

Ethical Considerations for Counsel When Advising Sunshine Law Boards

I. HRPC specifically recognizes public good in the governmental context as a factor tempering an attorney's duty of confidentiality

A. Rule

HRPC Rule 1.6. CONFIDENTIALITY OF INFORMATION.

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(c) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

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(4) to prevent a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good;

(5) to rectify the consequences of a public official's or a public agency's act which the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good

(Proposed revision would renumber – would become 1.6(b)(5) and (6))

B. Sunshine Law application

1. Legal requirements for Sunshine boards
 - a. Adequate and timely notice of meetings (92-7)
 - b. Limitation on closed session (92-3, -4, -5)
 - c. Minutes (92-9)
 - d. Discussion outside a meeting only as specifically allowed (92-2.5)
2. Criminal provision (92-13; misdemeanor for willful violation)
3. Public purpose of law

§92-1 Declaration of policy and intent. In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest. Therefore, the legislature declares that it is the policy of this State that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of governmental agencies - shall be conducted as openly as possible. To implement this policy the legislature declares that:

- (1) It is the intent of this part to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and

(3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

- a. Gov't attorney should be mindful of that purpose
- b. Better sense for why the law works the way it does and what actions may be inconsistent with the law
- c. Atty who raises the question of whether Sunshine allows something a client board wants to do notwithstanding pushback helps the board in the long run, as well as public, by avoiding a violation that could come back to bite the board

C. Where confidentiality is required who can waive – any member or full board? (Another who's the client problem)

D. What if a board member starts talking about stuff that should be confidential during the public session?

1. Advise exec session
2. Remind that decision to waive confidentiality should belong to the board, not a single member
3. Depending on the issue, remind of obligations toward third parties whose confidential info is being discussed

II. To whom does gov't attorney does owe duty when representing Sunshine Law boards

A. Gov't client's fiduciary duty toward those laws intended to serve

B. Public purpose of Sunshine Law

C. Hypos

1. Executive session discussion moving beyond what's covered by topic and purpose
 - a. Standard in 92-5(b): "In no instance shall the board make a decision or deliberate toward a decision in an executive meeting on matters not directly related to the purposes specified. . ."
 - b. Unintentional, within topic but beyond purpose
 - c. Unintentional, straying out of noticed topic
 - d. Intentional (now that we're in private . . .)
2. Inadequate minutes of executive session

- a. Exec session minutes still required to meet minimum standard including
 - i. True reflection of matters discussed and participant views
 - ii. Substance of all matters discussed/decided
 - iii. Vote by member
 - b. Deficiencies not obvious to public because minutes not public
 - c. Potential for public harm
 - i. Minutes may be requested in future/may become public
 - ii. Minutes should be avail. to inform future board
 - iii. Minutes ultimately part of historic record
3. What is attorney's obligation who observes Sunshine Law concerns during a meeting
- a. Straying from the agenda
 - i. One thing leads to another
 - ii. Testifier/member of public raises new issue
 - b. Can we add ____?
 - i. Minor items can be added with 2/3 vote of all members
 - ii. Major items cannot
 - iii. If not enough members, cannot
 - c. PIG reports and board wants to discuss right then
 - i. Statute requires no discussion till next meeting after report
 - ii. Contrast to standing or regular subcommittees
 - d. Video feed not working for meeting noticed as videoconference
 - i. Notice requirement – all locations member attending from
 - ii. Even if quorum in one location by statute still cannot hold meeting if cannot get it working
 - iii. If can get video at beginning, if it goes down later but still have audio, ok
 - iv. No exceptions even where e.g. no members of public attending anyway
4. 92-6 and a board's quasi-judicial function
- a. If not quasi-judicial Sunshine applies
 - b. If quasi-judicial then would expect to see appropriate set of rules being followed – likely contested case standards
 - c. What if board wants to do neither?

III. Overcoming Bias – Sunshine Law requirements for equal treatment of members of public

A. Gadflies and others board may not love

B. Members of groups that may inspire bias

C. 'Any person' standard

1. Acceptance of testimony
2. Time limits on testimony
 - a. Set reasonable time limits by rule
 - b. Apply in evenhanded manner – waive for all or none
3. Restricting subject matter of testimony
 - a. Can restrict to agenda item
 - b. What is the agenda item? Interpret broadly within reason; anything item as listed might reasonably encompass
 - c. Toleration of aspects other than what the board is interested in should not depend on testifier (e.g. developer's report vs. citizens opposed to project)
4. Hearing from only one interested party, then canceling item
 - a. Must hear from all testifiers
 - b. A cancellation should be announced up front with no discussion whatsoever
5. Timing of testimony
 - a. Can choose to do all at beginning or as each item called – total time allowed the same
 - b. Cannot choose to do after board's discussion/decision
 - c. Calling testifiers by category – could be ok if content-neutral categories (e.g. have testified on it before/ have not) but problematic if content based (e.g. those in support first, then two hours later when they're done, those against)
6. Some 'testifiers' are more witnesses than testifiers – e.g. representative of relevant agency, developer's rep for project being discussed – and for those, fair enough to call first/ allow more time if it is at board's request to better understand the issue

IV. Access to Justice – OIP's role as a form of Sunshine Law ADR

- A. OIP "shall establish procedures for filing and responding to complaints filed by any person concerning the failure of any board to comply with" the Sunshine Law, and "[s]hall take action to oversee [boards'] compliance with" the Sunshine Law including "[r]eceiving and resolving complaints."**

B. Sunshine Law also provides for actions brought in court or for criminal prosecution; hence complaints to OIP are an alternative and less expensive way for members of the public to have their Sunshine Law concerns addressed