Constitution Revision Commission
Declaration Of Rights Committee
Proposal Analysis

(This document is based on the provisions contained in the proposal as of the latest date listed below.)

Proposal #: P 81

Relating to: DECLARATION OF RIGHTS, Access to public records and meetings; LEGISLATURE, Quorum and procedure

Introducer(s): Commissioner Heuchan

Article/Section affected: Article I, Section 24; Article III, Section 4

Date: January 29, 2018

	REFERENCE	ACTION
1.	DR	**Pre-meeting**

I. SUMMARY:

Article I, Section 24 of the Florida Constitution requires that all meetings of any collegial body of the executive branch of state government or of a county, municipality, school district, or special district (local governments) be open and noticed to the public if official acts will be taken or public business of such body will be transacted or discussed. The "open meetings" requirement of Article I, Section 24 does not apply to the Judiciary and applies to the Legislature in only the circumstances specified in Article III, Section 4 of the Florida Constitution (sessions of each house, committee meetings, and certain prearranged meetings between members or members and the governor, the president of the senate, or the speaker of the house of representatives).

The proposal amends Article I, Section 24 and Article III, Section 4 of the Florida Constitution to require that the Legislature, the Judiciary (including meetings between judges and justices), and any Commission or Task Force be subject to the same "open meetings" requirements as the executive branch and local government.

If passed by the Constitution Revision Commission, the proposal will be placed on the ballot at the November 6, 2018, General Election. Sixty percent voter approval is required for adoption. If approved by the voters, the proposal will take effect on January 8, 2019.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Government in the Sunshine

Section 24 of Article I of the Florida Constitution

A constitutional right of access to "all meetings of any collegial public body of the executive branch or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed. . ." is recognized in Art. I, s. 24, Fla. Const.[1] All collegial public bodies of the executive branch and local government are covered by the open meetings mandate of this constitutional provision. The state legislature has its own constitutional provision requiring access in Art. III, s. 4(e), Fla. Const. The judiciary is not included in this provision.

This section of the constitution was added in 1992[2] in response to the Florida Supreme Court decision in *Locke v. Hawkes*,[3] which provided that open records laws did not apply to the legislature or other constitutional officers.[4]

Section 286.011, F.S.

Florida's Government in the Sunshine Law, s. 286.011, F.S., commonly referred to as the Sunshine Law, provides a right of access to:

"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 political subdivision. . ."

The law is equally applicable to elected and appointed boards, and applies to any gathering of two or more members of the same board to discuss some matter that will foreseeably come before that board for action.[5] Members-elect to such boards or commissions are also subject to the Sunshine Law, even though they have not yet taken office.

There are three basic requirements of s. 286.011, F.S. First, meetings of public boards or commissions must be open to the public. Second, reasonable notice of such meetings must be given. Finally, minutes of the meetings must be taken and promptly recorded.

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[1] See *Frankenmuth Mutual Insurance Company v. Magaha*, 769 So.2d 1012, 1021 (Fla. 2000), noting that the Sunshine Law "is of both constitutional and statutory dimension."

[2] *See* Amendment 2 for 1992 General Election, which was placed on the ballot by joint resolution of the Florida Legislature: http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=10&seqnum=8 (last visited 1/29/18).

[3] *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). *See also Westlaw Commentary on Art. I, s. 24 of the Fla. Const*. by William A. Buzzett and Deborah K. Kearney.

[4] *See* D'Alemberte, Talbot, *The Florida State Constitution*, 2nd edition (2017), pg 71-72.

[5] Section 286.011, F.S., does not apply to the legislature, the judiciary, the powers of the Governor and Cabinet which derive from the Constitution, and other boards and commissions created by the Constitution, which prescribes the manner of the exercise of their constitutional powers. *See Government-In-The-Sunshine Manual*, Volume 39, Prepared by the Office of the Attorney General, Published by First Amendment Foundation (2017), pgs. 5-9.

Judiciary

The open meetings provision found in Art. I, s. 24, Fla. Const., does not include meetings of the judiciary. The Florida Attorney General has opined that separation of powers principles make it unlikely that the Sunshine Law, a legislative enactment, could apply to the courts established pursuant to Art. V, Fla. Const.[6] Questions of access to judicial proceedings usually arise under other constitutional guarantees relating to open and public judicial proceedings, such as the Sixth Amendment of the U.S. Constitution[7], and freedom of the press provision of the First Amendment to the U.S. Constitution.[8]

Criminal Proceedings

A court possesses the inherent power to control the conduct of proceedings before it.[9] A three-pronged test for criminal proceedings has been developed to provide "the best balance between the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury."[10]

Closure in criminal proceedings is acceptable only when:

1) It is necessary to prevent a serious and imminent threat to the administration of justice;

2) No alternatives are available, other than change of venue, which would protect the defendant's right to a fair trial; and

3) Closure would be effective in protecting the defendant's rights without being broader than necessary to accomplish that purpose.

Article I, s. 16(b), Fla. Const., provides that victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.[11]

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[6] AGO 83-97.

[7] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

[8] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[9] *Miami Herald Publishing Company v. Lewis,* 426 So. 2d 1 (Fla. 1982); and *State ex rel. Miami Herald Publishing Company v. McIntosh,* 340 So. 2d 904 (Fla. 1976).

[10] *Lewis, supra* at 7. *And see Morris Publishing Group, LLC v. State*, 136 So. 3d 770, 779 (Fla. 1st DCA 2014).

[11] *See Sireci v. State*, 587 So. 2d 450 (Fla. 1991), *cert. denied*, 112 S.Ct. 1500 (1992) (court did not err by allowing the wife and son of the victim to remain in the courtroom after their testimony). *See also* s. 960.001(1)(e), F.S., restricting exclusion of victims, their lawful representatives, or their next of kin.

Civil Proceedings

In *Barron v. Florida Freedom Newspapers*, Inc., 531 So. 2d 113 (Fla. 1988), the Supreme Court set forth the following factors that must be considered by a court in determining a request for closure of civil proceedings:

1) A strong presumption of openness exists for all court proceedings;

2) Both the public and news media have standing to challenge any closure order with the burden of proof being on the party seeking closure;

3) Closure should occur only when necessary:

a) to comply with established public policy as set forth in the Constitution, statutes, rules or case law;
b) to protect trade secrets;
c) to protect a compelling governmental interest;
d) to obtain evidence to properly determine legal issues in a case;
e) to avoid substantial injury to innocent third parties; or
f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.

4) Whether a reasonable alternative is available to accomplish the desired result and if none exists, the least restrictive closure necessary to accomplish its purpose is used;

5) The presumption of openness continues through the appellate review process and the party seeking closure continues to have the burden to justify closure.[12]

Court Proceedings Closed by Statute

Certain court proceedings may be closed in accordance with Florida Statutes as follows:

(1) Adoption: Hearings held under the Florida Adoption Act are closed. Section 63.162(1), F.S. *See In re Adoption of H.Y.T.,* 458 So. 2d 1127 (Fla. 1984) (statute providing that all adoption hearings shall be held in closed court is not unconstitutional).

[12] *And see Amendments to the Florida Family Law Rules of Procedure,* 723 So. 2d 208, 209 (Fla. 1998), reiterating support for the *Barron* standards and stating that "public access to court proceedings and records [is] important to assure testimonial trustworthiness; in providing a wholesome effect on all officers of the court for purposes of moving those officers to a strict conscientiousness in the performance of duty; in allowing nonparties the opportunity of learning whether they are affected; and in instilling a strong confidence in judicial remedies, which would be absent under a system of secrecy;" and *Lake v. State*, 193 So. 3d 932, 934 (Fla. 4th DCA 2016) (trial court did not depart from essential requirements of law by refusing to close Jimmy Ryce Act civil commitment review proceeding; statutory provision requiring that certain treatment records introduced into evidence be maintained under seal unless opened by the judge "does not require that the press and public be barred from any discussion of treatment or treatment records during a review hearing").

(2) Dependency: Except as provided in s. 39.507, F.S., dependency adjudicatory hearings are open to the public unless, by special order, the court determines that the public interest or welfare of the child is best served by closing the hearing. Section 39.507(2), F.S. [13]

(3) Guardian advocate appointments: Hearings for appointment of guardian advocates are confidential.[14]

(4) HIV test results: Court proceedings in cases where a person is seeking access to human immunodeficiency virus (HIV) test results are to be conducted in camera unless the person tested agrees to a hearing in open court or the court determines that a public hearing is necessary to the public interest and proper administration of justice.[15]

(5) Pregnancy termination notice waiver: Hearings conducted in accordance with a petition for a waiver of the notice requirements pertaining to a minor seeking to terminate her pregnancy shall remain confidential and closed to the public, as provided by court rule.[16]

(6) Termination of parental rights: Hearings involving termination of parental rights are confidential and closed to the public.[17]

(7) Victim and witness testimony in certain circumstances: Except as provided in s. 918.16(2), F.S., if any person under 16 years of age or any person with an intellectual disability is testifying in any civil or criminal trial concerning any sex offense, the judge shall clear the courtroom, except for listed individuals. Section 918.16(1), F.S. If the victim of a sex offense is testifying concerning that offense, the court shall clear the courtroom, except for listed individuals, upon request of the victim, regardless of the victim's age or mental capacity. Section 918.16(2), F.S.[18]

Legislature

The Legislature is constitutionally required[19] to be open and noticed as provided in Art. III, s. 4(e), Fla. Const., except with respect to those meetings exempted by the Legislature pursuant to Art. I,

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[13] *And see Mayer v. State*, 523 So. 2d 1171 (Fla. 2d DCA), *review dismissed*, 529 So. 2d 694 (Fla. 1988) (former version of statute requiring hearings to be closed did not violate First Amendment).
[14] Section 39.827(4), F.S.
[15] Section 381.004(2)(e)9., F.S.
[16] Section 390.01114(4)(f), F.S.
[17] Section 39.809(4), F.S. *See Natural Parents of J.B. v. Florida Department of Children and Family Services*, 780 So. 2d 6 (Fla. 2001), upholding the constitutionality of the statute. *And see J.I. v. Department of Children and Families*, 922 So. 2d 405 (Fla. 4th DCA 2006) (Sunshine Law does not apply to Department of Children and Families permanency staffing meetings conducted to determine whether to file petition to terminate parental rights). *Cf. Stanfield v. Florida Department of Childen and Families*, 698 So. 2d 321 (Fla. 3d DCA 1997) (trial court may not issue "gag" order preventing a woman from discussing a termination of parental rights case because "[t]he court cannot prohibit citizens from exercising their First Amendment right to publicly discuss knowledge that they have obtained independent of court documents even though the information may mirror the information contained in court documents").
[18] *Cf. Pritchett v. State*, 566 So. 2d 6 (Fla. 2d DCA), *review denied*, 570 So. 2d 1306 (Fla. 1990) (where a trial court failed to make any findings to justify closure, application of s. 918.16, F.S., to the trial of a defendant charged with capital sexual battery violates the defendant's constitutional right to a public trial). *Accord Kovaleski v. State*, 854 So. 2d 282 (Fla. 4th DCA 2003), *cause dismissed*, 860 So. 2d 978 (Fla. 2003).
[19] Article I, s. 24, Fla. Const.

s. 24, Fla. Const., or specifically closed by the Constitution.[20] Pursuant to Art. III, s. 4(e), Fla. Const., the rules of procedure of each house of the Legislature must provide that all legislative committee and subcommittee meetings of each house and joint conference committee meetings be open and noticed. Such rules must also provide:

> [A]ll prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public. All open meetings shall be subject to order and decorum. This section shall be implemented and defined by the rules of each house, and such rules shall control admission to the floor of each legislative chamber and may, where reasonably necessary for security purposes or to protect a witness appearing before a committee, provide for the closure of committee meetings. Each house shall be the sole judge for the interpretation, implementation, and enforcement of this section.

In accordance with Article III, s. 4(e), Fla. Const., both the Senate and the House of Representatives have adopted rules implementing this section.[21]

B. EFFECT OF PROPOSED CHANGES:

The proposal requires the legislature, the judicial branch and any commission or task force to adhere to the same open meetings standard as any collegial public body of the executive branch or collegial public body of a county, municipality, school district or special district.

If approved by the voters, the proposal will take effect on January 8, 2019.[22]

FISCAL IMPACT:

Unknown.

[20] *And see* Art. III, s. 4(c), Fla. Const. (votes of members during final passage of legislation pending before a committee and, upon request of two members of a committee or subcommittee, on any other question, must be recorded).

[21] Senate Rules may be found online at www.flsenate.gov. Rules of the House of Representatives may be found at www.myfloridahouse.gov.

[22] *See* Article XI, Sec. 5(e) of the Florida Constitution ("Unless otherwise specifically provided for elsewhere in this constitution, if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.)

III. Additional Information:

A. Statement of Changes:
(Summarizing differences between the current version and the prior version of the proposal.)

None.

B. Amendments:

None.

C. Technical Deficiencies:

None.

D. Related Issues:

According to an analysis provided by the Appellate Section and Trial Section of the Florida Bar:

While the Legislature already has several procedural rules regarding open meetings, this proposal would dramatically affect the judiciary. The doctrine of judicial privilege dates back to the Constitutional Convention of 1787, where the delegates believed that the judiciary should be independent of the co-equal branches of government. Judicial independence has historically included private judicial deliberations.[23] No states have adopted an "open meeting" requirement for state courts to subject the deliberations to notice and publicly meet.[24]

Opponents argue that an open meetings requirement of the judiciary would slow down the deliberative process in Florida's District Courts of Appeal.[25] Cases often require more than one meeting to discuss and deliberate, and the notice requirement would likely slow the process. Opponents argue that these logistical challenges would create extraordinary delays and extensive costs.[26] There is also a concern about the judges' ability to fairly and impartially adjudicate complex issues without confidentiality of judicial communications.[27] Confidentiality in judicial deliberations allows for candid exchange of ideas which may or may not be unpopular, which is arguably important to the decision-making process.[28]

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[23] *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting A Privilege for the Federal Judiciary*, 44 Wash. & Lee L.Rev. 213 (1987).
[24] *See Justice on Display: Should Justices Deliberate in Public?* Time, Sept. 12, 2011.
[25] Florida Bar Trial Lawyers Section White Paper, on file with CRC staff.
[26] Id.
[27] *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting A Privilege for the Federal Judiciary*, 44 Wash. & Lee L.Rev. 213 (1987).
[28] *Trying California's Judges on Television: Open Government or Judicial Intimidation?* 65 A.B.A. J. 1175, 1178 (1979).