

## MEMORANDUM

**TO: Mayor and City Commissioners**  
**FROM: A. Kurt Ardaman, City Attorney**  
**DATE: February 20, 2018**  
**RE: The Sunshine Law and its Application to the Belle Isle City Council**

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The following information is an overview of the Government in the Sunshine Law and its application to the City Council and persons elected to the City Council who have not yet taken office.

### **Scope of the Sunshine Law**

Florida's Government in the Sunshine Law, commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings at both the state and local levels. The law is applicable to the Belle Isle City Council and has been applied to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. The law also applies to candidates that have been elected to serve on the City Council (Commissioner-elect) prior to taking office (i.e. being sworn in) to prohibit communications between individuals who will serve on the same City Council regarding matters foreseeably to come before the City Council. Thus, for the purposes of the Sunshine Law, a Commissioner-elect is treated the same as a sitting Commissioner. There are three basic requirements of section 286.011, Florida Statutes:

- (1) Meetings of the City Council must be open to the public;
- (2) Reasonable notice of such meetings must be given; and
- (3) Minutes of the meetings must be taken.

The key to understanding the Sunshine Law is the recognition of what constitutes a meeting of the City Council.

**Meeting Subject to the Sunshine Law**

The Sunshine Law is applicable to any gathering, whether formal or casual, of two or more Members of the City Council to discuss some matter on which foreseeable action will be taken by the City Council. The 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 between the Commissioners to be subject to section 286.011, Florida Statutes. Therefore, you should not have a discussion (by any method) with any Commissioner or other Commissioner-elect regarding any matter that may foreseeably come before the City Council, outside of a duly noticed public meeting. In no event should an individual Commissioner, outside of a public Council meeting, solicit responses from another Commissioner or respond to a communication from another Commissioner regarding a matter that may foreseeably come before the City Council. Methods deemed to frustrate the purpose of the Sunshine Law might also trigger application of Sunshine Law to individual Commissioners or persons acting on their behalf.

*Written Correspondence Between Commissioners*

The use of a written correspondence, including e-mail correspondence, prior to a public hearing by one Member to discuss with, solicit opinions and comments from, or inform other Members a subject of which will be discussed at a public hearing is a violation of the Sunshine Law. In addition, written correspondence including e-mail messages made or received by the Members in connection with official business are public records and subject to disclosure under the Public Records Act.

A Commissioner may prepare and circulate an informational memorandum or position paper to other Commissioners; however, the use of a memorandum to solicit comment from other Commissioners or the circulation of responsive memoranda by another Commissioner would violate the Sunshine Law. See AGO 01-20; AGO 90-03 (circulation of proposed contract among board members for comment to be provided to other members prohibited); AGO 96-35 (use of memorandum or position paper by school board member to solicit comments from other members prohibited).

If a Commissioner responds to another Commissioner's informational memorandum or position paper relating to a matter likely to come before the Council, such response would violate the Sunshine Law. Thus, to avoid the possibility of another Commissioner responding to a position paper or informational memorandum in violation of the Sunshine Law, it is recommended that Commissioners not circulate correspondence to another Commissioner or Commissioners relating to matters likely to come before the Council prior to a public Council meeting.

As seen above, the key to whether a Sunshine Law violation occurs is whether a communication between board members solicits or results in responsive communications from other board members. Nevertheless, the Florida Attorney General has strongly discouraged the practice of board members circulating position statements among themselves even where no responsive communications occur. See AGO 2001-21.

#### Telephone Conversations

The use of a telephone to conduct discussions between Commissioners does not remove the conversation from the requirements of section 286.011, Florida Statutes.

#### Use of Computer/E-mail

The use of private or public computers by Commissioners to communicate among themselves on issues pending before the Council subject to the Sunshine Law. Furthermore, e-mail messages made or received by a Commissioner in connection with official business are public records and subject to disclosure in the absence of a statutory exemption from public inspection. Under Chapter 119, Florida Statutes (the Public Records Act), it is the nature of the record itself, not its physical location, which determines whether a record qualifies as a “public record.” Emails and other written correspondence made or received by a Commissioner in connection with City business are public records and are subject to disclosure and proper retention. If emails are of a purely personal nature and do not include information pertaining to the conduct of City business, such emails need not be disclosed. Public records retain their public character and remain subject to public disclosure and retention regardless of whether they are stored, sent or received in private or public email accounts. Thus, regardless where a record is stored, if such record was made in connection with the transaction of official City business, such record must be disclosed and properly retained unless there exists an applicable statutory exemption. In addition, information stored in a City computer is as much a public record as a written page in a file stored in a filing cabinet. Therefore, it is recommended that you do not use the City e-mail system or use the City’s computers to convey personal messages or store personal files that you want kept private.

#### *Use of Websites/blogs*

The use of a website blog or message board to solicit comment from other members of the Council by their response on matters that would come before the Council would trigger the requirements of the Sunshine Law. Such action would amount to a discussion of public business through the use of the electronic format without appropriate notice, public input, or statutorily required recording of the minutes of the meeting. While the mere posting of a position does not

implicate the Sunshine Law, it would appear that any subsequent postings by other Commissioners on the subject of the initial posting could be construed as a response which would be subject to the statute.

While there is no statutory prohibition against a Commissioner posting comments on a privately maintained electronic bulletin board or blog, nor is there any statutory proscription against a Commissioner serving as the webmaster of such a site, Commissioners must not engage in an exchange or discussion of matters that foreseeably will come before the Council for official action. The Florida Attorney General has stated that use of such an electronic means of posting one's comments and the inherent availability of other participants or contributors to act as liaisons would create an environment that could easily become a forum for Commissioners to discuss official issues which should most appropriately be conducted at a public meeting in compliance with the Government in the Sunshine Law. It would be incumbent upon the Commissioners to avoid any action that could be construed as an attempt to evade the requirements of the law.

Furthermore, the Florida Attorney General has opined that a Commissioner's postings on a private website or blogs commenting on matters involving the Commissioner's public duties or City business is subject to the requirements of the Public Records Act. The individual Commissioner who creates the public documents through e-mails and posted comments on a private website or blog would be responsible for ensuring that the information is maintained in accordance with the Public Records Law and the City's retention schedule.

*Use of Nonmembers as Liaisons Between Commissioners*

The Sunshine Law is applicable to meetings between a Commissioner and an individual who is not a Commissioner when that individual is being used as a liaison between, or to conduct a de facto meeting of, the Commissioners. The City Manager is not a Member of the City

Council and thus, may meet with individual Commissioners; however, the Manager may not act as a liaison for Commissioners by circulating information and thoughts of individual Commissioners. Therefore, a City Manager should refrain from asking each Commissioner to state his or her position on a specific matter which will foreseeably be considered by the Council at a public meeting in order to provide the information to the other Members.

A Commissioner may express his or her views or voting intent on an upcoming matter to a news reporter prior to the scheduled public meeting without violating the Sunshine Law, so long as the reporter is not being used by the Member as an intermediary in order to circumvent the Sunshine Law requirements.

### **Discussions Covered by the Sunshine Law**

#### *Fact-finding Committees*

A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for committees established for fact-finding only. When a committee has been established strictly for, and conducts only, fact-finding activities, i.e., strictly information gathering and reporting, the activities of that committee are not subject to section 286.011, Florida Statutes. The fact-finding exception to Sunshine Law does not apply to the City Council, since the City Council makes the ultimate decisions for the City.

#### *Investigative Meetings or Meetings to Consider Confidential Material*

The Sunshine Law is applicable to investigative inquiries of the City Council. The fact that a meeting concerns alleged violations of laws or regulations does not remove it from the scope of the law. The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, section 286.011, Florida Statutes, should be construed as containing no exceptions.

#### *Legal Matters*

The City Attorney is not a member of the City Council, thus the City Attorney may meet and discuss matters with an individual Commissioner. However, the City Attorney cannot meet or correspond with more than one Commissioner at a time to discuss City business foreseeably to come before the City Council for action absent the existence and use of one of the few statutory exemptions for open public meetings. There are statutory exemptions that apply to some discussions of pending litigation between the City Council and its attorney. The City Council may meet in private with the City Attorney to discuss pending litigation to which the City is presently a party before a court or administrative agency, provided that the following conditions are met:

- a. The Council's attorney shall advise the Council at a public meeting that he desires advice concerning the litigation.
- b. The subject matter of the meeting shall be limited to settlement negotiations or strategy sessions related to litigation expenditures.
- c. The entire session shall be recorded by a certified court reporter.
- 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.
- e. The transcript shall be made part of the public record upon conclusion of the litigation.

The legislative history of the private Council – attorney meetings exemption to the Sunshine Law indicates that this exception was only intended to apply to discussions concerning pending litigation, rather than a final action relating to settlement negotiations or litigation expenditures. The decision to settle a case for a certain amount of money is a decision which must be voted on by the City Council in public. Only the City Council, City Manager, City Attorneys (including outside counsel retained for litigation) and the court reporter are authorized to attend a closed Council - attorney session. All other staff members or consultants are not allowed to be present. This type of City Council – City Attorney meeting to discuss pending litigation not in a public forum is often referred to as an Attorney-Client Executive Session or Executive Session.

#### *Interviews of Persons Appointed by City Council*

The Sunshine Law applies to meetings of the City Council when interviewing applicants for City positions appointed by the Council, when conducting job evaluations of City employees answering to and serving at the pleasure of the Council, and when conducting employment termination interviews of City employees who serve at the pleasure of the Council. A selection committee appointed to screen applications, and rank selected applicants for submission to the City Council would be subject to the Sunshine Law even if the City Council were not bound by the committee's rankings.

#### *Quasi-judicial Proceedings*

The Florida Supreme Court has stated that there is no exception to the Sunshine Law which would allow closed-door hearings or deliberations when a Council is acting in a "quasi-judicial" capacity. Examples of when quasi-judicial hearings will be conducted by the City Council are requests for variances, site plans, special exceptions and development order approvals affecting a small group of individuals or properties.

When quasi-judicial proceedings are necessary, certain elements of due process must be given to the parties in those proceedings exceeding the requirements of the Sunshine Law. The right of due process includes the right: to reasonable notice, to a hearing, to give and submit testimony and evidence at a hearing on the quasi-judicial matter, and for the Council's decision to be based on the testimony and evidence entered in the record at the hearing.

Communications with parties to quasi-judicial proceedings outside of the context of a public hearing, or ex parte communications, do not violate the Sunshine Law. Parties to a quasi-judicial proceeding would include the applicant, persons speaking in favor or against the proposed approval and the City's staff. However, such ex-parte communications may constitute a presumptive prejudice of another party's due process rights, which can subject the Council's action to challenge, unless such communications are disclosed during the public hearing concerning the matter discussed.

If ex parte communications are sent or received by a Commissioner, it is necessary that such Commissioner disclose at the public hearing on the quasi-judicial matter the nature of the ex parte communication. Disclosing the ex parte communication at the public hearing will allow the aggrieved party the opportunity for rebuttal and provide the some due process protection for any party who has been prejudiced by the ex parte communication. It is recommendation that the ex parte communication disclosure occur during the public hearing prior to the presentations from the applicant and other persons who desire to participate in the public hearing.

### **Sunshine Law Application to Other Situations**

#### *Members of Different Boards*

The Sunshine Law does not apply to a meeting between individuals who are members of different boards unless one or more of the individuals has been delegated the authority to act on behalf of his board.

Community Forums Sponsored by Private Organizations

A “Candidates' Night” sponsored by a private organization at which candidates for public office, including several incumbent City Commissioners, will speak about their political philosophies, trends, and issues facing the City, is not subject to the Sunshine Law unless the Commissioners discuss issues coming before the Council among themselves.

City Commissioners Attending Other City Board Meetings

The Sunshine Law does not prohibit a Commissioner from attending other City board meetings and commenting on agenda items that may subsequently come before the City Council for final action. However, a Commissioner attending such a meeting may not discuss or argue those issues with another Commissioner attending the same meeting. Thus, if two or more Commissioners are present at another City board meeting, it is recommended that Commissioner(s) not comment on matters likely to come before the Council in the presence of other Commissioner(s) to avoid the potential of a response by another Commissioner in violation of the Sunshine Law. Please note however, that if City Commissioners attend other City boards meetings dealing with issues that may subsequently come before the City Council in a quasi-judicial hearing, caution should be used. A Commissioner’s discussions with the other City board in this context may constitute a violation of the due process rights of the persons involved in the quasi-judicial hearing, since the Commissioner may be sitting as a judge/decision maker in a subsequent quasi-judicial proceeding on the matter.

Social Events

Members of the City Commission are not prohibited under the Sunshine Law from meeting together socially, provided that matters, which may come before the City Council, are not discussed at such gatherings.

## **Sunshine Law Notice and Procedural Requirements**

### *Notice*

A key element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. Notice is required even though meetings of the City Council are "of general knowledge" and are not conducted in a closed-door manner.

### *Place Where Public Meeting Held*

The courts have recognized that the mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law. Advance notice must be given, the public must be afforded a reasonable opportunity to attend, and minutes must be promptly recorded and made available for inspection. For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. For example, a 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. For public meetings where a large turnout of the public is expected, reasonable steps should be taken to ensure the facilities where the meeting will be held will accommodate the anticipated turnout. The Florida Attorney General has opined that 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.

### *Exclusion of Certain Members of Public*

All persons who choose to attend a public meeting may attend. The City Council may adopt reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior of the part of those persons attending a public meeting. A rule or policy, which prohibits the use of nondisruptive or silent tape recording and video recording devices, is invalid. A court has held that a government agency board violated the Sunshine Law by requesting that bidders responding to a request for proposal from the agency voluntarily excuse themselves from each others' presentations since the action amounted to a de facto exclusion of the competitors.

#### *Inaudible Discussions*

A violation of the Sunshine Law may occur, if, during a recess of a public meeting Commission members discuss issues before the Council in a manner not generally audible to the public attending the meeting. Therefore, even in the public forum, refrain from passing notes or whispering comments between other Commissioners concerning matters pending or likely to come before the City Council.

#### *Abstaining From Voting at Public Meeting*

Section 286.012, Florida Statutes, provides that no Commissioner who is present at any City Council meeting 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 City Commissioner present, except when: (i) with respect to any such Member, there is, or appears to be, a possible conflict of interest prescribed in Chapter 112, Florida Statutes, or (ii) in the context of a quasi-judicial proceeding abstention from a Member is needed to ensure a fair proceeding free from potential bias. Therefore, a Commissioner who is present at a meeting must vote unless one of the two above situations exists.

A voting conflict exists when a vote:

- would inure to the Commissioner’s special private gain or loss;
- the Commissioner knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained;
- Commissioner knows would inure to the special private gain or loss or a relative or business associate of the member.

Please consult with the City Attorney in advance of a meeting in which the applicable vote will occur if you believe that you may have a voting conflict or you are uncertain as to whether you have a voting conflict.

### **Penalties for Violating Sunshine Law**

#### *Criminal Penalties*

Any Commissioner who *knowingly* violates the Sunshine Law is guilty of a misdemeanor of the second-degree. A person convicted of a second-degree misdemeanor may be sentenced to a term of imprisonment not to exceed 60 days and/or fined up to \$500.

#### *Removal From Office*

The Governor may suspend a Commissioner who is indicted or informed against for any misdemeanor arising directly out of his or her official duties; this includes an allegation of a Sunshine Law violation. If convicted, the Commissioner may be removed from office by executive order of the Governor.

#### *Non-criminal Infractions*

The Sunshine Law imposes non-criminal penalties for violations of the Sunshine Law by providing that any public official violating the provisions of the Sunshine Law is guilty of a non-criminal infraction, punishable by a fine not exceeding \$500. A non-criminal violation of the Sunshine Law *does not require a knowingly* violation by a Commissioner. Therefore, a

Commissioner need not have intended to circumvent the purpose of the Sunshine Law to have a non-criminal penalty imposed against the Commissioner.

Attorney's Fees

Reasonable attorney's fees will be assessed against the City Council if it is found to have violated section 286.011, Florida Statutes. Such fees may be assessed against the individual Commissioner except in those cases where the Council sought, and took, the advice of its attorney; such fees may not be assessed against the individual Commissioners.

Civil Actions for Injunctive Relief

The Sunshine Law gives the Circuit Court the jurisdiction to issue injunctions enjoining any violation of the Sunshine Law. On a showing by any citizen that the Sunshine Law was violated in particular respects, a court may enjoin a future violation that bears some resemblance to the past violation.

Validity of Action Taken in Violation of the Sunshine Law and Subsequent Corrective Action

The Sunshine Law provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting. Recognizing that the Sunshine Law should be construed so as to frustrate all evasive devices, the courts have held that action taken in violation of the law was void.