Florida State University Law Review

Volume 2 | Issue 3

Summer 1974

Government in the Sunshine: Judicial Application and Suggestions for Reform

Sidney L. Matthew

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Since its passage in 1967, Florida's Government in the Sunshine Law has been well received by the judiciary. The courts have refused to riddle the law with exceptions or otherwise limit the broad scope of the open meeting principle. Ironically, it is this judicial deference that has made it necessary to consider the desirability of limiting the law in some respects; unbending application in some cases has brought about harsh results, totally out of proportion to the benefits derived from strict enforcement of the law. This note first will survey recent judicial developments concerning application of the Sunshine Law and then will offer suggestions for reform. It is the contention of this note that certain refinements could improve the law significantly, without damaging the open meeting principle.

I. APPLICATION OF THE SUNSHINE LAW

A. What Is a Meeting?

The Sunshine Law mandates that all "meetings" of state and local governing bodies, commissions and authorities must be open to the public when official actions are contemplated. The first attempt by a Florida court to define "meeting" arose under Florida's earlier open meeting statute. In Turk v. Richard the Florida Supreme Court held that § 286.011 supersedes and repeals § 165.22, which nonetheless remains in the statute books.

1. FLA. STAT. § 286.011 (1973) provides:
   (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or 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 political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

The statute will be referred to herein as the Sunshine Law.

2. See notes 116-37 and accompanying text infra.
3. See notes 138-45 and accompanying text infra.
4. See note 1 supra.
5. FLA. STAT. § 165.22 (1973). In City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971), the Florida Supreme Court held that § 286.011 supersedes and repeals § 165.22, which nonetheless remains in the statute books.
6. 47 So. 2d 543 (Fla. 1950).
preme Court held that only "formal assemblages" of a governing body "sitting . . . for the transaction of official municipal business" constitute "meetings." A "formal assemblage" occurred only when a body met as provided by law, for the purpose of joint consideration, decision and action, since only at such a gathering "could any formal action be taken . . . that could officially bind [the body]." Whenever a local body desired "to prevent the public from knowing what action [was] to be taken or what deliberation [was] taking place, it [gathered] in an informal session." Accordingly, the "formal meeting" doctrine rendered the early open meeting law impotent when officials sought to insulate their conduct from public scrutiny.

The Florida courts have refused, however, to invoke the "formal meeting" doctrine under the 1967 Sunshine Law. In *Times Publishing Co. v. Williams* the Second District Court of Appeal limited the holding in *Turk* to its definition of "meeting" as "a joint assemblage at which 'formal action' could be taken." Interpreting the new law to overcome the infirmities of *Turk*, the court concluded that the legislature intended to open to public view each step in the decision-making process leading to "formal action"; each step necessarily was an "official act" within the meaning of the statute.

Within two months of the *Times* decision, the Florida Supreme Court reached the same conclusion in *Board of Public Instruction v. Doran*. *Doran* involved a routine meeting of a school board held in executive session every Wednesday before later formal action. The purpose of the session was to inform and "educate" the board and staff members about issues to be considered at the formal meeting. The public and press were refused access to these assemblages since the board presumably believed that, under *Turk*, the new law covered only formal meetings. The supreme court, however, held that "[t]he obvious intent was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken by the board."

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7. Id. at 544.
12. Id. at 473.
13. Id.
14. 224 So. 2d 693 (Fla. 1969).
15. Id. at 696.
16. Id. at 698.
No further refinement of "foreseeable action" has been provided. Once it has been determined that formal action might be taken at some future time, *Times* and *Doran* indicate that each stage of the decision-making process, formal or informal, is within the scope of the Sunshine Law.\(^\text{17}\)

Despite the broad foreseeable action standard established in *Doran*, *Bassett v. Braddock*\(^\text{18}\) held that deliberations and discussions may "take place beyond the veil of actual 'meetings' of the body involved."\(^\text{19}\) The issue in that case was whether a school board's labor representative could initiate private preliminary negotiations with the teachers' representative without violating the open meeting principle. The preliminary discussions between the two representatives were held not to constitute "meetings,"\(^\text{20}\) but the court's justification for this conclusion appears to contradict prior case law:

Preliminary "discussions" may never result in any action taken. There may be numerous informal exchanges of ideas and possibilities, either among members or with others (at the coke machine, in a foyer, etc.) when there is no relationship at all to any meeting at which any foreseeable action is contemplated.\(^\text{21}\)

Under the rationale announced in the *Doran* case, these preliminary negotiations would seem to constitute an important step in the decision-making process. This apparent contradiction of its prior philosophy may have resulted from the court's belief that its decision was required by the Florida constitution. The court observed that closed meetings are necessary to preserve the public employees' constitutional right to bargain collectively.\(^\text{22}\)

The effect of *Bassett* on the "foreseeable action" test should be minimal for at least two reasons. First, the supreme court's holding can be viewed as the result of a conclusion that protection of a constitutional right outweighs rigid observation of the open meeting

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18. 262 So. 2d 425 (Fla. 1972).
19. *Id.* at 427.
20. *Id.*
21. *Id.*
22. *Id.*

The public should not suffer a handicap at the expense of a purist view of open public meetings, so long as the ultimate debate and decisions are public and the "official acts" and "formal action" specified by the statute are taken in open "public meetings."

*Id.* at 427. *FLA. CONST.* art. I, § 6, protects the rights of employees to bargain collectively.
principle. Secondly, the Florida legislature has altered the result in Bassett by passage of chapter 74-100. When collective bargaining issues are to be discussed, section 3 of that law exempts from the scope of the Sunshine Law consultations between the chief executive officer of a public employer and the public employer. The negotiations between a public employees' representative and a bargaining agent of the employer, however, are subject to the open meeting requirement. If this law is applied to facts similar to those in Bassett, discussions regarding collective bargaining between the public official in charge of administering the school system (presumably the superintendent of schools) and the school board should be exempt from the Sunshine Law. On the other hand, bargaining between the superintendent and the teachers' representative would not be exempt from the law. Although it is unclear from the language of the law, discussions between a professional bargaining agent employed by the school board and the teachers' representative also should be subject to the open meeting requirement. Application of the judicially created foreseeable action test to a situation such as that involved in Bassett also would require that the negotiations between both sides be open to the public. Thus this test formulated by the courts appears to comport well with the intent of the legislature regarding "meetings," as reflected in chapter 74-100.

Furthermore, a recent case emphasizes the continuing vitality of the foreseeable action test by suggesting that even preliminary stages in the decision-making process can be considered "meetings." Bigelow v. Howze involved a four-member fact-finding committee, established

23. See 262 So. 2d at 426.
24. Because of the constitutional basis for the holding in Bassett it might appear that legislative alteration of the decision would be precluded. The supreme court, however, has consistently refused to implement judicially the collective bargaining provision of the Florida constitution. The court has sought to preserve the right to bargain collectively without devising a specific bargaining scheme. At the same time, the court has urged the legislature to enact appropriate legislation implementing the constitutional provision. See Dade County Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969). Likewise in Bassett the court appears to have left open the door for legislative action in the area by its refusal to provide any specific guidelines. The court in Bassett was concerned with preserving the right, not implementing it. See 262 So. 2d at 426. Thus legislative implementation does not create a constitutional conflict. It remains to be decided, however, whether specific implementing legislation is consistent with the mandate of article I, § 6, of the Florida constitution.
25. Fla. Laws 1974, ch. 74-100, § 3 (§ 447.023), provides in part:

(1) All discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining shall be exempt from § 286.011, Florida Statutes.

(2) The collective bargaining negotiations between a chief executive officer and a bargaining agent shall not be exempt from § 286.011, Florida Statutes.
by the Charlotte County Commission, that had traveled to Tennessee to investigate the qualifications of two firms being considered as appraisers for a county contract. During the course of their travels, the committee members agreed that they would recommend the contract be awarded to Hunnicutt and Associates, Inc., rather than Howze and Associates. Upon return to Punta Gorda, the committee met with Hunnicutt representatives for breakfast, without notifying the public, to clarify some aspects of their agreement. The Second District Court of Appeals considered

whether public officials who are delegated fact-finding responsibility for the purpose of reporting back to the governing body violate the Sunshine Law when the fact-finders reach conclusions during the fact-finding process out of the presence of the public or press when both . . . had advance knowledge of the . . . mission and its whereabouts.

Indicating that a contrary conclusion would open the door to widespread evasion of the objectives of the Sunshine Law, the court stated that "where the members of the committee who are also members of the public body make decisions with respect to the committee's recommendation . . ." discussion must take place in the sunshine. Since a public meeting in Tennessee was not feasible, the two commissioners should not have discussed possible recommendations. "[C]ommittee recommendations are often accepted by public bodies at face value and with little discussion" and are therefore a crucial part of the deliberative process. Furthermore, the court recognized that the breakfast meeting in Punta Gorda was merely a continuation of the committee's deliberations regarding a recommendation. Since that meeting had been held without proper public notification, it too was "tainted."

The Bigelow court's analysis seems consistent with Times and Doran. An informal discussion among members of a public body concerning foreseeable formal action to be taken by the full body is an important stage in the decision-making process and therefore should be subject to the Sunshine Law. The foreseeable action test appears to be very much alive and applicable to even the most informal of deliberative

27. Id. at 646. The committee was composed of two commissioners from the five-member county commission, the tax assessor and the county attorney. Id.
28. Id.
29. Id. at 647.
30. Id.
31. Id. at 647-48.
processes. The attitude of the Florida judiciary was clearly expressed by the supreme court in City of Miami Beach v. Berns. While stating that "[i]n this area of regulating, the statute may push beyond debatable limits in order to block evasive techniques," the court advised that "[i]f a public official is unable to know whether by any convening of two or more officials he is violating the law, he should leave the meeting forthwith."

B. What Is a Board or Commission?

The Sunshine Law requires open 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." It is clear that formal governing units such as school boards, town and city councils, zoning appeals boards, county commissions, the State Board of Regents, and the State Cabinet all come within the scope of the statute. Although no case has been decided on the point, the Attorney General of Florida has advised that the open meeting statute does not apply to federal agencies operating in Florida.

A more perplexing problem arises, however, when a legislatively created body performs functions judicial in nature. The Florida Supreme Court considered this issue in Canney v. Board of Public Instruction. Michael Canney, a student at Gainesville High School, was suspended from school for violating the dress code when he refused to cut his long hair to a more "conventional" length. When the school board upheld the suspension Canney requested and was granted a public hearing on the matter. After Canney's attorney presented argument in his behalf, the school board reiterated its view that Canney's hair length violated the code; the board then recessed the hearing to deliberate privately on the matter.

In the First District Court of Appeal, Canney asserted that the school board, a legislatively created body, had violated the Sunshine Law.
Law when it recessed the hearing to reach a decision. The court of appeal concluded to the contrary that the secret deliberations held by the school board were privileged and did not fall within the purview of the statute. The court reasoned that, since all judicial deliberations are exempt from public scrutiny, quasi-judicial administrative board hearings also are protected at the deliberation stage.

The Florida Supreme Court perceived the issue in *Canney* to be whether, under the separation of powers doctrine, a school board acting in a quasi-judicial capacity is a part of the legislative branch of government. The court concluded that the county school board is a legislatively created agency vested with a combination of legislatively delegated powers. Therefore, the legislature not only could determine the powers to be exercised and regulate the procedure to be followed in hearings before the body it had created, but, further, could require all meetings of that body, at which official actions are taken, to be open to the public:

The characterization of a decisional-making [sic] process by a School Board as "quasi-judicial" does not make the body into a judicial body. A county school board should not be authorized to avoid the Government in the Sunshine Law by making its own determination that an act is quasi-judicial. The judiciary should not encroach upon the Legislature's right to require that the activities of the School Board be conducted in the "sunshine."

Thus, it appears that if the body in question is legislatively created its activities are subject to the open meeting requirement, irrespective of the functions that the body performs.

Another troublesome question involves committees formed by "boards and commissions." Many town councils and other state agencies employ committees to investigate and to administer their activities. Although these committees act only in an advisory capacity, their deliberations seem to be subject to the Sunshine Law. *Town of Palm Beach v. Gradison* involved a town council's decision to revise and update the town's zoning ordinances. A professional planning firm was employed to prepare a comprehensive plan, and an ad hoc committee comprised of five citizens was appointed to aid the planners. The purpose of this citizens' committee was to guide the planners "in
their efforts to assure that the plan produced would be consistent with the character, image and land-use controls intended by the citizens.\textsuperscript{47} The town council intended that the committee function as an arm of the zoning commission, although the committee had no authority to bind either the zoning commission or the town council with its recommendations. The citizens were not experts in the fields of landscaping, civil engineering or vocational zoning, nor were they regularly employed by the town. The committee never met in public, never gave notice of its meetings, and never recorded its proceedings.\textsuperscript{48} After receiving the citizens’ recommendations the zoning commission held five days of public meetings and debate. The zoning commission then sent its proposals to the town council, which held six days of public hearings. The town council publicly approved the plan submitted by the planners and the zoning commission in “essentially the same form.”\textsuperscript{49}

Certain property owners adversely affected by the zoning plan filed suit, maintaining that the ordinance had been passed in violation of the Sunshine Law. The trial court determined that this purely advisory body was not within the scope of the law.\textsuperscript{50} The Fourth District Court of Appeal reversed, holding that the committee was the “alter ego” of the town council and zoning commission.\textsuperscript{51} Gatherings of the committee were covered by the Sunshine Law since committee recommendations constituted one phase of the subsequent enactment of the zoning plan by the town council. Therefore, its meetings were within the foreseeable action test enunciated in \textit{Doran}.\textsuperscript{52}

The Florida Supreme Court affirmed the invalidation of the comprehensive plan “because of the non-public activities of the citizens planning committee, which committee was established by the Town Council, active on behalf of the Council in an advisory capacity, and participated in the formulation of the zoning plan.”\textsuperscript{53} Although the court conceded that the town council had acted in good faith, it stated

\textsuperscript{47} Id. at 474.
\textsuperscript{48} Id. at 475.
\textsuperscript{49} Id.
\textsuperscript{50} See IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 355, 355 (Fla. 4th Dist. Ct. App. 1973). The trial judge concluded that the citizens’ committee did not have the status of a board or commission:

“This committee of citizens, while influential in what the planner ultimately produced, was merely advisory as far as the planner, the zoning commission and the town council were concerned. They made no decision which bound either the zoning commission or the town council.”

\textit{Id.} (quoting from opinion of trial court).
\textsuperscript{51} Id. at 356.
\textsuperscript{52} Id. at 357.
\textsuperscript{53} 296 So. 2d at 478.
that the policy of public meetings extended to "any committee established by the Town Council to act in any type of advisory capacity." The citizens' committee in this case was delegated what the court determined were important zoning functions ordinarily exercised by the town council itself, elevating the committee to the "status of a board or commission." The state policy of public access to the decision-making process and the need to preclude evasion of the law dictated this result.

Because of the broad language employed by the court in *Town of Palm Beach* it is not clear whether advisory bodies lacking powers or duties must comply with the open meeting requirement. The court stressed the fact that the delegated powers fell within the foreseeable action standard. It would seem that absent the power to influence any step in the decision-making process an advisory body should not be subject to the Sunshine Law. Although it is also unclear at this point what functions are sufficiently important to elevate an advisory body to board or commission status, *Town of Palm Beach* seems to indicate that a body acting in any advisory capacity will be subject to the law. Additionally, the *Town of Palm Beach* opinion seems to encompass the type of advisory committee involved in *Bigelow v. Howze*. Certainly the presence on the advisory committee of members of the public body that had created the committee should make its delegated powers important enough to require compliance with the Sunshine Law. The lesson of *Town of Palm Beach* was well stated by the court and is equally applicable to all "board or commission" dilemmas: "The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State."

**C. The Exceptions**

Perhaps the major factor distinguishing the Florida open meeting

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54. *Id.* at 476.
55. *Id.* at 475.
56. *Id.* at 477, stating:
The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken.
57. See note 56 and accompanying text *supra*.
58. 296 So. 2d at 476.
60. 296 So. 2d at 477, citing Note, *supra* note 8, at 365.
statute from similar statutes enacted by other states61 is the absence of express exceptions. The Florida law mandates that all meetings of a board or commission shall be open to the public “except as otherwise provided in the constitution.”62 The 1968 Florida constitution appears to provide few exceptions, and the courts have not been eager to recognize exceptions for particular governmental bodies under the law. In Board of Public Instruction v. Doran63 the court explicitly stated that the Florida Sunshine Law “contains no exceptions.”64 The same judicial attitude is reflected in City of Miami Beach v. Berns.65 The city council customarily had held executive sessions excluding the press and public for the “discussion of condemnation matters, personnel matters, pending litigation or any other matter relating to city government.”66 The court declared that these sessions clearly come within the scope of the open meeting safeguard “and unless the legislature amends [the Sunshine Law], it should be construed as containing no exceptions.”67

In Times Publishing Co. v. Williams68 the Second District Court of Appeal stated that the Sunshine Law has no exceptions “unless there is a constitutional impediment to such a mandate.”69 The supreme court apparently found an impediment in Bassett v. Braddock.70 Preliminary contract negotiations between representatives of a school board and teachers were held exempt from the Sunshine Law.71 Although there is some question regarding the influence of constitutional principle on the decision reached in the case,72 the court’s

61. See, e.g., Tex. Rev. Civ. Stat. Ann. art. 6252-17, §§ 2(a)(1)-(3) (1970), which provides express exceptions for deliberations to consider the appointment, employment or dismissal of a public officer or employee, or to hear charges brought against a public employee unless he requests a public hearing; deliberations relating to the acquisition of real estate; and deliberations for matters affecting security.
63. 224 So. 2d 693 (Fla. 1969).
64. Id. at 700.
65. 245 So. 2d 38 (Fla. 1971).
66. Id. at 40.
67. Id. at 41.
68. 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969).
69. Id. at 473.
70. 262 So. 2d 425 (Fla. 1972).
71. Id. at 426.
72. See 25 U. Fla. L. Rev. 603, 608 (1973), stating:
   Even though the court seemingly based its decision on constitutional limitations, it was primarily influenced by the broader policy arguments, as evidenced by the court’s emphasis on pragmatism and fairness.

The Bassett decision appeared to signal a retreat from the broad “foreseeable action” test. Subsequent cases, however, have reaffirmed the test, see notes 26-31 and accompanying text supra, and the Bassett view appears to be an aberration.
language directly supports the finding of a specific constitutional exception at least in the absence of legislative action.\textsuperscript{78} The vitality of this impediment to strict application of the law has been substantially impaired by recent legislative action under the collective bargaining provision in the constitution.\textsuperscript{74}

The only other constitutional issue raised as yet concerns an attorney's ethical obligations and discipline. In \textit{Times Publishing Co. v. Williams}\textsuperscript{75} the district court of appeal declared that the legislature was impotent to regulate the conduct of attorneys, over which the supreme court has exclusive jurisdiction.\textsuperscript{76} The court stated that the attorney "cannot be put in the untenable position of choice between a violation of a statute or a violation of a specific Canon insofar as they \textit{clearly conflict}."\textsuperscript{77} Thus the legislature cannot require that an attorney's advice to a governmental agency regarding pending or contemplated litigation be made public when, in his professional judgment, that advice must remain confidential.\textsuperscript{78} The Code of Professional Responsibility,\textsuperscript{79} promulgated since the \textit{Times} decision, probably does not conflict with the Sunshine Law. Under the new Code, an attorney is relieved of the duty of confidentiality when required by law to divulge information.\textsuperscript{80} The Sunshine Law arguably incorporates this rule and, therefore, a constitutional problem no longer exists.\textsuperscript{81}

\textbf{D. Enforcement}

Criminal sanctions, injunctive relief and invalidation of illegal

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Another commentator has suggested that the court avoided a direct holding on the constitutional impediment issue by merely affirming the lower court. "It could well be argued that the Court was with reservation 'judicially implementing' the Constitutional collective bargaining provision in the absence of statutory guidance, without regard to the means employed." \textit{118 CONG. REC.} \textit{S} 12,803 (daily ed. Aug. 4, 1972).

73. "Here we have a literal \textit{constitutional} exception expressly provided within the Sunshine Law . . . ." \textit{262 So. 2d} at 426.
74. \textit{See} note 25 and accompanying text \textit{supra}.
76. \textit{Id. at 474. FLA. CONST.} art. V, \textit{\$ 23}, "gives 'exclusive jurisdiction' to the Supreme Court in the disciplining of attorneys." \textit{222 So. 2d} at 475.
77. \textit{222 So. 2d} at 475.
78. \textit{See id. at 475-76}.
79. Adopted by order of the Florida Supreme Court on June 3, 1970, the Code became effective October 1, 1970. \textit{See In re The Integration Rule of the Florida Bar, 235 So. 2d 723, 726 (Fla. 1970)}.
80. \textit{FLA. CODE OF PROF. RESP. DR 4-10(D)} provides in part:
A lawyer shall reveal:
(1) Confidences or secrets when required by law, provided that a lawyer required by a tribunal to make such a disclosure may first avail himself of all appellate remedies available to him.
81. \textit{See 1973 FLA. ATT'Y GEN. OP. 073-56}. 
action are available to discourage violation of the Sunshine Law. In addition, each citizen of Florida has standing to enforce the law.

(1) Criminal Sanctions

Any member of an agency subject to the Sunshine Law who attends a meeting in violation of the law is guilty of a second degree misdemeanor punishable by 60 days in jail, a 500-dollar fine, or both. The supreme court has construed the law "to impliedly require a charge and proof of scienter." While the inadvertent violator can therefore escape penal sanctions, injunctive relief and invalidation are still available.

Although prosecution under this section is difficult even without this judicial limitation, convictions have been obtained. There is little evidence that prosecutors are reluctant to enforce a law popular with the public and press.

(2) Injunctive Relief

Injunctive relief has been characterized by one court as "an extraordinary remedy which issues only when justice requires and there is not adequate remedy at law, and when there is a real and imminent

88. One commentator, discussing the criminal penalties under the Texas open meeting statute, Tex. Rev. Civ. Stat. Ann. art. 6252-17 (1970), is skeptical about the practicality of prosecuting intentional violations:

Nevertheless, even these violations may remain unchecked by the Act's criminal provisions. First, enforcement of the Act hinges upon the prosecutorial zeal of politically sensitive county and district attorneys, who are apt to be cautious in proceeding against often influential members of governing bodies. Secondly, intentional violations will be difficult to prove, particularly when the only available evidence is the failure to post notice. Thirdly, even if prosecution is successful, the relatively slight financial penalty is unlikely to loom as a massive deterrent force.

89. For example, the Mayor and Vice Mayor of North Lauderdale were convicted on May 5, 1971, of holding "secret" meetings in the back of a town police cruiser. 118 Cong. Rec. S 12,803 (daily ed. Aug. 4, 1972). Similarly, as a result of newspaper publicity, "[t]he city commissioners of Stuart, Florida were indicted and suspended by Governor Kirk for holding secret meetings for which they kept no minutes while they parcelled out bonuses to two city employees." Id. at 12,801.

90. Conscientious reporting of violations by the press arguably puts pressure on prosecutors to enforce the criminal penalties. Three of the first four cases seeking access to closed meetings were brought by newsmen. See Note, supra note 8, at 374.
danger of irreparable injury.”91 The injunction is an excellent tool for enforcement of the Sunshine Law, since inadvertent violations may be remedied and future compliance simultaneously ensured through contempt penalties. Its value, however, is limited considerably when proof of prior violations is made a prerequisite to its issuance.95

Florida courts do not require proof of a prior violation when seeking an injunction based upon a violation of the Sunshine Law. In *Times Publishing Co. v. Williams*93 the court stated:

[A] violation of the statutory mandate constitutes an irreparable public injury . . . . The effect of such a declaration in a subsequent judicial proceeding, then, would be that one of the requisites for a writ of injunction need not be proven, i.e., an irreparable injury; and a mere showing that the statute has been or is clearly about to be violated fully satisfies such requirement.94

Proof of impending violations can be established in two ways: by introducing evidence of prior violations or by introducing evidence of intent to meet in executive session when such meeting is not exempted from the statutes.95

Because of the judicially created scienter requirement for criminal sanctions,96 injunctive relief appears to be the remedy most frequently sought. In most cases injunctive relief will be readily obtainable when a violation is proved, especially when a pattern of past illegal conduct is demonstrable.97 Furthermore, since “[f]ew, if any, governmental

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94. Id. at 476.
95. See 49 *Tex. L. Rev.* 764, 774 (1971).
96. See note 87 and accompanying text supra.

This Court may enjoin violations of a statute where one violation has been found if it appears that the future violations bear some resemblance to the past violation or that danger of violations in the future is to be anticipated from the course of conduct in the past.

An injunction issued in that case after the following had been proved:

“For at least a year and a half there has been a pattern on the part of the board of holding [closed] conferences on Wednesday afternoon in advance of the [open] Thursday night meetings. . . .

. . . . [T]here was no doubt that there was a pattern or policy of the board that they would not discuss in open session litigation, real estate purchases, or personal matters.”

*Id.* at 696 (quoting from opinion of trial court).
boards or agencies deliberately attempt to circumvent" the Sunshine Law, most violations will be inadvertent, making injunctive relief the only practical remedy for preventing future violations.

(3) Invalidation

In Florida, invalidation of illegal action appears to be mandatory: "[N]o resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting" open to the public. In *Town of Palm Beach v. Gradison*, however, the supreme court refused to declare that it had no discretion to refuse invalidation when a violation is proved. Instead, the court adopted a New Jersey court's conclusion that mere absence of bad faith ordinarily is not sufficient to refuse invalidation.

Although the *Town of Palm Beach* court reserved judgment on mandatory invalidation, it expressly approved the invalidation of the zoning ordinance by the Fourth District Court of Appeal. That court had refused to allow the subsequent formal approval of the ordinance in public to remove the taint of previous secret meetings of an advisory committee. Implicitly recognizing the impracticality of invalidating only the secret deliberations which precede formal action, the court invalidated the entire ordinance since the action of the advisory committee "was an indispensible requisite to and integral part of the 'official acts' or 'formal action' of the Town Council." Thus any action taken by a public body which incorporates deliberations made in a prior prohibited closed session may be invalidated.

II. PROPOSALS FOR IMPROVING FLORIDA'S GOVERNMENT IN THE SUNSHINE LAW

Valid criticisms have been raised concerning several aspects of

99. Cf. note 87 and accompanying text supra.
101. 296 So. 2d 473 (Fla. 1974).
102. Id. at 478, quoting from *Wolf v. Zoning Bd. of Adjustment*, 192 A.2d 305, 308-09 (N.J. Super. Ct. 1963), as follows:
   "We need not now decide that no discretion is ever to be reserved to the court to save the validity of official action taken in contravention of the statute. . . . It suffices here to say that mere absence of bad faith or other impropriety on the part of the public body should not ordinarily move the court to stay its hand in voiding [illegal action]."
103. 296 So. 2d at 478.
Florida's open meeting statute. An initial infirmity in the statute is the conspicuous omission of a uniform notice provision; unannounced meetings usually will not be attended. Another weakness in the statute is the lack of beneficial exceptions to the open meeting requirement. The scope of the Sunshine Law can be modified in certain specifically delineated circumstances without sacrificing the public's right to know.

A. Notice Provisions

In order to attend and participate in the open session, the public and press certainly need advance notice of the time and location of a pending meeting. The potential for evasion of the law created by the failure to include a notice requirement is manifest. For example, notice may be posted in a place not reasonably accessible to the press and public.

Although Florida's statute contains no notice requirements, the attorney general has opined that notice of an official meeting must be provided when deliberations concerning official matters are to take place. Written notice of a regular meeting should be provided prior to the meeting to ensure that the public has a reasonable opportunity to become aware of it. Texas, for example, has established a three-day notice requirement. Additionally, the notice should specify the date, place and, whenever possible, the subject matter of each meeting.

In Shaughnessy v. Metropolitan Dade County the Third District Court of Appeal did not require that duplicate notice be given when a zoning board continued its meeting at a later date and completed deliberations at that time. Lack of notice of the second meeting, at which important official action was to be taken, seems clearly at odds with the objectives of the Sunshine Law. In view of Shaughnessy, the legislature should act to correct the situation. If a meeting is continued, written notice of the later meeting should be required.

It is not unrealistic for courts to imply notice requirements, absent a statutory provision, especially when a governmental body meets

105. See, e.g., Wickham, Let the Sun Shine In!, 68 NW. U.L. REV. 480, 491 (1973); Note, supra note 8, at 371.
106. Note, supra note 8, at 373.
107. Id. at 371-73.
109. See 1971 FLA. ATT'Y GEN. OP. 071-159.
111. See 49 TEX. L. REV. 764, 770 (1971).
112. 238 So. 2d 466, 468 (Fla. 3d Dist. Ct. App. 1970).
regularly at the same time and place. Often, however, emergency sessions are needed. In such situations special statutory guidance yields a more standardized result.\textsuperscript{113} The guiding principle should be, "The shorter the time period between notices and meeting, the more extensive and more accurately placed must be the notice."\textsuperscript{114} Pennsylvania requires twenty-four hours' notice for special meetings.\textsuperscript{115} Another approach might be to require that brief, perhaps two hour, notice of special meetings or emergency sessions be given to the press. After the emergency session another meeting could be held, with the usual notice, to re-evaluate the emergency actions. Regardless of the method adopted, the legislature should act to prevent case-by-case evaluation of the adequacy of notice.

B. Exceptions

It is important to recognize that the right of public access to governmental decision-making is not absolute.\textsuperscript{116} A balance must be struck between the public's right to know and the interests served by maintaining secrecy in certain situations. The approach to this balancing process, however, should be "not how much can be legitimately withheld, but rather how little must necessarily be withheld."\textsuperscript{117} The judicial attitude toward exceptions to the Sunshine Law is clear;\textsuperscript{118} consequently, the legislature must act to provide any necessary exceptions. In each of the following suggested exceptions the scales should tip in favor of secrecy, but a secrecy that does not do violence to the broad scope of the law.

(1) Quasi-Judicial Hearings and Deliberations

In \textit{Canney v. Board of Public Instruction}\textsuperscript{119} the supreme court held that although a school board performs quasi-judicial functions in conducting disciplinary hearings, it is nevertheless part of the legislative branch and therefore subject to the Sunshine Law.\textsuperscript{120} The court made it clear that any exception for quasi-judicial deliberations must be established by the legislature.\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{113} See Comment, \textit{supra} note 9, at 1661.
\item \textsuperscript{114} \textit{Id}.
\item \textsuperscript{116} See Wickham, \textit{supra} note 105, at 481; Yankwich, Legal Implications of, and Barriers to, the Right To Know, 40 Marq. L. Rev. 3, 32 (1956).
\item \textsuperscript{117} Rogers, The Right To Know Government Business From the Viewpoint of the Government Official, 40 Marq. L. Rev. 83, 85 (1956).
\item \textsuperscript{118} See notes 62-67 and accompanying text \textit{supra}.
\item \textsuperscript{119} 278 So. 2d 260 (Fla. 1973).
\item \textsuperscript{120} \textit{Id}. at 263.
\item \textsuperscript{121} The court stated:
In order to ensure due process of law and independence of proceedings judicial in nature, an express exception to the Sunshine Law in this area is warranted. As Justice Dekle stated in his dissent from Canney: "The regular activities of an agency and those which are quasi-judicial are altogether different." Accordingly, exemption of the latter activities from the Sunshine Law can be justified without altering the status of the former. If quasi-judicial functions are not treated exactly as are corresponding judicial ones, a denial of due process and equal protection of the law could result. A person involved in a quasi-judicial hearing should be accorded all the benefits of a judicial proceeding to assure fair deliberation on the issues. Judicial tribunals traditionally have deliberated in camera, thus preserving an environment of fairness and impartiality. Since agency hearings concerning disciplinary matters are functionally identical to judicial proceedings, those hearings should provide basic constitutional protections and safeguards for the individuals involved. Furthermore, in order to facilitate fair and independent adjudication of individual rights, open and uninhibited discussion among members of the deliberative body is essential. Such free discussions traditionally have been considered essential to a just and fair adjudication of rights by judges and juries. If an administrative agency or board is deprived of the right to deliberate in camera the free flow of discussion and exchange of ideas and differing viewpoints might be stifled, resulting in less than full consideration of the rights of those involved.

If the board or agency feels aggrieved, then the remedy lies in the halls of the Legislature and not in efforts to circumvent the plain provisions of the statute by devious ways in the hope that the judiciary will read some exception into the law.

Id. at 264.

122. Id. at 264 (Dekle, J., dissenting).
123. See id. at 265.
124. One writer has described safeguards traditionally thought inherent in American courts:

Courts are a part of government, the part of government involved in resolving disputes. Corrupt courts may decide disputes in the same way that fights decide disputes, but corrupt courts fail since they do not show fairness in government . . . . Since courts are the major agency through which due process and the rule of law is [sic] brought home to our citizens, courts are significant factors in the development of a sense of fairness and fair play among them. Obviously this can be developed only if the courts decide cases fairly, and in a way recognized by all as being fair. However, justice and fairness are only part of the whole. The climate must be such that the results, fair though they may be, will be generally accepted over a period of time by the citizens of this country.

125. See 278 So. 2d at 265 (Dekle, J., dissenting).
126. Id.
In further support of this exception, Justice Dekle noted that, when discipline is at issue, "private deals" and "extraneous considerations" against which the Sunshine Law is intended to guard are not likely to occur.127 If this is true, the public's right to know is satisfied when the result of private deliberations is made public,128 without concomitant harm to the open meeting concept.

On the other hand, the dividing line between regular and quasi-judicial functions will not always be clear. Accordingly, a flexible approach to the exception process should be established. The legislature should provide precise guidelines defining the scope of the exception and require written public notice of the intent to hold an excepted closed meeting. This would allow interested parties to challenge a specific exemption prior to the session.

The California approach preserves the interests of both due process and government in the sunshine. All administrative hearings involving public employees are deemed confidential unless the individual charged requests that the session be open to the public.129 Thus, those who stand to suffer from publicity of unfounded charges have the option of insulating the proceedings from public scrutiny. A similar approach is recommended for the Florida law in order to prevent character assassination or unwarranted damage to an individual's reputation.

(2) Official Investigations

A similar argument can be made for an exception to the Sunshine Law when an official investigation is undertaken. Initial stages of the investigation may involve the gathering of mere hearsay on which allegations have been based.130 Protection of an individual's reputation and preservation of his due process rights should be paramount to the public's right to know, at least at this stage of the proceeding. Disclosure of investigative information, many times obtained in confidence, could have adverse consequences for the government as well. Future operations could be hampered by the loss of sources of information, and suspects could be warned in advance of prosecution.131 Moreover, the government could be held responsible for spreading false charges or for violating the personal and property rights of em-

127. Id.
128. Id.
129. See CAL. GOV'T CODE § 54957 (West 1966).
130. See Wickham, supra note 105, at 485; Yankwich, supra note 116, at 88.
ployees or others by unauthorized disclosure of information. Again it appears that little harm can come to the open meeting principle by merely postponing public disclosure until preliminary findings are substantiated. A full, written report of findings developed in these sessions can be required if further action is taken. Only disclosure of that information necessary to secure procedural safeguards should be precluded.

(3) Public Land Negotiations

Meetings at which negotiations for public land acquisition are discussed should not be held in public, since premature publicity fosters the risk that informed speculators could inflate the price paid by the governmental authority. Although the meeting should be executive in nature, nothing precludes maintaining records of those deliberations. Full disclosure and even an independent audit could later be made, thereby minimizing the hazard of public officials themselves becoming unjustly enriched by acting on secret information. Of course, the problem is not present at meetings in which the property in question actually is acquired, and those meetings should be open.

C. Invalidation

In Town of Palm Beach v. Gradison the supreme court reserved judgment on whether invalidation is mandatory when a violation of the Sunshine Law is proved. Thus, action taken in mere technical violation of the law may be allowed to stand. This approach has been successful in other jurisdictions and provides a sensible means of preserving the open meeting principle without sacrificing efficiency in the administration of state and local government.

Town of Palm Beach exemplifies the harsh result of routinely in-

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133. Id.
134. See Wickham, supra note 105, at 486; Note, supra note 8, at 370. Of course, this argument assumes that those public officials with knowledge of the pending land transactions will not themselves disseminate that information prematurely.
138. 296 So. 2d 473 (Fla. 1974).
139. Id. at 478. See notes 101-104 and accompanying text supra.
140. See Note, supra note 136, at 1212-14.
validating official action when a technical violation of the law has occurred.\textsuperscript{141} The citizens' committee which held illegal closed sessions was not composed of experts and did not possess any special expertise:

"Much of what the Planning Committee did with the planner could have been done by the Town Manager, or some of the Town's staff, or the Planner could have sought out residents on its own initiative for advice and assistance in preparing the plan."\textsuperscript{142}

Realistically, it is unlikely that the zoning commission or the town council relied heavily, if at all, on the suggestions of the citizens' committee. This conclusion is reinforced by the fact that each body held a minimum of five days of public hearings prior to adoption of the ordinance.\textsuperscript{143} It is difficult to justify invalidation when so much opportunity for public input was available. Arguably, the public hearings of the zoning commission presented the earliest practical opportunity for public input regarding the plan. It therefore appears that the only significant justification for invalidation was the preservation of the open meeting principle. It also appears, however, that the principle of allowing public scrutiny prior to official action was satisfied by the eleven days of open hearings.\textsuperscript{144}

A balance should be struck between the potential harm to the sunshine principle and the costs of requiring ritual re-enactment of essentially valid local laws. The major cost is unnecessary disruption of the orderly functioning of the government. Another, perhaps "hidden," cost arises if a disgruntled party is able to prompt invalidation of official action merely because it was unfavorable to him; automatic invalidation could transform the Sunshine Law into a weapon for personal vengeance, with no actual relation to the goals of the open meeting principle.

Because it can be addressed only on a case-by-case basis, the invalidation issue does not seem readily adaptable to legislative action. The burden, therefore, must fall on the judicial branch of govern-

\textsuperscript{141} See notes 46-49 and accompanying text supra, discussing the facts of the case. \textsuperscript{142} 296 So. 2d at 479 (Dekle, J., dissenting) (quoting from opinion of trial court). \textsuperscript{143} See id. at 481. \textsuperscript{144} See IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 358, 360 (Fla. 4th Dist. Ct. App. 1973), aff'd sub nom. Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974):

When the matter was fully and fairly publicly aired and voted upon at the public meeting, the statutory requirement was satisfied, without regard to preliminary discussion or deliberation held prior thereto.
ment, and the courts should use their apparent power to stay invalidation\textsuperscript{145} in a manner that will prevent unnecessary disruption of the governmental process.

III. CONCLUSION

Judicial willingness to support the spirit and intent of the Sunshine Law is clear. There is good reason to believe, therefore, that legislative modifications intended to refine the law would receive the same favorable treatment. This note has proposed several such alterations, designed to limit the law in certain areas without sacrificing its purpose or mitigating its impact. An overly rigid application of the Sunshine Law can only damage its acceptability and, ultimately, create pressure to circumscribe its broad reach.

SIDNEY L. MATTHEW

\textsuperscript{145} See note 102 and accompanying text \textit{supra}. 