

DOUG MELLER LEGISLATIVE PROPOSAL FOR 8/26/22 WORKING GROUP MEETING

The working group seems to agree on the concept (if not the wording) of a new §92F-13(6) which allows discretion to defer disclosure of pre-decisional and deliberative government records until a decision is made. Discretion for deferred disclosure seems appropriate when public participation is not required or wanted in government decisions. However, because the intent of the Sunshine Law is to encourage public participation in government decisions, I believe this approach is inappropriate for board decisions under the Sunshine Law.

Last session, to facilitate informed public participation, the Legislature amended the Sunshine Law to guarantee timely public access to board packets prior to board meetings. And as was pointed out at our 8/9/22 meeting, if §92F-13 were amended to give discretion to defer disclosure of pre-decisional and deliberative government records until a decision is made, the current wording of §92-7.5 would allow boards to defer disclosure of pre-decisional and deliberative government records included in board packets. Under §92-7.5,

"board packet" means documents that are compiled by the board and distributed to board members before a meeting for use at that meeting, to the extent the documents are public under chapter 92F...

Assuming the working group recommends a new §92F-13(6), so that our legislative proposal does not affect disclosure of board packets, I suggest we also recommend amendment of §92-7.5 to read as follows:

§92-7.5 Board packet; filing; public inspection; notice. *At the time the board packet is distributed to the board members, but no later than forty-eight hours before the meeting time, the board shall also make the board packet available for public inspection in the board's office; provided that nothing in this section shall require creation of a board packet. The board shall provide notice to persons requesting notification of meetings pursuant to section 92-7(e) that the board packet is available for inspection in the board's office and shall provide reasonably prompt access to the board packet to any person upon request. The board is not required to mail board packets. As soon as practicable, the board shall accommodate requests for electronic access to the board packet.*

For purposes of this section, "board packet" means documents that are compiled by the board and distributed to board members before a meeting for use at that meeting, to the extent that under chapter 92F either the documents are public [under chapter 92F] or the only basis for their nondisclosure would be their pre-decisional status under section 92F-13(6); provided that this section shall not require disclosure of executive session minutes, license applications, or other records for which the board cannot reasonably complete its redaction of nonpublic information in the time available before the public inspection required by this section.

Although Jennifer Brooks “ghost-wrote” this for my use, please treat this as my proposal rather than as an OIP proposal. As an alternative, it would be possible to include a proviso in §92F-13(6) under which §92F-13(6) would not apply to board packets. Such a proviso is included in the MO Proposal. But as was pointed out at our 8/9/22 meeting:

- §92F-13(6) would be a new exception to the general rule that government records should be disclosed.
- a proviso, under which §92F-13(6) would not apply, would be an “exception to an exception”.
- “exceptions to exceptions” should be avoided in statutory drafting.