

GOVERNING ABOVE BOARD

Miami-Dade County Advisory Board Ethics Education Program

presented by
The Commission on Ethics & Public Trust

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*The men and women in power are delegated by the people.
They are given definite missions by the people.
In the fulfillment of their missions, they remain strictly subordinate
to the people who have delegated them.
The governing person is a leader entirely under the control
of those whom he or she leads.
Authority belongs not to the leaders, but to the led.
Real leadership, the one that is inseparable from authority,
belongs not to the government, but to the governed.*

Yves. R. Simon, Philosophy of Democratic Government 146 (6th ed. 1966).

I. Florida's Sunshine Law—"Public Meetings" Fla. Stat. § 286.011 (2004)

the sunshine law applies to—

- publicly created advisory boards that make recommendations re: official acts to be taken
- any gathering (formal or informal) of two or more members of the same board
- any discussion of public business or any matter that will foreseeable come before the board for action
- elected as well as appointed boards and their subcommittees
- staff members—but this depends on the nature of the actions they perform

three basic requirements of the sunshine law

- meetings must be open to the public
- the public must receive reasonable notice of meetings
- minutes of the meetings must be taken and open to public inspection

types of meetings subject to the sunshine law

- formal gathering of two or more members of same board
 - written communications, when reports are circulated among members for comments and these comments are provided to other members
 - telephone conversations
 - computer records
 - delegation of authority to a single board member
 - use of nonmember liaisons between board members
 - informal discussions, workshops
 - meetings to discuss personnel matters
- exemptions:** meetings re: certain confidential materials, *e.g.*, investigative meetings

notice and other procedural requirements of the sunshine law

- reasonable notice—definition varies, but consider including the following
 - i. notice the time and place of meeting, along with the agenda, if available
 - ii. prominently display the notice in the agency's office, in a place set aside for that purpose
 - iii. notice emergency meetings at least 24 hours in advance
 - iv. send press releases, make phone calls, and for matters of critical public concern, advertise in local newspapers of general circulation
- reasonable notice is also required for a rescheduled meeting, *e.g.*, when a quorum is not present or when meeting is adjourned to a later date to consider unfinished business
- meetings at facilities that discriminate or unreasonably restrict public access are prohibited
- luncheon meetings should be avoided
- out-of-town meetings are generally prohibited, but a balancing test may be used
- inspection trips are not prohibited, as long as discussions related to the business of the board are *not* discussed

- excluding certain members of the public is not allowed, unless they are unruly and disruptive
- cameras and tape recorders are permitted, but videotaping cannot be disruptive
- publishing an agenda is not required

public's right to participate in meetings

- the public has an inalienable right to be present and be heard at all deliberations
- the public must be allowed a *meaningful opportunity* to participate, but in cases where executive functions are being carried out, the public may be limited to attendance only, and excluded from participation
- public boards may adopt reasonable rules to (1) limit the amount of time an individual may address the board, (2) confine the speaker to agenda items, and (3) require speakers to register in advance of the meeting

voting

- use of secret ballots, coded letters, or numbers is prohibited
- *abstaining* from voting is not allowed by law, unless the member has or appears to have a conflict of interest
- members may *absent* themselves *prior* to a vote being taken, but this is discouraged, particularly if it results in the board losing a quorum

minutes

- written minutes must be kept and open to public inspection
- minutes need not be verbatim transcripts; a summary or series of brief notes is acceptable as long as all official votes are recorded and members' preferences are identified for the record
- sound recordings not required

penalties for noncompliance

- criminal misdemeanor in the second degree for a knowing violation
- removal from office
- non-criminal infractions—fines not to exceed \$500
- reasonable attorney's fees (against board or individual members), but if board has taken the advice of counsel, no fees are levied against individual members
- official actions taken by the board during a Sunshine violation are voided
- additional injunctive or declaratory relief may be ordered

review questions

1. A fellow board member calls you to discuss a matter that was voted on last month. May you discuss this matter over the phone?
2. Your board is planning a strategic planning meeting. No formal votes will be taken. No official business will be discussed. The members want to plan their management goals for the upcoming year. Is this meeting subject to the sunshine law?
3. Your board has an "Events Committee." You'd like to have a lunch meeting with the committee members to go over the upcoming event? Can you meet over lunch?

2, authority belongs not to the leaders, but to the led

II. Florida's Public Records Act

Fla. Stat. § 119.07 (2004)

freedom of information

- Fla. Const. art. I, § 24 provides the public with the constitutional right to access any public record made or received in connection with the official business of any public body, regardless of the physical form of the record.
- in addition to all print materials, other types of covered records include
 - i. computer data, e-mails
 - ii. personnel records (medical records, social security numbers, and the entire record of certain employees are exempt)
 - iii. data on wireless or digital devices, *e.g.*, palm pilots, blackberries, etc.
- “right of access” means—
 - i. access at any reasonable time, under reasonable conditions, and under the supervision of the custodian of the public record
 - ii. “reasonable time” means during regular business hours; government cannot establish arbitrary time for inspections
 - iii. “access” includes right to photocopy as well as examine all public records
- records must be open to *any* person for personal inspection; requester does not need a special interest or reason to inspect or copy public records
- requests need *not* be put in writing
- requests need not be specific
- *but*, requester *cannot* specify that the record be provided in a particular format; *e.g.*, if the government maintains its records in an electronic system, a copy in that medium may be provided
- responses to requester must be made within a reasonable period of time; automatic delays are impermissible
- government cannot refuse to comply with the request on the grounds that the records are not in the custodian's physical possession
- if the government claims an exemption, the custodian must state, in writing, the basis for the exemption, including the statutory citation to the exemption; if only some information is exempt, the exempt parts should be deleted and the remainder of the record should be provided to the requester
- even if record is exempt from disclosure, statutory restrictions on destruction of public records still apply; when disposing or destroying records, government must act in accordance with State records-retention schedule

fees for public records requests

- no charges allowed for mere inspection of records
- fees for copying and additional charges for certified copies are established by statute
- special service charges for extensive clerical or information technology services are permitted, but they may *not* be routinely imposed

remedies

- a requestor who has been denied legitimate access may seek relief through court orders (*e.g.*, mandamus and declaratory relief and/or injunctive relief)
- a requestor may obtain attorney's fees related to legal actions taken to pry documents from government
- criminal penalties may be imposed on government denying legitimate requests
- mootness is not a defense, *i.e.*, government cannot claim that the record is no longer relevant or of practical significance

review questions

1. A citizen's group has made a public records request of all information pertaining to last year's board business. May you ask the group for more detailed information about the specific documents they are looking for, given that it is a large request?
2. If your daily planner has information about meetings, both personal as well as those pertaining to your board service, is the planner exempt from public inspection? Can you delete your personal information and photocopy the remaining information pertaining to board business as a way to comply?
3. A co-worker in your law firm asked if you could provide minutes and other correspondence related to a matter that your board voted on last month. May you provide that information, or does the co-worker need to make that request formally with your board secretary?

III. Miami-Dade Co. Conflict of Interest and Code of Ethics Ordinance

transacting business 2-11.1 (c)(3)

advisory and quasi-judicial board members may not contract with any County agency or department subject to the regulation, oversight, management, policy-setting, or quasi-judicial authority of the board of which the person is a member

gifts 2-11.1 (e)

it is unlawful to solicit or demand a gift in exchange for an official duty or public action

- a gift is defined as anything of economic value, including meals, travel, loans, entertainment, hospitality, or a promise of such, without adequate consideration
- all gifts or series of gifts [within a quarterly period] that exceed \$100.00 in value must be reported
- food and beverages consumed at a single meal are considered a single gift and shall not be reported if the value for that meal does not exceed \$100.00

exemptions

- i. gifts solicited for official government business (city or County-sponsored events, charitable activities, and other government-authorized events)
- ii. gifts exchanged between co-workers, relatives, and friends
- iii. political contributions, awards for civic and professional achievement, informational books, pamphlets, and related materials that are instructive or promotional in nature

- iv. gifts solicited by commissioners on behalf of any nonprofit organization for use solely by that organization, where neither the commissioner nor his or her staff receives any compensation as a result of the solicitation

when officials solicit for charitable organizations and professional associations *unrelated to official County business*, they—

- ✓ cannot exploit their official position, *e.g.*, they cannot mention that they are elected or appointed officials
- ✓ cannot use County letterhead or other resources to solicit contributions on behalf of the non-profit or charity
- ✓ cannot solicit during public meetings
- ✓ cannot specifically target County vendors or coerce employees and citizens to contribute

exploitation of official position 2-11.1 (g)

elected officials, city managers, city attorneys, department heads, advisory board members, and employees may not use or attempt to use their official position to secure special privileges and exemptions for themselves or others

confidential information 2-11.1 (h)

elected officials, city or County managers, department heads, city and County attorneys, and advisory board members and employees—

- may not accept employment or engage in any business or professional activity that they might reasonably expect would require or induce them to disclose confidential information acquired by reason of their official position
- may not disclose confidential information obtained through their official position with the County
- may not use such information, directly or indirectly, for personal gain or benefit

appearances 2-11.1 (m)(2)

regarding the board on which they serve, advisory and quasi-judicial personnel

- may not appear before the board on behalf of third parties seeking a benefit from the board
- may not received compensation from third parties seeking a benefit from the board

“appearance” broadly defined means that one cannot submit documents or correspondence, appear in meetings with staff, or appear before any board or agency on behalf of a client, organization, or nonprofit

actions prohibited when financial interests involved 2-11.1 (n)

quasi-judicial and advisory personnel shall not participate in any official action directly or indirectly affecting a business in which he or she or any member of his or her immediate family has a financial interest

acquiring financial interest 2-11.1 (o)

quasi-judicial and advisory personnel shall not acquire a financial interest in a project, business entity, or property at a time when they believe or have reason to believe that the said financial interest will be directly affected by their official actions or by official actions by the County

recommending professional services 2-11.1 (p)

quasi-judicial and advisory personnel may not recommend the services of any lawyer, architect, public relations firm, or any other person or firm to assist in any transaction involving the County or any of its agencies, unless properly made by the duties of the office

lobbying 2-11.1 (s)

“lobbyist” is defined as anyone seeking to encourage the passage, defeat, or modifications of—

- any ordinance, resolution, action, or decision of the County Commission
- any action, decision, or recommendation of any County board or committee
- any action, decision, or recommendation of County personnel during the time period of the entire decision-making process *or* such action, decision or recommendation that foreseeably will be heard or reviewed by the County Commission, County board, or committee

others who are also considered lobbyists and must register as lobbyists include—

- principal of firm
- any employee whose normal scope of employment includes lobbying activity

requirements of lobbyists include—

- registering as a lobbyist and paying annual fee (failure to pay bars individuals and companies from lobbying)
- filing timely expenditure reports by September 1st (failure to file results in automatic suspension until fines are paid or appeal taken to the Ethics Commission)
- *but*, lobbyists are no longer required to register for each separate issue they defend

lobbyist contracts *cannot* contain contingency fees

who is *not* a lobbyist?

- attorneys or other representatives retained to represent individuals and corporate entities in quasi-judicial proceedings where the law prohibits ex-parte communications
- expert witnesses who only provide scientific, technical, or other specialized information or testimony in public meetings
- employees of the principal whose normal scope of employment does not include lobbying activities
- representatives of nonprofit organizations, *e.g.*, homeowner’s associations, who only appear at publicly noticed meetings, without special compensation or reimbursement for the appearance, whether direct, indirect, or contingent, to express support or opposition to any item

- community-based organizations, even when making contacts outside of public meetings, when grants or other funding matters are involved
- individuals who appear in their individual capacity for the purpose of self-representation
- any public officer, employee, or appointee who only appears in his or her official capacity

voting conflicts for members of advisory and quasi-judicial boards 2-11.1 (v)

board members may not vote on any matter if the member will be directly affected by the board action *and* the board member has any of the following relationships with the persons and entities appearing before the board—

- | | |
|---------------|---------------|
| ◦ officer | ◦ director |
| ◦ partner | ◦ of counsel |
| ◦ consultant | ◦ employee |
| ◦ fiduciary | ◦ beneficiary |
| ◦ stockholder | ◦ bondholder |
| ◦ debtor | ◦ creditor |

review questions

1. I am president of a nonprofit organization that is appearing before my board to request funding for a community program. May I vote on this matter, even though I will not personally receive any money or compensation as a result of this funding? What if I were the executive director whose salary would be supported in part by this funding?
2. My attorney is scheduled to appear before my board on behalf of her client. The matter is not connected to the matter for which I've retained this attorney. May I vote?
3. The homeowners' association I belong to is scheduled to make a presentation next week before the advisory board on which I serve. I am not an officer of the homeowners' association, and the presentation concerns a matter that does not directly affect me. Would I be permitted to listen to this presentation next week and, at a later date, vote on the matter?
4. I am an architect and president of my own architectural firm. I sit on the Planning & Zoning Board. My firm represents a client whose project will appear before the Planning & Zoning Board in the near future. Am I prohibited from voting on this matter?
5. My former employer is appearing before my board on a matter that requires a vote by our board. Do I have a voting conflict?
6. I am vice-president of a company that does business with Miami International Airport. I do not have a controlling financial interest in the company. I have been asked to sit on a board that has certain oversight and enforcement over companies doing business at the airport. May I serve on the board?
7. A local development company has invited our board members, along with County staff members, to attend an educational workshop. The workshop will be held at an

area hotel and will include breakfast and lunch. The development company is planning to present information about its work and provide marketing and research findings about area development opportunities. Other members of the public and private sector will be in attendance. The cost of the workshop is \$100.00, but the company has waived the fee for County board members and staff. Am I prohibited from attending?

8. I sit on the planning board. A friend of mine is involved in a dispute with the County concerning certain code violations. She has asked me to recommend an attorney to assist her with this case. My sister, who is a new attorney, could use the work. May I recommend my sister to my friend?
9. I serve on a quasi-judicial board. The son of a close family friend has a matter pending before the board. May I vote on this matter?

answers

1. **YES.** Subsection (v) of the Code does not prohibit you from voting. Although you are an officer of the nonprofit organization and thereby fall under one of the enumerated relationships, you will not receive compensation directly; therefore, there is no direct affect to you. A voting conflict under this subsection requires that you have *both* an enumerated relationship and a direct affect.

NO. If you were the executive director of a nonprofit organization *and* you were seeking funding that would support your salary, you would be prohibited from voting on the funding request. Additionally, if your job performance as an executive director would be evaluated, in part, on how much money you brought into the organization, you would be prohibited on voting as well.

2. **YES.** There is no prohibition *per se* under the Code to vote on matters involving your lawyer, accountant, doctor, etc., unless you have another relationship with this person as enumerated under the Code *and* you may be directly affected. Since the matters in this case are unrelated to you, you do not have a voting conflict.
3. **YES.** If you do not have any of the enumerated relationships outlined in subsection (v) *and* you will not be directly affected by the action of the board, you may listen to the presentation and later vote on the matter. However, because the homeowners' association represents your interests in some way, your participation in this matter may give the "appearance" of impropriety. Consequently, prior to the presentation and vote, you may wish to explain publicly why you are not directly affected by this particular decision regarding your homeowners' association.
4. **YES.** Section (v) prohibits you from voting on matters involving clients of the firm that employs you. In addition, subsection (m)(2) may prohibit you from serving on the board altogether. This section prohibits board members from appearing before their own board directly or through an associate. Subsection (m)(2) also prohibits board members from receiving compensation, directly or indirectly, from third parties who appear before their boards. If the benefit sought by your client is connected to the work your firm is expected to perform under its agreement with the client, you may not sit on the board.

5. **NO**, you do not have a conflict unless you maintain one of the enumerated relationships under section (v) *and* the matter is one that will directly affect you. Under state law, however, you may be prohibited from voting in a quasi-judicial setting if you could not be objective toward the presenter or the matter.
6. **YES**. Under section (c), you may serve on the board as long as you do not have a controlling financial interest (of 10% or more) in your company. However, you may not vote on matters that pertain to your firm, and you are required under subsection (f) to disclose to the board your employment with the firm.
7. **NO**. You may attend the workshop, but you must file a quarterly disclosure report acknowledging the gift of the workshop valued at \$100.00. If the developer might appear before your board in the future, you may also wish to avoid the appearance of impropriety by not accepting the gift. In that case, you or the board could pay for you to attend.
8. **NO**. Employees, officials, and board members are prohibited from recommending the services of lawyers, architects, public relations consultants, or other professionals to assist in any transaction involving the County or any of its agencies, unless required to by the official duties of the office.
9. **YES**. The Code does not prohibit you from voting, but because there may be an appearance of impropriety, you should disclose the nature of the relationship before the vote.