# TAB 1

# OVERVIEW OF APPLICABLE LAWS RELATING TO THE CREATION AND OPERATION OF THE CITY OF PALMETTO, GOVERNMENT IN THE SUNSHINE, PUBLIC RECORDS, AND ETHICS LAWS
(March 2011)

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This memo is designed to give an overview of some of the "Government in the Sunshine" laws, the laws relating to public records, and the laws relating to ethics that may be applicable to the City of Palmetto. This is a very broad overview and may not address all of the specific exemptions which could apply to a given situation.

## GENERAL

The City of Palmetto is a municipality, chartered in 1897. Municipalities have Home Rule authority, pursuant to Article VIII, Section 2(b), of the Florida Constitution, and as such have the authority to exercise any power for municipal purposes unless otherwise prohibited by law. As a municipality, the City must comply with the Government in the Sunshine Law (Chapter 286, Florida Statutes), Public Records Act (Chapter 119, Florida Statutes) and the Ethics laws (Chapter 112, Florida Statutes).

## GOVERNMENT IN THE SUNSHINE

Generally, the Sunshine Law (Section 286.011, Florida Statutes) require (1) that meetings of public boards be open to the public, (2) that the public is given reasonable notice of these meetings, and (3) that minutes are taken. These requirements apply not only to the public board, but to any advisory committees formed by the public board, unless the committee is purely a fact-finding committee.

In the City of Palmetto, the Sunshine Law would apply to the City Commission, Code Enforcement Board, Planning and Zoning Board, Community Redevelopment Agency Board, General Employee's Pension Plan Board, Nuisance Abatement Board, and the Police Officers' Pension Plan Board. If any additional committees are formed by the Commission or any of these boards, the City Attorney should be consulted to determine if the Sunshine Law applies to that committee as well.

The Sunshine Law requirements do not generally apply to staff meetings for a number of very practical reasons relating to communication among members, unless there has been some delegation of decision-making authority to staff members or the staff member is acting as a liaison between board members. This may be an issue for the Development Review Committee and we will be recommending some changes to reduce the possibility of the DRC becoming subject to the Sunshine Law.

## 1. Which meetings must be public?

A question frequently arises as to when a gathering of board members becomes a "meeting" subject to the Sunshine Law. The answer is that the *Sunshine Law apply to any gathering, whether formal or informal, involving two or more members of the same board, where a matter which will foreseeably come before the board for action is being discussed.* Sunshine Law issues will generally not arise in regard to communications between a board member and the Mayor, a board member and staff, or between members of different boards (for example, a City Commissioner and P&Z Board Member). However, when the Mayor or a staff member is having individual discussions with members of the same board, they must be careful not to act as a conduit and pass information or ideas from one board member to another.

There are also instances in which the Sunshine Law will apply even though two board members are not physically present. For example, a telephone conversation between two board members is subject to the Sunshine Law. If the subject of the conversation is a matter that may foreseeably come before the board, then a Sunshine violation may occur.

A written or e-mail report from one board member to the rest of the board, which merely informs them of an issue to be discussed at a upcoming meeting is not a Sunshine Law violation. However, if the report or e-mail solicits responses or comments from the other board members, then Sunshine Law issues may be created. (It should be noted that, as will be discussed further, such e-mail or report must be made available to the public under the Public Records Act regardless of whether or not it falls under the purview of the Sunshine Law.)

One evolving area of the Sunshine Law is internet activity by public officials. Social networking, blogging, message boards, tweeting, and other forms of web-based communications raise new questions regarding the potential applicability of the Sunshine Law.

As a general rule, we would not recommend that board members engage in any of type of communications which could be construed as a back-and-forth debate or discussion between board members regarding board matters. Remember, if a board member sends an e-mail or posts a blog about a board matter, and another board member provides an unsolicited response, it may be that both board members could be found to be in violation of the Sunshine Law, even though the first sender had no intention of starting a dialogue. The only way to avoid the potential for Sunshine issues is to avoid these types of communications regarding board matters altogether.

When a single board member is authorized to take action on behalf of the board, any meetings with regard to that action must be made "in the Sunshine." This would apply to a board member who has been authorized to reject certain options from board consideration, such as meeting with a private contractor and rejecting certain contract provisions on behalf of the board. However, if the board member is only gathering information regarding contract proposals and bringing those back to the board for consideration, then the Sunshine Law would not apply.

## 2. Telephonic meetings

Under Section 286.011, Florida Statutes, meetings of a public board must be held in a public place with a quorum of board members physically present. Thus, under AGO 2003-41,

participation of a board member in a public meeting by telephone conference should only be permitted in extraordinary circumstances. "Extraordinary circumstances" are determined by the board. It should also be noted that any board members participating by phone do not count towards the board's quorum requirements. The City Commission adopted a policy on this issue in 2009.

**3. What kind of notice is required?**

Under the Sunshine Law, the type of notice required varies depending on the circumstances, such as the gravity of the matter considered and the board involved. Chapters 163 and 166 Florida Statutes, provide certain notice requirements for certain types of actions. The only requirement under Section 286.011, Florida Statutes, is that the notice is "reasonable." The City of Palmetto has adopted a regular meeting and workshop schedule by ordinance, so this provides an additional level of notice above that which is required by general law.

Generally, the notice should contain the time and place of the meeting and an agenda, if available. The meeting notices are also required to contain specific information regarding handicapped access to the meeting, as well as a notice that anyone wishing to have a verbatim transcript of the meeting must hire their own court reporter.

**4. What is required for the minutes?**

Written minutes of a meeting must be made. There is no requirement for tape recording or a verbatim transcript. All that is required are brief notes or memoranda reflecting the events of the meeting.

**5. Shade Meetings**

One exception from the Sunshine Law requirements is for meetings between a public board and the board's attorney to discuss pending litigation or adverse administrative proceedings, commonly referred to as a "shade meeting". Shade meetings are limited in their scope to discussions regarding settlement negotiations or strategy related to litigation expenditures. There are many specific procedural issues that must be followed in order to conduct a shade meeting, including strict requirements regarding who may attend. The statute also requires that the shade meeting be recorded by a certified court reporter. So, it is important to remember that while the public may not be present for the shade meeting, the transcripts of the shade meeting(s) will become public record as soon as the litigation has concluded.

**6. Consequences of Sunshine violations**

**a. Criminal penalties**

A knowing violation of the Sunshine Law is a second degree misdemeanor, punishable by up to 60 days in jail and/or a $500 fine. If convicted, the official may be removed from office by executive order of the Governor.

**b. Civil actions**

Sunshine Law issues can result in costly lawsuits against the local government and the individual public officials alleged to have violated the law. The Sunshine Law provides for a plaintiff to recover their attorneys' fees and costs from the local government or individual defendants if they are able to prove a Sunshine Law violation has occurred. Further, if a public official is sued individually, and the official is found to have violated the law, the local government may be prohibited from reimbursing the official for the cost of defending against the claims

**c. Validity of action taken**

Any action taken in violation of the Sunshine Law is generally void ab initio. Thus, any resolutions passed during meetings which violate the Sunshine Law are generally of no effect and must be re-examined, re-discussed, and re-approved at an open meeting.

**d. Cure**

Violations of the Sunshine Law can often be cured by subsequent action of the board. Depending on the nature and status of the matter that was discussed, curative actions may include public disclosure of the violation, board discussion, public hearings and reconsideration of the matter discussed. If you believe you may have violated the Sunshine Law, please contact us so that we can determine how to resolve the issue.

## PUBLIC RECORDS ACT

Generally, all materials made or received by an agency in connection with official business are public records and must be held open for public inspection, unless they are specifically exempted by statute or the Florida Constitution. Section 119.07, Florida Statutes.

**1. What types of materials can be a public record?**

Anything intended to perpetuate, communicate, or formalize knowledge is sufficient to be a public record. This includes computer records and e-mails, including e-mails received by a board member at home which deal with City business. This also includes working drafts or preliminary reports, but may exclude board members' or employees' personal notes to themselves.

**2. Attorney-client records**

Generally, the Public Records Act does not protect communications between a board member and the agency attorney, when those communications are reduced to writing (or e-mail). There are public record exemptions for certain records prepared in conjunction with litigation or adverse administrative proceedings, but unless otherwise instructed by the agency attorney, it should be assumed that any written communications are public record. See Section 119.071(1)(d).

**3. Personnel records**

Unless there is a statutory exemption, personnel records are generally public records. Examples of exempted items are social security numbers, certain complaints made against employees, some criminal history information, and drug test results in the context of a drug-testing program.

**4. Exemptions in general**

There are a number of miscellaneous exemptions from disclosure, so any sensitive information should be referred to our office before the documents are made public. Here are some examples of miscellaneous exemptions found in the Florida Statutes:

a. Bank account, debit, charge, and credit card numbers. Section 119.071(5)(b).
b. Records regarding the ownership of, or security interests in, public obligations. Section 279.11.
c. Certain work product of the agency attorney. Section 119.071(1)(d).
d. Social security numbers. Section 119.071(4)(a).
e. Building plans, blueprints, schematic drawings, and diagrams which depict the internal layout and structural elements of a building owned by the agency. Section 119.071(3)(b).

**5. Retention of records**

The Department of State has adopted a General Records Schedule for State and Local Government Agencies, and we have previously provided the City with a copy of this Schedule. The time for retention of a public record varies greatly depending on the nature of the record. For example, minutes of a regular meeting are required to be kept permanently, while video or tape recordings of the meeting must be kept for 2 years.

**6. Copies of records**

The public may obtain copies of any record, in the form in which it is maintained, upon payment of the fees prescribed by the City. The City's fees may not exceed those prescribed in Section 119.07, Florida Statutes.

The statute also provides for the public to be charged a special service charge in instances where the nature or volume of the request involves extensive clerical or supervisory assistance by City staff. This charge must be reasonable in light of the labor cost actually incurred by the City in providing the service. The court has recently held that (1) this special service charge is applicable regardless of whether or not copies are made, (2) the local government may include the cost of the employee's salary and benefits in calculating the charge, and (3) the local government may collect a reasonable deposit before beginning the research. Board of County Commissioners of Highlands County v. Colby, 976 So.2d 31 (Fla. 2d DCA 2008). In fact, the court noted that a "policy of collecting an advance deposit seems prudent given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records." Id.

## 7. Consequences of Violations

### a. Criminal penalties

Violations of the Public Records laws are generally punishable as a first degree misdemeanor, carrying a maximum jail term of one year, and a maximum fine of $1,000. Public officers may also be suspended or removed from office.

### b. Civil actions

Violations of the Public Records law can result in civil lawsuits against the local government. Under the statute, the local government may be required to pay the Plaintiff's attorneys' fees and costs if suit is filed to gain access to the records, and the court determines that the local government unlawfully withheld the records.

## ETHICS FOR PUBLIC OFFICERS

### 1. Doing business with one's agency

In general, public officers acting in their official capacity are prohibited from doing business with any entity in which the officer or the officer's spouse or child has a material interest. Section 112.313(3). Similarly, a public officer in his or her private capacity generally may not do business with that officer's agency. An officer may not maintain private employment or contractual relationships with a business entity which is subject to regulation by the officer's agency or is doing business with that agency. Section 112.313(7)(a). The officer also may not maintain employment or contractual relationships with a business entity which would create a recurring conflict.

### 2. Conflicting employment or contractual relationships

In general, an officer may not maintain private employment or contractual relationships with a business entity which is subject to regulation by the officer's agency or is doing business with that agency. Section 112.313(7)(a). Officers are also generally prohibited from maintaining employment or contractual relationships with a business entity which would create a recurring conflict.

### 3. Voting conflicts

A board member may not vote on any matter which the board member knows would result in private gain to the board member, any relative, employer or any business associate. Section 112.3143(3)(a). If such a conflict exists, the officer must generally abstain from voting and publicly disclose his or her interest in the matter, then file a written memorandum.

### 4. Acceptance of gifts

A public officer is prohibited from accepting anything of value based on an understanding that the gift would influence the officer's vote, official action, or judgment. Section 112.313(2). The City Commission may adopt more restrictive requirements.

Again, these are very broad summaries of the current laws. If you have questions regarding this Memorandum or any specific instance, please contact us.

cc: Jim Freeman, City Clerk

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