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The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government

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THE GOVERNMENT-IN-THE-SUNSHINE LAW THEN AND NOW:
A MODEL FOR IMPLEMENTING NEW TECHNOLOGIES CONSISTENT
WITH FLORIDA'S POSITION AS A LEADER IN OPEN GOVERNMENT

Sandra F. Chance & Christina Locke

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THEN AND NOW: A MODEL FOR IMPLEMENTING
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GOVERNMENT

SANDRA F. CHANCE* & CHRISTINA LOCKE**

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I. INTRODUCTION

In 1967, after a decade of unsuccessful attempts, the Florida Legislature passed a “Sunshine Law”¹ requiring that the government decisionmaking process be open to the public. In the forty years since the passage of this open meetings law, Florida courts and lawmakers have shaped it through various judicial interpretations and statutory exceptions. Despite these changes, Florida’s Sunshine Law remains one of the strongest in the nation. In recognition of the fortieth anniversary of the Sunshine Law, this Article will examine the origins of the law, its evolution over the past forty years, its impact on legislation elsewhere, and how technological advances in the last decade have affected the Sunshine Law. Finally, a model policy statement regarding open meetings and the use of technology will be presented.

The philosophical underpinnings of open meetings laws are rooted in the concepts of democracy; the citizenry must be well informed in

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1. Although the term “Sunshine Law” is often used to describe both open meetings and public records laws, Florida uses this term to specifically refer to its open meetings law. For the purposes of this Article, Sunshine Law refers to the open meetings law, not the public records law.

order to effectively self-govern.² In addition to self-governance, open meetings laws contribute to a less corrupt, more efficient government and encourage more accurate news reporting.³ But the concept of government meetings open to public scrutiny is not one without concerns. Critics argue that open meetings laws are impractical in that they discourage free debate because politicians fear appearing ignorant or will choose to waste time making speeches in hopes of reelection rather than making meaningful political decisions.⁴ Open meetings laws also prompt fears that they will produce results contrary to their intended purpose—that government officials will meet secretly and then formally ratify decisions in public.⁵

A balancing of the public's interest in access and the potential side effects of open meetings laws inevitably results in favor of access, as evidenced by the passage of open meetings laws in all fifty states. Despite the convincing basis for open meetings laws, the right of the public to attend government meetings⁶ is granted by government officials, not the common law. There is no common law grant of access to government meetings; thus open meetings laws are a relatively modern phenomenon.⁷ A common law grant of access does exist, however, for government records.⁸ Despite the similarities between the values of the public's "right to know" how the government works and the values implied in the First Amendment guarantee of a free press, there is no First Amendment right of access to government meetings.⁹ In fact, the framers of the Constitution met in secret.¹⁰

In Florida, a statutory right of access to government meetings preceded the current Sunshine Law. Section 165.22, *Florida Statutes*, passed in 1905, provided for open meetings of a "city or town

2. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 539-42; Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200-01 (1962).

3. See Blasi, *supra* note 2, at 539-42; Note, *supra* note 2, at 1200-01.

4. See *id.* at 1202; see generally Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997).

5. 118 CONG. REC. 26908 (1972) (statement of Sen. Lawton Chiles).

6. For the purposes of discussing open meetings laws, the term "government meeting" does not include judicial proceedings. Additionally, in Florida, federal agencies are not subject to the Sunshine Law.

7. See *Tenby Corp. v. Mason*, (1908) I Ch. 457 (addressing whether the proprietor of a local newspaper, as a member of the press, public, or as a taxpayer, had the right to attend the meetings of a borough council). "No person had, simply as a member of the public, the right say, 'Open that door: I will come in.'" *Id.* at 468; see also HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 179-80 (1953); ANN TAYLOR SCHWING, *OPEN MEETING LAWS* 1 (1994); Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider's View*, 53 N.C. L. REV. 451, 453 (1975).

8. Sandra F. Chance, *Access to Public Documents and Meetings*, in COMMUNICATION AND THE LAW 341, 344-45 (W. Wat Hopkins ed., 2006).

9. See generally SCHWING, *supra* note 7, at 1-7.

10. SCHWING, *supra* note 7, at 1.

council or board of alderman of any city or town.”¹¹ J. Emory “Red” Cross, the Gainesville politician who introduced the 1967 Sunshine Law to the Florida Legislature, described this early law as ineffective.¹² Part of the reason for the ineffectiveness of this early open meetings law was the Florida Supreme Court’s narrow interpretation of the law.

In *Turk v. Richard*, the only case arising under the early statute, the court construed the law as applying only to “formal assemblages.”¹³ In *Turk*, a member of the Miami Beach City Council sought a declaratory judgment interpreting section 165.22.¹⁴ The issue before the Florida Supreme Court in the 1950 case was the Florida Legislature’s intended meaning of the statutory language “all meetings.”¹⁵ The court held that the statute applied only to “formal assemblages” of any city or town council.¹⁶ The *Turk* court grounded its decision in the general law of municipal corporations, relying on treatises and legal encyclopedias to construct its definition of “formal assemblages”¹⁷:

[Meetings] of the council sitting as a joint deliberative body as were required or authorized by law to be held for the transaction of official municipal business; for at no other type of gathering, whether attended by all or only some of the members of the city council, could any formal action be taken or agreement be made that could officially bind the municipal corporation, or the individual members of the council, and hence such a gathering would not constitute a “meeting” of the council.¹⁸

11. FLA. STAT. § 165.22 (1905) (repealed 1974).

All meetings of any city or town council or board of alderman of any city or town in the state, shall be held open to the public of any such city or town, and all records and books of any such city or town shall be at all times open to the inspection of any of the citizens thereof.

Any city or town councilman, or member of any board of aldermen, or other city or town official, who shall violate the provisions of this section, shall, upon conviction, be fined not more than one hundred dollars, or be imprisoned not more than two months.

Such conviction shall immediately vacate the office held by such city or town councilman, or member of the board of aldermen, or other office of such city or town.

Id.

12. Interview with Sen. J. Emory “Red” Cross, Dem., Gainesville (Nov. 3, 1978) (available at the University of Florida Department of History Samuel Proctor Oral History Program website, <http://web.history.ufl.edu/oral/>) [hereinafter Cross Interview].

13. *Turk v. Richard*, 47 So. 2d 543, 544 (Fla. 1950).

14. *Id.* at 543.

15. *Id.*

16. *Id.* at 544.

17. *Id.* (citing 62 C.J.S., *Municipal Corporations*, § 391 and cases cited; 37 AM. JUR. *Municipal Corporations*, § 54 and cases cited; McQuillin, *Municipal Corporations*, 2d ed., Vol. 3, § 1279).

18. *Id.*

In practice, section 165.22 did little to deter secret meetings among government officials.¹⁹ It was not until 1967, almost twenty years after the *Turk* decision, that the Florida Legislature passed a law securing the public's right to attend government meetings. But this broad Sunshine Law took several years to come to fruition. The first attempt to pass a more effective open meetings law took place in 1957.²⁰ The bill was debated for ten years before passage.²¹ The ongoing consideration of a Florida Sunshine Law was part of a larger movement by states to offer citizens a statutory guarantee of access to government meetings.²² The movement originated the same year *Turk* was decided, when the American press began to lobby for more open government.²³ A year later, in 1951, only one state—Alabama—had a Sunshine Law in its modern form.²⁴ This number increased to twenty-six by the early 1960s.²⁵

Florida's comprehensive Sunshine Law found its genesis²⁶ during a meeting of the Gainesville chapter of the journalism fraternity Sigma Delta Chi ($\Sigma\Delta\chi$).²⁷ Florida State Senator J. Emory "Red" Cross met with $\Sigma\Delta\chi$ members, including H.G. "Buddy" Davis, Jr.²⁸ Davis was a longtime journalism professor at the University of Florida and a Pulitzer Prize-winning editorial writer.²⁹ During the $\Sigma\Delta\chi$ meeting in the early 1950s, Cross expressed concern about private meetings

19. PETE WEITZEL, FIRST AMENDMENT FOUNDATION, THE WHITE PAPER: A NARRATIVE HISTORY OF OPEN GOVERNMENT IN FLORIDA 34 (2006).

20. See Mary K. Kraemer, *Exemptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida?*, 8 FLA. ST. U. L. REV. 265, 267 (1980); Ruth Mayes Barnes, Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361, 361 n.4 (1971).

21. See sources cited *supra* note 20; Douglas Q. Wickham, *Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, 68 NW. U. L. REV. 480, 491 (1973).

22. See Note, *supra* note 2, at 1199.

23. *Id.* at 1199. The American Society of Newspaper Editors was instrumental in organizing this movement. *Id.*

24. *Id.* at 1199-1200.

25. *Id.* at 1199. However, many other states, including Florida, continued in unsuccessful attempts to pass such laws. *Id.* at 1200 & n.8.

26. Cross Interview, *supra* note 12.

27. WEITZEL, *supra* note 19, at 55. $\Sigma\Delta\chi$ is now the Society of Professional Journalists. *Id.* at 50.

28. Cross Interview, *supra* note 12. Cross had first represented Gainesville in the Florida House of Representatives in 1952 and later served as a state senator. Press release from Fla. Attorney General Charlie Crist, (April 1, 2005), available at <http://myfloridalegal.com/NewsBriefs.nsf/OnlineBriefs/7999D56BB1A8270585256FD20047D018>. Cross died in March 2005 at the age of ninety-one. *Originator of State Sunshine Law Dies at 91*, BRECHNER REP., May 2005, at 1, available at <http://www.brechner.org/reports/2005/05may2005.pdf>.

29. *In Memoriam*, COMMUNIGATOR, Fall 2004, <http://www.jou.ufl.edu/pubs/communigator/fall2004/otr-inmemoriam.asp>. Davis died in 2004 at the age of eighty. *Id.* Davis received the 1971 Pulitzer Prize for his editorial writing in support of desegregating Florida schools. The Pulitzer Prizes, <http://www.pulitzer.org> (follow 1971 hyperlink found at top of website). Davis wrote for *The Gainesville Sun*. *Id.*

of public bodies throughout the state.³⁰ The ensuing discussion resulted in assistance from Davis and other $\Sigma\Delta X$ members in gathering examples of open meetings laws from other states.³¹ Cross drafted a bill that he introduced to the Florida Senate during every regular session for the next decade.³²

Lawmakers' resistance to unprecedented public access to government meetings stifled Cross's bill until 1967, when federal court rulings called for the reapportionment of the legislature.³³ Reapportionment resulted in the dissolution of the "Pork Chop Gang" of rural lawmakers who dominated the legislature.³⁴ An influx of lawmakers from urban areas and a new governor, Claude Kirk, provided the right environment for Cross's Sunshine bill to finally become law.³⁵ The media's push for the measure was also instrumental in convincing legislators to pass the Sunshine Law.³⁶

Cross' proposal, Senate Bill 9, was introduced to the Florida Senate in April 1967.³⁷ After the Committee on Judiciary "B" recommended passing the bill,³⁸ Florida senators amended the bill by deleting the provision imposing a minimum fine on officials in violation of the law and by adding "at which official acts are to be taken," which specified the type of meetings that would be subject to the law.³⁹ Sen-

30. Cross Interview, *supra* note 12.

31. *Id.*

32. *See id.*; *see also* Barnes, *supra* note 20, at 361 n.4.

33. Florida Society of Newspaper Editors, *The Lakeland Ledger: Our Tradition of "Sunshine,"* <http://www.fsne.org/sunshine/lakeland.shtml> (last visited Feb. 15, 2008).

34. *Id.*

35. *Id.*

36. Barnes, *supra* note 20, at 361; *see also* Little & Tompkins, *supra* note 7, at 482.

37. FLA. S. JOUR. 23 (Reg. Sess. 1967). Cross was joined by Senators de la Parte, Stolzenburg, Henderson, Askew, Saylor, and Fincher in introducing the bill. *Id.* The bill, as introduced, read:

Section 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 any political subdivision, except as otherwise provided in the constitution, are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection.

Whoever is convicted of a violation of the provisions of this act shall be punished by a fine of not less than one hundred dollars (\$100.00) and not more than five hundred dollars (\$500.00), or by imprisonment in the county jail for not more than six (6) months, or by both such fine and imprisonment.

Section 2. This act shall take effect July 1, 1967.

Fla. SB 9 (1967).

38. FLA. S. JOUR. 69 (Reg. Sess. 1967).

39. *Id.* at 83. Senator Clayton proposed amending the bill to limit the maximum possible jail time to thirty days. *Id.* This change "was withdrawn by unanimous consent of the Senate." *Id.*

ate Bill 9 then made its way to the Florida House of Representatives, which wanted to make three amendments to the bill: 1) a provision giving circuit courts jurisdiction to issue injunctions to enforce the law; 2) a provision exempting hearings involving individuals charged with violating the law and hearings related to employment; and 3) changing the title to reflect injunctive enforcement and the aforementioned exemptions.⁴⁰ The Senate agreed to the jurisdiction provision but refused to concur in the second and third amendments.⁴¹ The House eventually compromised, and the bill was signed into law by Gov. Kirk on July 12, 1967.⁴²

Florida's Sunshine Law, as enacted in 1967, stated:

- (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 any 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, regulation or formal action shall be considered binding except as taken or made at such meeting.
- (2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizens of this state.
- (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 any 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 and upon conviction thereof shall be punished by a fine of not more than \$500.00, or by imprisonment in the county jail for not more than 6 months, or by both such fine and imprisonment.⁴³

II. EARLY INTERPRETATION OF THE SUNSHINE LAW

The 1967 passage of Florida's Sunshine Law offered the press and the public a broad statute with which to exercise a right of access to government meetings. However, the breadth of the Sunshine Law also provided many opportunities for further interpretation of the

40. *Id.* at 679.

41. *Id.*

42. *Id.* at 1632.

43. FLA. STAT. § 286.011 (1969).

law. Many early cases brought under section 286.011, *Florida Statutes*, involved challenges against school boards. The first appellate review of the new Sunshine Law occurred in the 1969 case *Times Publishing Co. v. Williams*.⁴⁴

In *Williams*, the Second District Court of Appeal considered the media's complaint against the Pinellas County School Board.⁴⁵ The Times Publishing Company alleged that the school board violated the Sunshine Law by holding secret meetings in 1967 and 1968, which occurred after the Sunshine Law's enactment.⁴⁶ The company sought an order enjoining the school board from holding more meetings where the public was excluded.⁴⁷ The circuit court dismissed the company's complaint, but the Second District reversed,⁴⁸ holding that the school board acted in violation of the Sunshine Law.⁴⁹

The *Williams* court looked to the Florida Legislature's intent in passing the new Sunshine Law, especially in light of the *Turk* court's narrow interpretation of what constituted a meeting.⁵⁰ The *Williams* court reasoned that the legislature was presumably aware of the *Turk* ruling and intended for the new law to apply much more broadly than the previous statute.⁵¹ The court emphasized the new statute's "official act" language, finding that "[e]very step in the decision-making process," not just the final decision, constituted an "official act" within the meaning of the comprehensive Sunshine Law.⁵² The Second District also addressed claims by the Pinellas County School Board that there were exceptions to the Sunshine Law for attorney-client privilege⁵³ and discussion of personnel matters.⁵⁴ The Second District rejected both claims, but it did acknowledge a limited attorney-client privilege exception for discussion of matters related to pending litigation.⁵⁵

Within weeks of the Second District's decision in *Williams*, the Florida Supreme Court decided its first case interpreting the Sunshine Law.⁵⁶ The case originated in Broward County, and like *Williams*, it involved allegations of secret meetings conducted by a

44. See *Times Publ'g Co. v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969).

45. *Id.* at 472.

46. *Id.*

47. *Id.*

48. *Id.* at 472, 477.

49. *Id.* at 476.

50. *Id.* at 473.

51. *Id.*

52. *Id.* "Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act." *Id.*

53. *Id.* at 475.

54. *Id.* at 474-75.

55. *Id.* at 475.

56. *Bd. of Pub. Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969).

school board.⁵⁷ *Board of Public Instruction v. Doran* came before the Florida Supreme Court after the Board of Public Instruction of Broward County challenged a circuit court's order to enjoin the board from violating the Sunshine Law. The board contended that the law was vague; did not afford the board sufficient procedural due process; violated the separation of powers doctrine; and was in violation of Article III of Florida's Constitution.⁵⁸ The Florida Supreme Court rejected the board's appeal and enunciated a "foreseeable action" test for whether a meeting is covered by the Sunshine Law.⁵⁹ If members of a public body gather to "deal with some matter on which foreseeable action will be taken by the board," then the Sunshine Law applied.⁶⁰ The court also made it clear that because the statute was enacted for public benefit, it should be interpreted broadly in favor of the public.⁶¹ One benefit for the public, according to the *Doran* court, was to crack down on "hanky panky" by government officials.⁶²

Though Florida courts were reluctant to interpret exceptions to the Sunshine Law, the Florida Supreme Court did concede a constitutional exception in the 1972 case *Bassett v. Braddock*.⁶³ Just like the first two landmark Sunshine Law cases, this case involved a claim of secret school board meetings.⁶⁴ Citizens of Dade County were denied an injunction against the Dade County School Board after labor negotiators for the board held private meetings.⁶⁵ The Florida Supreme Court affirmed the denial on the grounds that to do otherwise could deny public employees their right under the Florida Constitution to "bargain collectively."⁶⁶ Sunshine was good, the court reasoned, but in this case it could result in "sunburn."⁶⁷ In his dissent, Justice Adkins expressed doubt as to whether public scrutiny would actually impair collective bargaining.⁶⁸ Justice Adkins asserted tax-

57. *Id.* at 695.

58. *Id.* at 697.

59. *Id.* at 698.

60. *Id.*

61. *Id.* at 699.

62. *Id.*

63. *Bassett v. Braddock*, 262 So. 2d 425, 426 (Fla. 1972).

64. *Id.* at 425.

65. *Id.* at 425-26.

66. *Id.* at 426; *see also* FLA. CONST. art. I, § 6.

67. *Bassett*, 262 So. 2d at 426.

68. *Id.* at 429 (Adkins, J., dissenting). Justice James C. Adkins was sometimes referred to as "Justice Sunshine" for his interpretations in favor of the Sunshine Law. Lucy Morgan, *On Lessons Learned from Both Sides of the Law*, ST. PETE. TIMES, Nov. 12, 2005, at 5B. Adkins was a law clerk at the Florida Supreme Court in 1938 and 1939; thirty years later, he returned to the court as a justice. Florida Supreme Court, Supreme Court Portrait Gallery, Justice James C. Adkins, <http://www.floridasupremecourt.org/about/gallery/adkins.shtml> (last visited Feb. 15, 2008).

payers are interested parties in negotiations concerning salaries of public employees.⁶⁹

Though the Florida Supreme Court allowed a collective bargaining exception to the Sunshine Law in *Bassett v. Braddock*,⁷⁰ it refused to recognize a quasi-judicial exception to the law in another early case brought under section 286.011.⁷¹ In *Canney v. Board of Public Instruction*, cautious of allowing an exception when boards act in a quasi-judicial capacity, the court quashed the judgment of the First District Court of Appeal.⁷² High school student Michael Canney challenged his suspension by the board for failure to comply with a regulation requiring “normal and acceptable haircuts.”⁷³ Canney alleged that the board violated the Sunshine Law when it recessed the public meeting regarding his suspension in order to reach a decision.⁷⁴ If such an exception were allowed, “[s]ecret meetings would be prevalent,” wrote Justice Adkins in the majority opinion.⁷⁵ The majority also considered the legislature’s intent for a broad application of the statute.⁷⁶ The 4 to 3 decision included a dissent by Justice Dekle that invoked First Amendment terminology in favor of recognizing the exception:

The result of depriving an administrative body of free deliberation among themselves . . . is to shut off the free flow of discussion among them and an exchange of ideas and an open discussion of differing views to the end that a fair and just result may be reached by the body based upon the evidence and arguments at the hearing.⁷⁷

These four early cases—*Williams*, *Doran*, *Bassett*, and *Canney*—illustrate the direction of Florida courts as they interpreted a new, comprehensive Sunshine Law. The power of the new Sunshine Law led some officials to take great efforts to avoid suspicion of violating of the law—even going so far as to have the doors removed from their offices.⁷⁸

69. *Bassett*, 262 So. 2d at 429 (Adkins, J., dissenting).

70. *Id.* at 425.

71. *Canney v. Bd. of Pub. Instruction*, 278 So. 2d 260 (Fla. 1973).

72. *Id.* at 263. Quasi-judicial is defined as “[o]f, relating to, or involving an executive or administrative official’s adjudicative acts.” BLACK’S LAW DICTIONARY 1278 (8th ed. 2004). “Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts.” *Id.*

73. *Canney v. Bd. of Pub. Instruction*, 231 So. 2d 34, 36 (Fla. 1st DCA 1970).

74. *Id.* at 39.

75. *Canney*, 278 So. 2d at 263.

76. *Id.*

77. *Id.* at 265 (Dekle, J., dissenting).

78. *Florida Ban on Closed Meetings Merges Candor and Confusion*, N.Y. TIMES, Feb. 28, 1971, at 58.

III. EVOLUTION OF FLORIDA'S SUNSHINE LAW

The Sunshine Law has been further defined and contoured in the years since its enactment as the judiciary, the legislature, the Florida Attorney General, and the public have influenced the application of section 286.011. The judiciary's influence has been evident in several cases⁷⁹ decided during the last forty years.⁸⁰

The Florida Supreme Court explicitly rejected Florida's earlier open meetings law, section 165.22, in *City of Miami Beach v. Berns*.⁸¹ In *Berns*, the court considered two major issues: whether the 1967 Sunshine Law superseded the earlier open meetings law, and whether a city council may hold closed, informal, executive sessions.⁸² After determining that section 286.011 repealed section 165.22 because of the breadth of the 1967 law, the court held that closed meetings were not permitted under the Sunshine Law.⁸³ Such "closed door operation of government" was specifically what the Sunshine Law sought to prohibit.⁸⁴ The *Berns* court also emphasized the potential for violating the Sunshine Law if less than a quorum is present; "any

79. See generally *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 383 (Fla. 1999) (applying the Sunshine Law to private entities to which the public entity has delegated "the performance of its public purpose"); *Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 823 (Fla. 1985) (affirming application of the Sunshine Law to meetings between a city council and the city attorney to discuss litigation settlement); *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (enjoining committee from excluding press or the public from meetings to screen applicants for deanship of law school); *McCoy Rests., Inc. v. City of Orlando*, 392 So. 2d 252 (Fla. 1980) (holding that airlines are not subject to the Sunshine Law by virtue of their lease with the aviation authority); *Occidental Chem. Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977) (holding that staff members are not subject to the Sunshine Law unless the entity delegates official acts); *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) (holding that a citizens' planning commission, comprised of private citizens, was subject to the Sunshine Law); *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971) (holding that any private meeting, formal or informal, of public officials regarding public business is a violation of the Sunshine Law); *Zorc v. City of Vero Beach*, 722 So. 2d 891 (Fla. 4th DCA 1998) (regarding the application of the Sunshine law to litigation involving the city council); *Cape Coral Med. Ctr., Inc. v. News-Press Publ'g Co.*, 390 So. 2d 1216, 1218 n.5 (Fla. 2d DCA 1980) (recognizing the similar policies behind the Sunshine Law and the public records law and that the two should be read together); *Bigelow v. Howze*, 291 So. 2d 645 (Fla. 2d DCA 1974) (holding that committee members violated the Sunshine Law by discussing their recommendation while outside of the state); *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973) (holding the Sunshine Law applies to members-elect).

80. J. Emory "Red" Cross said in a 1978 interview that the Florida Supreme Court "expanded [the law] a little more than [he] actually intended." Cross Interview, *supra* note 12. In an earlier interview, Cross described the quorum requirement as "absurd." Robert E. Greenberg, *An Annotated History of Florida's "Sunshine Law,"* 118 CONG. REC. 26912 (1972).

81. *Berns*, 245 So. 2d at 40.

82. *Id.* at 39, 40.

83. *Id.* at 41.

84. *Id.*

two or more members” could find themselves in violation of the law if they discuss matters that could come before the entity.⁸⁵

Three years after *Berns* was decided, the 1974 decision in *Town of Palm Beach v. Gradison* had important implications for committees established to advise boards, commissions, and other entities subject to the Sunshine Law.⁸⁶ In *Gradison*, the Town Council of the Town of Palm Beach appointed individuals to a citizens’ planning commission in order to assist in updating and revising the town’s zoning ordinances.⁸⁷ The advisory group’s meetings were not open to the public and no minutes were taken.⁸⁸ The private meetings were challenged after the Town Council passed an ordinance.⁸⁹ The Florida Supreme Court held that “any committee established by the Town Council to act in any type of advisory capacity would be subject to the provisions of the government in the sunshine law.”⁹⁰ The court invalidated the zoning ordinance, construing the statute “so as to frustrate all evasive devices.”⁹¹

Another important case in the history of the Sunshine Law is *Wood v. Marston*.⁹² The case, decided by the Florida Supreme Court in 1983, was brought by Gainesville-area news media⁹³ in order to gain access to meetings of a committee charged with assisting in the selection of a new dean for the University of Florida’s law school.⁹⁴ The committee’s duties were to solicit and screen applications for the deanship; submit for faculty approval a list of the best-qualified applicants; and forward the list to University President Robert Q. Marston, who would make the final decision.⁹⁵ The press sued Marston and the committee chairman, law professor Fletcher Baldwin, for access to the committee’s meetings.⁹⁶ Marston and Baldwin argued that the Sunshine Law was not intended to apply to institutions of higher education and that the committee did not fall within the ambit of the

85. *Id.* J. Emory “Red” Cross, who drafted the Sunshine Law, did not agree with the interpretation that the law applied to less than a quorum: “[You] cannot take final action without a quorum. I thought that would mean anything less than a quorum could meet as a fact-finding group for the board, body, or commission and report back in public what [that body] found out or recommended.” Cross Interview, *supra* note 12.

86. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974).

87. *Id.* at 474.

88. *Id.* at 475.

89. *See id.* at 478.

90. *Id.* at 476.

91. *Id.* at 477.

92. *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

93. Petitioners included Terri Wood, editor of the *Verdict*; Thomas R. Julin; and Campus Communications, Inc. *Id.* at 934. Campus Communications includes the *Independent Florida Alligator*, the University of Florida’s student-run newspaper. *See* The Independent Florida Alligator, <http://www.alligator.org/> (last visited Feb. 15, 2008).

94. *Wood*, 442 So. 2d at 936.

95. *Id.* at 937.

96. *Id.* at 934.

Sunshine Law.⁹⁷ The court, citing the legislature's explicit exemption of other search-and-screen committees from the Sunshine Law, rejected those arguments.⁹⁸ The *Wood* court analogized the search committee to the citizens' planning commission in *Gradison*; both cases involved the delegation of decisionmaking authority to an advisory group.⁹⁹ The court affirmed a lower court's entry of declaratory judgment and permanent injunction against private search-committee meetings.¹⁰⁰

Although courts have been cautious of reading exemptions into the Sunshine Law, the Florida Legislature has enacted approximately eighty-five exemptions to the open meetings law.¹⁰¹ These exemptions range from portions of meetings revealing emergency response plans for acts of terrorism¹⁰² to the discussions of settlement negotiations or strategy sessions related to litigation expenses for pending litigation.¹⁰³ In accord with the strength of the Sunshine Law, the legislature has enacted a process for the periodic review of statutory exemptions to Florida's Sunshine and public records laws.¹⁰⁴ The Open Government Sunset Review Act, enacted first in 1985 and again in 1995, requires lawmakers to reevaluate the necessity of open government law exemptions. Since 1995, most exemptions are subject to automatic review every five years.¹⁰⁵

The Florida Attorney General also has influenced the application of the law, producing nearly 300 opinions in response to questions regarding the interpretation of the Sunshine Law.¹⁰⁶

The citizens of Florida voiced their approval of the breadth of the state's open meetings laws in 1990, when they voted to amend the Florida Constitution to make the legislature itself subject to an open

97. *Id.* at 938. The committee included former American Bar Association President Chesterfield Smith. *Id.* at 937.

98. *Id.* at 938.

99. *Id.* at 939.

100. *Id.* at 941. The *Wood* court also approved another court's holding that committees who only engage in fact-finding are not subject to the Sunshine Law. *Id.* at 940 (citing *Bennett v. Warden*, 333 So. 2d 97, 100 (Fla. 2d DCA 1976)).

101. FLORIDA FIRST AMENDMENT FOUNDATION, EXEMPTIONS DATABASE, (CD-ROM), available at http://www.floridafaf.org/draft_exempt.aspx. The estimated number of exemptions is based on the authors' review of the database exemptions.

102. FLA. STAT. § 395.1056(1)(a) (2006).

103. *Id.* § 286.011(8)(b).

104. *Id.* § 119.15.

105. *Id.* § 119.15(3). Exemptions not subject to review are those required by federal law or those that apply solely to the legislature or judiciary. *Id.* § 119.15(2); see also Barry Richard & Richard Grosso, *A Return to Sunshine: Florida Sunsets Open Government Exemptions*, 13 FLA. ST. U. L. REV. 705, 717 (1985).

106. See Florida Attorney General Advisory Legal Opinions, available at <http://myfloridalegal.com/opinions> (search of the term "Sunshine Law" produced 298 results as of Feb. 15, 2008).

meetings requirement.¹⁰⁷ Though the Florida House and Senate already had rules of procedure reflecting openness to the public, the constitutional amendment provided stronger legal footing for citizens desiring access to legislative proceedings.¹⁰⁸ The amendment also ended a decade-long debate between the Florida Attorney General's Office and the legislature over the applicability of the Sunshine Law to the legislature.¹⁰⁹ Just as the press was instrumental in advancing Florida's Sunshine Law, it also helped propel the issue of legislative openness into the arena of public concern.¹¹⁰

Florida citizens endorsed open government laws again in 1992 when they approved another constitutional amendment.¹¹¹ This "Sunshine Amendment" granted constitutional status to the public's right of access to the government.¹¹² Ten years after passage of the Sunshine Amendment, Florida citizens voted in 2002 to amend the constitution again in favor of open government by requiring a two-thirds vote before an exemption is added to the Sunshine Law or public records law.¹¹³ The supermajority requirement also applies to the renewal of exemptions.¹¹⁴

Befitting Florida's commitment to open government, Florida Governor Charlie Crist established an Office of Open Government as one of his first official acts following his January 2, 2007, swearing-in.¹¹⁵ The mission of the office is to ensure compliance with the Sunshine Law and public records law and provide training on the laws for executive agencies.¹¹⁶

IV. FLORIDA'S SUNSHINE LAW IN PERSPECTIVE

The breadth of Florida's Sunshine Law and the liberal construction of the statute by Florida courts has resulted in Florida's longstanding reputation as a national leader in open meetings laws.¹¹⁷ In

107. FLA. CONST. art. III, § 4(e); Patricia A. Gleason & Joslyn Wilson, *The Florida Constitution's Open Government Amendments: Article I, Section 24 and Article III, Section 4(E)—Let the Sunshine In!*, 18 NOVA L. REV. 973, 977 (1994); see also Thomas Ross McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 FLA. ST. U. L. REV. 307, 309 (1991).

108. See McSwain, *supra* note 107, at 316.

109. *Id.* at 317.

110. See *id.*

111. FLA. CONST. art. I, § 24(b).

112. *Id.*

113. Lucy Morgan, *Attorney General Says Two-Thirds Vote Needed to Restrict Records*, ST. PETE. TIMES, May 7, 2003, at 4B.

114. 2003-18 Fla. Op. Att'y Gen. 3 (2003).

115. Fla. Exec. Order No. 07-01 (Jan. 2, 2007), available at <http://www.flgov.com/pdfs/orders/07-01-outline.pdf>.

116. *Id.*; see also Office of Open Government, http://www.flgov.com/og_home (last visited Feb. 15, 2008).

117. See Little & Tompkins, *supra* note 7, at 455 n.14, 461; Dan Paul & Steven Kamp, *Access in Florida: The Sunshine State of Mind*, 56 FLA. B.J. 233, 233 (1982); Richard &

the first *Florida Open Government Law Manual*, published in 1978 by Florida Attorney General Robert L. Shevin, and funded in part by The New York Times Company,¹¹⁸ Shevin described the state's open government laws as "among the broadest and most all-encompassing of their kind in the entire nation."¹¹⁹ Florida's Sunshine Law quickly gained a national reputation as being one of the strongest and most effective open meetings laws, prompting other states to pattern their laws after the Florida law.¹²⁰ In 1975, *The New York Times* described the Florida law as "set[ting] the pace" for other states.¹²¹

A 1974 study by the National Association of Attorneys General ranked states on a "maximum-openness-minimum-openness" scale according to their individual Sunshine Laws.¹²² The scale considered factors such as the scope of agencies covered by the statutes, the presence of a policy statement in support of openness, and provisions for legal recourse if the open meetings laws are violated.¹²³ Perhaps due in part to its lack of a policy statement within the statute, Florida scored an eight on the openness scale, with Tennessee ranked as the most open state with a score of twelve.¹²⁴ Just over a decade later, the University of Florida's Center for Governmental Responsibility compared Sunshine Laws across the nation in terms of their statutory exceptions.¹²⁵ Florida had noticeably fewer statutory exceptions than other states—of the six representative exceptions considered, Florida only had one—for collective bargaining.¹²⁶ In comparison, thirty-five states had exceptions for attorney-client privilege; thirty-eight for personnel hiring; thirty-eight for personnel charges and discipline; thirty-two for property transactions; and twenty-two for public safety/security.¹²⁷

Further, many scholarly analyses of open meetings laws use Florida as a prime example in illustrating the variety of approaches

Grosso, *supra* note 105, at 722; B. Mitchell Simpson III, *The Open Meetings Law: Friend and Foe*, R.I. B.J., Oct. 1996 at 7, 29; Wickham, *supra* note 21, at 491-92.

118. OFFICE OF THE FLA. ATTY GEN., *FLORIDA OPEN GOVERNMENT LAWS MANUAL* 2 (1978). Shevin was also a state senator and supporter of the Sunshine Law when the Florida Legislature passed it.

119. *Id.* at 1.

120. See Lawrence Fellows, *Connecticut Senate Fails to Vote Open Meetings*, N.Y. TIMES, Jan. 15, 1975, at 54; *Open-Meeting Act Is a Puzzle*, N.Y. TIMES, Dec. 21, 1975, at 62.

121. Lawrence Fellows, *Connecticut Right-to-Know Bill Gets Final Legislative Approval*, N.Y. TIMES, May 22, 1975, at 45.

122. NAT'L ASS'N OF ATTY'S GEN., *LEGISLATIVE APPROACHES TO CAMPAIGN FINANCE, OPEN MEETINGS, AND CONFLICT OF INTEREST* 42 (1974).

123. *Id.*

124. *Id.* at 44-45.

125. UNIV. OF FLA., *CTR. FOR GOVERNMENTAL RESPONSIBILITY, OPEN GOVERNMENT LAWS AND FLORIDA'S LOCAL GOVERNMENTS* 16 (1985).

126. *Id.*

127. *Id.*

states take to legislating the public's right to know about the workings of government.¹²⁸

Even the federal government has been affected by the strength of Florida's Sunshine Law. The federal Government in the Sunshine Act, signed into law by President Gerald Ford in 1976, provides public access to the deliberations of several federal agencies.¹²⁹ The law was prompted in part by Watergate and other Nixon-era scandals.¹³⁰ But it was Florida Senator Lawton Chiles who introduced the act to Congress.¹³¹ Chiles was a member of the Florida Senate when the original Sunshine Law was passed in 1967¹³² and used Florida's approach as an example of "good practical precedent" for a federal Sunshine Law.¹³³ According to one legal commentator, "[t]he Florida law in turn stimulated the federal law through the midwifery of Florida Senator Lawton Chiles."¹³⁴ Although the federal law is not as broad as Florida's Sunshine Law, Chiles' experience with his home state's "absolutist" law helped him to assuage fears among federal officials regarding the Government in the Sunshine Act.¹³⁵

V. TECHNOLOGY AND FLORIDA'S SUNSHINE LAW

The strong reputation of Florida's Sunshine Law and its demonstrated capability to affect legislation elsewhere is at somewhat of a crossroads as states deal with new technologies not in existence at the time their open meetings laws were enacted.¹³⁶ Approximately

128. See generally Margaret S. DeWind, *The Wisconsin Supreme Court Lets the Sun Shine In: State v. Showers and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 839-40; Little & Tompkins, *supra* note 7, at 458-64; Simpson, *supra* note 117, at 29; Wickham, *supra* note 21, at 491-92. Cf. William R. Wright II, *Open Meetings Laws: An Analysis and a Proposal*, 45 MISS. L.J. 1151, 1165 (1974).

129. Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (1976); Presidential Statement, 11 WEEKLY COMP. PRES. DOC. 38 (Sept. 13, 1976).

130. Thomas H. Tucker, "Sunshine"—*The Dubious New God*, 32 ADMIN. L. REV. 537, 538 (1980).

131. 118 CONG. REC. 26903 (1972) (statement of Sen. Chiles).

132. *Id.*

133. *Id.*

134. Tucker, *supra* note 130, at 540. In 1975, Florida Attorney General Robert Shevin also relayed his experiences with the Florida Sunshine Law to Congress. Martin Arnold, *Proxmire Backs Disclosure Act to Protect Federal Employees* [sic], N.Y. TIMES, Apr. 30, 1975, at 10. Shevin testified on behalf of an act that would protect federal employees from retaliation for releasing public information that was embarrassing to the government. *Id.* The legislation failed. S. 1210, 94th Cong. (1975). However, the Federal Employee Protection of Disclosures Act was reintroduced as recently as 2007. 110 CONG. REC. S274, 455-58 (daily ed. Jan. 11, 2007) (statement of Sen. Akaka).

135. Note, *The Federal "Government in the Sunshine Act": A Public Access Promise*, 29 U. FLA. L. REV. 881, 891 (1977).

136. The implications of electronic communication, especially in the corporate realm, have also impacted the way attorneys conduct discovery. Jason Krause, *E-Discovery Gets Real*, A.B.A. J., Feb. 2007, at 44. Amendments to the Federal Rules of Civil Procedure added "electronically stored information" to the list of what parties in a case may request from one another. *Id.* These changes, along with a series of rulings by a federal judge,

twenty-three states address computer technology in their open meetings statutes.¹³⁷ Missouri law, for example, specifically provides for meetings “by Internet chat, internet message board, or other computer link,” provided the public is notified of how to access the meeting.¹³⁸ Florida’s Sunshine Law does not specifically address the use of technology to conduct public meetings, but opinions of the Florida Attorney General and prior case law calling for a broad construction of the law make it clear that regardless of the technology used, meetings must still comply with the provisions of the Sunshine Law.

New computer technology raises issues of both public access and the privacy of public officials.¹³⁹ The primary concern for open government advocates is that personal computers offer new ways that government officials and decisionmakers can hide deliberation from public scrutiny.¹⁴⁰ The major categories of computer technology that have particular relevance to Sunshine Laws are email, instant messaging, text messaging, electronic discussion boards, and video conferencing. These technologies have important implications for Florida’s Sunshine Law, because the law has been interpreted to apply even when less than a quorum communicates regarding items that foreseeably will come before the public body.¹⁴¹ Government officials

prompted corporations to pay more attention to document retention software. *Id.* at 47. As companies invest more in the development of software that captures email, instant messages, and other documents, states could incorporate more of this software into their document retention plans. *See generally* FED. R. CIV. P. 34, 16, 26, 37; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (concerning the extent to which inaccessible electronic data is discoverable).

137. The states that statutorily address electronic meetings are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Iowa, Kansas, Missouri, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia. *See* ALA. CODE § 36-25A-1 (2006); ALASKA STAT. § 44.62.310(a) (2006); ARIZ. REV. STAT. ANN. § 38-431 (2006); CAL. GOV’T CODE § 54952.2 (2006); COLO. REV. STAT. § 24-6-402(2)(d)(III) (2006); CONN. GEN. STAT. § 1-200(2) (2006); HAW. REV. STAT. § 92-3.5 (2006); IOWA CODE § 21.8 (2006); KAN. STAT. ANN. § 75-4317(a) (2006); MO. REV. STAT. §§ 610.010-020 (2006); MONT. CODE ANN. § 2-3-202 (2006); NEB. REV. STAT. § 84-1411 (2006); N.J. STAT. ANN. § 10:4-8 (2006); N.D. CENT. CODE. § 44-04-20 (2006); OKL. STAT. tit. 25, § 306 (2006); OR. REV. STAT. § 192.670 (2006); R.I. GEN. LAWS § 42-46-5 (2006); S.C. CODE ANN. § 30-4-20 (2006); TENN. CODE ANN. § 8-44-108 (2006); TEX GOV’T CODE ANN. §§ 551.001, 551.127 (2006); UTAH CODE ANN. § 52-4-207 (2006); VA. CODE ANN. § 2.2-3708 (2006); W. VA. CODE § 6-9A-2 (2006); *see also* THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (2006), available at <http://www.rcfp.org/ogg/index.php> (providing a searchable outline of every state’s open records and open meetings laws, including a section dedicated to state law on electronic records).

138. MO. REV. STAT. § 610.020(1).

139. Patrick L. Imhof & Edwin A. Levine, *Impact of the Information Age on Access and Dissemination of Government Information in Florida*, 14 FLA. ST. U. L. REV. 635, 636 (1986).

140. Stephen Schaeffer, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS L.J. 755, 755 (2004).

141. For other pertinent laws, see FLA. STAT. § 286.0105 (2006) (requiring notice of meetings to include advice that in order to appeal any decision made by the board, agency,

also need clear guidance as to how technologies can be used without violating the Sunshine Law. This need stems in part from the consequences that can result from violations, including criminal penalties, removal from office, noncriminal infractions, payment of attorney fees, and invalidation of official acts.¹⁴²

In 1997, the legislature enacted a statute calling for uniform rules for state agencies¹⁴³ to conduct public meetings, hearings, workshops, and other proceedings using “communications media technology” (CMT).¹⁴⁴ The legislation resulted in Chapter 28-109 of the Florida Administrative Code, titled “Conducting Proceedings by Communications Media Technology.”¹⁴⁵ CMT is defined as “the electronic transmission of printed matter, audio, full-motion video, freeze frame video, compressed video, and digital video by any method available.”¹⁴⁶ The rules indicate that proceedings subject to the Sunshine Law can be conducted exclusively using CMT only if there is enough available technology for all interested citizens to attend.¹⁴⁷ If technical difficulties arise during such proceedings, the agency must terminate the proceedings until the problems have been fixed.¹⁴⁸ When providing notice of CMT meetings, the agency must include information on available access points and which access points are located in public places.¹⁴⁹

Besides the guidance provided by the legislature, opinions of the Florida Attorney General are the main sources of authority regarding the applications of technologies such as email, instant messaging, online discussion boards, and video conferencing to the requirements of the Sunshine Law.

or commission, a verbatim record of the proceedings must be made) and *id.* § 286.012 (requiring members of a board, commission, or agency to vote when present at a meeting of the entity).

142. OFFICE OF THE FLA. ATT’Y GEN., GOVERNMENT-IN-THE-SUNSHINE MANUAL 53-56 (2007). For more information on Sunshine Law prosecutions and the awarding of attorney fees, see The Brechner Center for Freedom of Information, Florida Public Records and Open Meetings Laws Prosecutions Database, http://www.brechner.org/prosecutions/DB_PROSECUTIONS.asp (last visited Feb. 15, 2008), and The Brechner Center for Freedom of Information, Florida Public Records and Open Meetings Attorney’s Fees Database, http://www.brechner.org/attorney/db_attorney1.asp (last visited Feb. 15, 2008).

143. These uniform rules apply only to state agencies and do not have broad application. See 98-28 Fla. Op. Att’y Gen. (1998) (advising that a physically absent school board member may use “electronic media technology” to attend a public meeting as long as a quorum of board members is physically present at the meeting), *available at* <http://myfloridalegal.com/ago.nsf/Opinions/0600842E2934EC6C852565E100480BA7>.

144. FLA. STAT. § 120.54(5)(b)(2) (2006).

145. FLA. ADMIN. CODE ANN. ch. 28-109 (2006).

146. *Id.* at r. 28-109.002(3).

147. *Id.* at r. 28-109.004(2).

148. *Id.*

149. *Id.* at r. 28-109.005. Access point is defined as “a designated place where a person interested in attending a CMT proceeding may go for the purpose of attending the proceeding.” *Id.* at r. 28-109.002(1).

A. Email

Email allows computer users to send electronic messages via the Internet or an intranet of computer users.¹⁵⁰ Of the sixty-two percent of Americans who have Internet access at work, almost all of them use email.¹⁵¹ For local government officials who have Internet access in the workplace, even more use email in connection with their official duties—eighty-eight percent.¹⁵² As early as 1989, the Attorney General of Florida addressed the issue of how the Sunshine Law applied to communication over computer networks.¹⁵³ Email as a meeting under the Sunshine Law was specifically addressed by Attorney General Robert Butterworth in 2001.¹⁵⁴ The opinion was authored in response to a city attorney who inquired whether city council members may communicate via email regarding factual background information without contravening the Sunshine Law.¹⁵⁵ Relying on an earlier Attorney General Opinion regarding the circulation of a written memorandum among members of a school board,¹⁵⁶ Attorney General Butterworth concluded that so long as the email communication does not result in the exchange of opinions on subjects requiring council action, it does not violate the Sunshine Law.¹⁵⁷

B. Instant Messaging and Text Messaging

Instant messaging allows computer users to communicate typed messages simultaneously with other computer users. More than 11 million computer users instant message (IM) at work, according to one study.¹⁵⁸ Transcripts of IM conversations can be saved on each user's personal computer, often without the knowledge of the other

150. Schaeffer, *supra* note 140, at 755-56.

151. DEBORAH FALLOWS, PEW INTERNET & AM. LIFE PROJECT, EMAIL AT WORK: FEW FEEL OVERWHELMED AND MOST ARE PLEASED WITH THE WAY EMAIL HELPS THEM DO THEIR JOBS 2 (2002), available at http://www.pewinternet.org/pdfs/PIP_Work_Email_Report.pdf.

152. ELENA LARSEN & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, DIGITAL TOWN HALL: HOW LOCAL OFFICIALS USE THE INTERNET AND THE CIVIC BENEFITS THEY CITE FROM DEALING WITH CONSTITUENTS ONLINE 2 (2002), available at http://www.pewinternet.org/pdfs/PIP_Digital_Town_Hall.pdf.

153. 89-39 Fla. Op. Att'y Gen. 1 (1989) (advising that county commissioners may use a computer network to conduct official business, subject to the requirements of Florida's Public Records and Sunshine laws; aides to the commissioners are not subject to "the Sunshine Law unless they have been delegated decision-making functions outside of the ambit of normal staff functions, are acting as liaisons between board members, or acting in place of the board members at their direction").

154. 2001-20 Fla. Op. Att'y Gen. (2001).

155. *Id.* at 1.

156. 96-35 Fla. Op. Att'y Gen. (1996).

157. 2001-20 Fla. Op. Att'y Gen. 1-2 (2001); see also Informal Fla. Op. Att'y Gen., June 8, 2007.

158. EULYNN SHIU & AMANDA LENHART, PEW INTERNET AND AM. LIFE PROJECT, HOW AMERICANS USE INSTANT MESSAGING 2 (2004), available at http://www.pewinternet.org/pdfs/PIP_Instantmessage_Report.pdf.

party.¹⁵⁹ Mobile devices, such as cell phones and personal digital assistants (PDAs) offer similar methods of communication by allowing users to send short text messages to each other.¹⁶⁰ In the federal government, the Department of Defense, the National Institute for Standards and Technology, and the Federal Emergency Management Agency all use IM services.¹⁶¹ Florida's State Technology Office also uses an advanced IM system.¹⁶²

These technologies are advantageous because they can improve employee communication.¹⁶³ Disadvantages of employee use of IM and text message services include the potential for violating the privacy of citizens' personal information; the need to retain records of the communications for purposes of the Sunshine Law and public records law; and ensuring the communications do not expose government computer systems to security threats.¹⁶⁴ The National Association of State Chief Information Officers (NASCIO) recommends that states prohibit the use of consumer IM services (such as America Online Instant Messenger) in the workplace in favor of "enterprise-class"¹⁶⁵ services better able to withstand security threats.¹⁶⁶ NASCIO also recommends that states establish management and retention policies for IM communications.¹⁶⁷ The Florida Attorney General's Office has not yet issued an advisory opinion on the implications of instant messaging and the Sunshine Law.

C. *Electronic Discussion Boards*

An online discussion board allows computer users to post messages for other computer users to view and post replies. Communication regarding matters of public concern via an electronic discussion board (also called an electronic bulletin board) can be of great benefit to the public by allowing increased participation and anonymity.¹⁶⁸ But issues of maintaining procedural order, public access, public no-

159. See NAT'L. ASSOC. OF STATE CHIEF INFO. OFFICERS (NASCIO), TLK2UL8R: THE PRIVACY IMPLICATIONS OF INSTANT AND TEXT MESSAGING TECHNOLOGIES IN STATE GOVERNMENT 7 (2005), <http://www.nascio.org/publications/documents/NASCIO-instantMessagingBrief.pdf> [hereinafter NASCIO]; Kate Zernike & Abby Goodnough, *Lawmaker Quits Over E-Mail Sent to Teenage Pages*, N.Y. TIMES, Sept. 30, 2006, at A1. Representative Mark Foley resigned after transcripts of explicit IM conversations between the politician and teenage pages were revealed. *Id.* Inappropriate emails surfaced first, but the IM conversations were much more graphic. *Id.*

160. NASCIO, *supra* note 159, at 2.

161. *Id.* at 4.

162. *Id.* at 8.

163. *Id.* at 1.

164. *Id.* at 4-7.

165. Enterprise-class devices are high-end equipment designed for a large organization. NASCIO, *supra* note 159, at 3.

166. *Id.* at 6.

167. *Id.* at 6-7.

168. Schaeffer, *supra* note 140, at 787-88.

tice, and quorum requirements make this technology especially sensitive to the demands of the Sunshine Law. The primary issue of concern with discussion boards and other forms of online meetings is the requirement that a quorum be physically present when official action is to be taken.¹⁶⁹

Among the issues to consider for boards, commissions, agencies, and other entities covered by the Sunshine Law who wish to engage in Internet meetings are: resistance to the medium; access issues for both the public and the agency; software implementation; whether public comment will be allowed; real-time chat capabilities versus posting; the appointment of a webmaster to monitor the discussion; and compliance with the Sunshine Law's public notice requirements.¹⁷⁰ This premeeting "to-do list" was developed by the Southwest Florida Water Management District¹⁷¹ (SWFWMD).¹⁷²

Subsequent to the SWFWMD's compilation of this list, Attorney General Butterworth issued an opinion regarding the development of an electronic bulletin board to discuss issues that may foreseeably come before a SWFWMD board.¹⁷³ Specifically, the district proposed a discussion board that would be open for a period of at least twenty days that would allow for the posting of board member comments but not direct, online responses by the public.¹⁷⁴ Provisions for public notice, public access, preparation of an agenda, and retention of board member comments were included in the district's plan.¹⁷⁵ Attorney General Butterworth rejected the district's proposal because it conflicted with the notice and access requirements of the Sunshine Law.¹⁷⁶ The public's access to the meetings would be limited because they would not be able to directly respond to board members' comments; instead, they would have to separately email comments to the

169. See, e.g., 83-100 Fla. Op. Att'y Gen. 1-2 (1983) and 89-39 Fla. Op. Att'y Gen. 3 (1989).

170. Karen A. Lloyd, *Electronic Sunshine: Swiftmud's Experience with Internet Meetings*, in PUBLIC OR PRIVATE? SUNSHINE OR ONLINE? PERSPECTIVES ON THE PUBLIC RECORDS AND GOVERNMENT IN THE SUNSHINE LAWS 6.1, 6.8 (Fla. Bar Continuing Legal Educ. Committee, Course No. 4810R, Nov. 1999).

171. This agency manages water resources. Southwest Florida Water Management District, Our Mission, <http://www.swfwmd.state.fl.us/about/mission/> (last visited Feb. 15, 2008).

172. Lloyd, *supra* note 170, at 6.7-6.8.

173. 2002-32 Fla. Op. Att'y Gen. (2002); see also 2001-66 Fla. Op. Att'y Gen. (2001) (regarding "the use of computers to conduct airport authority meetings with access to public given through internet"); Informal Fla. Op. Att'y Gen., Mar. 23, 2006 (regarding the use of an electronic message board to conduct public meetings).

174. 2002-32 Fla. Op. Att'y Gen. 1-2 (2002).

175. *Id.* For example, public notice would be published prior to the opening of the bulletin board. *Id.* The notice would include the length of time the bulletin board would be open, the topics to be discussed, and the locations where the public could access computers. *Id.* The SWFWMD would prepare an agenda for the discussion and the text of all board member comments would be archived as a public record. *Id.*

176. *Id.* at 3.

district or present them in person at a board meeting.¹⁷⁷ Further, the public would be unreasonably burdened in that they would have to monitor the discussion board constantly in order to ascertain if an issue of interest was up for discussion.¹⁷⁸ In sum, the opinion advised that the proposal would “essentially foreclose meaningful public participation in a public meeting.”¹⁷⁹

While the SWFWMD’s proposal concerned only the online *discussions* of issues, another query to Attorney General Butterworth asked whether boards could hold *meetings* online.¹⁸⁰ The Leesburg Regional Airport Authority asked the attorney general whether a plan for Internet “discussions/meetings” that accounted for the access and notice provisions of the Sunshine Law was permissible under the Sunshine Law.¹⁸¹ As long as these provisions were complied with, Attorney General Butterworth opined, informal “discussions and workshops” were permitted.¹⁸² But for meetings where official actions would be taken—which would require a quorum of members—online meetings would not be permitted under the Sunshine Law.¹⁸³ Attorney General Butterworth advised that “in the absence of a statute to the contrary, the requisite number of members must be physically present at the meeting in order to constitute a quorum.”¹⁸⁴ In other words, for official acts to be taken, the Authority would have to designate an official (physical) meeting site where the public could at-

177. *Id.* at 2.

178. *Id.* at 4.

179. *Id.*

180. 2001-66 Fla. Op. Att’y Gen. 1 (2001); *see also* 2002-82 Fla. Op. Att’y Gen. 1 (2002) (advising that physically disabled members of a city board created to address needs of the handicapped may participate electronically so long as a quorum of members is physically present at the meeting location); Informal Op. Att’y Gen. 3 (Mar. 23, 2006) (advising that a town’s electronic discussion board proposal appeared to assuage previous concerns of the Attorney General’s Office, but expressing concern “about any proposal for a public meeting which places the burden on the public to constantly monitor the site in order to participate meaningfully in the discussion and which extends this burden over the course of days, weeks, or months”); 98-28 Fla. Op. Att’y Gen. 1 (1998) (allowing a school board to use electronic media technology for a physically absent member to participate so long as a quorum is physically present); 92-44 Fla. Op. Att’y Gen. 1 (1992) (concluding that a county commissioner unable to attend a meeting for medical reasons could participate using distance technology, but only if a quorum of members would be present at the public meeting site); 94-55 Fla. Op. Att’y Gen. 1 (1994) (determining that a member of the board of trustees of a public body could participate in meetings by telephone, but only if a quorum of members would be present at the public meeting site).

181. 2001-66 Fla. Op. Att’y Gen. 1 (2001). In his query to Attorney General Bob Butterworth, Leesburg City Attorney Joseph C. Shoemaker apparently did not offer specific plans for online meetings. *See id.*

182. *Id.* at 3.

183. *Id.*

184. *Id.* at 2 (“In order to constitute a quorum the requisite number of members must be actually present at the meeting and the requisite number cannot be made up by telephoning absent members and obtaining their vote over the telephone.” *Id.* at 2 n.7 (quoting 62 C.J.S. *Municipal Corporations* s. 399)).

tend; public Internet access could be used in conjunction with these in-person meetings to improve access.¹⁸⁵

D. Video Conferencing

The use of audio and video technology to simultaneously broadcast and receive images and sounds allows people who are not in each other's physical presence to simulate a face-to-face conversation. This concept of video conferencing allows meaningful communication between individuals who are not able to meet in person.

The Florida Keys have been testing grounds for the potential to utilize video conferencing to conduct meetings.¹⁸⁶ The unique geography of Monroe County—over one hundred miles connected by bridges—prompted the commission to consider video conferencing and digital audio for certain meetings.¹⁸⁷ The commission holds meetings, special meetings, and workshops at three locations throughout the county, from the upper Keys to the lower Keys.¹⁸⁸ In late 2005, a Monroe County commissioner proposed a one-year test program to use video conferencing for special meetings.¹⁸⁹ The Office of the Attorney General of Florida, led by Attorney General Charlie Crist, issued an informal opinion on the issue, advising that for meetings where no formal action will be taken, video conferencing would be permissible.¹⁹⁰ But the office urged the county to be “vigilant” in ensuring that such meetings or workshops did not become “forums for the commission to undertake formal decision making,” thus violating the requirement for a quorum to be physically present at the meeting site.¹⁹¹

The Florida Legislature provided the Monroe County Commission with more leeway in conducting special meetings via video conferencing technology when it passed a special law, later signed by the governor, during the 2006 regular session.¹⁹² The bill approved the one-year plan to conduct special meetings using video conferencing and suspended the quorum requirement for these meetings.¹⁹³ The act

185. *See id.* at 3.

186. *See* Fla. H.R. Comm. on Govtl. Ops., HB 1335 (2006) Staff Analysis 6 (final Mar. 29, 2006) (on file with comm.); Informal Fla. Op. Att’y Gen. (Nov. 29, 2005).

187. Fla. H.R. Comm. on Govtl. Ops., HB 1335 6 (2006) Staff Analysis (final Mar. 29, 2006) (on file with comm.).

188. *Id.* at 3.

189. Informal Fla. Op. Att’y Gen. 1 (Nov. 29, 2005).

190. *Id.* at 3.

191. *Id.*; *see also* 2006-20 Fla. Op. Att’y Gen. 4 (2006) (advising the Joint Citizens Advisory Committee, whose members are representatives from several county planning boards, that the use of electronic technology for meetings would not satisfy quorum requirements).

192. Act effective July 1, 2006, ch. 2006-350, 2006 Fla. Laws 172.

193. Fla. HB 1335 § 2 (2006).

contained a provision for the automatic repeal of the law after one year.¹⁹⁴

VI. CONCLUSION

When the legislature passed the Sunshine Law forty years ago, it marked a new era of government transparency, an important first step in putting the days of government secrecy and the “Pork Chop Gang” in the past. The Sunshine Law also placed Florida in the forefront of a national movement to open government meetings to the public. The Sunshine Law influenced open government policies at both the state and federal levels, serving as an example of how one state succeeded in passing an extremely broad open meetings law. The state courts also played a major role in the success of the Sunshine Law by embracing the breadth of the Sunshine Law and enforcing the construction of the statute in favor of public benefit. Though several exemptions to the Sunshine Law have been established over the last four decades, the law still remains strong, with relatively few exemptions compared to the public records law.

But the strength of the Sunshine Law makes the incorporation of new technologies and potential meeting formats a difficult task. To date, the Florida Attorney General’s Office has served as the primary driving force behind the application of the Sunshine Law to new technologies, with no Florida courts speaking directly to the issue.¹⁹⁵ The Florida Legislature, via statutes regulating the use of communications media technology, addressed some issues of technology and the Sunshine Law. However, the portions of the Florida Administrative Code that address these statutes only apply to state agencies—not local entities.

Local officials need clear guidance—whether from the legislature, courts, or Florida Attorney General—in order to reap the benefits of these technologies without violating the Sunshine Law. Unfortunately, the legal guidelines are scattered throughout various statutes and Attorney General opinions. A common policy among entities would encourage entities to take advantage of technology with reduced fear of criminal and civil liability.

The appendix to this Article contains a model policy statement for entities subject to the Sunshine Law. The model policy statement summarizes the input thus far from the legislature and attorney general regarding the implications of technology for Sunshine Law entities. The adoption of such a policy statement will help ensure

194. *Id.* at § 4.

195. The Florida Supreme Court has addressed email technology in the public records context, finding that if the emails relate to public business, they are public records. *State v. City of Clearwater*, 863 So. 2d 149, 155 (Fla. 2003).

that entities subject to the Sunshine Law embrace new technology for its benefits—such as increased public participation and anonymity—while also complying with all provisions of the law.

APPENDIX

MODEL POLICY ON TECHNOLOGY FOR ENTITIES SUBJECT TO
FLA. STAT. § 286.011 (“SUNSHINE LAW”)

Communications media technology can enhance public participation in the government decisionmaking process and facilitate participation by government officials themselves. However, this technology also presents special challenges in light of Florida’s strong open meetings laws. It is therefore the policy of _____ to adhere to the following guidelines when implementing communications media technology into its decisionmaking process.

DEFINITIONS

Communications Media Technology – “[T]he electronic transmission of printed matter, audio, full-motion video, freeze frame video, compressed video, and digital video by any method available.”¹⁹⁶

Entity – “Any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision.”¹⁹⁷

PRINCIPLES OF FLORIDA’S OPEN MEETINGS LAWS

- Citizen participation is essential to an effective democracy.
- Floridians have a constitutional right of access to government proceedings.
- Florida’s Sunshine Law is to be interpreted broadly in favor of the public.

SCOPE OF PROBLEM

Communications media technology has the potential to increase public participation in the government decisionmaking process, thus advancing the principles of a democratic society. This same technology also has the potential to increase the prevalence of secret government meetings. A clear policy on communications media technology is necessary to avoid violating the Sunshine Law and the public’s right of access to government deliberations.

COMPLIANCE WITH APPLICABLE LAWS

Nothing in this policy statement shall be construed in contravention of Fla. Stat. § 286.011, Florida’s Sunshine Law.

196. FLA. STAT. § 120.54(5)(b)(2) (2006).

197. *Id.* § 286.011(1).

POLICY STATEMENT

1. ELECTRONIC PARTICIPATION BY A MEMBER NOT PHYSICALLY PRESENT

Members of an entity who are unable to physically attend a meeting may participate via communications media technology. This form of participation is conditional upon the requirement that a quorum of members is physically present at an official meeting site.

2. ELECTRONIC PARTICIPATION BY ALL MEMBERS

All members of an entity may participate in deliberations in contemplation of an official act via communications media technology if 1) the public is given reasonable notice of the meeting, including an agenda and public locations where interested members of the public can access communications media technology; and 2) enough communications media technology access points are provided so that all interested members of the public can participate. However, the entity may not take official action at such meetings. Official acts may only be taken when a quorum of members is physically present at an official meeting site.

3. INSTANT MESSAGING, TEXT MESSAGING, OR EMAIL COMMUNICATION AMONG MEMBERS

Members of entities may not use instant messaging, text messaging or email to communicate with fellow members regarding a matter that foreseeably might come before the entity (with an exception for communications regarding factual background information). Members of entities may not reply to emails sent by members of the same entity regarding official business. Necessary software will be implemented in order to maintain a record of such communications.

4. MAINTENANCE OF MEETING RECORDS

All meetings or discussions conducted using communications media technology will be recorded using the necessary software and made available to the public under the Florida Public Records Law.