

2006 LEGISLATIVE ISSUE FORM

BOG/SUS ISSUE: Direct Support Organizations and the Sunshine Law



PROPOSED STATUTORY LANGUAGE: To Be Determined

1. Change Needed: Chapter 286, Florida Statutes

Limited exemptions from Chapter 286, Florida Statutes (the sunshine law) are needed for portions of meetings of university direct support organizations where confidential issues are discussed. For example, the statute should be amended to exempt from the sunshine law meetings where donor information, land transactions or pending business deals are discussed. This would make the sunshine laws consistent with the public records law.

2. Current Condition:

Background

As a result of a recent attorney general opinion, direct support organizations are now complying with the sunshine law. However, certain confidential information, which the legislature has previously exempted from the public records law, may only be discussed by board members in a public meeting.

On April 20, 2005, Florida Attorney General Charlie Crist issued a legal opinion finding that a community college direct support organization (DSO) was subject to Chapter 286 of the Florida Statutes, better known as the "Sunshine Law." The community college DSOs are created and governed by Section 1004.70 of the Florida statutes. The language of that statute is almost identical to section 1004.28 of the Florida Statutes, the university DSO statute. While Attorney General opinions are not legally binding authority on Florida courts, they are persuasive. Therefore a court would most likely find that university DSOs are subject to the Sunshine law.

Overview of Sunshine Law

The Sunshine Law, also known as the Open Meetings Law, requires that all meetings of a public board or commission be open to the public. In a university setting, "board or commission" includes committees with advisory or decision-making functions. A group established solely for fact-gathering is not a "board or commission" for purposes of the statute. All discussions between two or more members of a board or committee concerning issues that will foreseeably come before the board or committee for action must occur only at a public meeting. However, the law does not prohibit a private meeting between a single board or committee member and a non-member, such as a university employee, so long as the meeting is not intended as a substitute for a meeting of the board. Likewise, meetings of two board members to discuss matters not related to board business are exempt from the law.

The legislature has exempted some otherwise public meetings from the Sunshine Law. These include student conduct hearings and collective bargaining strategy discussions. The Sunshine Law requires that notice of public meetings be posted and minutes kept. Any member of the

public has the right to attend a public meeting, but does not have the right to participate in or disrupt the meeting.

Notice of Meetings

The board must give the public “reasonable notice” of its meetings. However, the Sunshine Law does not define what constitutes reasonable notice. Also, if an agenda is prepared, it must be posted with the notice, but the board is not required to follow the published agenda.

Sanctions or Penalties for Violation

If a person knowingly violates the Sunshine Law, he or she is subject to criminal misdemeanor charges and a fine. In addition, a member of the public can bring a civil action to enforce the law, and, if successful, attorney’s fees can be assessed. A violation of the Sunshine Law can also result in invalidity of any action taken at that meeting. Fortunately, the law does allow the board to correct a violation by holding a second public meeting and reconsidering the action taken at the previous meeting.

Application to private corporations

While private entities generally are not subject to the Sunshine Law, Florida courts and the Attorney General, in order to avoid circumvention of the statute, have held that the law applies to private organizations which are created by law or performing functions on behalf of, or under the control of, a public entity. For example, the Attorney General has concluded that Enterprise Florida, a corporation established by Florida Statutes, is subject to the sunshine law. Likewise, the Florida Supreme Court has held that an advisory committee established by a city council and composed of private citizens was subject to the Sunshine law.

University DSOs are created by statute and required to be “organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the benefit of a state university.” In addition, by statute, the university president or his designee serves on the board of directors of the DSO and the chairman of the university board of trustees appoints a representative to the board. These facts, along with the close operational relationship between a university and its DSO, support the application of the sunshine law to direct support organizations.

Relationship to Public Records Law

A direct support organization is exempt from the public records law (Chapter 119, Florida Statutes) and, therefore, its records may be kept confidential, except for its auditor’s reports and management letter and any documents it chooses to release as a matter of policy. However, the fact that an exempt record is being discussed at a board meeting does not cause the meeting to be exempt from the Sunshine Law. In fact, in 1991 the Legislature, in response to several court cases holding that otherwise public meetings could be closed to consider confidential documents, amended the Sunshine law to specifically provide that an exemption from the public records law does not create an exemption to the Sunshine Law. Therefore, confidential records cannot be discussed at DSO Board or committee meetings.

3. Rationale for Change:

It will be extremely difficult for DSOs to operate in the sunshine when discussing possible gifts from private donors that wish to remain anonymous, as well as potential land purchases for the benefit of the university.

4. Fiscal Impact:

None

5. Justification for BOARD OF GOVERNOR'S Priority (if applicable):

To supplement legislative appropriations, universities rely heavily on private donations. Barriers to negotiate with those private donors would have a negative impact on the ability of universities to raise funds toward meeting the educational needs of Florida.

6. Link to BOG Strategic Plan:

This flexibility promotes Goal A on access, Goal C on building world class academic programs and research capacity, and Goal D on meeting community needs and fulfilling unique institutional responsibilities of the BOG strategic plan. Some dollars from donors support programs or build facilities used for classes and research. In turn, this helps to build world-class research universities by providing facilities and funds for our research programs. Finally, donations from these donors allow universities to meet local community needs and individual institutional responsibilities.