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

MEMORANDUM

TO: Honorable Council Member Garrett L. Dennis

CC: Jason R. Gabriel, General Counsel

FROM: Stephen M. Durden, Chief Assistant General Counsel

RE: Resolution 2019-63; Interactive Social Media (Twitter) & Free Speech Law

DATE: February 11, 2019

I. BACKGROUND

Some elected and appointed City officers maintain interactive online social media accounts, e.g., Twitter, Facebook, Instagram. These sites permit an account holder to post messages and permit others to respond to such messages. The person posting the message can, however, restrict viewers from being able to read and respond to the posted messages. An official's use of such an account raise many different issues which implicate Sunshine, Public Records, and Free Speech Law. These issues may be different for executive branch officials and collective body officials, e.g., City Council, boards, commissions. This memorandum will focus solely on issues raised by a Council Member's use of social media involving an interactive component, i.e., posted messages to which others are permitted and even invited to respond. While there are various social media platforms available, this memorandum focuses on the blocking feature of Twitter.[1] The reasoning, however, is applicable to other social media

[1] Twitter is an online social media platform where users are able to publish short messages, republish or respond to others' messages, and interact with other Twitter users in relation to those messages. A Twitter user is an individual or entity who has created a Twitter account. All of the user's own tweets are displayed on the user's timeline, which the most recent tweet at the top of the timeline. There are various forms of interaction on Twitter, but the most basic form of interaction is when Twitter users "follow" others user's accounts, which allows the follower to be notified when the user publishes a tweet on his/her timeline. Twitter followers are then permitted to reply to the tweets of the user they are following using words, photographs, videos, or links. A Twitter user, however, can choose to "block" a follower's access to his/her timeline. When a Twitter follower is blocked, the follower can no longer see or reply to the blocking user's tweets, view the blocking user's list of followers, or use the Twitter platform to search for the blocking user's tweets. While followers are not notified they have been blocked, they can see a message on the blocking user's Twitter timeline that he/she has been blocked from the account and from viewing the tweets associated with the account.

platforms as they offer similar features.

II. QUESTION ASKED.

Whether a Council Member may lawfully block another person, including other Council members, from his or her social media account.

III. SHORT ANSWER.

To the extent a Council Member's interactive social media account is used for purposes that include public business, the Council Member may not block another person, including another Council Member.

IV. DISCUSSION

Three areas of law that must be analyzed to understand the breadth of the question presented above are Florida's Sunshine, Public Records, and Free Speech Law. These areas are reviewed, in order, below.

A. Sunshine Law

In order to answer the question of whether a Council Member may block another Council Member first requires a review of the Sunshine Law and its impact on Twitter accounts and posts. Section 286.011, F.S., the Sunshine Law, requires that any gathering of two or more members of the same board to discuss some matter that will foreseeably come before that board for action must be held at a noticed meeting at which minutes are taken. A board, or a meeting of two or more board members, *must* hold any and all meetings at a physical location. If a quorum is present physically, other members may join the meeting electronically. Board members may not use any artifice or device to circumvent the requirements of the Sunshine Law.

As explained by the Florida Supreme Court nearly a half century ago, "The statute should be construed so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). For example, two or more board members may not engage in private discussion of board business via written correspondence, emails, text messages or other electronic communications. Fla. Att'y Gen. Op. 89-39 (1989) (members of a public board may not use computers to conduct private discussions among themselves about board business) *and* Fla. Att'y Gen. Op. 09-19 (2009) (members of a city commission may not engage on the city's Facebook page in an exchange or discussion of matters that foreseeably may come before the commission for official action). The "frustration of all evasive devices"

> 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 government agency, and relates to any matter on which foreseeable action will be taken.

Town of Palm Beach, 296 So.2d at 477. The Fourth DCA has noted that "[b]ecause the law must be construed to frustrate all evasive devices, the Sunshine Law is implicated when a person other than a board member is used as a liaison among board members." *Transparency for Fla. v. City of Port St. Lucie*, 240 So. 3d 780, 784-85 (Fla. 4th DCA 2018) (internal quotations and citations omitted) (*citing and quoting* Fla. Att'y Gen. Op. (1975)); *accord*, *Blackford v. Sch. Bd. of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979) (finding a Sunshine violation where a series of conversations between the school superintendent and the board members could constitute *de facto* meetings).

In *Citizens for Sunshine, Inc. v. School Board of Martin County*, 125 So. 3d 184 (Fla. 4th DCA 2013), the Fourth DCA determined that school board members who did not speak directly to each other during an on-site school visit, nonetheless violated the Sunshine Law. In that case, the board members were simply in each other's presence when a discussion about a matter reasonably foreseeable to come before the school board occurred. *Id.* at 186. The appellate court concluded that the lack of direct discussion between two board members at the on-site visit was still a meeting subject to the Sunshine Law. *Id.* at 188. Similarly, in *Finch v. Seminole County School Board*, 995 So. 2d 1068 (Fla. 5th DCA 2008), the Fifth District held 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. The court expressed its concern that the trip provided opportunity to violate the Sunshine Law. *Id.* at 1073. Along these same lines, a trial court in Broward County determined that the Sunshine Law was violated where city commissioners attended a breakfast meeting and individually asked the Sheriff questions, but did not direct questions or comments to each other. *State v. Foster*, 2005 WL 6258031 (Fla. 17th Cir. Ct., Sept. 26, 2005). The court rejected the contention that there needed to be discussion among themselves in order for there to be a Sunshine Law violation. *Id.* The court in *Foster* denied the commissioners' motion for summary judgment and ruled that the discussion should have been held in the Sunshine because the sheriff was a "common facilitator" or liaison between commissioners. *Id.*

On the other hand, other cases have found no Sunshine violation merely on the facts that board members were physically in the same location as one another listening to, and even commenting upon, information provided at a meeting open to the public. In *Citizens for Sunshine v. City of Sarasota*, No. 2013 CA 007532 (Fla. 12th Cir. Ct. July 8, 2016), *per curium affirmed*, (Fla. 2d DCA April 5, 2017), the court held that a city commissioner did not violate the Sunshine Law when she spoke about city commission issues at a private event organized by local merchants even though another commissioner was in the audience, noting that "one cannot harmonize *Finch* with the large body of Florida law that defines 'meetings' under the Sunshine Law as gatherings of members of a governmental entity." The Attorney General has found no

Sunshine violation where multiple members of the same board attended community forums sponsored by private organizations unless the council members discussed issues coming before the council among themselves. Fla. Att'y Gen. Op. 92-05 (1992). The Attorney General has likewise found that the Sunshine Law is not violated in circumstances where county commissioners attend a political forum sponsored by a private civic club, during which the county commissioners will express their positions on matters that could foreseeably come before the commission, so long as the commissioners avoid discussions among themselves on these issues. Fla. Att'y Gen. Op. 94-62 (1994); *see also* Fla. Att'y Gen. Op. 08-18 (2008) (participation by two city council members in a citizens' police academy does not violate the Sunshine Law; "[t]he educational course is not changed into a meeting of a board or commission . . . by the attendance and participation of members of the city council in the course work of the academy"). However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements.

While the above cases and opinions may seem too have reached different conclusions as to when the gathering of officials constitutes a sunshine violation, an analysis of the specific facts of each case explains how the reasoning can be harmonized. The Fourth and Fifth DCAs in *Citizens for Sunshine v. Sch. Bd. Martin County, supra,* and *Finch, supra,* would not lead to a conclusion different from the Attorney General with regard to one board member viewing another board member's interactive social media site. In *Citizens for Sunshine v. Sch. Bd. Martin County, supra,* and *Finch, supra,* the board members were physically together, as if in a meeting, and away from the public. While on the bus, the court found, it was too easy to speak to each other. Similarly, when visiting a school together, the board members were in each other's presence, but out of the public eye, purportedly listening to discussion, with the ability to ask questions, knowing the questions asked by the other board members. In addition, the Second DCA rejected the reasoning in *Citizens for Sunshine v. Sch. Bd. Martin County, supra,* and *Finch, supra,* in affirming the trial court holding "that a city commissioner did not violate the Sunshine Law when she spoke about city commission issues at a private event organized by local merchants even though another commissioner was in the audience." *Citizens for Sunshine v. City of Sarasota, supra.*

The facts in *Citizens for Sunshine v. City of Sarasota, supra* (a meeting where one board member speaks and another attends), are much more akin to an interactive social media site than the facts of board members on basically private trips together. *Citizens for Sunshine v. City of Sarasota* supports the Attorney General's conclusion that viewing a post is not a *per se* violation of the Sunshine Law. Indeed, to apply *Citizens for Sunshine v. Sch. Bd. Martin County, supra,* and *Finch, supra,* to interactive social media sites would push the Sunshine Law to where it would prohibit any board member from being in the presence of another board member who spoke of matters that may come before the board, no matter the circumstances, including *any* forum open to the public, e.g, a public panel discussion with (1) a board member panelist and (2) the ability of the audience to ask questions to the panelists.

Moreover, the Attorney General, has already opined on applicability of the Sunshine Law to interactive media sites. The Attorney General concluded that a board member does not violate

the Sunshine Law merely by following another board member on Twitter. Fla. Att'y Gen. Op. 2008-07 (2008). The Attorney General, while concluding that two board members could post differing messages on differing topics on the same website, found they would violate the Sunshine Law if they engaged in discussion by responding to each other's postings. The Attorney General also cautioned the members regarding the risk of Sunshine violations where different board members posted on the same site. The Attorney General concluded as follows:

> The use of a website blog or message board to solicit comment from other members of the board or commission by their response on matters that would come before the board would trigger the requirements of the Sunshine Law. Such action would amount to a discussion of public business through the use of the electronic format without appropriate notice, public input, or statutorily required recording of the minutes of the meeting. While as noted above, the mere posting of a position does not implicate the Sunshine Law, it would appear that any subsequent postings by other commission members on the subject of the initial posting could be construed as a response which would be subject to the statute.
>
> While there is no statutory prohibition against a city council member posting comments on a privately maintained electronic bulletin board or blog, nor is there any statutory proscription against a city council member serving as the webmaster of such a site, members of the board or commission must not engage in an exchange or discussion of matters that foreseeably will come before the board or commission for official action. *The use of such an electronic means of posting one's comments and the inherent availability of other participants or contributors to act as liaisons would create an environment that could easily become a forum for members of a board or commission to discuss official issues which should most appropriately be conducted at a public meeting in compliance with the Government in the Sunshine Law.* It would be incumbent upon the commission members to avoid any action that could be construed as an attempt to evade the requirements of the law.

Id. (emphasis added).

None of the above opinions and cases, however, directly address the question of whether the Council Member who creates the interactive social media site may block members of the public or other Council Members. A Council Member posting information on a social media site does not implicate the Sunshine Law. So long as two Council Members do not "meet" on a

social media site, the public has no right to "attend" the social media site.[2] Communications with the public have no bearing on the Sunshine Law. Consequently, a Council Member may block a member of the public without violating the Sunshine Law. With regard to social media and the Sunshine Law, the Attorney General noted, "It would be incumbent upon the commission members to avoid any action that could be construed as an attempt to evade the requirements of the law." *Id*. The Florida Supreme Court gave a similar admonition more than 40 years ago: "The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State." *Town of Palm Beach*, 296 So. 2d at 477. These admonitions suggest that one Council Member, in order avoid any risk of Sunshine violation, might choose to block one or more Council Members in order ensure that the other Member(s) do not unintentionally violate the Sunshine Law. Blocking would prevent other Council Members from responding to a Council Member's post, thereby ensuring that such responses do not violate the Sunshine Law.[3]

In conclusion, the Sunshine Law does not require that one Council Member block another Council Member and likewise, the Sunshine Law does not prohibit one Council Member from blocking another Council Member. The Sunshine Law, however, may encourage one Council Member to block another Council Member, but there remain other legal implications to consider.

B. Public Records Law

The Public Records Law may suggest a different answer than the Sunshine Law as to the legality of blocking. In Fla. Att'y Gen. Op. 08-07 (2008), the Attorney General also opined on some of the public records issues raised by public officials posting information on various social media platforms. The Attorney General noted that the Public Records Law applies to council members and to electronic records:

> [A] city council member clearly is subject to the provisions of Chapter 119, Florida Statutes, when making or receiving

---

[2] Of course, a "meeting" of two Council Members on social media violates the law even if it is noticed, as the Sunshine Law requires meetings to be held in person at a publicly accessible place, physically. Informal Opinion to Honorable David Cheifetz, 2016 WL 4719096 (Fla. A.G. July 20, 2016)("[I]f a quorum of a local board is physically present at the public meeting site, a board may allow a member with health problems to participate and vote in board meetings through the use of such devices as a speaker telephone that allow the absent member to participate in discussions, to be heard by other board members and the public and to hear discussions taking place during the meeting."); *see also* Fla. Att'y Gen. Ops. 09-56 (2009) (where a quorum is required and absent a statute to the contrary, the requisite number of members must be physically present at a meeting in order to constitute a quorum), and 10-34 (2010) (city may not adopt an ordinance allowing members of a city board to appear by electronic means to constitute a quorum).

[3] While blocking does not prevent a Council Member from finding another Council Member's social media post nor does it prevent a Council Member from replying via email or text or some other method to another Council Member's social media post, it does eliminate the temptation that exists when one Council Member may with ease read and immediately respond to the social media post of another Council Member.

> public records in carrying out official business. This office has stated that e-mail messages made or received by agency employees or officials in connection with official business are public records and are subject to disclosure in the absence of an exemption.[4] It is the nature of the record created rather than the means by which it is created which determines whether it is a public record. . . . To the extent that the council member is publicly posting comments relating to city business, this office [is] of the opinion that such postings would be subject to the requirements of the Public Records Law.

Id.

The Attorney General then applied these principles to the situation where the council member acted as webmaster posting various information regarding public business:

> In the instant situation, the public official with control over the records is the city council member who creates and posts the comments on the website. Since the records are public records *as they are related to the transaction of city business*, such records would appear to be subject to the city's policies and retention schedule regarding city records. While the webmaster administering the website is a city council member, you have stated that the city has no ownership, control, or affiliation with the website. Thus, it would appear that *the individual council members who create the public documents through the posted comments and emails would be responsible for ensuring that the information is maintained in accordance with the Public Records Law and the policies and retention schedule adopted by the city.*

Id. (emphasis added).

In Attorney General Informal Opinion, 2016 WL 3595417 (Fla. A.G. June 1, 2016), the Attorney General considered the impact of the Public Records Law on Twitter. The Attorney

---

[4] *See, e.g.*, Fla. Att'y Gen. Ops. 01-20 (2001) and 96-34 (1996). *And see In re Amendments to Rule of Judicial Administration 2.051--Public Access to Judicial Records*, 651 So. 2d 1185, 1187 (Fla. 1995) ("The fact that information made or received in connection with the official business . . . can be made or received electronically does not change the constitutional and rule-mandated obligation of . . . officials and employees to direct and channel such official business information so that it can be properly recorded as a public record.").

General concluded that whether a Twitter account and its tweets were a public record was left to a factual determination but added that "[i]f the 'tweets' the public official is sending are public records, then a list of blocked accounts, prepared in connection with those public records 'tweets,' could well be determined by a court to be a public record."[5] In other words, once a Council Member creates a public record, the Council Member must comply with all aspects of the Public Records Law, including records created related to that first public record, e.g., persons blocked and, more obviously, responses to the initial posts.

In sum, both Opinion 08-07 and the 2016 Informal Opinion agree that once posts are determined to be public records, the full weight of the Public Records Law falls upon the posts. In a different context, the Attorney General concluded that "the statute provides that public records must be maintained so as to be accessible to the public and kept in the location where they are ordinarily used." Fla. Att'y Gen. Op. 93-16 (1993). Section 119.021(1), Florida Statutes, requires:

---

[5] Authorities in at least eleven states have concluded that writings stored on the personal electronic accounts and devices of individual officials that relate to public business are public records. *Adkisson v. Paxton*, 459 S.W.3d 761, 773-781 (Tex.Ct.App. 2015) (holding that emails by a county official relating to the official business of the county but stored on his private accounts were public information subject to disclosure); *Nissen v. Pierce County*, 333 P.3d 577, 581-83 (Wash.Ct.App. 2014), review granted, 343 P.3d 759 (Wash. 2015) (holding that text messages relating to public business sent and received by a public official on his personal phone were public records because they "clearly were 'prepared' and 'used' in his official capacity); *Bradford v. Director*, *Employment Services Dept.*, 128 S.W.3d 20, 27-28 (Ark.Ct.App. 2003) (holding e-mails transmitted between two government officials relating to public business are public records subject to public access regardless of whether they were sent between public or private accounts); *Vining v. District of Columbia*, Docket No. 2013 CA 8189 B, 2014 D.C. Super. LEXIS 13, at *6, (D.C.Sup.Ct. Aug. 12, 2014)(holding e-mails on an individual ANC Commissioner's personal e-mail account were public records because they were "clearly made in pursuit of ANC business"); *Gail Anne Shea v. Planning and Zoning Com., Town of Stonington* (Conn. Freedom of Information Com., Oct. 24, 2007) Docket No. FIC 2006-679, <http:// www.state.ct.us/foi/2007FD/20071024/FIC2006-679.htm> (holding a Commission Chairman's e-mails relating to public business stored on his personal e-mail account were public records, and admonishing that officials who conduct public business on personal accounts and devices open those accounts and devices up to potential public scrutiny); *Meyers v. Borough of Fair Lawn* (N.J. Government Records Council, Dec. 2, 2005) Complaint No. GRC 2005-127, <http:// www.ni.gov/grc/decisions/2005-127.html> (concluding writings made, maintained, kept, or received in the course of official business by a public officer or official are government records subject to disclosure, even if stored on an official's personal e-mail account); Ops.Okla.Atty.Gen. 09-012 (2009), 2009 WL 1371725 at *30 (concluding e-mails, text messages, and other electronic communications made in connection with the transaction of public business are subject to Oklahoma's Open Records Act even if they are created, received, transmitted, or maintained on privately owned communication devices); *Re: Public Records - Government in the Sunshine - Municipalities -Computers - Websites - application of Sunshine Law and Public Records Law to city council members posting comments on website operated by a city council member*, Fla.Atty.Gen. Op. 08-07 (2008), (concluding "it is the nature of the record created rather than the means by which it is created which determines whether it is a public record," and, "an email created by a public official in connection with the transaction of official business is a public record whether it is created on a publicly or privately owned computer"); *Re: Personal Use of Electronic Equipment*, Ops.Alaska.Atty.Gen. 661-08-0388 (2008), 2008 WL 3909811, (concluding "state business records generated on a personal cell phone or PDA are public records subject to review and disclosure"); Ops.N.D.Atty.Gen. 2008-O-07 (2008), 2008 WL 773339, (concluding that if government officials act within the scope of their public position and create a record regarding public business, "that record is subject to the open records law regardless of whether it is located at their private homes or businesses").

> (1) Public records shall be maintained and preserved as follows:
> (a) All public records should be kept in the buildings in which they are ordinarily used.
> (b) Insofar as practicable, a custodian of public records of vital, permanent, or archival records shall keep them in fireproof and waterproof safes, vaults, or rooms fitted with noncombustible materials and *in such arrangement as to be easily accessible for convenient use*.

Section 119.01 (1)-(2), Florida Statutes, requires:

> (1) It is the policy of this state that all state, county, and municipal records are *open for personal inspection* and copying by any person. *Providing access to public records is a duty of each agency.*
> (2)(a) Automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic recordkeeping, *each agency must provide reasonable public access to records electronically maintained* and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.
>
> (c) *An agency may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect* or copy the public records of the agency, including *public records that are online* or stored in an electronic recordkeeping system used by the agency.
>
> (e) Providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible. If an agency provides access to public records by remote electronic means, such *access should be provided in the most cost-effective and efficient manner* available to the agency providing the information.

(emphasis added).

None of these provisions expressly concern themselves with the concept of blocking. Blocking does, however, inhibit, or at least affect, the inspection of a public record. Blocking

can be inconsistent with: (1) providing access to a public record in the most cost-effective and efficient manner (Fla. Stat. § 119.01(2)(e)), (2) the prohibition on "impair[ing] the ability to inspect" the post (Fla. Stat. Ann. § 119.01(2)(c)), and (3) "keep[ing] the [the public record] in such arrangement as to be easily accessible for convenient use (Fla. Stat. § 119.021(1)(b)."

While these various provisions do not directly address interactive social media posts, they give a variety of indicators of the intent of the Legislature and the Public Records Law. If the Council Member created a different method by which to preserve and allow inspection of such records, that Council Member might be able to block members of the public from the actual posting site and still comply with the Public Records Law. The Council Member may not rely, however, on the creative searching power of the public to find posts. The duty to preserve public records and make them available for inspection belongs to the Council Member. The conclusion is unchanged if the member of the "public" is another Council Member. Each Council Member has the same right as the public to inspect public records.

C. Free Speech

The next question is whether the Freedom of Speech Clause of the Florida Constitution prohibits a Council Member from blocking members of the public or fellow Council Members. Answering this question requires referencing case law under the First Amendment to the United States Constitution. "Freedom of speech is . . . guaranteed under Article I, Section 4 of the Florida Constitution: 'Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.' "The scope of the Florida Constitution's protection of freedom of speech is the same as required under the First Amendment. *See* [*Dep't of Educ. v.*] *Lewis,* 416 So.2d [455,] 461 [(1979)]. Thus, this Court applies the principles of freedom of speech as announced in the decisions of the Supreme Court of the United States. *See id.*" *Cafe Erotica v. Fla. Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002).

A small handful of federal courts have applied the First Amendment to social media accounts. *See Davison v. Randall*, 2019 WL 114012 (4th Cir. January 7, 2019), *Knight First Amendment Institute at Columbia University v. Trump*, 302 F. Supp. 3d 541, at 566-67 (S.D.N.Y. 2018), and *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010 (E.D. Ky. 2018). Most recently, the United States District Court for the Western District of Wisconsin did an extensive analysis of Free Speech and its relationship to social media platforms such as Twitter. *One Wisconsin Now v. Kremer*, 2019 WL 266292 (W.D. Wis. Jan. 18, 2019). The Western District of Wisconsin agreed with the Fourth Circuit in *Davison* and the Southern District of New York in *Knight*, finding Free Speech violations when a public official posts information related to his or her official position, and then blocks those who would like to both view and respond to such posts. These cases use the analysis set forth below.

I. Government Action

A Free Speech claim under the Florida Constitution concerning the constitutionality of blocking on an interactive social media site will first require determining whether the site belongs to the government or actions regarding the site will be attributable to government action and therefore subject to the Free Speech Clause of the Florida Constitution. If a court concludes that a particular forum is not a government forum, then the Free Speech Clause of the Florida Constitution will not apply. A Florida constitutional claim does not have an exact corollary to claims brought under federal statute 42 U.S.C. Section 1983, but the state actor doctrine provides assistance in determining whether the actions on the social media site are attributable to the government.

Under 42 U.S.C. § 1983, as an initial matter, the plaintiff must establish that the defendant acted under color of state law. *One Wisconsin,* 2019 WL 266292 at *6, *citing Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009). "The color of state law test examines whether the defendant (1) explicitly or implicitly invoked state authority or (2) 'could not have acted in violation of the plaintiff's constitutional rights but for his state authority.'" *Id.* at *7 (quoting *Luce v. Town of Campbell*, 113 F.Supp.3d 1002, 1016 (W.D. Wis. 2015), *rev'd in part on other grounds*, 872 F.3d 512 (7th Cir. 2017)). In other words, the question is "whether there is a sufficient nexus between the state and the private actor to show that "the deprivation committed by the private actor is fairly attributable to the state." *Id*. (citations and internal quotations omitted).

The court in *One Wisconsin* noted that *Davison*, *supra*, applied the totality of circumstances test and found that the elected official defendant, by creating and operating a Facebook page, acted under color of state law. *One Wisconsin,* 2019 WL 266292 at *87. The fact that some of the Facebook account included purely personal matter did not outweigh the factors that suggested that the creation and operation of the social media page constituted state action. *Id.* According to the court in *One Wisconsin*, "the *Davison* court found the following dispositive: (1) the social media page's obvious public, not private, purpose (defendant's election to public office and subsequent use as a tool of governance); (2) defendant's use of government resources, including government employees, to maintain the page; (3) the connection between defendant's official newsletters and the page; and (4) defendant's efforts to swathe the page in the trappings of her office." *Id*. (citations and internal quotations omitted). *Id.*

With regard to the final factor, i.e., trappings of office, the trial court in *Davison* identified at least eight ways in which the social media page was bound up with the office:

> (1) the title of the page includes [Defendant's] title; (2) the page is categorized as that of a government official; (3) the page lists as contact information [Defendant's] official County email address and the telephone number of [Defendant's] County office; (4) the page includes the web address of [Defendant's] official County website; (5) many—perhaps most—of the posts are expressly

> addressed to [the Defendant's] constituents; (6) [Defendant] has submitted posts on behalf of the [Board] as a whole; (7) Defendant has asked her constituents to use the [page] as a channel for 'back and forth constituent conversations'; and (8) the content posted has a strong tendency toward matters related to [Defendant's] office.

Davison, 912 F.3d at 681.

In *One Wisconsin*, one elected official created and continued to use his account for public purposes. In particular, the official used the account as an "additional way to get [the official's] views out to the public and [as an] opportunity to talk directly to people. *One Wisconsin,* 2019 WL 266292. The official used the account for tweets "about policy" and for "personal tweets." *Id.* The account was also heavily "swathed" in the "trappings" of the office, including registering the account to "the State Representative representing parts of Racine County." *Id.* at *9. Finally, "[t]he account feature[d] an image of uniformed individuals and an American flag." *Id. One Wisconsin* concluded that those "two facts alone show that the account [] represents [the elected official] in his official, not personal, capacity." *Id.* Finally, *One Wisconsin* concluded that "the essential purpose and function of [the] account remain[ed] . . . to perform actual and apparent duties as state assembly person using the power and prestige of that office to communicate legislative matters and other issues with the public." *Id.*

Obviously, whether or not creation of the Twitter account by a Council Member for interactive social media purposes is government action could be determined by application of these factors. On the other hand, the Sunshine Law and Public Records Law shed insight into the government character (or not) of a social media site under Florida Law. As noted above, "[t]o the extent that the council member is publicly posting comments relating to city business," the Attorney General has opined "that such postings would be subject to the requirements of the Public Records Law." As such, to the extent that a posting relates to City business, those postings would be considered government action for the purposes of the Free Speech Clause of the Florida Constitution. The Sunshine Law supports that conclusion. The Attorney General has also noted, "While . . . the mere posting of a position does not implicate the Sunshine Law, it would appear that any subsequent postings by other commission members on the subject of the initial posting could be construed as a response which would be subject to the statute." Fla. Att'y Gen. Op. 08-07 (2008). In other words, the first posting of a Council Member's position on a matter that will or may come before the Council must be considered government action, because a response by any other Council Member would be a "meeting." Accordingly, when a Florida public official, e.g., a Council Member, posts on Twitter information that relates to public business, that post is government action.

II. Designated Public Forums

The next question is whether the "*interactive* components" of a Council Member's Twitter account(s) create a forum and, if so, what kind of forum. Under the First Amendment,

each type of government property creates various Free Speech rights and, consequently, various burdens and restrictions upon the government. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). The Supreme Court has for more than a century recognized public streets and public parks as traditional public forums. *Id.* In such fora, the Free Speech Clause provides the zenith of its protection, and regulations of speech, other than time, place manner restrictions, in such forums require the government to have a compelling government interest and demonstrate that the government cannot protect that interest with a less restrictive regulation. The government can also create a nontraditional, i.e., designated, public forum, identified as a "location[] or channel[] of communication that the government opens up for use by the public for expressive activity." *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011). The Supreme Court has long accorded the traditional public forum protections to speech in these designated public forums.

A government does not create such non-traditional public forums "by inaction or by permitting limited discourse." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, ––– U.S. ––––, 135 S.Ct. 2239, 2250 (2015). Rather, the government creates such nontraditional public forums when it intentionally opens such "nontraditional forum for public discourse." *Id.* (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985)). The Supreme Court has created a two-part test to determine whether a government has intentionally designated a forum as nontraditional public forum. The reviewing court will consider (1) the "policy and practice of the government," and (2) "the nature of the property and its compatibility with expressive activity." *Id.*

One Wisconsin noted that the Supreme Court's decision in *Packingham v. North Carolina*, ––– U.S. ––––, 137 S.Ct. 1730 (2017), came close to holding as a matter of law that "the internet generally, and particularly social media, is a new space for public discourse analogous to traditional public forums." *One Wisconsin,* 2019 WL 266292 at *10. The Supreme Court said:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen more .... A basic rule, for example, is that street or park is a quintessential forum for the exercise of First Amendment rights .... While in the past there may have been some difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general ... and social media in particular.

137 S.Ct. at 1735-36. According to *One Wisconsin* "the Supreme Court observed that when one creates a social media account, one subscribes to the fundamental purpose of social media: to create a digital space for the exchange of ideas and information." *One Wisconsin,* 2019 WL 266292 at *10 *(citing to Davison*, 267 F.Supp.3d at 716 (internal quotations omitted)).

Relying on the test for determining whether the government has designated a forum a public forum, *One Wisconsin* concluded that based on the "nature of Twitter and its compatibility with expressive activity . . . the interactive portions of . . . Twitter accounts plainly constitute designated public forums." *Id.*; *see also Knight*, 302 F.Supp.3d at 575 (finding that "[t]he interactivity of Twitter is one of its defining characteristics" and similarly concluding that the interactive portion constitutes a designated public forum); *Davison*, 912 F.3d at 682 (concluding that the interactive component of a government official's Facebook page constituted a public forum because it was "intentionally opened ... for public discourse" and was "compatible with expressive activity").

People can use the internet to disseminate their ideas through weblogs or other type of electronic publication that do not inherently invite response from the universe of internet users. Here, the Council Member that chooses the interactive social media platform of Twitter, but does not choose to prohibit all responses, intentionally creates an open forum for discussion. And, where the Council Member chooses to discuss public business, the Council Member not only intends "to communicate with members of the public about news and information related to their roles as public officials," but intentionally invites the public to respond, to "speak" to the Council Member, and the rest of the world, on that same "news and information related to their roles as public officials." *Id.*

It could be argued that rather than create a forum at all, the Council Member who creates a Twitter account, and blocks various persons, intends to create a way of getting the Council Member's perspective to the public, and that the Twitter account is, therefore, considered government speech that is not subjected to a free speech analysis. However, this could only be the case if the Council Member (1) provided a method of contacting the Council Member not viewable on the Twitter site, e.g., an email address; (2) reviewed all emails received; and (3) then posted the messages him or herself. In other words, if the Council Member reviewed and *edited all content* before posting the content him or herself, then clearly all the content would belong to the Council Member. In a Twitter account, the Council Member cannot edits the responses to his post. Therefore, it cannot be argued that the interaction constitutes government speech.

Nor may the Council Member hide the nature of the forum by posting mostly private matters. This would be akin to inviting the public to an auditorium, having a slide show of a family vacation, followed by a discussion of matters pending before the Council, followed by a slide show of the Council Member's favorite flowers, all the while having a microphone available to any member of the public, and then claiming that the entire event was a "private event." Hiding a public forum between two private events does not change the character of the public forum. Once the Council Member has invited the public to attend the event, an event during which the Council Member discusses, and invites discussion of public matters, the event remains a public forum, even if the Council Member also discusses personal matters.

For all of these reasons, courts will most likely conclude that a Council Member's

Twitter account, used to discuss public matters, is a designated public forum.

III. Basing Discrimination on Content, Viewpoint, or Speaker

The government may restrict speech in a designated public forum under limited circumstances. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (noting that designated public forums are subject to the same standards as traditional public forums). In particular, the government may adopt for the forum "reasonable time, place and manner regulations." *Id.* at 46, 103 S.Ct. 948. The government may also limit speech based on content, *but only* if the government's reason for content-based restrictions satisfy strict scrutiny, i.e., the government meets the high burden of proving that the content-based restriction is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interests." *Id.* at 45. Even more impermissible is viewpoint discrimination. *See Child Evangelican Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006), *quoted in Davison* at 12. "Viewpoint discrimination … 'targets not subject matter, but particular views taken by speakers on a subject.'" *Id.* Viewpoint discrimination is apparent if a government official's decision to take a challenged action was 'impermissibly motivated by a desire to suppress a particular point of view." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, at 812-813 (1985).

A court may consider whether a Council Member who uses the blocking feature of his/her Twitter account impermissibly engages in viewpoint-based or content-based discrimination. Determining viewpoint discrimination would require a court to engage in an almost impossible task of determining the motivation each time the Council Member blocked a person. Finding content-based discrimination may also create difficulty for a court. For example, suppose a Council Member blocks all members of a particular political party. This says nothing in particular regarding what a blocked speaker may say about a specific topic. Even restricting the subject matter to the two major parties, members of each party would or might have different content.

One Wisconsin relied on the holding and analysis in *Surita v. Hyde*, 665 F.3d 860 (7th Cir. 2011), to conclude that the official in question engaged in content-based discrimination. *One Wisconsin* explained, "an impermissible content-based restriction [exists] where a mayor block[s] an individual from speaking about an issue at a city council meeting because of something the speaker said two days before the meeting." *One Wisconsin,* 2019 WL 266292 at *11. In other words, by using the content of speech as a justification to exclude a speaker, the government engages in content-based discrimination. This opinion suggests that a Council Member engages in content-based discrimination whenever a Council Member blocks a person that has posted a response.

The District Court in Robinson v. Hunt County, Tx., 2018 WL 1083838, at *6 (N.D. Tex. Feb. 28, 2018), rejected the same argument with the following reasoning:

> Plaintiff's Amended Complaint fails to show that Defendants

> engaged in viewpoint discrimination or that Defendants' conduct was motivated by Plaintiff's exercise of her constitutional right. *See Washington v. Whittington*, Civ. Action No. 10-356, 2010 WL 3834589, at *5 (W.D. La. Aug. 19, 2010) ("[T]he complaint nonetheless fails to establish that defendants evicted him because of his protected activity. Conclusory allegations of causation do not suffice to withstand a motion to dismiss.... Rather, plaintiff must either adduce direct evidence of motivation, or set forth a 'chronology of events from which retaliation may plausibly be inferred.' ... Here, plaintiff does neither." (citing *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999))). While it may be possible that Defendants removed her comment because she criticized the HCSO, it is also possible Defendants removed the comment because Defendants deemed it to be insensitive to the family of the recently deceased officer or inappropriate for other family followers. *Cf. Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (The Supreme "Court's First Amendment Jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where ... the audience may include children."); *Snipes v. Volusia Cty.*, 704 Fed.Appx. 848 (11th Cir. 2017) ("[T]here are many ways to communicate ones' thoughts, and the vulgar, derogatory phrases used by Snipes weigh against him."). Furthermore, Defendants' conduct in allowing many other critical comments to remain on the HCSO Facebook page runs counter to the notion that Plaintiff's criticism of the HCSO substantially motivated Defendants' actions. Therefore, Plaintiff's First Amendment claim fails, because Plaintiff's allegations do not permit the Court "to infer more than the mere possibility of misconduct." *See* [Ashcroft v.] *Iqbal*, 556 U.S. [662,] 679 [(2009)].

Robinson, supra. The Texas District Court missed a glaring content-based discrimination, i.e., suggesting that the defendants removed the plaintiff due to the 'insensitiv[ity]" of the plaintiff's comments. Removal for "insensitivity" is as content-based as removal for "criticism." Nevertheless, *Robinson* indicates the fact sensitive nature of determining whether Council Member blocks a follower due to content-based discrimination or due to some non-content-based reason.

Furthermore, inquiry into the existence of content-based motivation for blocking has no value if a Council Member blocks someone who has in the past merely followed the Council Member and never posted anything. The Seventh Circuit provided a clue, however, as to how to more properly view blocking speakers when it noted that the mayor "excluded a speaker within the class to which the designated public forum was available." *Surita* 665 F.3d at 870. As

explained by the United States Supreme Court, speech "restrictions distinguishing among different speakers" are "instruments" used to censor and are "interrelated" content and viewpoint discrimination. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340, 130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010). "Speech restrictions based on the identity of the speaker are all too often simply a means to control content." *Id.*

The Court has not invalidated all speech restrictions that disadvantage particular persons. The Court reasoned, in these cases, that the government entities involved had an interest in performing its functions. The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. *See*, *e.g., Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986) (schools); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 129 (1977) (prisons); *Parker v. Levy,* 417 U.S. 733, 759 (1974) (military); *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 557 (1973) (federal civil service system).[6] "These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Id.* at 341.

In explaining the similarities between speaker-based restrictions and content-based restrictions, the Court wrote:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Id. at 340–41; *accord Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 580 (2011) (disfavored speaker

[6] The Supreme Court has long held that "'well-defined and narrowly limited classes of speech,'" such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, "'the prevention and punishment of which have never been thought to raise any Constitutional problem.'" *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)); *see also United States v. Stevens*, 559 U.S. 460, 468 (2010); *Knight* 302 F. Supp. 3d at 565. A review of this area of law is beyond the scope of this opinion. Suffice to say that for most part the government may not prevent speech for fear of speech falling into one of these categories nor may the government, as a general rule, prevent a speaker from speaking merely for having once engaged in speech the First Amendment does not protect. Instead, the government must let speech occur and may punish the speaker if it falls into one of these categories.

law is essentially viewpoint discrimination); *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173, 193-94 (1999) ("decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment."); *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 763 (1988) ("[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of . . . viewpoint censorship."); *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("we have frequently condemned such discrimination among different users of the same medium for expression"); s*ee also, Veith v. Jubiler, 541 U.S. 267, 314 (2004)* (Kennedy, concurring) (viewpoint discrimination occurs when discrimination is based on political parties); *Bd. Of Educ. v. Pico*, 457 U.S. 853, 870-871 (1982) (same). With regard to political contributions, a form of speech or expression, a "ban on corporate political contributions treats LLCs and unions differently from corporations . . . , the State has the burden of demonstrating "that its classification has been precisely tailored to serve a compelling governmental interest." _*Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685, 691 (E.D. Ky. 2016) (citation omitted); *accord, Oklahoma Corr. Professionals Ass'n, Inc. v. Jackson,* 2012 WL 12948535, at *5 (W.D. Okla. Aug. 13, 2012) (Restrictions on certain speakers and not on others violate the First Amendment.).

Applying this reasoning to blocking, only one conclusion follows: A Council Member who blocks followers engages in speaker-based discrimination indistinguishable from content-based discrimination, and such discrimination violates Free Speech protections unless the Council Member has a compelling governmental interest and blocking is the least restrictive means to protect that interest. No governmental interest exists in a public official offering a platform to "speak" about a public official's public actions but prohibiting a few from using that platform. Consequently, a court may well conclude that blocking by a public official violates the Free Speech Clause of the Florida Constitution.

The conclusion may be different, however, for a Council Member blocking another Council Member. A Council Member may have a compelling interest, based on the Sunshine Law, in blocking another Council Member, but that prevents such other Council Member from viewing public records. Even elected officials have the right under the Public Records Law to view public records.

In *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 704 (W.D. Tex. 2011), *aff'd,* 696 F.3d 454 (5th Cir. 2012), the United States District Court for the Western District of Texas rejected a First Amendment challenge to the Texas Open Meetings Act ("TOMA"). While under the Florida Sunshine Law, government officials such as council members must notice a meeting between two or more members. Under TOMA, "[i]f a majority of government officials discuss public business outside of an open meeting, they must subsequently disclose that information to avoid prosecution." *Id.* The court held that "TOMA is narrowly-tailored because there is no less restrictive means of limiting what a quorum of a governmental body can say outside of a meeting" and found that the government's "interests—that open meetings provide transparency in government's decision-making process, discourage fraud and corruption in government, and

foster trust in government—are compelling." *Id*. In other words, while the Sunshine Law may infringe on Free Speech rights of Council Members, the government has a compelling governmental interest in guaranteeing that members of a governmental body do not secretly make decisions, and preventing them from meeting outside the Sunshine is narrowly tailored to protect that interest.

One could argue, therefore, that a Council Member who posts on Twitter has multiple compelling governmental interests in blocking other Council Members – "transparency in government's decision-making process, discourag[ing] fraud and corruption in government, and foster[ing] trust in government." *Id*. In other words, a Council Member has a compelling interest in complying with the Sunshine Law, a statute based on compelling governmental interests. Blocking may be determined to be narrowly tailored to protect that interest. A social media account can only be a public forum subject to the First Amendment if the Council Member uses it to discuss public business. For a Council Member, public business necessarily could include matters that the council member may one day vote on, i.e., matters subject to the Sunshine Law. A Council Member might argue that the only possible method or means, and necessarily the least restrictive means, of guaranteeing and ensuring no possible Sunshine violation is to block all fellow council members.

It is of import, however, that a Council Member devalues his or her interest in preventing a Sunshine violation by choosing to post public records in an interactive environment. The Attorney General has already concluded that one board member viewing another board member's social media posting is not a violation of the Sunshine Law. The posting Council Member has chosen to risk a Sunshine violation by another Council Member. Having done so, a court may find that the posting Council Member has created the danger and cannot claim a compelling interest in preventing such a violation by blocking another Council Member.[7] A contrary argument exists. Both the Sunshine Law and the Public Records Law encourage open government and opportunities for the public to have its various voices heard. Interactive social media, such as Twitter, opens government even further. If a Council Member who fears Sunshine violations chooses to stop using Twitter, government becomes a little less transparent, a little less available to the public. For these reasons, a Council Member who has a Twitter account could be found to have a compelling interest in blocking other Council Members, but only if the Council Member blocks all other Council Members. *See,* discussion*, supra,* regarding speaker based discrimination.

While both of the above arguments could, in good faith, be posited to a court, it seems unlikely that a court will find that the protection of one law (Sunshine Law) at the expense of another law (Public Record Law) would constitute a compelling government interest.

---

[7] If a Council Member could prevent a follower from making *any response*, public or private, then such an action would be a narrowly-tailored method guaranteeing and ensuring no possible Sunshine violation on a site that otherwise provides interaction. Obviously, no board member can prevent another board member from violating the Sunshine Law. Any board member may choose to read another's public record and then respond via letter or email or even a post on the reader's own social media site.

V. CONCLUSION

In sum, when a Council Member posts discussions of matters related to his or her office, the Council Member creates a public record, and the Council Member must comply with the Public Records Law as set forth in this memorandum. In particular, the Council Member must make that public record available to the public, including other Council Members. Second, when the Council Member chooses to post these public records on an interactive social media site such as Twitter, another Council Member may run afoul of the Sunshine Law by responding to a matter which is before, or may come before, the Council. The originally posting Council Member may not use that risk to block other Council Members. Indeed, the Free Speech Clause of the Florida Constitution prohibits a posting Council Member from blocking any member of the public from his or her account.

GC-#1265098-v1-Memo re Interactive Social Media Public Records Sunshine Free Speech.pdf