Sunshine Law, questions posed to staff prior to meeting

Number: INFORMAL

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Subject:
Sunshine Law, questions posed to staff prior to meeting

Mr. Samuel S. Goren
City of Pembroke Pines Attorney
3099 East Commercial Boulevard
Suite 200
Fort Lauderdale, Florida 33308

Dear Mr. Goren:

You have asked for comment from this office on a proposed procedure allowing city commission members to pose written questions regarding issues on the agenda for the commission's next regular meeting. Under your scenario, commission members would be provided the meeting agenda on the Friday preceding a regularly scheduled Wednesday meeting, with a deadline to submit any question by a time certain on Monday. None of the questions would be shared with the commission members at that time, but would be sent to the city manager who would review the questions and, at his or her discretion, reword the question to ensure objectivity and to remove any bias or opinion of the questioner. The questions would then be transmitted to appropriate staff for review and response. The staff's review and response would be reviewed by the city manager and provided, along with the questions, to the city commission on the day of the commission meeting.

You further state that the commissioners would have no opportunity to reply to the answers or to ask follow-up questions in a manner that would allow indirect communication among commission members. Members would, however, be able to informally ask the city manager to seek follow-up information or clarification on the questions or answers received under the proposed system.

Florida's Sunshine Law requires that all meetings of any collegial public body of the executive branch of state government or of a county, municipality, school district, or special district, at which official action is to be taken or discussed, are to be noticed and open to the public. Moreover, minutes of a meeting of any such board or commission must be promptly recorded and such records shall be open to public inspection.[1]

Recognizing that the Sunshine Law is to be construed "to frustrate all evasive devices,"[2] this office has previously concluded that the use of memoranda among board or commission members to avoid a public meeting may be a violation of the law, even though two members of the board or commission are not physically present.[3] In such a situation, if a memorandum reflecting the views of a board member is circulated among the other members of the board for each to indicate his or her approval or disapproval, the completion of the members signing off the memorandum has the effect of becoming official action of the board in violation of the

Government in the Sunshine Law.[4]

Similarly, the Sunshine Law is implicated when a person other than a board member is used as a liaison among board members. For example, a city manager may not ask each commissioner to state his or her position on a specific matter that will foreseeably be considered by the commission at a public meeting, in order to provide the information to the members of the commission.[5]

In Attorney General Opinion 2001-21, this office was asked whether the preparation and distribution of individual position statements on the same subject by several city council members to all other council members would constitute an interaction or exchange by the council that would be subject to the requirements of the Government in the Sunshine Law. This office determined that such a practice would violate the Sunshine Law to the extent that any such communication is a response to another council member's statement. In reaching this conclusion, it was noted that the city council's discussions and deliberations on matters coming before it 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.

Similarly, Attorney General Opinion 2007-35 concluded that members of a commission may exchange documents that they wish other members of the commission to consider on matters coming before the commission for official action, provided there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting. However, it was noted that if the commissioners intended to exchange individual position papers on the same subject, this office would express the same concerns as discussed in Attorney General Opinion 2001-21 and discourage such a practice.

Clearly, commissioners may seek advice or information from staff.[6] In addition, as discussed above, this office has recognized that individual position papers may be provided to other commission members.[7] This office would reiterate the same concerns raised in earlier opinions that such an exchange of questions and answers not be used in a manner to circumvent the requirements of the Sunshine Law. While recognizing that the responses in the instant situation come from staff, not commissioners, this office would advise the city to be cognizant of the potential that commissioners seeking clarification by follow-up with staff and staff responses provided to all commissioners might be considered to be a *de facto* meeting of the commissioners by using staff as a conduit between members of the commission.

In addition, I note that the process you propose contemplates that questions posed by members of the commission would be protected from disclosure until such time they are released by the city manager to all of the members of the city commission. Chapter 119, Florida Statutes, Florida’s Public Records Law, expresses the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person.[8] Section 119.011(12), Florida Statutes, defines "[p]ublic records" as

"all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

Thus, a city commission member clearly is subject to the provisions of Chapter 119, Florida Statutes, when making or receiving public records in carrying out official business and any such records would be open to inspection and copying, absent a statutory provision making such records confidential or exempt. If the purpose of a document is to perpetuate, communicate, or formalize knowledge, it is a public record, regardless of whether it is in final form or the ultimate product of an agency.[9] Thus, the questions posed to the city manager would be public records open to inspection and copying, despite any review or revisions made by the city manager. You have not provided, nor have I found, any statutory provision that would support the maintenance of these records in such a manner.[10]

I trust that these informal comments will be of assistance.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See* Art. I, s. 24(b), Fla. Const., and s. 286.011, Fla. Stat.

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

[3] *See* Ops. Att'y Gen. Fla. 90-03 (1990) (proposed contract may not be circulated among board members for comments to be provided to other members, as this would be communication among the members on an issue upon which the board will take official action subject to the Sunshine Law) and 93-90 (1993) (board responsible for assessing the performance of its chief executive officer should conduct the review and appraisal process in a proceeding open to the public, instead of using a review procedure in which individual board members evaluate the CEO's performance and send their individual written comments to the board chairman for compilation and subsequent discussion with the chief executive officer).

[4] *See* Inf. Op. to the Honorable John Blair, May 29,1973.

[5] *See* Op. Att'y Gen. Fla. 89-23 (1989).

[6] *See Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983), recognizing that the function of staff is to inform and advise the decision-maker.

[7] *See* Op. Att'y Gen. Fla. 01-21 (2001).

[8] Section 119.01(1), Fla. Stat. *See also* Art. I, s. 24(a), Fla. Const., representing this state's constitutional pronouncement regarding access to public records, providing:

"Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting

on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."

[9] *See Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.,* 379 So. 2d 633, 640 (Fla. 1980) ("memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business").

[10] *See Tribune Comany v. Cannella*, 458 So. 2d 1075, 1077 (Fla. 1984), *appeal dismissed sub. nom., DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985) (local enactment or policy purporting to dictate additional conditions or restrictions on access to public records is of dubious validity since the legislative scheme of the Public Records Act has preempted any local regulation of this subject).