



City of Pensacola

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*Office of
City Attorney*

August 30, 2006

Gregory A. Marcille, Esquire
Assistant State Attorney
190 Governmental Center
Pensacola, Florida 32502

VIA HAND DELIVERY

Re: Complaint of Tom Garner

Dear Mr. Marcille:

Thank you for the invitation in your letter of August 30, 2006, to provide you with information regarding the complaint your office received from Tom Garner alleging violations of the Sunshine Law by certain officials of the City of Pensacola.

The essence of Mr. Garner's complaint appears to be that individual members of the City Council violated Florida's Government-In-The-Sunshine Law by communicating their intent to support a proposed Community Maritime Park project on a City-owned parcel of land, commonly known as the Trillium property, prior to any public meeting concerning the proposal. Mr. Garner asserts that the violation of the law was evidenced by (1) a January 16, 2005, newspaper story in which several Council members expressed varying degrees of support for the conceptual project as they understood it at that time; (2) e-mails and other communications indicating that proponents of the Community Maritime Park project had briefed individual members of the City Council on their proposal in advance of a public meeting; and (3) a series of meetings between the City Manager and individual members of the City Council in December 2004, March 2005, and June 2005. Mr. Garner's lengthy complaint contained various other assertions and alleged evidence which he imagines supports his fanciful conclusion that the law has been violated.

Florida's Government-In-The-Sunshine Law, §286.011, Florida Statutes, requires that "meetings of any board or commission of

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any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting." The law also requires that reasonable notice be provided of all such meetings, that minutes of such meetings must be promptly recorded and open to public inspection, and that any public officer who violates the law is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.

I can confirm for you that proponents of the Community Maritime Park project did brief individual members of the City Council on their proposal in advance of the first public meeting of the City Council concerning the project, that individual members of the City Council expressed in varying degrees their support for the project as they understood it prior to the first public meeting of the City Council, and that the City Manager has briefed individual members of the City Council on aspects of the proposed project on more than one occasion.

None of these facts, nor any manner by which Mr. Garner attempts to embellish them, constitutes a violation of §286.011, Florida Statutes.

Respecting comments by individual members of the City Council to the news media, you may find a 1981 opinion by Florida's Attorney General, AGO 81-42, to be instructive. A copy of the opinion is enclosed for your information. That opinion concerned a practice by a local newspaper in Boca Raton, Florida, of interviewing members of that community's city council in advance of scheduled public meetings, inquiring as to the voting intent of members of the governing body with respect to matters later scheduled for public meetings, and publishing in the newspaper what the members of the governing body said about their probable votes.

The Attorney General found no violation of §286.011, Florida Statutes, in such circumstances. The Attorney General further opined that such activities "can serve as a positive

stimulant for interested citizens to participate more in the governing process." The Attorney General cautioned that a city council member should refrain from disclosing his or her probable vote on a matter of public benefit in advance of a public meeting "if in fact the representative of the news media or any other person is being designedly or intentionally used by the city council or a member thereof as its or his or her agent or intermediary to circumvent or evade the public meeting requirements of the Sunshine Law." There exists no evidence that any such thing has occurred here.

With respect to briefings or other meetings between individual members of the City Council and proponents of the Community Maritime Park project, the Sunshine Law is not violated when such briefings or meetings occur. Meetings between individual members of public bodies and citizens, business representatives, neighborhood associations, and other groups occur all of the time and are part of the responsibilities of public officials to communicate with their constituents and to be informed about matters concerning which they might foreseeably be required to take official action. The Sunshine Law is violated in such meetings only when public officials meet between themselves outside of public meetings or use third persons as liaisons or intermediaries to circumvent or evade the public meeting requirements of the Sunshine Law. There is no evidence that any such thing occurred here.

Respecting meetings between the City Manager and individual members of the City Council, such meetings similarly occur quite frequently. It is part of the City Manager's responsibilities to keep members of the City Council informed by sharing with them matters about which public meetings may be forthcoming or to describe to Council members events or actions which have occurred subsequent to public meetings.

In December 2004, the City Manager held meetings with individual members of the City Council, as is his custom following the recent City Council election held in November, so that he could inform Council members of matters which they could expect to see in the months ahead. During those meetings the City Manager informed Council members individually that they could expect to hear from proponents of a concept for the

redevelopment of the City-owned Trillium property. In March 2005, the City Manager reported to individual Council members about the results of a feasibility study for the proposed Community Maritime Park project which had been undertaken at the direction of the City Council at a recent prior meeting. The results of that feasibility study were publicly reported at a subsequent public meeting of the City Council.

In June 2005, the City Manager reported to individual members of the City Council that he had received legal advice that the City should publish a notice of intention to dispose of real property in order to comply with a statutory requirement so as to move forward legally with the Community Maritime Park project.

Although it is not addressed in Mr. Garner's complaint, the City Manager and the undersigned City Attorney met with individual members of the City Council in the spring of 2006 to brief them on and answer their questions concerning the organization and contents of a proposed master development agreement, a proposed master lease agreement, and a proposed interlocal agreement to formalize the manner in which the Community Maritime Park project was proposed to take place.

None of these conversations violate the Florida Sunshine Law. I hope that you will very rapidly come to the same conclusion.

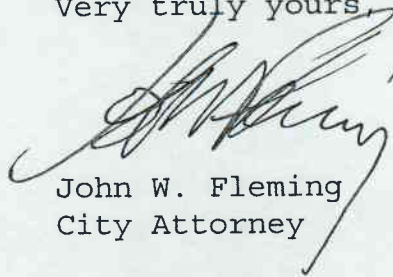
Enclosed for your information is a summary list prepared by the City Clerk of meetings of the City Council and of the City's Community Redevelopment Agency as well of reports and studies presented to the City Council concerning the Community Maritime Park project. This list is not all inclusive of every public meeting held by the City Council because the list does not include publicly noticed committee meetings in which the project was discussed and public input was received in advance of meetings intended to propose formal City Council action. Nor does the enclosed list include other meetings to which the public was invited to discuss the project, but which were not conducted directly under the auspices of the City of Pensacola.

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Anyone who examines this list and reflects upon the very open and public debate about the merits of the proposed Community Maritime Park project cannot help but conclude that there has been absolutely no effort by anyone associated with the City of Pensacola to circumvent or evade the public meeting requirements of Florida's Sunshine Law.

If I can provide any further information or documentation for you to facilitate your further review of this matter, do not hesitate to call on me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "John W. Fleming".

John W. Fleming
City Attorney

cc: Mayor and City Council
Thomas J. Bonfield, City Manager

Florida Attorney General Advisory Legal Opinion

Number: AGO 81-42

Date: May 29, 1981

Subject: Sunshine law ; news reporters

Mr. M. A. Galbraith, Jr.
City Attorney
City of Boca Raton

QUESTIONS:

1. Is it a violation of the Government in the Sunshine Law for a news reporter to convey statements of voting intent on a particular matter made by a member of the governing body of a public agency subject to the Sunshine Law to another member of that governing body in advance of a scheduled public hearing on the matter, regardless of whether the information is conveyed orally or during an interviewing process or in the form of a published news story?

2. Is it a violation of the Government in the Sunshine Law for a member of a governing body of a public agency subject to the Sunshine Law to make a statement of voting intent on a particular matter to a news reporter known by the member to engage in the journalistic practice of obtaining and reporting the statements of voting intent in advance of scheduled public hearings?

SUMMARY:

Unless and until judicially determined otherwise, it is not a violation of the Sunshine Law, s. 286.011, F.S., for a news reporter to convey statements of voting intent on a particular matter made to him by a member of the governing body of a public agency subject to the Sunshine Law to another member of that governing body in advance of a scheduled public hearing on the particular matter so long as the news reporter is not being designedly appointed and used by a member of the council or the council itself as its or his or her agent or intermediary to circulate or collect and convey the information and thoughts of such member or members to the governing board in order to circumvent or evade the Sunshine Law. In the same vein, it is not a violation of the Sunshine Law for a member of the governing body to express his views or voting intent on an upcoming matter to a news reporter who the member knows will probably publish the same in a local newspaper prior to the scheduled public hearing so long as the news reporter is not being designedly appointed and used by the member or any other member of the council as an intermediary in order

to circumvent or evade the public meeting requirements of the Sunshine Law.

As your questions are interrelated, they will be answered together. With qualifications, both questions are answered in the negative.

You state that it is a common practice among representatives of the local news media to interview city councilmembers individually in advance of council meetings regarding controversial issues and to publish the results of the interviews, including the councilmembers' probable votes, prior to the city council meetings at which the items of business are scheduled for discussion. You further state that because of this practice a poll of city councilmembers has been taken and the results announced prior to the public hearing on the matter. You state it may possibly constitute a 'meeting' when the members of a city council, the day before a scheduled public hearing on a particular matter, read in a local newspaper what the probable outcome of the vote will be. It is also your opinion that a news story publishing the probable vote of individual councilmembers in advance of a council meeting may serve the same function as an intermediary who collects and conveys the same sort of information in private and in violation of the Sunshine Law. For the reasons stated herein, I do not share the same view.

The Government in the Sunshine Law, s. 286.011, F.S., provides:

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

(3) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

It is true that the Government in the Sunshine Law, s. 286.011, F.S., is not limited to meetings at which final, formal actions are taken. It applies to 'any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the

board.' Board of Public Instruction of Broward County v. Doran, 224 So.2d 693 (Fla. 1969); Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260 (Fla. 1973).

The test for determining whether a violation of the law has occurred is whether *the members* have dealt in secret with any matter on which foreseeable action may be taken by the board. (Emphasis supplied.) Hough v. Stembridge, 278 So.2d 288 (3 D.C.A. Fla., 1973). The Sunshine Law applies only when *two or more members* of a public board deal with some matter on which foreseeable official action will be taken. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971); Board of Public Instruction of Broward County v. Doran, *supra*. As any conversation or interview between an individual board member and a news reporter would not involve 'two or more members of a public board,' it is my opinion that ordinarily such conversations or interviews are not prohibited by s. 286.011, F.S. Cf. AGO 75-59 (telephone communications of director of utility authority and city manager to individual members of their respective legislative bodies not per se prohibited). I emphasize, however, that if the news reporter in fact has been appointed as the agent of and is being designedly used by a member or members of the council as or for the purpose of a 'liaison' or 'intermediary' to calculate and circulate among the board members the thoughts of such member or members in order to circumvent the statute, then such conversations or interviews might well be found by the courts to be violative of the letter and spirit of the law. The Sunshine Law should be construed so as to frustrate all evasive devices. Town of Palm Beach v. Gradison, 296 So.2d 473 (Fla. 1974). As stated in AGO 074-47, '[c]are should be taken, however, not to intentionally avoid the requirements of an open meeting by having an individual who is not a board member act as a *liaison for board members* by circulating information and thoughts of individual councilmen to the rest of the board.' (Emphasis supplied.)

The American Heritage Dictionary of the English Language defines 'liaison' as, *inter alia*, an instance or means of communication between bodies, groups or units; a close relationship. The same dictionary defines an 'intermediary' as, *inter alia*, one that acts as an agent between persons or things. If, in fact, the news reporter is being *intentionally used by the council or a member thereof as an agent of the council or councilmember* by which to convey or circulate information or thoughts to be rest of the board then such action is in my opinion violative of the letter and spirit of the law. However, based on the facts as presented by you, I am inclined to view the news reporter more as the agent of the print media and public at large.

In Town of Palm Beach v. Gradison, *supra* at 475, the Supreme Court stated, *in dictum*, as follows: