

“BEYOND DEBATABLE LIMITS”: A CASE FOR LEGISLATIVE CLARIFICATION OF FLORIDA’S SUNSHINE LAW

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*It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals.*¹

I. INTRODUCTION

After years of political wrangling, the Florida Legislature passed a sunshine law in 1967.² Regarded as one of the most expansive in the nation,³ Florida’s Sunshine Law requires that all meetings related to government decision-making be held in public.⁴ Florida courts have broadly construed it, creating a body of caselaw that supports a liberal view of open government.⁵

One of its principal champions was Florida Supreme Court Justice James C. Adkins.⁶ Time and again he refused to create judge-made exceptions to the law, arguing that the “Court should never place the stamp of approval” on Sunshine Law violations.⁷ Justice Adkins understood that this ideal must be preserved, that

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1. Abraham Lincoln, Speech, *State of the Union Address* (D.C., Dec. 3, 1861) (available at <http://www2.hn.psu.edu/faculty/jmanis/poldocs/uspressu/SUaddressALincoln.pdf>).

2. Jon Kaney, *Courts Key to Strength of Florida’s Sunshine Law*, 54 *Masthead* 12, 13 (Summer 2002).

3. Sandra F. Chance & Christina Locke, *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*, 35 *Fla. St. U. L. Rev.* 245, 245 (2008).

4. Fla. Stat. § 286.011 (2011).

5. Kaney, *supra* n. 2, at 14.

6. *Tolar v. Sch. Bd. of Liberty Co.*, 398 So. 2d 427, 429 (Fla. 1981) (England, Overton & McDonald, JJ., concurring).

7. *Id.* at 432 (Adkins, J. & Sundberg, C.J., dissenting).

any sort of tolerance for government secrecy would create a slippery slope toward government in the darkness.⁸ “The statute,” he wrote, “having been enacted for the public benefit, should be interpreted most favorably to the public.”⁹ It “should be construed so as to frustrate all evasive devices.”¹⁰ The meaning of his language is clear: if the courts provide public officials with loopholes in the open meetings law, some of them will undoubtedly meet in private “in a dark back room.”¹¹

Not everyone agrees that open government is a good idea—or even attainable. Some public officials and legal analysts argue that sunshine laws impede government decision-making processes by hampering executive agencies’ collegiality and overwhelming the decision-makers with too much information from too many interest groups.¹² Others have suggested that the populist ideal of a completely open government is simply impossible to achieve given the size, scope, and complexity of public entities in modern society.¹³

Whatever the merits of these arguments, the Florida Legislature has made few changes to the Sunshine Law over the course of more than four decades, and relatively few exemptions have been enacted in other statutes.¹⁴ The policy implications echo Justice Adkins’ position: that the ideal of the Sunshine Law must be preserved in order to effect its goals.

The Legislature’s firm stance is laudable, but the fact remains that Florida’s Sunshine Law has been shaped more by judicial action than by legislative action; scores of opinions have addressed the Sunshine Law.¹⁵ Because courts must apply the law to specific sets of facts, these opinions, over the course of

8. *Canney v. Bd. of Pub. Instr. of Alachua Co.*, 278 So. 2d 260, 263 (Fla. 1973).

9. *Id.*

10. *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

11. Appellants’ Br. on the Merits, *Sarasota Citizens for Responsible Gov’t v. City of Sarasota*, 2010 WL 3623011 at *10 (No. SC10-1647, 48 So. 3d 755 (Fla. 2010)). The phrase “dark back room” was used in an email between members of a team negotiating with the Baltimore Orioles to bring spring training to Sarasota. *Id.* The *Sarasota* case is discussed in depth at *infra* nn. 160–163 and accompanying text.

12. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173, 179–180 (1997).

13. Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 Admin. L. Rev. 617, 623 (2010).

14. See *infra* nn. 209–212 and accompanying text (reviewing statutory exemptions the Florida legislature has enacted).

15. Chance & Locke, *supra* n. 3, at 267.

time, have established boundaries around open-meetings requirements.

The Florida Supreme Court has held that the judiciary has no authority to create general exemptions to the Sunshine Law.¹⁶ Yet that is essentially what has happened. Florida courts have established that officials may meet with staff members and advisory committees who are "information gatherers" rather than decision-makers.¹⁷ If officials violate the Sunshine Law, the violation can be cured by simply reconsidering the matter at a later public meeting.¹⁸ These exceptions were formed as practical responses to fact-specific circumstances. Stripped of those facts, they represent a significant shift from Justice Adkins' fundamental view of our Sunshine Law toward a more tempered vision of open meetings in Florida.

Whatever one's view of open government, there is no question that these judge-made exceptions create uncertainty rather than clarity about Florida's Sunshine Law. Recent cases along with events plucked from the headlines show that government officials and the public alike are unsure of their rights and responsibilities.¹⁹ This Article recommends that the Florida Legislature revisit our Sunshine Law in light of these exceptions and clarify the course and direction of our Sunshine Law for the next half-century. Section II sets out a broad overview of open-meetings requirements and surveys case law interpreting open-meetings legislation. Section III examines two judge-made exceptions to the Sunshine Law that represent a significant departure from broad open-government policy. Section IV discusses challenges and inherent limitations in open-meetings mandates and explores ways the Sunshine Law might be amended to address these challenges while ensuring that government business is conducted in the sunshine. By more carefully defining "the statute's spirit, intent, and purpose,"²⁰ the Florida Legislature can enable sound decision-making and the efficient operation of government and

16. *Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824 (Fla. 1985).

17. *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 763 (Fla. 2010).

18. *Grapski v. City of Alachua*, 31 So. 3d 193, 200 (Fla. 1st Dist. App. 2010) (citing *Bassett v. Braddock*, 262 So. 2d 425, 428-429 (Fla. 1972) and *Bruckner v. City of Dania Beach*, 823 So. 2d 167, 171 (Fla. 4th Dist. App. 2002)).

19. Chance & Locke, *supra* n. 3, at 267.

20. *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d Dist. App. 1973).

safeguard Floridians' fundamental right to oversee the operations of their government.

II. A BRIEF HISTORY OF FLORIDA'S SUNSHINE LAW

Florida's Sunshine Law is generally considered one of the strongest in the nation.²¹ The statute's language and its broad interpretation by the courts have created a solid framework supporting open government in Florida. Court decisions handed down early in the Sunshine Law's history deserve significant credit for the law's continued strength over the course of more than four decades.²² Those decisions eloquently articulated the purpose of the new open meetings law and carefully sidestepped attempts by officials to create loopholes and exceptions.²³

Florida Supreme Court Justice James C. Adkins in particular deserves significant credit for establishing the philosophical underpinnings of Florida's Sunshine Law.²⁴ Acknowledged by his peers as the "strong judicial voice in Florida in support of an unadulterated Sunshine Law,"²⁵ Justice Adkins authored many of the seminal opinions from the early days of Florida's open-meetings legislation.²⁶ He believed that Florida's Sunshine Law, enacted in 1967 and codified under Florida Statutes Section 286.011, empowered the public with an "inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."²⁷ He argued that the court's "duty is to interpret this law as it is written and, if possible, do so in a manner to prevent its circumvention."²⁸ A broad interpretation of the statute represented the legislative will, stating that authorizing "secret meetings for privileged matter is the concern of the Flor-

21. Chance & Locke, *supra* n. 3, at 245. Research conducted in 1985 found that of the six Sunshine Law exceptions studied, Florida only had one exception, which was for collective bargaining. *Id.* at 258.

22. Kaney, *supra* n. 2, at 14.

23. *Id.* at 12.

24. *Tolar*, 398 So. 2d at 429 (England, Overton & McDonald, JJ., concurring).

25. *Id.*

26. *Gradison*, 296 So. 2d at 474; *Canney*, 278 So. 2d at 262; *Bd. of Pub. Instr. of Broward Co. v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

27. *Doran*, 224 So. 2d at 699.

28. *City of Miami Beach v. Berns*, 245 So. 2d 38, 40 (Fla. 1971).

ida Legislature[,] and unless the Legislature amends [the statute], it should be construed as containing no exceptions."²⁹

And, indeed, the Legislature did not amend the statute in response to any of Justice Adkins decisions.³⁰ As the Florida Supreme Court noted in 1985, "[o]ne can argue and reargue whether the broad reading of the Sunshine Law . . . is politically wise. The fact remains that [these decisions] placed the legislature and all concerned on notice of our broad reading of [S]ection 286.011."³¹

A. Birth of an Ideal: The Origins and General Provisions of Florida's Sunshine Law

In strictly construing the new Sunshine Law, early court decisions acknowledged a legislative history that extended back to the early 1950s, when Florida State Senator J. Emory "Red" Cross expressed his concerns about closed meetings to a group of journalists.³² The journalists collected examples of open-meetings legislation from other states, which Cross used to draft a bill that he introduced during every regular session of the Florida Senate.³³

In 1954, LeRoy Collins campaigned for governor with a promise of "government in the sunshine and not in the shade."³⁴ When Collins was elected governor he urged the Florida Legislature to help fulfill this promise.³⁵ Each year the House passed a sunshine bill, but it was defeated in the Senate by the Pork Chop Gang, a secretive group of state senators from rural north Florida.³⁶ This conservative bloc was ultimately broken by court-ordered reapportionment.³⁷ An influx of liberal South Florida Democrats and a new Republican governor paved the way for the passage of Senate

29. *Id.* at 41.

30. Fla. Stat. § 286.011 (1967); Jon Kaney, *Florida's Sunshine Law: Notes on a Law and an Ideal*, 5, <http://www.cobbcole.com/archives/news-archives-sunshine-3.pdf> (May 29, 2002).

31. *Neu*, 462 So. 2d at 825–826.

32. Chance & Locke, *supra* n. 3, at 248–249.

33. *Id.* at 249.

34. Kaney, *supra* n. 30, at 1.

35. *Id.*

36. *Id.*

37. *Id.*

Bill 9 with language virtually identical to the current law.³⁸ The new law's expansive language reflected the ideal that government activities must be held open to public scrutiny:

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.³⁹

The Sunshine Law does not define “agency” or “authority.”⁴⁰ Over time, however, courts have found that any public body vested with decision-making authority must hold public meetings.⁴¹ There are three basic requirements: the meeting must be open to the public, it must be noticed, and the meeting's minutes must be taken promptly.⁴²

The right of public access to meetings should be “virtually unfettered.”⁴³ Public meetings may not be held in any facility that unreasonably restricts public access.⁴⁴ It is not sufficient that a meeting be held in a public place—the public must be given suffi-

38. Chance & Locke, *supra* n. 3, at 249. Governor Claude Kirk signed the bill into law on July 12, 1967. *Id.* at 250.

39. Fla. Stat. § 286.011(1) (1967). The House sought to introduce exceptions to the open-meetings requirement for certain types of hearings but ultimately was forced to compromise. Chance & Locke, *supra* n. 3, at 250.

40. *Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d Dist. App. 1979).

41. In *Krause*, the court looked to the public records law for direction. *Id.* That statute defines “agency” as “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.” *Id.* (quoting Fla. Stat. § 119.011(2) (1977)). Based on that definition, the *Krause* court found that the Miami city manager was an “agency” and an advisory group he appointed to aid in decision-making was a “board.” *Id.*

42. Fla. Stat. § 286.011(1)–(2) (2011); *Lyon v. Lake Co.*, 765 So. 2d 785, 790 (Fla. 5th Dist. App. 2000).

43. *Pinellas Co. Sch. Bd. v. Suncam*, 829 So. 2d 989, 990 (Fla. 2d Dist. App. 2002) (citing *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d Dist. App. 1985)). The *Suncam* court found that the School Board's decision to prohibit videotaping of a public meeting violated the Sunshine Law's “spirit, intent, and purpose,” even though the statute did not require that public meetings be recorded. *Id.* at 990–991.

44. Fla. Stat. § 286.011(6) (2011).

cient notice to have a reasonable opportunity to attend.⁴⁵ The relevant “public” includes those citizens affected by the official actions.⁴⁶ The discussion of public business does not have to be verbal or take place in person to be subject to the Sunshine Law.⁴⁷ Discussions by mail, telephone, email, and computer file sharing may be considered “meetings” as contemplated by the law.⁴⁸

Officials who violate the Sunshine Law face criminal and civil penalties.⁴⁹ An official who knowingly attends a meeting held in violation of the Sunshine Law commits a second-degree misdemeanor punishable by up to sixty days in jail.⁵⁰ Although criminal statutes are generally construed strictly, Sunshine Law’s broad construction applies equally in the criminal context.⁵¹ Because Florida Statutes Section 112.51(5) provides that the Governor may remove any official convicted of a misdemeanor, an official

45. *Bigelow v. Howze*, 291 So. 2d 645, 647–648 (Fla. 2d Dist. App. 1974). Originally, the Sunshine Law did not specifically require public notice; however, courts have deemed public notice mandatory for “a public meeting to be in essence ‘public.’” *Hough*, 278 So. 2d at 291. The Legislature added a reasonable notice requirement in 1995, although “reasonable” is not defined. Fla. Stat. § 286.001(1) (1995).

46. *Rhea v. Sch. Bd. of Alachua Co.*, 636 So. 2d 1383, 1385 (Fla. 1st Dist. App. 1994).

47. Fla. Atty. Gen. Op. 2001-20, 2001 WL 276605 at *3 (Mar. 20, 2001).

48. *Id.* The Attorney General distinguished unilateral communications of facts from correspondence that is, in essence, a substantive discussion. If officials distribute memoranda or emails stating their position on an issue or request a response from other decision-makers, such communications could constitute a meeting subject to the Sunshine Law. *Id.* Email presents a particular problem. See John F. O’Conner & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 Geo. Mason L. Rev. 719, 757 (2004) (illustrating the problems of email). Some states have gone so far as to include email discussions in their Sunshine Law provisions. *Id.* at 758–759.

49. Fla. Stat. § 286.011(3) (2011). Although genuine reconsideration of the matter in an open meeting may prevent the official action from being voided, the officials involved are not absolved of responsibility. *Doran*, 224 So. 2d at 699.

50. Fla. Stat. § 286.011(3)(b) (2011); *id.* at § 775.082(4)(b). In 1971, the Legislature changed the punishment for violations of the Sunshine Law described in Subsection (3) from a maximum fine of \$500 and/or maximum imprisonment of up to six months to the punishment defined in Florida Statutes Section 775.082 or Section 775.083 for a second-degree misdemeanor. Fla. Stat. § 286.011(3) (1971). In 1978, the Legislature added alternative punishment pursuant to Florida Statutes Section 775.084, along with Subsections (4) through (7). Fla. Stat. § 286.011 (1978). In 1985, Subsection (3) was subdivided into criminal and noncriminal components, with a scienter requirement added to the criminal component. Fla. Stat. § 286.011(3) (1985).

51. *Wolfson v. State*, 344 So. 2d 611, 613–614 (Fla. 2d Dist. App. 1977). The court found that “although such definition of ‘official act’ [as applied in *Gradison*, 296 So. 2d 473] was thus employed in a civil context, we can think of no reasoning process which would compel the conclusion that it necessarily assumes a fatal vagueness when considered in a criminal context.” *Id.* at 614.

may be removed from office for criminal Sunshine Law violations.⁵²

A court may void official action resulting from a Sunshine Law violation.⁵³ “Mere showing that the [G]overnment in the [S]unshine [L]aw has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*.”⁵⁴ Further, “the principle that a Sunshine Law violation renders void a resulting official action does not depend on a finding of intent to violate the law or resulting prejudice.”⁵⁵

Plaintiffs who prevail in civil actions for Sunshine Law violations are entitled to attorney’s fees and court costs, which may be assessed against the agency or individual officials.⁵⁶ This provision is designed to encourage citizens to seek enforcement of the Sunshine Law.⁵⁷

This high-level view of Florida’s Sunshine Law depicts a clear policy in favor of open government, with significant ramifications for Sunshine Law violations. This policy has been enhanced by court decisions supporting a broad interpretation of the statute.

B. Setting the Stage

The new Sunshine Law supplanted a 1905 statute requiring that “[a]ll meetings” of city and town councils and boards of aldermen “be held open to the public.”⁵⁸ Florida courts construed the older law narrowly. In 1950, the Florida Supreme Court held that the law applied

52. In February 2011, Governor Rick Scott removed Daniel Ashley Graham, City Commissioner for the City of Wauchula, under this provision. Fla. Exec. Or. 11-28 (Feb. 11, 2011) (available at <http://www.flgov.com/wp-content/uploads/orders/2011/11-28-graham.pdf>).

53. *Gradison*, 296 So. 2d at 477.

54. *Id.*

55. *Port Everglades Auth. v. Int’l Longshoremen’s Ass’n Loc. 1922-1*, 652 So. 2d 1169, 1171 (Fla. 4th Dist. App. 1995).

56. Fla. Stat. § 286.011(4) (2011).

57. *Id.*; see also Aaron Leviten, Michael Olexa & Robert Sheesley, *Rethinking the Application of Contingency Risk Multipliers in Fee Awards: Should Florida Courts Recede from Quanstrom?* 79 Fla. B.J. 75, 77 (Oct. 2005) (noting how the award of attorney’s fees in insurance-related cases encourages citizens to bring claims on a noncontingent-fee basis they would not otherwise bring).

58. Fla. Stat. § 165.22 (repealed 1974).

only to such formal assemblages 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.⁵⁹

In a concurring opinion somewhat remarkable by today's standards, Justice Roy H. Chapman wrote "that the public interest, not only frequently but time and time again, is adversely affected by deliberations and discussions of governing municipal bodies open to the public."⁶⁰

The first case testing the new Sunshine Law, *Times Publishing Co. v. Williams*,⁶¹ required the Second District Court of Appeal to make sense of *Turk v. Richard*⁶² in a new context. Presuming that the Florida Legislature was aware of *Turk*, the court found that *Turk's* definition of "meetings" still applied but was extended to a broader range of government entities.⁶³ At the same time, the court carefully framed that definition to include any assembly at which formal action *could* be taken.⁶⁴

The court went on to define "official acts" and "formal action"—language not found in the older statute.⁶⁵ The appellants argued that informal meetings fell within the purview of the

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

60. *Id.* (Chapman, J., concurring). Justice Chapman continued:

It is my view that under parliamentary procedure, all such matters affecting the public interest of the municipality should, by a special order of the city or town council or the board of alderman, be referred to a special committee of the governing body. This Committee could hold executive meetings not open to the public, whereby the interest of the municipality and of the people generally would be promoted. Such meetings of the special committee would not fall within the inhibitions of Section 165.22.

Id.

61. 222 So. 2d 470 (Fla. 2d Dist. App. 1969).

62. 47 So. 2d 543 (Fla. 1950).

63. *Id.* at 473.

64. *Id.* The court states that "formal assemblages" are not limited to ceremonial votes or formal executions of documents. *Id.* (internal quotations omitted).

65. *Id.*

Sunshine Law, while the appellees suggested that “official acts” and “formal action” were the same thing.⁶⁶ The court did not agree with this latter viewpoint.⁶⁷ Formal votes already became a matter of public record, so the new legislation would be unnecessary if it applied only to them.⁶⁸ The court thus found that the Sunshine Law’s “obvious purpose”⁶⁹ was to encompass not just the final decision of a governing body but everything leading up to it:

Every thought, as well as every affirmative act, of a public official as it relates to and is within the scope of his official duties, is a matter of public concern; and it is the entire *decision-making process* that the legislature intended to affect by the enactment of the statute before us. This act is a declaration of public policy, the frustration of which constitutes irreparable injury to the public interest. 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.⁷⁰

In one breathtaking paragraph the court cast a blazing light on the government’s inner workings.⁷¹

Times Publishing was decided on May 9, 1969.⁷² Less than two months later, on July 2, the Florida Supreme Court decided its first Sunshine Law case.⁷³ Justice Adkins took the momentum created in *Times Publishing* and wrote the first in a series of opinions that collectively establish the broadest possible interpretation of Florida’s Sunshine Law.

66. *Id.* at 472–473.

67. *Id.* at 474.

68. *Id.*

69. *Id.* at 474.

70. *Id.* at 473.

71. The *Times Publishing* court rejected the idea of a broad exception for attorney-client privilege and personnel matters but did allow a limited exception for attorney-client privilege in discussing matters related to pending litigation. *Id.* at 474–475. The court found that the Legislature had no authority to interfere with an attorney’s ethical duties. *Id.* at 475. The Florida Supreme Court rejected that idea some fifteen years later. *Neu*, 462 So. 2d at 825. In 1993, the Florida Legislature codified a limited exception for attorney-client privilege under Florida Statutes Section 286.011(8). See *infra* n. 209 and accompanying text (describing the attorney-client exception).

72. 222 So. 2d at 470.

73. *Doran*, 224 So. 2d at 693.

C. Justice Adkins’ Liberal Construction

The new Sunshine Law first came before the Florida Supreme Court in *Board of Public Instruction of Broward County v. Doran*.⁷⁴ The Broward County School Board routinely met in private before and during official meetings to share background information regarding matters that might come up for consideration.⁷⁵ Although no formal action was to be taken at these closed-door sessions, it was clear that decisions were made; during formal board meetings there was little discussion, “[i]tems were passed by letter and number[,] and it was impossible for the public to understand the items being considered.”⁷⁶ The trial court found that these private conferences violated the open-meetings statute, and the court issued an injunction foreclosing such meetings.⁷⁷ On appeal, the board argued that the new law was unconstitutionally vague and, in any event, injunctive relief was improper because no “official acts” were taken.⁷⁸

Justice Adkins, writing for the majority, found that “[t]he [law’s] 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.”⁷⁹ Echoing the language in *Times Publishing*, he concluded that the new law would have been an unnecessary reiteration of *Turk* if it applied only to “formal assemblages.”⁸⁰ Although the Board in this case had taken care not to reach an official decision behind closed doors, “good intentions” were not enough to forgive “devious ways”

74. 224 So. 2d 693 (Fla. 1969).

75. *Id.* at 696. The board generally allowed members of the press to attend these informal “conferences” but not the public. *Id.* at 697. No one was allowed to attend when the discussion involved personnel matters, real estate sales or acquisitions, or conferences with counsel. *Id.*

76. *Id.* at 696.

77. *Id.* at 697.

78. *Id.* at 697–699.

79. *Id.* at 698. What if a private meeting includes less than a quorum of members? The First District Court of Appeal found that such a meeting did not violate the Sunshine Law. *Jones v. Tanzler*, 234 So. 2d 372, 372 (Fla. 1st Dist. App. 1970). Asked to review the case for conflict with *Doran*, the Florida Supreme Court discharged the writ of certiorari. *Jones v. Tanzler*, 238 So. 2d 91, 91 (Fla. 1970) (per curiam). Justice Adkins concurred only because of pending bond validation proceedings: “The statute does not make reference to the existence of a quorum. . . . The important question is not whether a quorum was present, but whether the members deal with any matter on which foreseeable action may be taken.” *Id.* at 92–93 (Adkins, J., concurring).

80. *Doran*, 224 So. 2d at 698.

designed to “deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.”⁸¹

The Court ultimately repealed *Turk* in *City of Miami Beach v. Berns*.⁸² Justice Adkins again wrote for the majority, noting that “the right to attend meetings of government bodies did not exist at common law” and that the older open-meetings statute applied only to meetings of municipal governments.⁸³ Acknowledging that “repeals by implication are not favored,” the Court nonetheless held that such a repeal had indeed taken place:

We are persuaded to apply the rule that a statute enacted for the public benefit should be construed liberally in favor of the public It appears to us that in enacting [Florida Statutes Section 286.011], the Legislature intended a general revision of the law applicable to open meetings of public agencies. In such a situation a later statute operates as a substitute for or repeal of an earlier one.⁸⁴

Noting that the Legislature had not acted since *Times Publishing* or *Doran*, Justice Adkins concluded that the Sunshine Law “should be construed as containing no exceptions.”⁸⁵ Informal executive sessions were not allowed.

In *Berns*, Justice Adkins reiterated the idea, first expressed in *Times Publishing*, that the Sunshine Law extends to any entity over which the Legislature has “dominion or control.”⁸⁶ This concept came into play in *Canney v. Board of Public Instruction of Alachua County*,⁸⁷ in which the Court held that the Sunshine Law applied to administrative agencies “acting in a quasi-judicial capacity.”⁸⁸ The school board did not become a part of the judicial

81. *Id.* at 699.

82. 245 So. 2d 38, 38, 41. The questions before the Court were whether Florida Statutes Section 286.011 superseded *Turk* and whether a city council could continue to hold informal executive sessions. *Id.* at 39–40.

83. *Id.* at 40.

84. *Id.* In repealing *Turk*, *Berns* also made it clear that the Sunshine Law applied to meetings attended by less than a quorum of members. *Id.* at 39–40.

85. *Id.* at 41.

86. *Id.* at 40 (citing *Times Publ'g*, 222 So. 2d 470).

87. 278 So. 2d 260 (Fla. 1973).

88. *Id.* at 262–263. The trial court found that the quasi-judicial action was not subject to the Sunshine Law. *Id.* at 262. Justice Adkins countered that “[i]f a county school board is a part of the legislative branch, then the Government in the Sunshine Law should be

branch in performing such functions.⁸⁹ More importantly, agencies should not be allowed to decide on their own when to hold secret meetings:

Various boards and agencies have obviously attempted to read exceptions into the Government in the Sunshine Law [that] do not exist. Even though their intentions may be sincere, such boards and agencies should not be allowed to circumvent the plain provisions of the statute. The benefit to the public far outweighs the inconvenience of the board or agency.⁹⁰

In *Town of Palm Beach v. Gradison*,⁹¹ Justice Adkins addressed the matter of a committee of citizens selected by the town of Palm Beach to assist in updating and revising zoning ordinances. The citizens planning committee frequently met in private, without recording minutes of their meetings.⁹² The town council deemed the committee an “element” of the zoning commission and ultimately approved a comprehensive zoning plan that was essentially the same as the one proposed by the committee and outside consultants.⁹³

Justice Adkins determined that the committee served as the “alter ego[]” of the town council,⁹⁴ stating that “a subordinate group or committee selected by the governmental authorities should not feel free to meet in private.”⁹⁵ Restating language from a 1968 California case, he penned a paragraph that has often been quoted in Sunshine Law cases:

One purpose of the [G]overnment in the [S]unshine [L]aw was to prevent at nonpublic meetings the crystalliza-

applicable, and any exception or amendment should be considered by the legislative, not the judicial branch.” *Id.*

89. *Id.* at 263. In addition to discussing the separation of powers doctrine, Justice Adkins noted that the Senate had rejected exceptions for certain hearings when the Sunshine Law was passed. *Id.*; see also *supra* n. 39 and accompanying text (noting that any public body vested with decision-making authority, without exception, is subject to the expansive scope of the Sunshine Law).

90. *Id.* at 264.

91. 296 So. 2d 473 (Fla. 1974).

92. *Id.* at 475.

93. *Id.*

94. *Id.* at 474.

95. *Id.* at 476.

tion of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. 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.⁹⁶

He went on to hold that the “[m]ere showing that the [G]overnment in the [S]unshine [L]aw has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*.”⁹⁷

In sum, Justice Adkins’ opinions created an increasingly broad characterization of the sorts of “meetings” that come within the Sunshine Law’s ambit. Meetings are not merely formal assemblages;⁹⁸ there are no exceptions for executive sessions.⁹⁹ The law applies to agencies acting in a quasi-judicial capacity.¹⁰⁰ It does not permit agencies to formulate their own exceptions—indeed, it extends to non-elected committees acting on authority granted by the government.¹⁰¹ Using the notion that the Sunshine Law applies to each step in the decision-making process, Justice Adkins carefully closed loopholes that might have allowed the government to dodge the law.

Critics argue that he went too far. Some claim that the framework these early cases established goes beyond the statute’s plain language, which “only addresses ‘meetings at which official acts are to be taken.’”¹⁰² Others go so far as to label Justice

96. *Id.* at 477; see also *Sacramento Newsp. Guild v. Sacramento Co. Bd. of Supervisors*, 69 Cal. Rptr. 480, 487 (Cal. App. 3d Dist. 1968) (using similar language). Justice Adkins first used some of this language in *Berns*, noting (without citation) the California court’s finding that “the statute may push beyond debatable limits in order to block evasive techniques.” 245 So. 2d at 41; see also *Sacramento Newsp. Guild*, 69 Cal. Rptr. at 487 (using the same language).

97. *Gradison*, 296 So. 2d at 477 (citing *Times Publ’g*, 222 So. 2d at 476).

98. *Id.* at 478.

99. *Id.*

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

101. *Id.* at 264.

102. Robert Michael Eschenfelder, *Modern Sunshine: Attending Public Meetings in the*

Adkins an activist judge who "launched a broadside attack on secret meetings in general" by engaging in "classic emotive reasoning with no foundation in fact."¹⁰³

Whatever the merits of these criticisms, the fact remains that Justice Adkins' decisions still stand, and the Florida Legislature failed to respond with any changes to the statute.¹⁰⁴ Whenever the Sunshine Law has been held to apply, it has generally been given the force and effect Justice Adkins desired. The trick, it turns out, lies in determining just when the law applies.

III. THE MAKING OF TWO EXCEPTIONS

Even if everyone agreed that the public deserves unfettered access to government activities, the realities of the modern administrative state have forced practical limitations on Florida's Sunshine Law. Faced with the need to interpret the law in the context of fact-based circumstances, Florida courts have substantially deviated from Justice Adkins' purist view of open government.

In particular, the courts have carved out two exceptions that institutionalize a compromise between an idealistic view of open government and the realities of day-to-day governmental operations. The staff or "fact-finding" exception allows a government official and his or her staff members to meet in private as long as they are engaged in fact-finding rather than decision-making.¹⁰⁵ The post hoc remedial meeting exception allows officials who have violated the Sunshine Law to "cure" the violation by later reconsidering the matter at issue in an open meeting.¹⁰⁶ The language and tone of these decisions emphasize practical considerations rather than a broad, idealistic policy of open government.

Over time, these limitations and exceptions have in essence become codified, creating a tacit set of parameters around open-meetings requirements. Florida's Sunshine Law remains philosophically broad but functionally limited by rules that have, in

Digital Age, 84 Fla. B.J. 28, 31 (Apr. 2010) (quoting Fla. Stat. § 286.011(1)).

103. Peter H. Seed, *Florida's Sunshine Law: The Undecided Legal Issue*, 13 U. Fla. J.L. & Pub. Policy 209, 222–223 (2002).

104. See *supra* n. 50 and accompanying text (discussing amendments to the statute).

105. *Bennett v. Warden*, 333 So. 2d 97, 99 (Fla. 2d Dist. App. 1976).

106. *Bassett v. Braddock*, 262 So. 2d 425, 428–429 (Fla. 1972).

many cases, lost their context. They function, in essence, as the sort of general, court-made exemptions to the Sunshine Law forbidden by the Florida Supreme Court.¹⁰⁷ More significantly, they arguably violate the spirit, if not the letter, of Florida's Sunshine Law.

A. The Staff or "Fact-Finding" Exception

The staff exception to the Sunshine Law first appeared in *Bennett v. Warden*¹⁰⁸ in 1976. The *Bennett* court found that a council of employees, which the St. Petersburg Junior College president organized to discuss wages, hours, and working conditions, did not come within the Sunshine Law's ambit.¹⁰⁹ The Second District Court of Appeal held that an executive officer may meet with staff in private for the purpose of "fact-finding" rather than policy-making.¹¹⁰ In a widely cited paragraph, the court explained the practical necessity of its finding:

Any other conclusion, carried to its logical extension, would in our view unduly hamper the efficient operation of modern government[,] the administration of which is more and more being placed in the hands of professional administrators. It would be unrealistic, indeed intolerable, to require of such professionals that every meeting, every contact, and every discussion with anyone from whom they would seek counsel or consultation to assist in acquiring the necessary information, data or intelligence needed to advise or guide the authority by whom they are employed, be a public meeting within the disciplines of the Sunshine Law. Neither the letter nor the spirit of the law require[s] it.¹¹¹

The court also found that the committee in question was "far too remote" from the decision-making process to influence the Board of Trustees, and thus was not subject to the Sunshine Law.¹¹² This

107. *Neu*, 462 So. 2d at 824.

108. 333 So. 2d 97 (Fla. 2d Dist. App. 1976).

109. *Id.* at 98, 100.

110. *Id.* at 99. The court distinguished *Gradison*, in which the town council delegated decision-making authority to a citizens committee, finding the committee in question served at the pleasure of the president, not the Board. *Id.* at 100.

111. *Id.* at 99-100.

112. *Id.* at 100; see also *infra* n. 134 and accompanying text (discussing the Second

latter aspect of the decision, however, has been given little attention.

The Florida Supreme Court expanded upon *Bennett* in *Occidental Chemical Co. v. Mayo*,¹¹³ creating a virtually unfettered staff exception. The Public Service Commission's staff had drafted a lengthy rate proposal that the Commission adopted, essentially verbatim, in a ninety-minute public meeting with minimal discussion.¹¹⁴ Occidental argued that the Commission must have met in secret or delegated its decision-making authority to staff.¹¹⁵ Admitting that the circumstances "create[d] an appearance of prejudice," the Court found no evidence of a Sunshine Law violation.¹¹⁶ "Nothing in the Sunshine Law requires each commissioner to do his or her thinking and studying in public. The law is satisfied if the commissioners reached a mutual decision . . . when they met together in public for their 'formal action.'"¹¹⁷

Justice Adkins agreed that the Sunshine Law could not extend to "every performance of an administrative duty by an agency employee."¹¹⁸ Nonetheless, the circumstances compelled the conclusion that the Commission staff exerted considerable influence on the decision-making process.¹¹⁹ It did not matter that there was no record of a secret meeting—the Commission simply could not have reached a decision on so complex a matter in just ninety minutes.¹²⁰ "Requiring evidence of a particular meeting at a specific time and place would serve only to encourage concealment and secrecy in governmental proceedings, thereby undermining the statutory purpose."¹²¹ In other words, a blanket rule excepting staff meetings regardless of any questions raised by the circumstances would enable officials to evade the Sunshine Law through their employees.

District Court of Appeal's later focus on the remoteness concept as opposed to a blanket staff exception).

113. 351 So. 2d 336 (Fla. 1977).

114. *Id.* at 339.

115. *Id.* at 341.

116. *Id.* The court refused to "indulge in speculation as to what did or did not occur So far as the record shows, the commissioners did not discuss various points among themselves before making a final decision." *Id.* at 342.

117. *Id.* (internal footnote omitted).

118. *Id.* at 344 (Adkins, J., dissenting).

119. *Id.* at 343.

120. *Id.* at 344.

121. *Id.*

It did not take long for such a blanket rule to take shape, however. In 1978, the First District Court of Appeal noted that “[i]t is well settled that frequent, unpublicized meetings between an agency member and advisors, consultants or staff who assist him in the discharge of his duties are not meetings within the contemplation of the Sunshine Law.”¹²² In less than two years, the staff exception had apparently crystallized into established law.

That is not to say that the blanket exemption suggested in *Occidental* was widely accepted, even if it was frequently cited. Other courts were careful to bind the “rule” within the factual context at issue. In *Blackford v. School Board of Orange County*,¹²³ for example, the court agreed that conversations between a board member and his or her staff might not constitute a “meeting.”¹²⁴ Nonetheless, the court found that rapid-fire, serial meetings between a school superintendent and individual School Board members over twelve weeks violated the Sunshine Law.¹²⁵ Despite the school superintendent’s protests that he did not convey any School Board member’s position to another in these meetings, the court found that the Board “used staff members as intermediaries in order to circumvent public meeting requirements” during these “de facto meetings.”¹²⁶ The court did

122. *Fla. Parole & Probation Comm’n v. Thomas*, 364 So. 2d 480, 482 (Fla. 1st Dist. App. 1978).

123. 375 So. 2d 578 (Fla. 5th Dist. App. 1979).

124. *Id.* at 579–580 (noting that “there is law to [the] effect” that a conversation between a single board member and his or her staff would not constitute a “meeting” under the Sunshine Law). The court carefully worded its analysis to avoid a blanket rule: “[W]e agree that scheduled discussions between staff and a single member of a board frequently are not ‘meetings’ under the act.” *Id.* at 580 (emphasis added). The court stated that *Occidental* “expanded” the staff exception. *Id.*

125. *Id.* The superintendent admitted that the meetings were conducted in an attempt to keep discussions secret without violating the law, relying on the exception for meetings between a single official and his or her staff. *Id.* at 579. It is possible that the court was influenced by the superintendent’s candid admission. Recently, the Florida Supreme Court found that a series of one-on-one briefings between individual county commissioners and county staff did not constitute a Sunshine Law violation because there was “no evidence” that the meetings were designed to enable the commissioners to communicate secretly. *Sarasota Citizens*, 48 So. 3d at 764–765.

126. *Blackford*, 375 So. 2d at 580–581 (quoting *Occidental*, 351 So. 2d at 341). The School Board argued that it was attempting to avoid public outcry over proposals that might never see the light of day. *Id.* The court was sympathetic but unmoved: “[A]ny argument that not all public business can be conducted center stage under the critical glare of the media’s spotlights . . . should be addressed to the legislature not the courts.” *Id.* at 581.

not discuss whether the staff members were “fact-finders” or “decision-makers.”

In *News-Press Publishing, Inc. v. Carlson*,¹²⁷ the Second District Court of Appeal found that meetings of an ad hoc budget committee held over the course of four to six months violated the Sunshine Law.¹²⁸ The court acknowledged the staff exception but found that the board had delegated decision-making authority to the committee; therefore, its meetings were subject to the Sunshine Law.¹²⁹ Relying on *Gradison*, the court noted that “we must look to the substance of the committee rather than its form.”¹³⁰

The appellees in *Carlson* turned to *Bennett* for the notion that staff members are exempt from open-meetings requirements.¹³¹ The court explained that *Bennett* created no such blanket exception.¹³² The staff members in *Bennett* were exempt from the Sunshine Law because they were “far too remote in the decision-making process” to formulate policy.¹³³ By focusing on this aspect of the *Bennett* decision, the court noted

that it would be ludicrous to hold that a certain committee is governed by the Sunshine Law when it consists of members of the public, who are presumably acting for the public, but hold a committee may escape the Sunshine Law if it consists of individuals who owe their allegiance to, and receive their salaries from, the governing authority.¹³⁴

127. 410 So. 2d 546 (Fla. 2d Dist. App. 1982).

128. *Id.* at 547. The committee, which consisted of the president, CEO, and four vice presidents of Lee Memorial Hospital, prepared a thirty-five-million-dollar budget that contained more than 4,700 line items; the hospital board accepted and approved the budget with minimal discussion. *Id.*

129. *Id.* at 547–548.

130. *Id.* at 548.

131. *Id.*

132. *Id.* at 548–549.

133. 333 So. 2d at 100.

134. *Carlson*, 410 So. 2d at 548. The court was alluding to language in *IDS Properties, Inc. v. Town of Palm Beach*, a predecessor to *Gradison*, stating that “[i]t would be ludicrous to invalidate the actions of a *public body* which are the result of secret meetings of *that body* or members thereof while at the same time giving approval to actions which result from the secret meetings of *committees designated by such public body.*” *IDS Props.*, 279 So. 2d 353, 356 (Fla. 4th Dist. App. 1973) (emphasis added).

In *Wood v. Marston*,¹³⁵ the Florida Supreme Court praised the *Carlson* decision, although it did not seem to appreciate the court's focus on the "remoteness" concept.¹³⁶ "The Second District, with a precise and accurate analysis of the import of *Occidental Chemical* and *Bennett v. Warden*, correctly focused on the nature of the act performed, not on the make-up of the committee or the proximity of the act to the final decision."¹³⁷ The Florida Supreme Court did, however, back away from the seemingly open-ended staff exception created by *Occidental*, adopting instead the "decision-making" versus "fact-finding" analysis developed in *Carlson*.¹³⁸ If an agency "merely reviews decisions delegated to another entity, the potential for rubber-stamping always exists. To allow a review procedure to insulate the decision itself from public scrutiny invites circumvention of the Sunshine Law."¹³⁹

The First District Court of Appeal has also tended to focus on this fact-finding aspect. In *Cape Publications, Inc. v. City of Palm Bay*,¹⁴⁰ the court found that a group of staff members and outside consultants involved in interviewing candidates for police chief performed a fact-finding rather than decision-making role.¹⁴¹ The court relied on *Bennett* for the notion that fact-finding functions are not within the Sunshine Law's ambit, distinguishing cases in which committees were given decision-making authority.¹⁴² The court later reaffirmed this stance in *Knox v. District School Board of Brevard*.¹⁴³

The Second District Court of Appeal, in contrast, has declared that "[t]he Sunshine Law has historically been subject to two exceptions, the staff exception and the exception for remoteness

135. 442 So. 2d 934 (Fla. 1983).

136. *Id.* at 939, 941.

137. *Id.* at 939 (citing *Carlson*, 410 So. 2d 546).

138. *Id.* at 939-941.

139. *Id.* at 939-940.

140. 473 So. 2d 222 (Fla. 5th Dist. App. 1985).

141. *Id.* at 223-225. The group did not screen applicants or make recommendations. *Id.* at 223. The group did ask technical questions and comment on each candidate's qualifications to help the city manager, who had sole decision-making authority, narrow the field. *Id.* The trial court came to the odd conclusion that the group constituted a board subject to the Sunshine Law because it included non-employees. *Id.* at 224.

142. *Id.* The court did note that *Wood* "abolished any 'staff exception' where the staff members compose a committee [that] is delegated authority normally within the governing body." *Id.* at 225.

143. 821 So. 2d 311, 314 (Fla. 5th Dist. App. 2002).

from the decision-making process."¹⁴⁴ The court then further refined the rule, stating that when "public officials delegate their fact-finding duties *and* decision-making authority to a committee of staff members, those individuals no longer function as staff members but 'stand in [the] shoes of such public officials insofar as application of [the] Government in Sunshine Law is concerned.'"¹⁴⁵ This new pronouncement seems to question the idea that fact-finding can be separated from the decision-making process. It also appears to cast doubt upon the Florida Supreme Court's analysis in *Wood* that proximity to the final decision is irrelevant.

The Fourth District Court of Appeal seemed to agree in *Dascott v. Palm Beach County*.¹⁴⁶ A pre-termination conference panel consisting of a decision-maker and two staff members convened to hear an employee's side of the charges against her.¹⁴⁷ After a public hearing, the employee was asked to leave, and the panel deliberated in private.¹⁴⁸ Although affidavits filed by the county stated that the staff members on the panel had no decision-making authority, the affidavits nonetheless suggested that the staff members provided "consultation and advice."¹⁴⁹ Finding "little distinction between 'advice' and 'recommendations,'" the court held that the staff members had decision-making authority.¹⁵⁰ On motion for rehearing, the court did not dispute the fact that no vote was taken during the closed-door session, but the court noted that the decision was made during that closed meeting.¹⁵¹ If "no evaluation and advice . . . was given to the ultimate decision-maker at the time of his decision, then there was no need for a closed-door deliberation."¹⁵² In other words,

144. *Evergreen Tree Treas., Inc. v. Charlotte Co. Bd. of Co. Comm'rs*, 810 So. 2d 526, 531 (Fla. 2d Dist. App. 2002) (internal quotations omitted). The question before the court was whether the Charlotte County Developmental Review Committee (DRC) violated the Sunshine Law by not allowing the public to be heard before rendering a decision on a development project. *Id.* at 528. The lower court found that DRC members were county staff fulfilling their job functions, thus the Sunshine Law did not apply. *Id.* at 531.

145. *Id.* at 531–532 (quoting *Carlson*, 410 So. 2d at 547–548) (emphasis added).

146. 877 So. 2d 8 (Fla. 4th Dist. App. 2004).

147. *Id.* at 9.

148. *Id.* at 9–10.

149. *Id.* at 13.

150. *Id.* The court also found delegation of authority based on a letter stating that the decision-maker and the panel would come to a "joint decision." *Id.*

151. *Id.* at 14.

152. *Id.*

close proximity to the decision rendered staff input into something more than fact-finding.

Just two years later in *Jordan v. Jenne*,¹⁵³ the court seemed to ignore its own reasoned analysis of the impact of staff recommendations. Finding that the committee in question “provided only a mere recommendation . . . and did not deliberate,” the court held that the committee had no decision-making authority.¹⁵⁴ The court distinguished *Dascott*, where a closed-door meeting took place immediately following the public hearing, and the decision-maker deliberated with the staff members on the panel; in *Jordan*, the decision-maker reviewed the committee’s recommendations outside its presence.¹⁵⁵ In his dissent, Judge Fred A. Hazouri argued that it was “the fact that the panel consulted and advised the department head that influenced this court’s decision” in *Dascott*.¹⁵⁶ But the subtlety had now been lost.

The Second District Court of Appeal noted its approval of the *Jordan* decision in *McDougall v. Culver*.¹⁵⁷ The *McDougall* court found that the circulation of written memoranda from senior officials to the decision-maker did not constitute a “meeting” under the Sunshine Law because the staff members only made recommendations and did not deliberate with the decision-maker.¹⁵⁸ The court distinguished *Dascott* as holding that the panel constituted a “board” because it exercised decision-making authority.¹⁵⁹

In 2010, the Florida Supreme Court faced the question of whether a team negotiating with the Baltimore Orioles to bring spring training to Sarasota County constituted a committee subject to the Sunshine Law.¹⁶⁰ The negotiating team was comprised of Deputy County Administrator David Bullock, the staff members, and other experts Bullock consulted for advice in developing a Memorandum of Understanding (MOU) with the Orioles.¹⁶¹ Bullock testified that he “retained and exercised the ultimate authority to negotiate the terms of the MOU,” and the Florida

153. 938 So. 2d 526 (Fla. 4th Dist. App. 2006) (per curiam).

154. *Id.* at 530 (emphasis added).

155. *Id.* at 530.

156. *Id.* at 531 (Hazouri, J., dissenting).

157. 3 So. 3d 391 (Fla. 2d Dist. App. 2009).

158. *Id.* at 392.

159. *Id.* at 393.

160. *Sarasota Citizens*, 48 So. 3d at 758.

161. *Id.* at 759.

Supreme Court found that the negotiating team did not constitute a committee subject to the Sunshine Law because it served an information-gathering role.¹⁶² Furthermore, a series of one-on-one briefings of board members by staff before a public hearing did not constitute meetings in violation of the Sunshine Law.¹⁶³

Thus, over the course of some thirty-five years, Florida courts have cemented the "staff" or "fact-finding" exception from open-meetings requirements. As long as staff members are not delegated decision-making authority and do not "deliberate" with the decision-maker at the point where the decision is made, they have virtually unlimited power to meet privately to provide input, advice, and recommendations.

There is little doubt that it would be "unrealistic, indeed intolerable," as described in *Bennett*, to require that all meetings between officials and staff members take place in the sunshine.¹⁶⁴ Somewhere along the way, however, the degree of influence on the decision-maker and proximity to the decision-making process was removed from the calculus. If, as articulated in *Times Publishing*, the Sunshine Law encompasses "[e]very step in the decision-making process, including the decision itself," the "staff" exception as it is currently understood surely violates the law.¹⁶⁵

B. The Post Hoc Remedial Meeting Exception

In *Tolar v. School Board of Liberty County*,¹⁶⁶ the Florida Supreme Court concluded that Sunshine Law violations may be cured if the matter discussed in private is reconsidered in an open meeting.¹⁶⁷ The Court found that the school board's private meetings violated the Sunshine Law, and that "any resolution, rule, regulation, or formal action taken at these secret meetings would not be binding."¹⁶⁸ The school board did not take formal

162. *Id.* at 763.

163. *Id.* at 765. The Court found that there was "no evidence that Bullock or other County staff communicated what any commissioner said to any other commissioner." *Id.* In *Blackford*, however, the Fifth District Court of Appeal found that similar seriatim briefings constituted a meeting in violation of the Sunshine Law. 375 So. 2d at 580; see also *supra* nn. 125–126 and accompanying text (discussing *Blackford*).

164. 333 So. 2d at 100.

165. 222 So. 2d at 473.

166. 398 So. 2d 427 (Fla. 1981).

167. *Id.* at 429.

168. *Id.* at 428.

action during the private meetings, however; it held a public meeting and ultimately took a voice vote.¹⁶⁹ That was more than sufficient.

The Court acknowledged the holding in *Gradison* that the discussion leading up to decisions must take place in the sunshine, but found that it did not mean “that public final action of the Board will always be void and incurable merely because the topic of the final public action was previously discussed at a private meeting.”¹⁷⁰ For support, the Court looked to *Bassett*, in which the secret election of the chairman and vice-chairman of the Dade County School Board was “rendered ‘sunshine bright’” by a later public vote.¹⁷¹

Justice Adkins found *Bassett* to be inapposite.¹⁷² He contended that selecting a chairman had little impact on the public; in contrast, decisions affecting the public must be subject to public scrutiny at every step.¹⁷³

The important question is not whether a formal meeting was held, but whether the members of the Board had a nonpublic meeting dealing with any matters on which foreseeable actions might be taken.

. . .

169. *Id.*

170. *Id.* The concept of curing Sunshine Law violations in a subsequent meeting had also been suggested in *Blackford*. 375 So. 2d at 581. In that case, the court found that seriatim meetings between a school superintendent and individual members of the school board over twelve weeks violated the Sunshine Law, and a public meeting eleven days later did not remedy it. *Id.* at 580–581. Recognizing that the outcome might well be the same, the court did not require reversal of the decision but insisted that “all the supporting data and input leading up to the resolutions which are the subject matter of this cause[] be re-examined and re-discussed in open public meetings.” *Id.* at 581.

171. *Tolar*, 398 So. 2d at 429 (citing *Bassett*, 262 So. 2d at 428–429). The court also discussed its holding in *Occidental*:

We stated that the sunshine law required public meetings whenever the commission takes “official acts” and that it invalidates “formal action” taken in private. Upholding the commission’s action, we declared that the sunshine law is satisfied if the commissioners reached a mutual decision . . . when they met together in public for their “formal action.”

Id. at 428–429.

172. *Id.* at 430 (Adkins, J. & Sundberg, C.J., dissenting).

173. *Id.*

Under the reasoning of the majority, any board or commission could have informal meetings in which each member could commit himself to some matter on which foreseeable action will be taken. This could be done in the absence of the public and without giving the public an opportunity to be heard.¹⁷⁴

He then went on to express his grave concern regarding the potential impact of the *Tolar* holding: “The bright rays of the sunshine law have not been dimmed, they have been obliterated. We now have to rely upon the good faith of public officials to continue public meetings and avoid the presumption of ‘hanky-panky’ [that] flows from ‘secret sessions.’”¹⁷⁵

At first, Florida courts were careful not to extend the post hoc meeting exception given life in *Tolar*, requiring that curative meetings involve a genuine reconsideration of the matter, not a “perfunctory ratification” of decisions made in private.¹⁷⁶ After all, the acknowledged goal of the Sunshine Law was to ensure that every step of the deliberative process take place in the open. In *Gradison*, the town council had simply rubberstamped decisions made by the citizens planning committee. In *Tolar*, the school board ultimately held an open meeting and permitted discussion on the issue. Subsequent court decisions carefully bracketed the post hoc meeting exception between the *Tolar* and *Gradison* endpoints.¹⁷⁷

That all changed in *Monroe County v. Pigeon Key Historical Park*.¹⁷⁸ The Third District Court of Appeal found that “*Tolar*

174. *Id.* at 432.

175. *Id.*

176. See *Port Everglades*, 652 So. 2d at 1171 (holding that a Sunshine Law violation occurred because the Port Everglades Authority ratified a committee’s recommendations without conducting a full, open hearing); *Spillis Candela & Partners v. Centrust Sav. Bank*, 535 So. 2d 694, 695 (Fla. 3d Dist. App. 1988) (holding that “[o]nly a full, open public hearing by the Board could have cured” the Sunshine Law violation); *Yarbrough v. Young*, 462 So. 2d 515, 517–518 (Fla. 1st Dist. App. 1985) (noting that a technical violation of the Sunshine Law would not nullify decisions made at an open meeting absent evidence that the meeting involved “perfunctory ratification of secret decisions”).

177. E.g. *Port Everglades*, 652 So. 2d at 1171; *Spillis Candela*, 535 So. 2d at 695.

178. 647 So. 2d 857 (Fla. 3d Dist. App. 1994). Monroe County staff members were authorized to negotiate a thirty-year lease of Pigeon Key that was adopted in a later public meeting. *Id.* at 859. A letter and memorandum summarizing the two closed meetings was

recedes from *Gradison*,” and gives agencies carte blanche to cure Sunshine Law violations through remedial meetings.¹⁷⁹ Although “*Tolar* effectively sounded the death knell of an unadulterated Sunshine Law,” the court felt bound by the notion that government actions cannot be voided as long as a curative meeting is held that is not purely ceremonial.¹⁸⁰

The Fourth District Court of Appeal refused to accept the position that *Tolar* had such far-reaching effect. In *Zorc v. City of Vero Beach*,¹⁸¹ the court considered whether a remedial meeting constituted an effective cure when all but one council member declined to reconsider the matter discussed in private.¹⁸² Emphasizing that “only a *full*, open hearing will cure a defect arising from a Sunshine Law violation,” the court found that the remedial meeting did not involve a full reexamination of the issues.¹⁸³ “Despite the *Tolar* standard of remediation . . . violation[s] will not be cured by a perfunctory ratification of the action taken outside of the sunshine.”¹⁸⁴

Other courts have not framed the matter so carefully. In *Finch v. Seminole County School Board*,¹⁸⁵ the Fifth District

read into the record at the public meeting. *Id.*

179. *Id.* at 860. In a lengthy and spirited dissent, Judge Gerald B. Cope, Jr., argued that the majority “misse[d] the distinction between *Gradison* and *Tolar*.” *Id.* at 867 (Cope, J., dissenting). In *Tolar*, the school board itself held a secret meeting in violation of the Sunshine Law, then later held a public meeting to discuss the same issues. *Id.* at 866. In *Gradison*, a separate committee met in secret, and that group did not reinitiate the entire deliberative process in the subsequent public meeting. *Id.* Thus, Judge Cope noted a distinction between cases in which the same body holds a meeting to cure its own Sunshine Law violation (*Tolar, Bassett*), and those in which an agency holds a meeting to cure a committee or advisory board’s violation (*Gradison, Spillis Candela*). *Id.* at 864–865. The “cure” may be effective in the former but not the latter. *Id.*

180. *Id.* at 861 (majority). The trial court had held that the negotiation of a thirty-year lease of public property was of much greater public importance than the comparatively trivial matters involved in *Tolar* and *Bassett*. *Id.* at 863 (Cope, J., dissenting). The Third District Court of Appeal put that argument to rest upon rehearing, stating that “the Sunshine Law does not provide that cases be treated differently based upon their level of public importance.” *Id.* at 868 (majority, motion for rehearing). The court also addressed Judge Cope’s dissent, holding that “the Sunshine Law does not require unique treatment for governmental advisory committees.” *Id.*

181. 722 So. 2d 891 (Fla. 4th Dist. App. 1998).

182. *Id.* at 903.

183. *Id.* The court carefully analyzed *Gradison, Tolar*, and *Pigeon Key*. *Id.* at 902.

184. *Id.* at 903. By contrast, the court found in *Bruckner v. City of Dania Beach* that the minutes of the remedial meeting reflected genuine reconsideration of the matter discussed in private. 823 So. 2d 167, 171 (Fla. 4th Dist. App. 2002). Indeed, the city took care to meet all legal requirements to cure any possible Sunshine Law violation. *Id.*

185. 995 So. 2d 1068 (Fla. 5th Dist. App. 2008).

Court of Appeal determined that decision-makers can cure Sunshine Law violations if they “reach[] a mutual decision on the pertinent issue when they subsequently meet together in public.”¹⁸⁶ In *Grapski v. City of Alachua*,¹⁸⁷ the First District Court of Appeal nullified the City’s acceptance of meeting minutes and then chided the City for failing to solve its own problems by simply holding a remedial meeting.¹⁸⁸

Sarasota Citizens also raised the question of whether post hoc board meetings “cured” any Sunshine Law violations committed via email discussions between board members.¹⁸⁹ The Florida Supreme Court found that multiple public meetings held after the email exchanges in which multiple proposals were discussed and rejected constituted independent final action in the sunshine.¹⁹⁰

For better or worse, the post hoc meeting exception has been given the force of law. Private decisions made in violation of the Sunshine Law will not be nullified if officials ultimately conduct a public meeting that is not purely ceremonial. As with the “staff” exception, there are practical considerations supporting some form of the post hoc meeting rule. In *Bassett*, the school board had merely elected a chairman and vice-chairman in secret; there was little doubt that the board would come to any other decision in public, and the reasoning behind the decision scarcely mattered.¹⁹¹ In *Blackford*, the secret decisions resulted in the closing of a junior high school, and the court did not want to force the reopening of the school if a public meeting was held to discuss the redistricting issue.¹⁹² Those rulings simply make good sense.

That a later public meeting can cure any closed-door decision does not make good sense, particularly given the scant guidance

186. *Id.* at 1073. The court suggested that the decision-makers themselves must effect the cure, an idea established by the dissent in *Pigeon Key*. *See id.* (noting that “Sunshine Law violations may be cured by later actions of the decision maker”). *See supra* n. 179 for a discussion of the *Pigeon Key* dissent. The court also noted that the violation was not egregious or willful and was inadvertent, ignoring the holding in *Port Everglades* that the nullification of official action does not depend upon intent to violate the Sunshine Law. *Finch*, 995 So. 2d at 1073.

187. 31 So. 3d 193 (Fla. 1st Dist. App. 2010).

188. *Id.* at 200. “The City will perhaps consider this sanction extreme. We would only note the City could have cured its default by reconsidering the Minutes. . . . The City owns its decision to stand firm on the open meeting violation.” *Id.*

189. 48 So. 3d at 766.

190. *Id.*

191. 262 So. 2d at 428.

192. 375 So. 2d at 580–581.

as to what constitutes genuine reconsideration of the matter. Because it is impossible to know exactly what was discussed during a private meeting, there is no way to ensure that every step in the decision-making process is brought to light. As Justice Adkins warned, any closed meeting could involve “hanky-panky.” That is why he pronounced in *Gradison* that any decision made out of the sunshine is void.¹⁹³ He could not have anticipated blanket acceptance of the post hoc meeting exception.

IV. WHY THE LEGISLATURE SHOULD RESPOND

Open government is a creature of statute. The Open Government Movement began in the 1950s, largely driven by members of the press seeking access to closed meetings and government records.¹⁹⁴ Although the common law provides no right to attend governmental meetings—indeed, English law once prohibited publication of parliamentary debates¹⁹⁵—open-government advocates insisted that the Constitution guarantees such access.¹⁹⁶ Finding no judicial support for that notion, the next step was to push for statutory remedies.¹⁹⁷ By 1976, all fifty states and the District of Columbia had open-meetings statutes on the books.¹⁹⁸

The Open Government Movement found fertile ground in Florida. The legislative history of Florida’s Sunshine Law, coupled with the small number and limited scope of statutory exemptions, illustrates Florida’s commitment to a broad view of open government. That contrast is heightened by the fact that open government is a constitutional right in Florida, and exemp-

193. 296 So. 2d at 477; see also *supra* n. 97 and accompanying text for a discussion of the *Gradison* decision.

194. Harvard L. Rev. Ass’n, *Open Meeting Statutes: The Press Fights for the “Right to Know”*, 75 Harv. L. Rev. 1199, 1199 (1962).

195. *Id.* at 1203.

196. *Id.* at 1203–1204.

197. *Id.* at 1204.

198. O’Connor & Baratz, *supra* n. 48, at 724. Alabama enacted the first open meetings law in 1915—a vague statute pushed through by wealthy landowners who feared increasing corporate influence over legislators. Ryan Lozar, *Alabama Jettisons Open Meetings Law, Adopts New One*, 29 News Media & L. 27, 27 (2005) (available at <http://www.rcfp.org/node/102615>). New York was the last state to enact a Sunshine Law, in 1976. O’Connor & Baratz, *supra* n. 48, at 724.

tions to the open government mandate must be periodically reviewed.¹⁹⁹

Florida's commitment to open government is laudable, but it ignores several criticisms that have been around since the beginning of the Open Government Movement.²⁰⁰ Government officials and legal experts offer salient reasons why the ideal of transparent government is less than ideal in the real world of day-to-day government operations, particularly given the dramatic growth of the administrative state.²⁰¹ These arguments dovetail with the Sunshine Law exceptions carved out by Florida courts faced with such practical considerations.

These fact-specific solutions may not reflect legislative policy, however. The Florida Legislature has tacitly agreed to Justice Adkins' broad interpretation of the Sunshine Law, yet has also tacitly agreed to judge-made exceptions. Legislators need to address the staff and post hoc meeting exceptions to set the course of Florida's Sunshine Law beyond debatable limits.

A. Florida's Commitment to Strong Open Government

In some ways, Florida's Sunshine Law policy is reflected more by silence than by action. The Florida Legislature has made few changes to the Sunshine Law over the course of more than four decades, and relatively few exemptions have been enacted in other statutes. Florida's strong support for open government was dramatically reaffirmed in 1992 when the Sunshine Law was enshrined in the Declaration of Rights of the Florida Constitution.²⁰² Open government was taken beyond its statutory roots to become a fundamental right of Floridians, with strict limits on the enactment of Sunshine Law exemptions.

199. Fla. Const. art. I, § 24.

200. Harvard L. Rev. Ass'n *supra* n. 194, at 1200.

201. Fenster, *supra* n. 13, at 623. Some legal analysts argue that transparent government is functionally unattainable. *See id.* at 622–623 (arguing that government "can never be fully transparent, at least not in the sense that the term and its populist suspicions of the state require").

202. Fla. Const. art. I, § 24. Florida is one of two states with a constitutional provision pertaining to open government. The 1974 Louisiana constitution created a "Right to Direct Participation," declaring that "[n]o person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases established by law." La. Const. art. XII, § 3.

The push for a constitutional amendment began in the 1980s with growing public awareness that Florida legislators were making critical decisions behind closed doors.²⁰³ The Florida Supreme Court fueled this impetus by holding that separation of powers principles precluded the application of the Public Records Law to the “constitutional officers of the three branches of government or to their functions.”²⁰⁴ The court later withdrew that opinion and held that the Public Records Law did apply to the Executive Branch and to local government agencies but not to the Legislature.²⁰⁵ Nonetheless, it was clear that a constitutional amendment was needed.

The amendment requires that “[a]ll meetings . . . at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public.”²⁰⁶ Exemptions to the Sunshine Law must be expressly created by statute; “[t]he Sunshine Law itself contains no general provision for closure in the ‘public interest.’”²⁰⁷ The constitutional amendment requires that exemptions to the Sunshine Law be passed by a two-thirds vote of each house, and any exemption must specify the public necessity for exemption and be no broader than necessary to accomplish its stated purpose.²⁰⁸

A 1993 amendment to Florida Statutes Section 286.011 added Subsection 8, allowing governmental agencies to meet in private with their attorneys to discuss pending legislation under certain narrow conditions.²⁰⁹ In 2011, the Florida Legislature voted unan-

203. 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, 976 (1994).

204. *Locke v. Hawkes*, 1991 Fla. LEXIS 1915 at *8 (Fla. Nov. 7, 1991), *vacated and superseded*, 595 So. 2d 32 (Fla. 1992).

205. Gleason & Wilson, *supra* n. 203, at 979.

206. Fla. Const. art. I, § 24(b). This provision extends to the executive branch of state government as well as local government agencies and special districts. Article III, Section 4(e) covers legislative meetings. Gleason & Wilson, *supra* n. 203, at 983.

207. Reps. Comm. for Freedom of the Press, *Florida—Open Government Guide*, <http://www.rcfp.org/florida-open-government-guide>; scroll down to *Open Meetings, select Exemptions and Other Legal Limitations, select Exemptions in the Open Meetings Statute* (accessed Mar. 7, 2011).

208. Fla. Const. art. I, § 24(c); Reps. Comm. for Freedom of the Press, *supra* n. 207.

209. This exemption is “narrower than the attorney-client communications exception recognized for private litigants.” Fla. Att’y Gen. Op. 95-06, 1995 WL 37642 at *2 (Jan. 27, 1995). It “does not create a blanket exception to the open meeting requirement of the Sunshine Law for all meetings between a public board or commission and its attorney.” *Id.* Florida courts have held that “the legislature intended that a strict construction be

imously to amend Florida Statutes Section 286.0113(2) to close meetings related to negotiations with vendors in a competitive bid process.²¹⁰ Other statutory exemptions include certain proceedings of the Commission on Ethics and the Elections Commission, certain hearings in juvenile dependency cases, deliberations of the Public Employees Relations Commission, certain matters heard by the Human Rights Advocacy Committees, and matters related to attorney and student discipline.²¹¹ Information related to trade secrets may not be disclosed in public hearings.²¹²

Exemptions have a limited lifespan. In 1995, the Legislature passed the Open Government Sunset Review Act, which provides for periodic review of all Sunshine Law exemptions except those required by federal law or those that apply solely to the Legislature or State Court System.²¹³ Any “new exemption or substantial amendment of an existing exemption” is automatically repealed after five years unless the Legislature reenacts the exemption.²¹⁴ An exemption is substantially amended if the amendment expands its scope.²¹⁵ The constitutional requirement that exemptions serve an identifiable public purpose and be no broader than necessary to accomplish that purpose also applies to their revision and maintenance.²¹⁶ In addition, the Legislature must find “that the purpose is sufficiently compelling to override the strong public

applied.” *City of Dunnellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. 5th Dist. App. 1995). Only those persons specifically listed in the exemption may attend. *Zorc*, 722 So. 2d at 897; see *Sch. Bd. of Duval Co. v. Fla. Publ’g Co.*, 670 So. 2d 99, 101 (Fla. 1st Dist. App. 1996) (holding that the presence of staff members and a consultant at a closed School Board meeting violated the Sunshine Act).

210. The statute also exempts “[a]ny portion of a team meeting at which negotiation strategies are discussed.” Fla. Stat. § 286.0113(2)(b)(2) (2011). “Team” is defined as “a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.” *Id.* at § 286.0113(2)(a)(2) (2011). “A complete recording shall be made of any portion of an exempt meeting”; however, the recording is exempt from public records requirements until the earlier of the agency’s decision or thirty days after opening the competitive solicitation process. *Id.* at § 286.0113(2)(c) (2011).

211. Reps Comm. for Freedom of the Press, *supra* n. 207, at “Description of Each Exemption.”

212. *Id.*

213. Fla. Stat. § 119.15(2) (2009).

214. *Id.* at § 119.15(3).

215. *Id.* at § 119.15(4)(b).

216. *Id.* at § 119.15(6)(b).

policy of open government and cannot be accomplished without the exemption.”²¹⁷

The Florida Supreme Court has held that the courts must examine legislative exemptions to the Sunshine Law according to “the exacting constitutional standard of [A]rticle I, [S]ection 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose.”²¹⁸ At the same time however, the Florida Supreme Court has held that the Sunshine Law has “both constitutional and statutory dimension[s],”²¹⁹ and lower courts have found “no reason to construe the [constitutional] amendment differently than the Supreme Court has construed the statute.”²²⁰ Although the Sunshine Law has been enshrined in the Declaration of Rights of the Florida Constitution,²²¹ and legislative exemptions are to be strictly scrutinized, judicial exemptions to the law remain in place.

217. *Id.*

218. *Halifax Hosp. Med. Ctr. v. News-J. Corp.*, 724 So. 2d 567, 569 (Fla. 1999). “Lower courts have recognized that the standard adopted in *Halifax* ‘recognizes that the rights secured by [S]ection 24 must be respected as fundamental rights to be protected by strict enforcement of the unique textual standard of review.’” Kaney, *supra* n. 34, at 4–5 (quoting *Mem’l Hosp. W. Volusia, Inc. v. News-J. Corp.*, 2002 WL 390687 at *5 (Fla. 7th Cir. 2002)).

219. *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012, 1021 (Fla. 2000). The constitutional amendment did not repeal the statute.

220. *Pigeon Key*, 647 So. 2d at 868 (on motion for rehearing). In upholding the post hoc meeting exemption after ratification of the constitutional amendment, the Third District Court of Appeal found that if “the drafters of the amendment sought to overrule *Tolar*, they would have done so.” *Id.* Judge Cope strongly disagreed: the constitutional amendment, he said, made it “abundantly clear that hereafter, all doubts must be resolved in favor of the right of the public to have fully protected access to open meetings. The . . . judiciary is obliged to give proper enforcement to the new constitutional right.” *Id.* at 867 (Cope, J., dissenting).

221. Around the time the Sunshine Law amendment was enacted, the Florida Supreme Court explained the import of the Declaration of Rights:

The text of our Florida Constitution begins with a Declaration of Rights—a series of rights so basic that the framers of our Constitution accorded them a place of special privilege. These rights embrace a broad spectrum of enumerated and implied liberties that conjoin to form a single overarching freedom: They protect each individual within our borders from the unjust encroachment of state authority—from whatever official source—into his or her life. Each right is, in fact, a distinct freedom guaranteed to each Floridian against government intrusion. Each right operates in favor of the individual, against government.

Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992).

B. Policy Meets Practical Limitations

If the fact-finding and post hoc meeting exemptions to Florida’s Sunshine Law are at odds with Florida’s policy favoring open government, that policy is at odds with both history and practical considerations. Although legislatures traditionally opened their formal assemblages to the public,²²² they were not required to do so under common law.²²³ As Sunshine Law critics often point out, the U.S. Constitutional Convention itself was held behind closed doors.²²⁴ That fact alone seems to imply a sort of foundational birthright for clandestine government action. The policies behind open government stand in sharp contrast.

The Founding Fathers had their own reasons for secrecy, however, and the authors of modern sunshine laws had different reasons for limiting it. In the decade spanning 1952 to 1962, half of the states passed open-meetings legislation, largely in response to pressure from media interests.²²⁵ The battle was not easily won; some sunshine bills were defeated more than once before passing.²²⁶ Often, the laws that were passed were deemed inadequate within a few years of enactment thanks to narrow interpretations by courts and attorneys general.²²⁷ Furthermore, the vast majority of these statutes allowed for closed meetings under certain circumstances. Most defined these exemptions by subject matter, but six allowed for closed-door deliberations falling short of final action.²²⁸

In this context, it is easy to see why Florida’s Sunshine Law has been lauded for its breadth and strength. Enacted to eliminate the culture of closed-door decision-making that had turned

222. Fenster, *supra* n. 13, at 660.

223. O’Connor & Baratz, *supra* n. 48, at 723.

224. Fenster, *supra* n. 13, at 660.

225. Harvard L. Rev. Ass’n, *supra* n. 194, at 1199–1200.

226. *Id.* at 1200.

227. *Id.* A 1960 California court decision found that the state’s Sunshine Law did not apply to advisory committees performing a fact-finding function. *Id.* at 1205–1206. In 1961, California amended its open-meetings statute to explicitly include advisory committees as well as any publicly funded group on which government officials serve in their official capacity. *Id.* at 1206. Massachusetts similarly amended its statute to cover committees and subcommittees. *Id.* The Florida Supreme Court’s decision in *Gradison* obviated the need for an amendment to Florida’s Sunshine Law related to committees and subcommittees, although it did not address the fact-finding exception.

228. *Id.* at 1209–1210.

public legislative sessions into a sham and supported by early judicial interpretation, Florida's Sunshine Law has held true to open-government policy.²²⁹ The statute, however, fails to take into account practical limitations to open government, leaving it to the courts to create arbitrary distinctions between the day-to-day functions of government and the policy behind the statute.

Sunshine laws represent both a populist ideal of participatory democracy and the vehicle by which that ideal should be achieved.²³⁰ Government is separated from the public physically—by distance and location within public buildings—and because of the complexity of the modern bureaucratic state. Separation begets distrust, and the public rightly or wrongly considers this distant behemoth a threat to normative democratic values. Sunshine laws seek to tear down physical and metaphorical walls so that the public can understand the basis of decisions and hold government accountable.

The fact remains, however, that officials at every level of government make untold numbers of decisions every day, ranging on a continuum from trivial to vitally important. It is simply not possible or even desirable to expose the basis of every decision.²³¹ Thus, sunshine laws reflect the fundamental conflict between the public's desire for open government and government's natural tendency toward obscurity, leading us to “fetishize means at the cost of ends.”²³² This conflict is reflected in the Sunshine Law's focus on “meetings,” and the inherent difficulty in defining exactly which meetings are subject to the law.

In Florida, those boundaries are defined broadly in terms of who, what, when, and where. The only real question is why—that is, whether the meeting involves official decision-making. In theory (and by judicial interpretation), Florida's Sunshine Law requires every step in the decision-making process to take place in the open. In practice, it is difficult to define the decision-

229. Fla. Soc'y of News Eds., *Third Annual Sunshine Sunday, The Lakeland Ledger: Our Tradition of Sunshine*, <http://rgga.com/fsne/sunshine2003/lakeland.shtml> (Mar. 16, 2003). For a broader discussion of the history of Florida's Sunshine Law, see *supra* nn. 34–37 and accompanying text.

230. Fenster, *supra* n. 13, at 620.

231. *Id.* at 623. There is a saying often attributed to Otto von Bismarck: “[T]o retain respect for sausages and laws, one must not watch them in the making.” *In re Pet. of Graham to Quash Subp. Duces Tecum of the Fla. St. Legis.*, 104 So. 2d 16, 18 (Fla. 1958).

232. Fenster, *supra* n. 13, at 623.

making process and determine the point in the process at which officials must conduct an open meeting. The Florida Supreme Court in *Occidental* held that no official was required “to do his or her thinking and studying in public,” but officials were required to reach a “mutual decision” in an open meeting.²³³ That is a dramatic divergence from the “every step” requirement, yet it still fails to take into account the practical limits inherent in the concept of open government.²³⁴

In establishing the staff or fact-finding exception, Florida courts have acknowledged that certain parts of the government decision-making process simply cannot be made public. The post hoc meeting exception concedes that officials who do deliberate in private are likely not to change their minds once they reach a decision. At first blush, these court-made exceptions appear to offer an effective escape valve for officials caught between the “spirit, intent, and purpose”²³⁵ of the Sunshine Law and the impossibility of conducting all decision-making in the sunshine.

In reality, however, these exceptions do little to ease the conflict between policy and practicality and may serve to exacerbate some of the problems associated with open government. The fact that government can never be truly open “lead[s] only to cycles of frustration. The popular will to see the state will ride an asymptotic line that approaches—but never reaches—the perfect and perfectly accountable and responsive government.”²³⁶

These court-made exceptions are not necessarily wrong. The problem is that they come into conflict with Florida’s Sunshine Law policy, held at the populist extreme. The boundaries of the open-meeting principle need to be defined with greater care, so that officials better understand the limitations on their conduct.

233. 351 So. 2d at 342.

234. As early as 1962, Sunshine Law critics noted that while open discussion is informative, government officials have a valid interest in closed-door sessions for “preliminary fact gathering and consultation.” Harvard L. Rev. Ass’n, *supra* n. 194, at 1219–1220. “To some extent this problem is inherent in the open meeting concept, but it may stem largely from the presently inadequate statutory treatment of executive sessions, which ranges from total prohibition to virtually carte blanche approbation.” *Id.* at 1220.

235. *Hough*, 278 So. 2d at 289.

236. Fenster, *supra* n. 13, at 671.

C. The Costs of Open Government

Florida's Sunshine Law is unusually expansive. Indeed, "federal law and the vast majority of states refuse to extend their open meeting laws to this degree."²³⁷ But even at the federal level, with its restrictive view of open meetings, Sunshine Law critics have questioned whether the benefits of open government exceed the costs.²³⁸

One of the criticisms of open-government statutes is that they impede the collegiality of government agencies.²³⁹ In 1995, the Administrative Conference of the United States (ACUS)—a now-defunct federal agency charged with conducting research and making recommendations regarding procedural reforms for administrative agencies—established a special committee to review the federal Government in the Sunshine Act.²⁴⁰ Numerous federal agencies subject to the Act reported that officials utilized staff members and written memoranda to communicate with one another without triggering the open-meeting requirement.²⁴¹ Further, these officials often rely upon staff members, who "may meet to discuss the issues that ultimately will require a decision by their politically accountable principals," as intermediaries in the decision-making process.²⁴²

ACUS was concerned with the fact that federal commissions were reaching important decisions without meaningful discussion among members.²⁴³ Indeed, the specter of the Sunshine Act had led many agencies to prohibit meetings of a quorum or more members, instead allowing members to vote on issues by "notation."²⁴⁴ But ACUS also found that indirect deliberations had

237. *Id.* at 664.

238. "The public must certainly know about the government's operations, but obtaining that knowledge is not a costless transaction." *Id.* at 623.

239. Rossi, *supra* n. 12, at 228–230.

240. *Id.* at 230.

241. *Id.* at 232–234. Although these actions would violate Florida's Sunshine Law, they do not violate the federal Government in the Sunshine Act, which applies only to meetings of at least a quorum of the members of a multimember commission. *Id.* at 228. A "meeting" involves "deliberations [that] determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2) (2006).

242. Rossi, *supra* n. 12, at 234.

243. *Id.* at 232–233.

244. *Id.* at 233–234. Such blanket rules prohibiting "meetings" stemmed in part from "the difficulty in distinguishing between preliminary conversations, which are outside of the Sunshine Act's requirements, and deliberations, which must be held in public." *Id.* at

another effect: they “enhanc[ed] the power of the intermediary staff members *vis[-à-]vis* the agency members, and, perhaps, reduc[ed] the accountability of appointed agency members.”²⁴⁵

Because Florida’s Sunshine Law places even greater restrictions on private meetings than the federal Government in the Sunshine Act, government agency staff members may wield even greater power and influence in Florida than at the federal level. Indeed, one critic of Florida’s Sunshine Law has opined that

[t]he real winners . . . are non-elected staff and lobbyists who can privately pursue their agendas with each board member and thereby influence board decisions as long as each board member is left in the dark as to the thinking of the other board members on the subject until the board meeting.²⁴⁶

This seemingly counters the populist ideal of open government as giving the public control and oversight over authority that can be changed each election cycle.²⁴⁷ It also hinders the input of the public in public decisions.²⁴⁸

233.

This difficulty was one of which Congress was aware in drafting the Sunshine Act. Congress ultimately substituted the language “deliberations that result in . . .” for the previously suggested language “deliberations that concern,” in an attempt to exclude general discussions that “concern” agency business but do not determine or result in the adoption of a firm position on an issue.

Id. at 233 n. 315.

245. Richard K. Berg, Stephen H. Klitzman & Gary J. Edles, *An Interpretive Guide to the Government in the Sunshine Act* 302 (2d ed., Am. Bar Ass’n 2005).

246. Seed, *supra* n. 103, at 260.

247. Fenster, *supra* n. 13, at 630.

248. As Justice Adkins noted in *Gradison*,

No governmental board is infallible and it is foolish to assume that those who are elected or appointed to office have any superior knowledge concerning any governmental problem. Every person charged with the administration of any governmental activity must rely upon suggestions and ideas advanced by other knowledgeable and interested persons. As more people participate in governmental activities, the decision-making process will be improved.

296 So. 2d at 476.

The post hoc meeting exception established in *Tolar* was also conceived, in part, to enable collegiality among government officials. In a concurring opinion in *Tolar* in which two other justices joined, Florida Supreme Court Justice Arthur J. England expressed his opinion that officials should be allowed to discuss matters privately.²⁴⁹ He believed that Justice Atkins had “overcharacterized the private meetings involved in this case by calling them ‘secret sessions’ of the board, and that the ostensible reach of his characterization would bar all private communications with and among public officials on a collegial body.”²⁵⁰ He added,

To the extent that Justice Adkins implies that a public official cannot communicate ideas to her supervisory board except by convening or attending a public meeting, I must respectfully disagree and suggest that there is no legislative history to indicate that the public meetings law was designed to so restrict public officials in the performance of their duties.²⁵¹

That line of reasoning was particularly applicable to the facts of *Tolar*, in which a majority of school board members had discussed the matter at issue during an informal gathering at the home of the school superintendent-elect.²⁵² It is also a useful mechanism for dealing with email exchanges that are found to constitute a meeting under Florida’s Sunshine Law, as the Florida Supreme Court found in *Sarasota Citizens*.²⁵³ Because government officials never remove their mantles of authority, the Sunshine Law would, in theory, follow them everywhere. “Taken to its logical end, however, this view would allow no space that an official occupies to be securely private—including his or her home (from

249. *Tolar*, 398 So. 2d at 429 (England, Overton & McDonald, JJ., concurring).

250. *Id.*

251. *Id.*

252. *Id.* at 428.

253. 48 So. 3d at 766. Some critics argue that email exchanges should not be considered meetings because officials’ email is already subject to public records requirements. “Prohibiting email communications under the auspices of an open meeting statute would hinder the efficiency of local government solely in the interest of creating public access to communications to which the public already has a right of access through state open records statutes.” O’Conner & Baratz, *supra* n. 48, at 722.

where the official can make calls and send e-mails via private phone lines, computers, and e-mail accounts).”²⁵⁴

The problem with the post hoc meeting exception is that it does not address the underlying issue—that prohibitions on informal, private discussions between two or more officials impede collegiality and effective governance. Instead, it creates a blanket exception that enables officials to meet privately yet avoid nullifications of their decisions as long as a public meeting is ultimately held. There is really no way for the public to know the extent of the private discussions and thus whether the post hoc meeting effectively addressed the content of those discussions. Furthermore, we are left with the same line-drawing issues regarding the decision-making process.

Taken to their limits, the court-made exceptions to Florida’s Sunshine Law create some rather absurd results. In attempting to balance Florida’s expansive Sunshine Law policy with the practical limits to the reach of open government, the courts have helped create an unelected power bloc, and have provided officials with a broad loophole for remediating Sunshine Law violations. Florida’s Legislature needs to step in and more carefully define the limits of the law, with legislative exemptions that facilitate better, more efficient decision-making while meeting constitutional requirements.

D. Proposed Legislative Response

Even Justice Adkins conceded that Florida’s Sunshine Law has practical limits.²⁵⁵ But Justice Adkins disagreed with his colleagues’ departure from what he felt was the correct reading of the Sunshine Law—a pure, populist view dedicated to the public’s “inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.”²⁵⁶

By failing to respond to Justice Adkins’ opinions with legislative action, the Florida Legislature has tacitly accepted this purist ideal as policy. More tellingly, attempts to carve out broad legisla-

254. Fenster, *supra* n. 13, at 664.

255. See *Occidental*, 351 So. 2d at 344 (Adkins, J., dissenting) (stating the Sunshine Law could not extend to “every performance of an administrative duty by an agency employee”).

256. *Doran*, 224 So. 2d at 699.

tive exceptions to the Sunshine Law have been blocked by the representative branches, even prior to the enactment of the constitutional amendment.²⁵⁷

At the same time, however, the Legislature has failed to respond to the staff and post hoc meeting exceptions, thus accepting the contrary view that the populist goal of open government is unattainable. The Legislature needs to address this apparent inconsistency. Furthermore, because judge-made exceptions to the Sunshine Law are not permitted,²⁵⁸ the Legislature needs to respond with an effective exemption that meets the requirements of the Florida Constitution and the Open Government Sunset Review Act.

The staff or fact-finding exception to the Sunshine Law arguably falls within one of the public purposes articulated in the Open Government Sunset Review Act: an exemption has an identifiable public purpose if it “[a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.”²⁵⁹ The courts, in crafting the “staff” exception, found that it would be “unrealistic, indeed intolerable” to require that “every meeting, every contact, and every

257. In 1977, Governor Reubin Askew vetoed House Bill 1107, which included a broad exception permitting government agencies to meet in private with counsel regarding pending litigation.

Discussion of pending litigation behind closed doors would prove a very broad and significant exception to the “Sunshine Law.” Many of the decisions which public boards and agencies are called upon to make today are directly related to pending litigation. . . .

Furthermore, discussion about litigation almost necessarily wanders far afield. Practically speaking, such discussions cannot be confined to narrow legal issues. Secret discussions could very well result in tentative or even final decisions on matters of great public interest. . . .

Section 8 of House Bill 1107 invites abuse. “Government-in-the-Sunshine” offers needed protection from the willfulness and the duplicity that too often characterize governments which meet in secret. Public decisions must not be made by public officials in private meetings.

Fla. H.J., Fifth Legis. under the 1968 Const., Spec. Sess. at 2 (1977). A narrow exemption for attorney-client communications was codified in 1993. *See supra*, n. 209 and accompanying text (discussing the attorney-client communications exemption).

258. *Neu*, 462 So. 2d at 824 (noting that the courts “have no constitutional or statutory authority to create an exception to the Sunshine Law for governmental bodies to meet privately”).

259. Fla. Stat. § 119.15(6)(b)(1).

discussion” with staff members “be a public meeting within the disciplines of the Sunshine Law.”²⁶⁰ The staff exception enables governmental entities to function more efficiently by allowing officials to rely upon staff assistance in fulfilling their duties.

The problem with the staff exception is establishing its boundaries. Courts are forced to accept officials’ word that staff members are engaged only in fact-finding and not decision-making. It also ignores the key role that fact-finding and recommendations play in decision-making.²⁶¹ Staff members and consultants can exert substantial influence over the decision-making process, even if they do not “deliberate” with the decision-maker at the point where the decision is made. Limits must be placed upon the staff exception to promote efficiency without violating the spirit of the Sunshine Law.

Clues to a possible legislative approach can be found in caselaw and existing statutory exemptions. The notion of remoteness from the decision-making process, first articulated in *Bennett*, deserves revival.²⁶² Justice Ben F. Overton’s recommendation that “officials clearly delineate the functions and responsibilities of any special boards, commissions, or committees they create to assist them in carrying out their responsibilities” also merits consideration.²⁶³ These concepts complement language from Florida Statutes Section 286.011(8) and Florida Statutes Section 286.0113(2), which carve out limited exceptions for attorney consultations and negotiations with vendors in a competitive bid process, respectively.

Proximity to the decision-making process can be established by publicly defining upcoming decisions to be made. In creating the attorney-consultation exception, Florida Statutes Section 286.011(8)(a) requires that “[t]he entity’s attorney . . . advise the entity at a public meeting that he or she desires advice concerning the litigation.” Similarly, the Sunshine Law could be amended to

260. *Bennett*, 333 So. 2d at 99–100.

261. The court in *Krause* acknowledged that simply narrowing the field of choices is “an integral part of the decision-making process.” 366 So. 2d at 1252.

262. 333 So. 2d at 100. The *Bennett* court found that the advisory committee in question was too far removed from the decision “to be capable of making or formulating policy or crystalizing decisions anywhere near that point, ‘. . . just short of ceremonial acceptance . . .’ by the Board.” *Id.* The Second District Court of Appeal reiterated this idea in *Carlson*. 410 So. 2d at 548.

263. *Wood*, 442 So. 2d at 942 (Overton, J., concurring).

require officials seeking input from staff members and consultants on a particular issue to state that fact on the record in a public meeting. The subject matter of the meetings would be confined to the stated issue.

Just as Florida Statutes Section 286.011(8) requires that the governmental entity give notice of the names of the persons involved in the attorney consultation, and Florida Statutes Section 286.0113(2) defines a negotiating team, the Sunshine Law could be amended to require officials to identify on the record those individuals engaged in fact-finding and from whom they will seek guidance. Similarly, just as both existing statutes require that the closed meetings be recorded, the staff exception should require that any meetings on a defined issue with identified staff be recorded, with the transcripts becoming part of the public record.

This rule would limit the staff exception by considering the degree of influence on the decision-maker and proximity to the decision-making process without hindering agency functions by requiring that every staff meeting take place in the sunshine. The public would also be informed, via the public record, as to the matters considered in the course of the decision-making process.

The post hoc meeting exception, in contrast, has no viable limitations. As Justice Adkins noted, the exception enables boards and agencies to sidestep open-meetings requirements as long as a public meeting is eventually held.²⁶⁴ It takes away a key means of enforcing Sunshine Law provisions and forces the public “to rely upon the good faith of public officials to continue public meetings and avoid the presumption of ‘hanky-panky[,]’ which flows from ‘secret sessions.’”²⁶⁵ Justice Adkins cautioned that “[t]he bright rays of the [S]unshine [L]aw have . . . been obliterated,”²⁶⁶ and the Third District Court of Appeal agreed in *Pigeon Key*.²⁶⁷ The post hoc meeting exception is a drastic remedy wholly at odds with Florida’s Sunshine Law.

The courts have required full reconsideration of the matter discussed in closed meetings in order to effectively cure the Sunshine Law violation. But what does that mean? How can the

264. *Tolar*, 398 So. 2d at 432 (Adkins, J. & Sundberg, C.J., dissenting).

265. *Id.*

266. *Id.*

267. 647 So. 2d at 861.

public know exactly what officials discuss in private and whether all of those matters are eventually aired in a public meeting? There is simply no way to know, which is precisely why the Sunshine Law is necessary. The courts can only look at the post hoc meetings and decide whether they *appear* to be thorough—as in *Sarasota Citizens*, where the county commission examined and rejected several proposals in multiple meetings after the alleged Sunshine Law violations.²⁶⁸ While that sounds like a thorough reconsideration, the plaintiffs argued that a few public meetings lasting several hours could not compare to the lengthy private meetings of the negotiating team; furthermore, the details of the negotiating team meetings were not disclosed in the public forum.²⁶⁹ These arguments have merit.

The post hoc meeting exception has no identifiable public purpose as defined by the Open Government Sunset Review Act; agencies would be hard-pressed to argue that post hoc “cures” to Sunshine Law violations are necessary to the efficient administration of government programs. The post hoc meeting exception as it was originally considered in *Bassett*, applying to purely procedural matters such as the selection of a board chair, has some limited value.²⁷⁰ Given the line-drawing challenges and potential for abuse, however, the Legislature should eliminate this exception. Doing so is simply a matter of incorporating into the statute some of Justice Adkins’ language in *Gradison*, stating that a Sunshine Law violation “constitutes an irreparable public injury so that the ordinance is void *ab initio*.”²⁷¹

The Open Government Sunset Review Act takes into account both Florida’s open government policy and the constitutional requirements of our Sunshine Law. The Florida Legislature should use this Act as a guide in amending the Sunshine Law statute to support a limited version of the staff exception and eliminate the post hoc meeting exception. In so doing, the Legislature would reaffirm the State’s commitment to open government

268. 48 So. 3d at 766.

269. Appellant’s Br. on the Merits, *Sarasota Citizens for Responsible Gov’t v. City of Sarasota*, 2010 WL 3623011 at **48–49 (No. SC10-1647, 48 So. 3d 755 (Fla. 2010)).

270. *Bassett*, 262 So. 2d at 428–429. The acceptance of meeting minutes, as in *Grapski*, also supports a very limited post hoc meeting exception for procedural matters. 31 So. 3d at 200.

271. *Gradison*, 296 So. 2d at 477.

and close a loophole created by the courts in an attempt to address the practical limits of open government.

V. CONCLUSION

The language of Justice Adkins' opinions and Florida's strong Sunshine Law policy stand for a purist view of open government that seeks to preserve the right of the People to be present throughout all phases of government decision-making. At the opposite end of the spectrum, the critics of open government argue that this populist ideal is simply unattainable. Courts, attempting to balance the two, have developed practical exceptions that take into account the realities of the day-to-day operation of the administrative state.

In many ways, the staff and post hoc meeting exceptions to the Sunshine Law make good sense. It is unrealistic to suggest that sunshine can reach every corner of every agency at all times. It is inefficient to require that all decisions reached in secret be invalidated when the agency would have reached the same decision in the sunshine.

All of that may well be true from a practical standpoint, but practicalities should not take away the public's rights. When government officials are given the power to determine the reach of our Sunshine Law, there is no question that some will choose to operate in darkness. That is not to imply that every decision made in the shadows will be wrong, subversive, or even relevant to the public trust. There will be those that range from innocuous to beneficial. That is not the point. In Florida, the public has been given a right to know the basis for every decision, and that ideal can be achieved only if every step in the process takes place in the open.

The courts have been tinkering around the edges of the Sunshine Law for decades, devising practical solutions to problems that have devolved into broad exceptions outside of their factual context. Legislators need to address these exceptions to reflect Florida's policy of open government. The statute must push beyond debatable limits in order to ensure that Florida's Sunshine Law remains strong.