OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 630-1724

MEMORANDUM

TO: **The Honorable City Council Members**

CC: **Margaret Sidman, Managing Deputy General Counsel**
Carla Miller, Executive Director, Ethics, Compliance and Oversight
Kirby Oberdorfer, Deputy Director, Ethics, Compliance and Oversight

FROM: **Jason R. Gabriel, General Counsel**

RE: **Florida's Sunshine and Public Records Law**

DATE: **October 21, 2015**

I. EXECUTIVE SUMMARY

A. Brief History

Justice William O. Douglas, in explaining the importance of open government, wrote:

"Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions, there should be "uninhibited, robust, and wide-open" debate." New York Times v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

Sunshine Laws

Florida's Sunshine Laws were implemented in 1967 when Florida first established its open public meeting requirements – right around the same time that the City of Jacksonville was in the process of becoming consolidated – a time that was just preceded by a series of allegations of malfeasance on the part of several public officials whom, after the consolidation movement was in full swing, were ultimately indicted by a county grand jury.

The obligations of public officials in connection with open meetings have expanded through both legislative and judicial interpretations since. In 1992, Florida voters amended the State's Constitution to incorporate these ideals of open government.[1]

The basic law, known as the Sunshine Law, is found in Chapter 286, Florida Statutes and its main theme is that: all meetings of any board, commission, agency or authority, where official acts are taken, are declared to be public meetings open to the public at all times.

Public Records Laws

Florida's first Public Records Law was passed in 1909 and mandated that all state, county and municipal records are at all times open for a personal inspection by any citizen of Florida, and those in charge of such records could not refuse such citizen privilege.

Since 1909, Florida's Public Records Law, codified in Chapter 119 of the Florida Statutes, has grown exponentially, and similar to the State's Sunshine Laws, in 1992, the citizenry adopted the concept into the Florida Constitution which provided a constitutional guarantee to the openness of public records.[2]

The Attorney General of the State of Florida has always been considered the State's guardian of the State's open government laws, including the Public Records Law; and annually publishes the "Government-In-The-Sunshine Manual" which contains over 300 pages of guidance and references to assist Florida's public officials in open government compliance, and citizens in open government access.

Chapter 119, Florida Statutes, considers all documents or any other material regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency to be a public record, and it requires the custodian of such public record to permit the inspection and copying of all such records under reasonable conditions.

B. The Frustration of Evasive Devices

Recently there have been issues reported in the media with respect to certain use of text messages during Council meetings, and the content of those texts, the purported use of a third-party liason to communicate between members, their respective interplay with the Sunshine Law, and alleged problems with the retention and timely disclosure of public records.

A Grand Jury Report filed on January 17, 2008 by the State Attorney, after extensive review of the City's open government laws and compliance found, among other things, that the General Counsel's Office should assume additional promotional responsibilities supplemental to

[1] Article 1, Section 24(b) of the Constitution of the State of Florida, reads as follows: "All meetings of any collegial public body of . . . a county, municipality . . . 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 . . ."

[2] Article 1, Section 24(a) of the Constitution of the State of Florida, reads as follows: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution."

education to ensure that Jacksonville's officials act in a manner that is both legal and thoughtful of the public's interest.

In that spirit, the Office of General Counsel takes very seriously not only the technical requirements of Florida's very liberally construed Sunshine and Public Records Laws, but, due to enhanced citizen interest in matters of public treasury, trust and affairs, a high premium is placed on strict adherence to the principles of both the spirit and intent of such laws. The Sunshine Law mandates that not only are the final decisions of a governmental collegial body to be made in the open with full public access and participation, but in fact, the *entire decision-making process* itself is required to be conducted in the public. In a similar vein, the Public Records Law requires the custodian of public records to allow the inspection and copy of any public record under reasonable conditions.

In the realm of Sunshine Law, it does *not* always take two to tango. It has been concluded at times that the presence of two individuals from a collegial body is not always necessary to trigger the application of the Sunshine Law. The use of a third party messenger to communicate between two members (i.e., a liason) can be found to be violative. The use of ever-changing technology makes communication easier by the day. Likewise, the delegation of collegially-held authority to one person to execute a proposition can also subject that one person to conducting that operation in a manner that complies with all Sunshine Laws. As the Florida Supreme Court has stated, the Sunshine Law is to be construed "so as to frustrate all evasive devices."[3]

Similarly, Florida's Public Records Law places an obligation on the custodian of a public record to reasonably disclose such records when requested. There are official retention schedules produced by the State of Florida that must be strictly adhered to. The importance of the retention of public records is amplified when the record sits within the tenuous confines of one's personal device. While emails on the "coj.net" system are accessible by ITD, public-business related texts saved on one's personal device may not be readily accessible by others, and in such event, the burden is on the particular official or employee to retain that public record. Just like with respect to the Sunshine Law, there are consequences, both civil and criminal, for violating the Public Records Law.

C. Liberally Construed Laws

It cannot be overemphasized how Florida's Sunshine Laws are some of the most broad-based and liberally construed rules in the country. In other words, often times, governments find themselves on the defensive and in a losing posture when attempting to defend why it acted in a manner that may have obstructed a discussion, debate or discourse involving a public activity.

Similarly, access to public records is a substantive right, and the Public Records Act is liberally construed in favor of open government. Consequently, exemptions from disclosure are narrowly construed by the courts; they are strictly limited to their stated purpose. Any claim that there is an exemption to the Public Records Law has to be expressly stated and referenced in the statute. That is, the agency or custodian claiming an exemption bears the burden of proving the express right to an exemption.

[3] Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974).

D. Consequences for Violation

A violation of the Sunshine Law or Public Records Law carries with it not only the potential for severe civil penalties, but in fact, if the violation were found to be intentional, the potential for criminal sanctions.

i. Sunshine Law Violation(s); Penalties.

A knowing violation of the Sunshine Law is a misdemeanor of the second degree. Such a violation could result in up to 60 days in jail for the offender.[4] All other violations are considered non-criminal with fines not to exceed $500.00.[5] Additionally, removal from office is an option for the Governor.[6] Civil actions for injunctive or declaratory relief may be filed with the result being a court order: a. declaring the violation; b. enjoining future violations; c. invalidating action taken by the Council or Committee; d. awarding attorneys' fees and costs in the event a violation is found even against the individual in violation.

ii. Public Records Law Violation(s); Penalties.

1. A knowing violation of the Public Records Law is a misdemeanor of the first degree punishable by imprisonment in jail for up to one (1) year. There is also Provision for the suspension and removal or impeachment of the public officer.[7]

2. Other violations which are deemed to be non-criminal, are punishable by fines not exceeding $500.00.

3. Civil actions. A violation of the Act will likely result in a civil action for injunctive or declaratory relief against the City and the individual Council Member wherein the claimant will seek to:

   a. Declare the violation;[8]

   b. Compel disclosure and copying;[9] and

   c. Award attorneys fees and costs in the event of violation.[10]

E. Purpose

Accordingly, this memo presents a brief summary of interpretations of Sunshine and Public Records Law principles that are offered to you for contemplation, consideration and incorporation into everyday governmental practice and operations.

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[4] Sec. 286.011(3)(b), F.S.
[5] Sec. 286.011(3)(a), F.S.
[6] Sec. 112.52, F.S.
[7] Sec. 119.10, F.S.
[8] Sec. 119.11, F.S.
[9] Staton v. McMillan, 597 So.2d 940 (Fla 1st DCA 1992)
[10] Sec. 119.12, F.S.

II. SUMMARY OF PERTINENT SUNSHINE AND PUBLIC RECORDS LAW

A. Sunshine Laws

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 governmental proceedings of public boards. The law is equally applicable to elected and appointed boards, and applies to any gathering of two or more members to the same board to discuss some matter which will foreseeably come before that board for action. The Sunshine Law requires all such meetings to: (1) be open to the public; (2) be reasonably noticed; and (3) have minutes taken and transcribed.

B. Public Records Law

The Public Records Law requires a public custodian to permit the inspection and copying of all public records under reasonable conditions and supervision.[11] All documents are public records unless expressly exempted by Florida Statute.[12] A public record[13] is: "Any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge." If it relates to official business of the government, it should be assumed that it is a public record.

C. Materials circulated prior to open meetings

While the unilateral dissemination of information (ie, the forwarding of a newspaper article or a position piece) pertinent to an issue with instruction for no one to reply, in and of itself, may not be a Sunshine Law violation, engaging in such a practice is a slippery slope that can easily lead into a bilateral conversation and hence a potential Sunshine Law violation. It is a far safer and better practice to not provide other members of the Council with any communications outside of a duly noticed, public meeting. If it is imperative to send unilateral information, it should always be accompanied with a conspicuous note reminding the recipient(s) to *not* respond in any way and to reserve any comment or debate for the noticed public meeting.

● The Attorney General's Office has expressed concern that a process whereby board members distribute their own position papers on the same subject to other members is "problematical" and should be discouraged. *See* AGO 01-21 (city council's discussions and deliberations on matters coming before the council must occur at a duly noticed city council meeting and the circulation of position statements must not be used to circumvent the requirements of the statute). *Accord* AGO 07-35. *And see* AGO 08-07 (city commissioner may post comment regarding city business on blog or message board; however, any subsequent postings by other commissioners on the subject of the initial posting could be construed as a response subject to the Sunshine Law).

● A procedure where a board takes official action by circulating a memorandum for each board member to sign whether the board member approves or disapproves of a particular issue,

[11] Sec. 119.07(1), F.S.
[12] Sec. 119.011(8) F.S.
[13] Shevin v. Byron, Harles, et. al., 379 So.2d 633 (Fl. 1980); See also Sec. 119.011(12).

violates the Sunshine Law. Inf. Op. to Blair, May 29, 1973. *And see* Leach-Wells v. City of Bradenton, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999).

● A city commissioner may, prior to a public meeting, send to members of the commission documents relating to matters coming before the commission for official action, provided that there is no response from, or interaction related to, such documents by the commissioners prior to the public meeting. Florida Op.Atty.Gen., 2007-35, August 28, 2007 (2007 WL 2461925).

● It is permissible prior to a meeting to circulate drafts of proposals of actions to be taken so that members may have the opportunity to study the proposals prior to the time of the formal meeting. Florida Op.Atty.Gen., 074-294, Sept. 24, 1974.

D. Meetings

The Sunshine Law requires that meetings between two or more members of the Council be open to the public; be reasonably noticed; and have minutes taken and transcribed. The monthly Council and standing committee type of meetings are routinely noticed, open to the public and minutes are taken in accordance with the Sunshine Law. In some instances Council members are asked to participate in meetings outside of these regular meetings, i.e., conferences, luncheons, ceremonies, and workshops. In those instances where two or more Council members attend, they must be mindful of the Sunshine Law. If such a meeting is not publicly noticed or the public is precluded from attending in any way, City business may not be discussed.

● The balancing of interests rather than a bright-line test determines legality under the Sunshine Law of meetings that are distant from the usual meeting place; the interest of the public in having a reasonable opportunity to attend the meeting must be balanced against the government board's need to conduct a meeting at a distant site; and the distance from the usual meeting place is a significant factor, and the burden is on the board to demonstrate a need for the alternative site, which increases, as the distance increases. Rhea v. School Bd. of Alachua County, App. 1 Dist., 636 So.2d 1383 (1994).

● The fact that a meeting is held in public does not make it "public" within meaning of the Sunshine Law; for a meeting to be public, it is essential that the public be given advance notice and a reasonable opportunity to attend. Rhea v. School Bd. of Alachua County, App. 1 Dist., 636 So.2d 1383 (1994).

● The meeting of a committee which included two of five county commissioners and which constituted a continuation of the committee's deliberations with respect to a recommendation for action by the commission was not "public" for purposes of this section despite the fact that it took place in a public room at an inn, because there was no advance notice and no reasonable opportunity for the public to attend. Bigelow v. Howze, App. 2 Dist., 291 So.2d 645 (1974).

● Unless it can be clearly demonstrated that informal luncheon meetings between individual school board members and administrative staff members are purely social in nature and thus are not being used by the board as a vehicle by which to circumvent this section by

secretly discussing matters pending before the board, such meetings should be immediately discontinued. Florida Op.Atty.Gen., 074-197, July 10, 1974. Though, in another context luncheon meetings held by a private organization for city, county and school board officials, members of organizations, and other members of the public at which there was no discussion among officials of any official action is not a "secret meeting" of public bodies represented in meeting within the purview of this section. Florida Op.Atty.Gen., 072-158, May 11, 1972.

● The law is applicable to *any* gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable* action will be taken by the public board or commission. Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755, 764 (Fla. 2010). *And see* City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); and Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969).

● The Sunshine Law is applicable to all functions of covered boards and commissions, whether formal or informal, which relate to the affairs and duties of the board or commission. "[T]he Sunshine Law does not provide that cases be treated differently based upon their level of public importance." Monroe County v. Pigeon Key Historical Park, Inc., 647 So. 2d 857, 868 (Fla. 3d DCA 1994). *See, e.g.,* Inf. Op. to Nelson, May 19, 1980 (meeting with congressman and city council members to discuss "federal budgetary matters which vitally concern their communities" should be held in the sunshine because "it appears extremely likely that discussion of public business by the council members [and perhaps decision-making] will take place at the meeting").

● The "fact-finding exception" to the Sunshine Law does not apply to a board with "ultimate decision-making authority." *See* Finch v. Seminole County School Board, 995 So. 2d 1068 (Fla. 5th DCA 2008), holding that a district school board, as the ultimate decision making body, violated the Sunshine Law when the board, together with school officials and members of the media, took a bus tour of neighborhoods affected by the board's proposed rezoning even though board members were separated from each other on the bus, did not express any opinions or their preference for any of the rezoning plans, and did not vote during the trip. *See also* Citizens for Sunshine, Inc. v. School Board of Martin County, 125 So. 3d 184 (Fla. 4th DCA 2013) (three school board members violated the Sunshine Law when they visited an adult education school and talked with a school administrator, teachers and students, because the "undisputed evidence showed that the defendant board members, without providing notice, conducted a meeting at the adult education school relating to matters on which foreseeable action would have been taken.").

E. Non-board members or staff as liaisons

As a general rule, individual board members "may call upon staff members for factual information and advice without being subject to the Sunshine Law's requirements." Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755, 764 (Fla. 2010). However, the Sunshine Law is applicable to meetings between a board member and an individual who is not a board member when that individual is being used as a liaison between, or to conduct a *de facto* meeting of, board members. *See* AGO 74-47 (city manager is not a member

of the city council and thus may meet with individual council members; however, the manager may not act as a liaison for board members by circulating information and thoughts of individual council members). *See also* Inf. Op. to Goren, October 28, 2009 (while individual city commissioners may seek advice or information from staff, city should be cognizant of the potential that commissioners seeking clarification by follow-up with staff with staff responses provided to all commissioners could be considered to be a *de facto* meeting of the commissioners by using staff as a conduit between commissioners). *Compare* Sarasota Citizens for Responsible Government v. City of Sarasota, *supra* at 765 (private staff meetings with individual county commissioners in preparation for a public hearing on a proposed memorandum of understanding [MOU] did not violate the Sunshine Law because the meetings were "informational briefings regarding the contents of the MOU," and "[t]here is no evidence that [county] staff communicated what any commissioner said to any other commissioner").

F. Text Messaging, Facebook and other Electronic Communications

The Sunshine Law requires boards to meet in public; boards may not take action on, or engage in private discussions of, board business via written correspondence, e-mails, text messages or other electronic communications. *See* AGO 89-39 (members of a public board may not use computers to conduct private discussions among themselves about board business). Further, electronic communications which involve official public business are considered a public record and hence subject to the retention and disclosure requirements of Florida law.

i. Text Messaging.

There is little debate over whether a public business related text message is subject to disclosure. Section 119.011(12), Florida Statutes defines "public records" to include: "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing, software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So.2d 633, 640 (Fla. 1980). All such materials, regardless of whether they are final form, are open for public inspection unless the Legislature has exempted them from disclosure. Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979). Accordingly, "the form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business."

The use of text messages to conduct official business carries with it extraordinary risks. First, the device carries with it the original public record. Being the repository of the public record(s), the device itself must be protected. Because of the transitory nature of a personal electronic device, it is often difficult to protect it from loss or destruction. Accordingly, to the extent they contain official business-related messages, text messages should regularly be backed up or downloaded to a secure location for preservation. For these reasons, should Council

Members decide to use text messages to conduct public business, such members are required to preserve the public record(s) and be prepared to locate and provide such record(s) should they be requested. It is imperative that Council Members choosing to conduct official business via text messaging understand that it is *never* permissible for Council Members to text each other regarding any official business. Texting between Council Members carries with it an extraordinarily high risk that such messages would be considered unlawful. If any of the Council Members have questions regarding the use or retention of text messages, additional guidance can be provided through the Office of Ethics, Compliance and Oversight and the Office of General Counsel.

ii. Electronic correspondence.

Like text messages, email messages made or received by agency employees in connection with official business are public records and subject to disclosure in the absence of a statutory exemption from public inspection. *See*, Rhea v. District Board of Trustees of Santa Fe College, 109 So. 3d 851, 855 (Fla. 1st DCA 2013) noting that electronic communications such as email are covered by the Public Records Act just like communications on paper. Further, just like other public records, e-mail messages are subject to statutory restrictions on destruction of public records, which require agencies to adopt a schedule for the disposal of records no longer needed. *See* AGO 96-34.

iii. Retention schedule.

A public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division of Library and Information Services of the Department of State. *See* Florida Statutes, Section 257.36(6).

See also, Florida Statutes, Section 668.6076 which requires public agencies that operate a website and use electronic mail to post the following statement in a conspicuous location on its website:

> Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing.

iv. Facebook.

Similar to other electronic platforms, the placement of material on a city's Facebook page presumably would be in the connection with the transaction of official business and thus subject to the Public Records Law. To the extent that the information on a city's Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established by law. AGO 09-19.

Similarly, postings relating to city business which are submitted by a city council member to a privately-owned and operated internet website are public records. AGO 08-07.

G. Public Records Retention regarding Electronic Communications

In March 2010, the Florida Attorney General wrote to the Department of State (which is statutorily charged with the development of public records retention schedules), stating that the "same rules that apply to e-mail should be considered for electronic communications including Blackberry PINS, SMS communications (text messaging, MMS communications [multimedia content]), and instant messaging conducted by government agencies." The Department of State subsequently revised its records retention schedule to note that text messages may be public records and that retention of text messages could be required depending upon the content of those texts or electronic communications.

Specifically, the most recently updated State of Florida General Records Schedule (GS1-SL) for State and Local Government Agencies (February 19, 2015) sets forth that, as it pertains to electronic communications, there is no single retention period that applies to all electronic messages or communications, whether they are sent by email, instant messaging, text messaging (such as SMS, Blackberry PIN, etc), multimedia messaging (such as MMS), chat messaging, social networking (such as Facebook, Twitter, etc.), voice mail/voice messaging (whether in audio, voice-over-internet protocol, or other format), or any other current or future electronic messaging technology or device. Retention periods are determined by the *content, nature, and purpose* of records, and are set based on their legal, fiscal, administrative, and historical values, *regardless of the format* in which they reside or the method by which they are transmitted. In other words, when in doubt, you must *retain* the public record. The destruction of a public record is an action which carries with it all of the potential civil and criminal penalties and liability prescribed in law as referenced in this memo.

III. CONCLUSION

In light of the recent events that have engendered a discussion of the Sunshine Laws, I believe it is important to provide the Council with guidance on how both the Sunshine Law and Public Records Law are interpreted by the courts and the Florida Attorney General. This memo was intended to serve as a general primer on these laws with a focus on current issues. While there may be times where a technical violation of the law may not have occurred, in the realm of Sunshine and Public Records Law, the courts, the Attorney General, and my office, underscore and emphasize at every turn, the paramount importance of the spirit and intent of the law, especially considering that this is a field of law where the public interest and trust is at its most delicate apex.

I have conferred with Carla Miller, Executive Director of Ethics, Compliance and Oversight, and she will be setting up individual meetings with Council Members to elaborate on the matters provided here and will provide one-on-one guidance tailored to the specific questions each individual Council Member may have. If there is ever any doubt whether there could be a Sunshine Law or Public Record issue, please consult with the Office of General Counsel and the Office of Ethics, Compliance and Oversight. Carla Miller and I are available to discuss these important matters with you at any time.