

## **Lahmeur, Merriane**

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**From:** Johnston, Paige  
**Sent:** Wednesday, February 26, 2020 5:50 PM  
**To:** WC Gentry (wcgentry@gentrylaw.net)  
**Subject:** Strategic Planning Commission  
**Attachments:** AGO 2011-04.pdf

Commissioner Gentry,

I am sorry I could not call you back yesterday but I was preparing for the City Council meeting and had other commitments related to Council that needed attention.

Kirby Oberdorfer and I spoke by phone with Pat Gleason, an Open Government attorney with the Attorney General's Office in Tallahassee.

We discussed the intended composition of the Strategic Planning Commission as well as the Advisory Board. Pat opined that regardless of whether elected officials, staff or Council Members were on either the Commission or Board, as members they would be subject to Sunshine and could not discuss any matter that could foreseeably come before the Board. She also agreed that Strategic Planning is such a broad topic that it really would hamper the members' ability to discuss ordinary business which may be discussed between say Council Members and the Sheriff or Council Members and the CAO.

She stated that at the state level, many elected officials, including the Attorney General, are appointed to various boards regarding different topics like crime, opioid abuse, etc. She said that if the Attorney General, for instance, sat on the opioid abuse commission with a county sheriff, they would be bound by Sunshine Law and would not be able to address matters related to opioids- this would make their communications on local county matters difficult as well.

As a result, she said that it is common for each of the elected officials to select a designee who "sits in his or her shoes" on the board. Thus, in the example with the Attorney General, the designee would be the Sunshine Law board member and could not discuss opioid matters with the county sheriff but the Attorney General would be free to talk to the sheriff. She said that it is very common that the elected officials or higher ranking appointed officials just don't sit on boards for this reason and have designates.

She referred me to Attorney General Opinion 2011-04 for reference, which I have attached for your review. I also included the page in the Government in the Sunshine Manual that deals with staff or board members sitting on another board.

She stated that having designees sit on the boards (both the main and advisory) would be the way to go. She stated that the risks of civil or criminal liability for violation of the Sunshine Law is possible for those who sit on a board and should not be minimized.

Also, she stated that as to fact finding, one cannot use this as a sidestep of the Sunshine Law and that the boards I discussed, even though they be advisory and make recommendations, would still be considered boards subject to the Sunshine Law.

Finally, I asked her about whether the appointment of the board members could be established so that they have a set term where they are active for say the first year as the board and then only reconvene or come together at set specific timeframes.

As you suggested, the commission would not be able to meet, dissolve and then meet again without being reappointed. If they were to dissolve after the establishment of the Strategic Plan, they would need to have a mechanism to be reappointed in order to meet and provide input on annual reports or to conduct any business.

She did suggest that you all consider having staggered terms if you intended the members to meet over several years since there would likely be turnover in the elected officials and members depending on political changes and elections. She said that one Sheriff would likely pick a designee different from the next incoming Sheriff so the staggered terms would take this into account and allow for changes in representation by different elected or appointed officials.

She also thought that the types of folks I described as sitting on the advisory board (Chamber of Commerce, university presidents, etc.) may not want to be hamstrung to Sunshine Law to the extent that this would affect their ability to talk to other members of the advisory board and that designees should be available for them as well as they would have some of the same issues with Sunshine Law and other advisory board members.

I will also provide this report at the meeting tomorrow but wanted you to have this information in advance since you reached out.

Thanks,

Paige  
Paige H. Johnston



ATTORNEY GENERAL  
**ASHLEY MOODY**

FLORIDA OFFICE OF THE ATTORNEY GENERAL



**Advisory Legal Opinion - AGO 2011-04**

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Number: AGO 2011-04

Date: March 15, 2011

Subject: Sunshine Law, discussions between appointing officers

The Honorable Michael F. McAuliffe  
State Attorney  
Fifteenth Judicial Circuit  
401 North Dixie Highway  
West Palm Beach, Florida 33401-4209

RE: GOVERNMENT IN THE SUNSHINE - CRIMINAL JUSTICE COMMISSIONS -  
COUNTIES - SHERIFFS - STATE ATTORNEYS - effect of appointment of other  
to serve on commission instead of sheriff or state attorney on  
communication between sheriff and state attorney. s. 286.011, Fla.  
Stat.

Dear Mr. McAuliffe:

You ask substantially the following question:

Would section 286.011, Florida Statutes, apply to communications  
between the state attorney and the sheriff when, as authorized by  
ordinance, each elects to appoint an individual in each officer's place  
to serve as a member of the Palm Beach County Criminal Justice  
Commission?

In sum:

When the state attorney and the sheriff elect to appoint individuals to  
serve on the Palm Beach County Criminal Justice Commission in the place  
of each officer, as authorized by county ordinance, neither the state  
attorney nor the sheriff would appear to be a member of the commission  
such that communications between the two officials would be subject to  
section 286.011, Florida Statutes.

You state that the Palm Beach County Criminal Justice Commission  
(commission) is an advisory board established by county ordinance. The  
commission functions to make recommendations to the county commission

on policies and programs designed to: coordinate law enforcement and crime prevention efforts; provide an efficient, cost effective, and timely county criminal justice system; and permanently reduce crime. [1] The county ordinance creating the commission currently provides that the sheriff and the state attorney are members of the commission. [2] There has been concern that in numerous instances when the sheriff and the state attorney communicate regarding pending criminal investigations and prosecutions that there may be discussion involving matters which may foreseeably come before the commission for official business. To address these concerns, the county is contemplating amending the ordinance to enable constitutional officers to either serve as members of the board or to appoint others to serve in their places. The question arises, therefore, whether communications between two such officers who have appointed individuals to serve on the commission would be subject to section 286.011, Florida Statutes.

Section 286.011, Florida Statutes, commonly referred to as the "Sunshine Law," provides a right of access to governmental proceedings of public boards and commissions. The law applies equally to elected or appointed boards and covers any gathering, whether formal or casual, of two or more members of the same board to discuss a matter upon which foreseeable action will be taken by the board. [3]

There is no question that the Palm Beach County Criminal Justice Commission, a collegial commission created by county ordinance to advise the county commission on criminal justice matters, is a public board or commission subject to the Sunshine Law. [4] In Attorney General Opinion 93-41, this office determined that communications between the sheriff and state attorney, as members of the county's criminal justice commission, were subject to the Sunshine Law when such discussions involved matters which foreseeably could come before the commission. The opinion noted, however, that to the extent that the discussions related to an ongoing criminal case or investigation or related to factual inquiries or matters upon which the commission was not required to act, the discussions would not fall within the scope of the Sunshine Law.

In the factual situation you have presented, the proposed county ordinance states that the sheriff and the state attorney will have the option of serving on the commission or each may designate an individual to serve on the board in his or her stead. As you have recognized, the Sunshine Law does not allow a board or commission to delegate its business to an alter ego in order to escape application of the law. [5] This would apply equally to an individual who serves on a board or commission. It does not appear, however, that in appointing an individual to serve on the commission as provided by county ordinance, the sheriff or state attorney would be delegating authority to an alter ego; rather, to the extent the appointment of the individual removes the sheriff or the state attorney from any connection with the commission, the appointed individual becomes a member of the commission in his or her own right subject to the restrictions of the Sunshine

Law.

As you note, should the sheriff and state attorney appoint individuals to serve on the commission, they (the sheriff and the state attorney) should not serve as a liaison between the appointed commission members on matters that may foreseeably come before the commission.[6]

Accordingly, it is my opinion that the sheriff or the state attorney who, as authorized by county ordinance, appoints an individual to serve on the Palm Beach County Criminal Justice Commission, is not a member of the commission such that communications between the sheriff and the state attorney would be subject to the Sunshine Law.

Sincerely,

Pam Bondi  
Attorney General

PB/tals

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[1] Section 2-217, Div. 5, Art. 5, Ch. 2, Palm Beach County Code of Ordinances (Ord. No. 88-16, s. 2, 8-16-88), setting forth the objectives of the Palm Beach County Criminal Justice Commission.

[2] See Sec. 2-216, Div. 5, Art. 5, Ch. 2, Palm Beach County Code of Ordinances.

[3] See *Hough v. Stenbridge*, 278 So. 2d 288 (Fla. 3d DCA 1973); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971); and *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).

[4] See Op. Att'y Gen. Fla. 93-41 (1993) (Hillsborough County Criminal Justice Commission created by county ordinance and serving a county-wide agency developing and making recommendations on criminal justice issues is subject to, and must comply with the requirements of, the Government-in-the-Sunshine Law).

[5] See *IDS Properties, Inc. v. Town of Palm Beach*, 279 so. 2d 353, 359 (Fla. 4th DCA 1973), certified question answered sub. nom., *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). See also *News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 547-548 (Fla. 2d DCA 1982) (when public officials delegate de facto authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by those public officials, delegates stand in the shoes of such public officials under the Sunshine Law).

[6] See Op. Att'y Gen. Fla. 74-47 (1974) (city manager who is not

2/25/2020

Advisory Legal Opinion - Sunshine Law, discussions between appointing officers

member of city commission may meet with individual council members, but may not act as liaison for council members to circulate information and thoughts of individual members).

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In some cases, staff members or public officials also serve as members of public boards. If so, discussions between those board members that involve matters which foreseeably could come before the board must be held in the Sunshine. For example, a 1993 Attorney General Opinion concluded that communications between the sheriff and the state attorney, as members of the county's criminal justice commission, would be subject to the Sunshine Law when such discussions involve matters which foreseeably would come before the commission. AGO 93-41. Cf. AGO 11-04, noting that if the state attorney and sheriff elect to appoint individuals to serve on a county criminal justice commission in the place of each officer, as authorized by county ordinance, neither the state attorney nor the sheriff would be a member of the commission so as to make these communications subject to the Sunshine Law. See now s. 286.01141, F.S. (2013), creating a Sunshine Law exemption for that portion of a meeting of a duly constituted local advisory criminal justice commission at which members of the commission discuss active criminal intelligence or investigative information that is currently being considered by or which may foreseeably come before the commission, provided that public disclosure of the discussion is made at any public meeting of the commission at which the matter is being considered.

However, the Sunshine Law is applicable only to discussions of matters which may foreseeably come before the board. For example, the Sunshine Law would not apply to meetings between the mayor and city commissioners where a mayor performs the duties of city manager and the city commissioners individually serve as the head of a city department when the meeting is held solely by these officers in their capacity as department heads for the purpose of coordinating administrative and operational matters between executive departments of city government for which no formal action by the governing body is required or contemplated. Those matters which normally come before, or should come before, the city commission for discussion or action, however, must not be discussed at such meetings. AGO 81-88. Accord AGOs 83-70 and 75-210 (mayor may discuss matters with individual city council member which concern his or her administrative functions and would not come before the council for consideration and further action).

Similarly, the Sunshine Law would not apply to a school faculty meeting simply because two or more members of school advisory council who are also faculty members attend the faculty meeting as long as council members refrain from discussing matters that may come before the council for consideration. Inf. Op. to Hughes, February 17, 1995; and Inf. Op. to Boyd, March 14, 1994.

**C. WHAT MEETINGS OF MEMBERS OF BOARDS ARE COVERED? APPLICATION OF THE SUNSHINE LAW TO:**

1. **Board members attending meetings or serving as members of another public board**
  - a. **Board members attending meetings of another public board**

Several Attorney General Opinions have considered whether one or more members of a board may attend or participate in a meeting of another public board. For example, in AGO 99-55, the Attorney General's Office said that a school board member could attend and participate in the meeting of an advisory committee appointed by the school board without prior notice of his or her attendance. However, the opinion cautioned that "if it is known that two or more members of the school board are planning to attend and participate, it would be advisable to note their attendance in the advisory committee meeting notice."

Moreover, while recognizing that commissioners may attend meetings of a second public board and comment on agenda items that may subsequently come before the commission for final action, the Attorney General Opinions have also advised that if more than one "commissioner is in attendance at such a meeting, no discussion or debate may take place among the commissioners on those issues." AGO 00-68. Accord AGO 98-79 (city commissioner may attend a public community development board meeting held to consider a proposed city ordinance and express his or her views on the proposed ordinance even though other city commissioners may be in attendance; however, the city commissioners in attendance may not engage in a discussion or

