



MEMORANDUM

To: Audit Advisory Committee Members

From: Alan L. Gabriel, City Attorney

Date: August 18, 2020

Re: Florida's Open Government and Ethics Laws

This Memorandum is respectfully submitted for your guidance as appointees to the Audit Advisory Committee.

State and local elected officials are expected to adhere to an array of open government and ethics laws to reassure the public that officials are acting ethically when conducting public business. Some City board and committee members may not be familiar with some of these guidance principles. With this in mind, the following summary provides an overview of these State regulations.

I. SUNSHINE LAW / OPEN GOVERNMENT (Chapter 286, Florida Statutes)

The purpose of the Sunshine Law is to ensure that all official acts of the City are taken at public meetings. The Sunshine Law covers the City Council and all boards and committees that are part of the decision-making process even if a board's authority is limited to an advisory function. The Sunshine Law restricts two or more members of the same board from meeting privately to discuss items on the current agenda or any item that could foreseeably come before that board. If two Committee members wish to converse about items unrelated to City business, they can do so without any legal consequences. Moreover, the Sunshine Law does not apply to one-on-one meetings that Committee members may have with staff, such as the City Manager or City Attorney, City Councilors and other board and committee members.

In order for a meeting to comply with Sunshine Law, it must be open to the public; reasonable notice must be given and minutes must be taken. Another important element of the Sunshine Law is to give the public meaningful opportunity to

participate in the process, which means providing the public with the right to be heard on most items before final action by the Committee. The Committee is well within its rights to limit the length of time the public may speak, as long as the amount of time given is reasonable. Actions by the City Council or the City's boards taken outside of a public meeting are void and other serious sanctions can be imposed against offending parties.

II. PUBLIC RECORDS (Chapter 119, Florida Statutes)

The Public Records Law gives the public the right to inspect and obtain copies of public records without unreasonable delays. The intent of the law is make all City records, with some exceptions, available to the public if such records were received or sent by a City official or employee in connection with City business. The term "record" is interpreted quite broadly and includes such items as maps, photographs and all other public records regardless of form. The City has no authority to force a person to put a public records request in writing, nor can records be withheld because the City questions the person's motives. The City can charge for the cost of duplicating requested documents and the reasonable costs associated with staff time spent on assembling the requested records. If a record was prepared in connection with City business, the official or employee who created it cannot claim an exemption on account of the fact it was sent from a personal computer or another personal device. Conversely, a record send from City Hall is not automatically a public record. The overriding factor is the content of the communications or record. If the record is comprised of City business, regardless of the device used or the location of the transmission, it is a public record. If the record has nothing to do with City business, the fact that it was sent from the City does not convert it into a public record. Please realize that a request to inspect or receive copies of your records (cellphone bills or a calendar) where you have combined City business with private business does not allow the requester to gain access to the private information. For example, if your calendar was requested, you would only have to turn over the portion of the calendar that listed appointments tied to your official City duties – the other appointments could be redacted.

Although the Public Records exemptions are limited in scope, every request for a public record should be carefully evaluated to prevent unwarranted disclosure of exempt or confidential information. Therefore, the City Attorney's Office would recommend against you responding directly to a Public Records request. It would be advisable for you to contact the City Clerk or the City Attorney before taking any action on a Public Records request made to you. The law makes each official custodian of their own public records. What this means in practical terms is that any public records that you personally create or you receive in your capacity as a

City official requires you to retain such records. If you don't want to assume this responsibility, you can forward these records to the City for storage and you will be relieved of this legal obligation. Failure of to adhere to the requirements of the Public Records Law can result in civil or/and criminal sanctions to the City and its officials.

III. SOCIAL MEDIA ACTIVITIES

Social media post, blogs, or other communications may constitute public records under Florida's public records regulations. Public records are defined as "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. Communications between two or more committee members through social media relating to matters on which foreseeable action will be taken may constitute a violation of Florida's Sunshine regulations. For example, if you respond to a comment posted by another Committee member that relates to an issue for which there will be action taken by the Audit Advisory Committee, this may be a violation. Where the activity constitutes City business your social media post, blogs, etc., communications may constitute public records under Florida's public records law that you may be held responsible for maintaining those records indefinitely. If a public records request is made to the City, you may be responsible for providing those records or face the consequences as discussed above.

IV. ETHICS LAWS (Sections 112.311- 112.3261, Florida Statutes)

As an appointed official for the City of Marco Island, you are bound by the ethics provisions set forth in state law. Rather than examine each of these rules, this document will highlight the most significant rules.

- 1) **Voting Conflicts:** State law prohibits you from abstaining from voting on any matter coming before the City Council unless the official has an actual conflict, or a perceived conflict. A voting conflict exists if you, a family member, a business associate or your employer were to obtain a special gain or loss as a result of some action/vote that you were part of as a Committee member. If you have a real or actual voting conflict or you believe a perception of a conflict would be created if you were to vote, you must disclose the nature of the conflict in a written memorandum filed with the person recording the minutes of your meeting. In the event that disclosure has not been made prior to the meeting, the disclosure shall be made orally

at the meeting and the written memorandum shall then be filed within 15 days after the oral disclosure with the person recording the minutes. A member with a voting conflict is not allowed to participate in the discussion of the item and must abstain from voting on the item. If you need guidance as to a possible voting conflict, you can ask the City Attorney for an opinion or the Florida Commission on Ethics.

- 2) Gifts: There are many facets to the state gift law. The most important consideration is whether a gift was given to your official capacity or your personal capacity. Generally speaking, a gift received in your personal capacity is beyond the reach of the gift statute. Moreover, gifts received in one's official capacity do not have to be reported, but Committee members must act cautiously when accepting "official capacity" gifts if the gift was given to influence any action that you would take in your official capacity. Similarly, Committee members are not permitted to solicit gifts of any value for private, personal gain.
- 3) Misuse of Official Position: State law prohibits a public official from corruptly using or attempting to use his/her official position to secure special privileges or benefits for himself or others not otherwise permitted by the law. Using city resources for one's personal benefit could be misuse of position as well. In essence, any attempt to ask for special treatment on account of your position is considered misuse use of position if your intent is wrongful. If there is no corrupt intent and your actions are consistent with your duties as an elected official, you have not misused your position.

If you have any questions concerning the above, please do not hesitate to contact me.