on the proposed development that the committee may make)..

The "fact finding exception" to the Sunshine Law, however, 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.

b. Luncheon meetings

Public access to meetings of public boards or commissions is the key element of the Sunshine Law and public agencies are advised to avoid holding meetings in places not easily accessible to the public. The Attorney General's Office, has suggested that public boards or commissions avoid the use of luncheon meetings to conduct board or commission business. These meetings may have a "chilling" effect upon the public's willingness or desire to attend. People who would otherwise attend such a meeting may be unwilling or reluctant to enter a public dining room without purchasing a meal and may be financially or personally unwilling to do so. Inf. Op. to Campbell, February 8, 1999; and Inf. Op. to Nelson, May 19, 1980. In addition, discussions at such meetings by members of the board or commission which are audible only to those seated at the table may violate the "openness" requirement of the law. AGO 71-159. Public boards or commissions are, therefore, advised to avoid holding meetings at places where the public and the press are effectively excluded. AGO 71-295. *Cf.*, *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971), in which the Florida Supreme Court observed: "A secret meeting occurs when public officials meet at a time and place to avoid being seen or heard by the public."

c. Meetings at facilities that discriminate or unreasonably restrict access prohibited

Section 286.011(6), F.S., prohibits boards or commissions subject to the Sunshine Law from holding their meetings at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access to such a facility. *And see*, s. 286.26, F.S., relating to accessibility of public meetings to the physically handicapped.

Public boards or commissions, therefore, are advised to avoid holding meetings at places where the public and the press are effectively excluded. AGO 71-295. Thus, a police pension board should not hold its meetings in a facility where the public has limited access and where there may be a "chilling" effect on the public's willingness to attend by requiring the public to provide identification, to leave such identification while attending the meeting and to request permission before entering the room where the meeting is held. AGO 96-55. *And see*, Inf. Op. to Galloway, August 21, 2008, in which the attorney general's office expressed concerns about holding a public meeting in a private home in light of the possible "chilling effect" on the public's willingness to attend. While a city may not require persons wishing to attend public meetings to provide identification as a condition of attendance, it may impose certain security measures on members of the public entering a public building, such as requiring the public to go through metal detectors. AGO 05-13.

d. Out-of-town meetings

The mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law.; For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. *Bigelow v. Howze*, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974)

Accordingly, a school board workshop held outside county limits over 100 miles away from the board's headquarters violated the Sunshine Law where the only advantage to the board resulting from the out-of-town gathering (elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend. *Rhea v. School Board of Alachua County*, 636 So. 2d 1383 (Fla. 1st DCA 1994). The court refused to adopt a rule prohibiting any board workshops from being held at a site more than 100 miles from its headquarters; instead, applying a balancing of interests test to determine which interest predominates in a given case. As stated by the court, "the interests of the public in having a reasonable opportunity to attend a Board workshop must be balanced against the Board's need to conduct a workshop at a site beyond the county boundaries." *Id.* at 1385.

In addition, there may be other statutes which limit where board meetings may be held. See, e.g., s. 125.001, F.S. (meetings of the board of county commissioners may be held at any appropriate public place in the county); s. 1001.372, F.S. (school board meetings may be held at any appropriate public place in the county). *And see*, AGOs08-01 and 03-03 (municipality may not hold commission meetings at facilities outside its boundaries). See now s. 166.0213, F.S. (governing body of municipality with 500 or fewer residents may hold meetings within 5 miles of the exterior jurisdictional boundary of the municipality at such time and place as may be prescribed by ordinance or resolution).

Conduct which occurs outside the state which would constitute a knowing violation of the Sunshine Law is a second degree misdemeanor. Section 286.011(3), F.S. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, F.S.

4. Can restrictions be placed on the public's attendance at, or participation in, a public meeting?

a. Public's right to attend or record meeting

(1) Size of meeting facilities

The Sunshine Law requires that meetings of a public board or commission be "open to the public." For meetings where a large turnout of the public is expected, the Attorney General's Office has recommended that public boards and commissions take reasonable steps to ensure that the facilities where the meeting will be held will accommodate the anticipated turnout. *Inf. Op.to Galloway*, August 21, 2008. If a huge public turnout is anticipated for a particular issue and the largest available public meeting room cannot accommodate all of those who are expected to attend, the use of video technology (e.g., a television screen outside the meeting room) may be appropriate. See *Kennedy v. St. Johns River Water Management District*, no. 2009-0441-Ca (Fla. 7th Cir. Ct. September 27, 2010), per curiam affirmed, no. 5D 10-3656

(Fla. 5th DCA October 25, 2011) (even though not all members of the public were able to enter the meeting room, board did not violate the Sunshine Law when it held a meeting at the board's usual meeting place and in the largest available room; the court noted, however, that the board set up a computer with external speakers so that those who were not able to enter the meeting room could view and hear the proceedings).

(2) Inaudible discussions

A violation of the Sunshine Law may occur if, during a recess of a public meeting, board members discuss issues before the board in a manner not generally audible to the public attending the meeting. Although such a meeting is not clandestine, it nonetheless violates the letter and spirit of the law. *Rackleff v. Bishop*, No. 89-235 (Fla. 2d Cir. Ct. March 5, 1990). *And see*, AGO 71-159, stating that discussions of public business which are audible only to "a select few" who are at the table with the board members may violate the "openness" requirement of the law.

(3) Exclusion of certain members of the public

The term "open to the public" as used in the Sunshine Law means open to *all* persons who choose to attend. AGO 99-53. Thus the court in *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th DCA 1995), ruled that a procurement committee violated the Sunshine Law by requesting that bidders voluntarily excuse themselves from each other's presentations. See now s. 286.0113(2)(b), F.S., providing an exemption from the Sunshine Law for certain meetings held pursuant to a competitive solicitation, including meetings at which a vendor makes an oral presentation or answers questions as part of a competitive solicitation, and requiring a complete recording of the exempt meeting.

Staff of a public agency clearly are members of the public as well as employees of the agency; they cannot, therefore, be excluded from public meetings. AGO 79-01. Section 286.011, F.S., however, does not preclude the reasonable application of ordinary personnel policies, for example, the requirement that annual leave be used to attend meetings, provided that such policies do not frustrate or subvert the purpose of the Sunshine Law. *Id.*

Although not directly addressing the open meeting laws, courts of other states have ruled that in the absence of a compelling governmental interest, agencies may not single out and exclude a particular news organization or reporter from press conferences. *See, e.g., Times-Picayune Publishing Corporation v. Lee*, 15 Media L. Rep. 1713 (E.D. La. 1988); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Hawaii 1974); *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8 (S.D. Iowa 1971); and *Southwestern Newspapers Corporation v. Curtis*, 584 S.W.2d 362 (Tex. Ct. App. 1979).

(4) Cameras and tape recorders

A board or commission may adopt reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending a public meeting . A board, however, may not ban the use of non-disruptive recording devices *Pinellas County School Board v. Suncam, Inc.*, So. 2d 989 (Fla. 2d DCA 2002) (school board's ban on unobtrusive videotaping invalid. And see AGO 77-122 (silent nondisruptive tape recording of district meeting permissible).

The Legislature in Ch. 934, F.S., appears to implicitly recognize the public's right to silently record public meetings. AGO 91-28. Chapter 934, F.S., the Security of Communications Act, regulates the interception of oral communications. Section 934.02(2), F.S., however, defines "oral communication" to specifically exclude "any public oral communication uttered at a public meeting." See *also*, Inf. Op. to Gerstein, July 16, 1976, stating that public officials may not complain that they are secretly being recorded during public meetings in violation of s. 934.03, F.S.

b. Public's right to participate in a meeting

(1) Importance of public participation

Court decisions interpreting the Sunshine Law in the years following passage of s. 286.011, F.s., recognized the importance of public participation in governmental proceedings. See, e.g., *Board of Public Instruction of Broward County v. Doran*, 224 so. 2d 693, 699 (Fla. 1969) (specified boards and commissions . . . 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); *Town of Palm Beach v. Gradison*, 296 so. 2d 473, 475 (Fla. 1974); and *Krause v. Reno*, 366 so. 2d 1244 (Fla. 3d DCA 1979) ("citizen input factor" is an important aspect of public meetings). however, these cases did not specifically rule on the extent to which the Sunshine Law requires a governmental entity to permit the public to speak at public meetings.

The Florida Supreme Court expressly addressed the question of public participation in a 1983 decision. in *Wood v. Marston*, 442 So. 2d 934, 941 (Fla. 1983), the Court held that the Sunshine Law does not give the public the right to speak at a meeting of a committee appointed by a university president to recommend candidates for a university position. And see *Law and Information Services v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996), citing *Marston* for the principle that the public does not have a right to speak on all issues prior to resolution of the issue by the board; *Homestead-Miami Speedway, LLC. v. City of Miami*, 828 So. 2d 411 (Fla. 3d DCA 2002) (city did not violate Sunshine Law where there was public participation and debate in some but not all of the meetings concerning a proposed contract).

More recently, the First District Court of Appeal relied on "clear and unambiguous language in the Marston decision and ruled that a non-profit corporation charged by the

City of Pensacola with overseeing the development of a parcel of public waterfront property must allow the public to attend the meetings but was not required to provide an opportunity for the public to speak. *Keesler v. Community Maritime Park Associates, Inc.*, 32 so. 3d 659 (Fla. 1st DCA 2010), review denied, 47 so. 3d 1289 (Fla. 2010). And see *Grapski v. City of Alachua*, 31 so. 3d 193 (Fla. 1st DCA 2010), review denied, 47 so. 3d 1288 (Fla. 2010) (citizens are authorized to attend open meetings but not participate in the decision making process). Accord *Kennedy v. St. Johns River Water Management District*, no. 2009-0441-Ca (Fla. 7th Cir. Ct. September 27, 2010), per curiam affirmed, no. 5D10-3656 (Fla. 5th DCA October 25, 2011).

While recent decisions have clarified that the Sunshine Law does not mandate that boards permit the public to speak at open meetings, that law does not prohibit boards from choosing to do so as a matter of public policy. The benefits of public input into the decision-making process recognized in the Doran, Gradison and Krause opinions are still valid today. Accordingly, the attorney general's office strongly encourages public boards to consider a reasonable opportunity for the public to address the board prior to taking action. Cf. AGOs 04-53 and 91-53 (reasonable rules and policies, which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending, are appropriate).

Although not directly considering the Sunshine Law, the court in *Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989), recognized that "to deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting-- would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions." Thus, the court concluded that a mayor's actions in attempting to confine the speaker to the agenda item in the city commission meeting and having the speaker removed when the speaker appeared to become disruptive constituted a reasonable time, place and manner regulation and did not violate the speaker's First Amendment rights. *And see, Rowe v. City of Cocoa*, 358 F. 3d 800 (11th Cir. 2004) (city council's regulation limiting speech of nonresidents during its meetings is viewpoint-neutral and does not violate the First or Fourteenth Amendment rights of nonresidents). Cf., AGO 04-53 (statute requiring special district board to hold "a public hearing at which time qualified electors of the district may appear and be heard" does not prohibit nonqualified electors from participating).

5. May the members of a public board use codes or pre-assigned numbers in order to avoid identifying individuals?

Section 286.011, F.S., requires that meetings of public boards or commissions be "open to the public at all times." If at any time during the meeting the proceedings become covert, secret or not wholly exposed to the view and hearing of the public, then that portion of the meeting violates the portion of s. 286.011, F.S., requiring that meetings be "open to the public at all times." See *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985), the Court disapproved of a procedure by which representatives of the media would be permitted to attend a city council meeting provided that they agreed to "respect the confidentiality" of certain matters. "Under the Sunshine Law, a meeting is

either fully open or fully closed; there are no intermediate categories."

The use of pre-assigned numbers or codes at public meetings to avoid identifying the names of applicants violates s. 286.011, F.S., because "to permit discussions of applicants for the position of a municipal department head by a pre-assigned number or other coded identification in order to keep the public from knowing the identities of such applicants and to exclude the public from the appointive or selection process would clearly frustrate or defeat the purpose of the Sunshine Law." AGO 77-48. *Accord*, AGO 76-240 (Sunshine Law prohibits the use of coded symbols at a public meeting in order to avoid revealing the names of applicants for the position of city manager). *And see*, *News-Press Publishing Company v. Wisher*, 345 So. 2d 646 (Fla. 1977)"public policy of this state as expressed in the public records law and the open meetings statute eliminate any notion that the commission was free to conduct the county's personnel business by pseudonyms or cloaked references.")

6. May members of a public board vote by written or secret ballot?

Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act.

By contrast, a secret ballot violates the Sunshine Law. *See*, AGO 73-264 (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee). *Accord*, AGOs 72-326 and 71-32 (board may not use secret ballots to elect the chairman and other officers of the board).

7. May board members cast proxy votes?

in the absence of statutory authority, proxy voting by board members is not allowed. AGO 78-117.

8. Are board members authorized to abstain from voting?

Section 286.012, F.S., provides:

No member of any *state, county or municipal* governmental board, commission, or agency who is present at any meeting of any such body at which an official decision, ruling, or other official act is to be taken or adopted may abstain from voting . . . a vote *shall be* recorded or counted for each such member present, except when, with respect to any such member, there is, or appears to be, a possible conflict of interest under . . . s. 112.311, s. 112.313, or s. 112.3143, F.S. (e.s.)

A member of a state, county or municipal board who is present at a meeting is thus prohibited from abstaining from voting unless there is, or appears to be, a possible conflict of interest under ss. 112.311, 112.313 or 112.3143, F.S., of the Code of Ethics for Public Officers and Employees. *See*, AGO 02-40 (s. 286.012 applies to advisory

board appointed by a county commission). Cf. Inf. Op. to Rodgers, June 9, 2011 (concurring with Commission on ethics opinion that “non-economic bias or prejudice on the part of a public officer toward someone affected by a measure would not constitute a basis for a valid abstention” pursuant to s. 286.012, F.S.).

Failure of a member to vote, however, does not invalidate the entire proceedings. *City of Hallandale v. Rayel Corporation*, 313 So. 2d 113 (Fla. 4th DCA 1975), *cause dismissed sua sponte*, 322 So. 2d 915 (Fla. 1975) (to rule otherwise would permit any member to frustrate official action merely by refusing to participate).

Section 286.012, F.S., applies *only* to state, county and municipal boards. AGO 04-21. Special district boards are not subject to its provisions and may adopt their own rules regarding abstention, subject to s. 112.3143, F.S. AGOs 04-21, 85-78 and 78-11.

Section 112.3143(3)(a), F.S., prohibits a county, municipal, or other local public officer from voting on any measure which inures to his or her special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal or parent organization or subsidiary of a corporate principal, other than a public agency, by whom he or she is retained; or which the officer knows would inure to the special private gain or loss of a relative or business associate of the officer. An exception exists for a commissioner of a community redevelopment agency created or designated pursuant to s. 163.356, F.S., or s. 163.357, F.S., or an officer of an independent special tax district elected on a one-acre, one-vote basis. Section 112.3143(3)(b), F.S.

For those local officials subject to s. 112.3143(3) (a), F.S., no exception exists even though the abstention has the effect of preventing the local legislative body from taking action on the matter. AGO 86-61. Prior to the vote being taken, the local officer must publicly state the nature of his or her interest in the matter from which he is abstaining. Within 15 days of the vote, the officer must disclose the nature of his or her interest in a memorandum filed with the person responsible for recording the minutes of the meeting who shall incorporate the memorandum in the minutes. Section 112.3143(3) (a), F.S.

State public officers are not required to abstain from voting because of a conflict of interest. Section 112.3143(2), F.S. *But see*, s. 120.665(1), F.S., applicable to agencies subject to Ch. 120, F.S., the Administrative Procedure Act, stating that "notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding."

If the state officer votes, however, on a matter which would inure to his or her special private gain or loss, or to the special gain or loss of any principal or parent organization or subsidiary of a corporate principal by which the officer is retained, or to the special private gain or loss of a relative or business associate, the officer is required to disclose the nature of his or her interest in a memorandum. The memorandum must be filed within 15 days after the vote with the person responsible for recording the minutes of

the meeting who shall incorporate the memorandum in the minutes. See, s. 112.3143(2), F.S.

Although a member of a *state* board or commission is authorized to abstain from voting on a question in which he or she is personally interested, the member is not disqualified from voting; the member may, therefore, be counted for purposes of computing a quorum for a vote on that question. Once a quorum is present, a majority of those members actually voting is sufficient to decide the question. AGO 75-244.

When a member of a *local* board is *required* to abstain pursuant to s. 112.3143(3), F.S., the local board member is disqualified from voting and may not be counted for purposes of determining a quorum. AGOs 86-61 and 85-40.

Questions as to what constitutes a conflict of interest under the above statutes should be referred to the Florida Commission on Ethics.

9. Is a roll call vote required?

While s. 286.012, F.S., requires that each member present cast a vote either for or against the proposal under consideration by the public board or commission, it is not necessary that a roll call vote of the members present and voting be taken so that each member's specific vote on each subject is recorded. The intent of the statute is that all members present cast a vote and that the minutes so reflect that by either recording a vote *or* counting a vote for each member. *Ruff v. School Board of Collier County*, 426 So. 2d 1015 (Fla. 2d DCA 1983) (roll call vote so as to *record* the individual vote of each such member is not necessary). *Cf.*, s. 20.052(5)(c), F.S., requiring that minutes, including a record of all votes cast, be maintained for all meetings of an advisory body, commission, board of trustees, or other collegial body adjunct to an executive agency.

9. Must written minutes be kept of all sunshine meetings, including workshops?

a. Scope of minutes requirement

Section 286.011, F.S., requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection. Workshop meetings are not exempted from this requirement. AGOs 08-65 and 74-62. And see *Lozman v. City of Riviera Beach*, no. 502007Ca007552XXXXmBan (Fla. 15th Cir. Ct. June 9, 2009), per curiam affirmed, 46 so. 3d 573 (Fla. 4th DCA 2010) (minutes required for city council's agenda review meetings).

Draft minutes of a board meeting may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes. AGOs 02-51 and 74-294. The minutes are public records when the person responsible for preparing the minutes has performed his or her duty even though they have not yet been sent to the board members or officially approved by

the board. AGO 91-26. And see *Grapski v. City of Alachua*, 31 so. 3d 193 (Fla. 1st DCA 2010), review denied, 47 so. 3d 1288 (Fla. 2010) (city violated both the language and the purpose of s. 286.011[2] by denying public access to its minutes until after approval).

Section 286.011, F.S., does not specify who is responsible for taking the minutes of public meetings. This appears to be a procedural matter which the individual boards or commissions must resolve. Inf. Op. to Baldwin, December 5, 1990.

b. Content of minutes

The term “minutes” in s. 286.011, F.S., contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting accordingly a verbatim transcript is not required. AGO 82-47. And see, *State v. Adams*, No. 91-175-CC (Fla. Sumter Co. Ct. July 15, 1992) (no violation of Sunshine Law where minutes failed to reflect brief discussion concerning a proposed inspection trip).

c. Tape recordings or internet archive

The Sunshine Law does not require that public boards and commissions tape record their meetings. AGO 86-21. However, other statutes may require that certain proceedings be recorded. Cf. AGO 10-42 (where statute requires that all closed proceedings of child abuse death review committee be recorded and that no portion be off the record, audio recording of the proceedings “would appear to be the most expedient and cost-efficient manner to ensure that all discussion is recorded”).

However, while a board is authorized to tape record the proceedings if it chooses to do so, the Sunshine Law also requires written minutes. AGO 75-45. Similarly, while a board may archive the full text of all workshop discussions conducted on the internet, written minutes of the workshops must also be prepared and promptly recorded. AGO 08-65.

Moreover, the tape recordings are public records and their retention is governed by schedules established by the Division of Library Information Services of the Department of State in accordance with s. 257.36(6), F.S. Accord AGO 86-93 (tape recordings of school board meetings are subject to Public Records Act even though written minutes are required to be prepared and made available to the public).

d. Use of transcript as minutes

Although a written transcript is not required, a board may use a written transcript of the meeting as the minutes, if it chooses to do so. inf. op. to Fulwider, June 14, 1993.

4. Florida Attorney General Advisory Legal Opinion (excerpt)

Number: AGO 2009-19 Date: April 23, 2009 Subject: Records, municipal Facebook page

Mr. Samuel S. Goren
Coral Springs City Attorney
9551 West Sample Road
Coral Springs, Florida 33065

RE: MUNICIPALITIES–RECORDS–GOVERNMENT IN THE SUNSHINE LAW–
INTERNET–public record implications for city's Facebook page. s. 119.011(12), Fla.
Stat.; Art. I, s. 23, Fla. Const.

Dear Mr. Goren:

On behalf of the Coral Springs City Commission, you ask the following questions:

1. If the city chooses to maintain a Facebook page, would all contents of the city's page, including information about the city's "friends" and their pictures, and the friend's respective Facebook pages, be subject to the Public Records Law, Chapter 119, Florida Statutes?
2. If Question One is answered in the affirmative, is the city obligated to follow a public records retention schedule as set forth in the State of Florida General Records Schedule GSI for State and Local Government Agencies?
3. If Question One is answered in the affirmative, is Florida's Right of Privacy, as guaranteed in Article I, section 23, Florida Constitution, implicated by the inclusion of information about the city's "friends" and the respective link to the friends' Facebook pages linked to the city's page?
4. Would communications on the city's Facebook page regarding city business be subject to Florida's Government in the Sunshine Law, section 286.011, Florida Statutes?

In sum:

1. Since the city is authorized to exercise powers for a municipal purpose, the creation of a Facebook page must be for a municipal, not private purpose. The placement of material on the city's page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes. In any given instance, however, the determination would have to be made based upon the definition of "public record" contained in section 119.11, Florida Statutes. Similarly, whether the Facebook page of the friends would also be subject to the Public Records Law, Chapter 119, Florida Statutes, would depend on whether the page and information contained therein was made or received in connection of the transaction of official business by or on behalf

of a public agency.

2. The city is under an obligation to follow the public records retention schedules established by law.
3. While Article I, section 23, Florida Constitution, may be implicated in determining what information may be collected by the city, the constitutional provision expressly states that "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Thus, to the extent that information on the city's Facebook page constitutes a public record within the meaning of Chapter 119, Florida Statutes, Article I, section 23, Florida Constitution, is not implicated.
4. Communications on the city's Facebook page regarding city business by city commissioners may be subject to Florida's Government in the Sunshine Law, section 286.011, Florida Statutes. Thus, members of a city board or commission must not engage on the city's Facebook page in an exchange or discussion of matters that foreseeably will come before the board or commission for official action.