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MEMORANDUM

DATE: May 8, 2024
TO: Board Members
FROM: Terrill C. Pyburn, City Attorney *zcp*
SUBJECT: Overview of Florida Sunshine Law; Public Records Laws; Ethics Laws; Coconut Creek's Lobbyist Registration Ordinance, Social Media, and Parliamentary Procedures

I. Introduction

I want to share with you a quick overview of Florida's Sunshine, Public Records, and Ethics laws, the City's Lobbyist Registration requirements, some guidelines for complying with Sunshine, Public Records and Ethics requirements in social media activities, and finally some general parliamentary procedure guidelines. Additional references have been noted throughout this Memorandum. If you have any questions or would like assistance accessing any of those additional resources, please contact the City Attorney's office. Coconut Creek meetings are being conducted live and provisions for remote or on-line interactive participation are not available, however, city staff works to ensure the public has the ability to provide public comment on board business at the meetings. The City does not maintain a dedicated email or voicemail for advance public comment however, emails or voicemails received by city staff on board business will be provided to the board, and if applicable, to the relevant applicant prior to the meeting.

II. Overview

As a board member, you are an appointed officer of the City of Coconut Creek, subject to the requirements of the Florida Government in the Sunshine Act. Most critically, meetings of two (2) or more members of the same board must be noticed and open to the public with minutes taken. Under the Sunshine Act requirements, what qualifies as a "meeting" is different than traditionally understood and explained in more detail in Section III. As a board member, any record that you create, or that is provided to you, in relation to City business must be made available to the public for inspection and must be retained for a certain period of time (including, but not limited to, e-mails, texts and social media postings). You must deliver honest services to the City (free of improper influence) and any personal voting conflicts must be publicly disclosed. Lobbyists who seek to meet with you must be registered with the City. Lobbyists will log and disclose any such meetings.

III. Sunshine Law

The Sunshine Law applies to any gathering, whether formal or informal, of two (2) or more members of the same board or commission to discuss some matter upon which foreseeable action will be taken by the board or commission. These “gatherings,” no matter how informal or impromptu, are “meetings” under the Sunshine Law. Such discussions must be noticed, made open to the public, with minutes taken. See generally Section 286.011, *Florida Statutes*, “Public meetings and records; public inspection; criminal and civil penalties,” and *Hough v. Stembridge*, 278 So.2d 288 (Fla. 3d DCA 1973). Therefore it is important to refrain from discussing (verbally, in person, over the phone, email, or on social media) or sharing an opinion, on any item of City business that could come before your board, with any other member of your board, outside of a formal City meeting.

In this age of technology, it is imperative that you take extra precautions to avoid inadvertent violations of the Sunshine Law. For example, if a board member sends an e-mail or makes a post on a social media website that pertains to board business (including something that *could possibly come before the board at a later date*), if another board member responds to that e-mail or comment there may be a Sunshine Law violation since the conversation was not noticed, open to the public, and no minutes were taken. Please remember that all conversations, virtual, electronic, live, or in any other form, that are held between board members regarding board business must comply with the Sunshine Law. Relevant to this brief discussion it is important to understand that the word “conversation” does not always mean a traditional back and forth communication between two people, but implies any interaction where two people on the same board express an opinion, in any forum, or combination of forums, on a matter that may come before them as a board. See Attorney General Opinion 2001-66, involving board discussions held over the internet, and Attorney General Opinion 2009-19, discussing a City’s Facebook page.

IV. Public Records Law

All e-mails, texts, or writings that pertain to City business are public records. It does not matter whether the e-mail or writing resides on a City computer, personal computer, tablet or phone. Given the complexity of records management related to text messaging, I recommend you do not use text messaging for City business. The determining factor of whether a document or e-mail is a public record is the nature of the communication, not its physical location. See generally Section 119.07, *Florida Statutes*, “Inspection and copying of records; photographing public records; fees; exemptions,” and *State of Florida v. City of Clearwater*, 863 So.2d 149 (Fla. 2003), and Informal Attorney General Opinion dated June 1, 2016, discussing Twitter records as public records. Using your personal device for public business could open that device to court inspection. Texting or even looking at your device during a public meeting leaves the public with the perception that you are texting about City business. Should a records request be made, it will be up to a judge, reviewing your texts *in camera*, to determine which texts were City business subject to public records disclosure and which texts were personal (see *Sunny Isles Beach v. Gatto*, 338 So. 3d 1045 (3d DCA 2022) where the judge reviewed all the commissioner’s texts (which included disparaging remarks about a colleague, sent to her husband and to a friend) and determined those sent to her friend, who was also a resident, were public records subject to disclosure, and those to her husband were not – but we all still know now the tenor of what was said). It is your legal obligation to maintain any public

records, on any of your devices. City policy requires that if those communications are not on a City device, you forward such communications to the City for retention. Any records should be sent to publicrecords@coconutcreek.net and simply note your board name and PR retention, or something similar, in the subject line. State law also requires that any public records that are on your personal device(s) be delivered to the City's Records Custodian at the expiration of your term of office. See Section 119.021, *Florida Statutes*.

V. Florida Ethics Laws

Pursuant to the Florida Ethics Code, City board members are "public officers" and are prohibited from using their position to take, or fail to take, any action that will result in a financial benefit to: 1) himself/herself; 2) his/her relative (including his/her father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, and daughter-in-law); or 3) his/her business associate and/or principal. If you or someone close to you will receive a special economic benefit or harm as a result of your action or inaction as a public officer, you may have a voting conflict. If you think you might have a conflict, or even the *appearance* of a conflict, please contact the City Attorney's Office *in advance of the vote and preferably in advance of the meeting* to determine whether or not a true conflict exists and, if necessary, obtain the specific disclosure and reporting forms. See Section 112.3143, *Florida Statutes*; Florida Commission on Ethics Opinion 16-2, "Conflict of Interest; Voting Conflict; Misuse of Position."

Also, you must not accept any gift(s) from any person based upon an understanding that your vote as a public officer would be influenced thereby. Please review the State Code of Ethics found within Chapter 112, *Florida Statutes*, Part III, "Code of Ethics for Public Officers and Employees," as well as Broward County's Code of Ethics found within the Broward County Code of Ordinances, Section 1-19, "Code of Ethics for Elected Officials."

VI. Social Media – The Perfect Storm of Sunshine, Public Records and Ethics

"The City of Coconut Creek recognizes that social media can be a great asset to our City, helping us build our brand, promote our programs and events, and more directly communicate with our residents and customers."

- City of Coconut Creek Social Media Policy

Social media can be very useful, however, extreme caution is necessary to avoid violations of first amendment, sunshine, public records, accessibility, or copyright laws.

First amendment issues can be triggered when a board member speaks as a board member, or *appears* to speak as a board member, on social media. When a board member speaks on social media the courts can find that the board member is speaking "on behalf" of the City, or "under the color of state law" (versus acting in a personal capacity). This means the speaker must be particularly cognizant of their speech to ensure they are inclusive, non-discriminatory and fully open and available to the public. While in their personal capacity an individual may block people and choose at will who can and can't participate in their social media activity. That freedom does not exist when using social media in a government capacity – or as a board member speaking about business that may come before the board. If the board member blocks an individual from the platform where they are exercising "government speech", they are denying the blocked individual's right to speech and the Courts will always find that blocking citizens

from a government forum is viewpoint based discrimination. In 2018, President Trump blocked individuals from his twitter account after they responded to a tweet from him with a message that was critical of him or his policies. Plaintiffs, individuals who were blocked, sued alleging first amendment violations. The US. Supreme Court held that “the First Amendment does not permit a government official who utilizes a social media platform for official purposes to exclude persons from an otherwise open dialogue merely because they expressed views disfavored by the official.” *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 220 (2d Cir. 2020) overturned on other grounds by *Biden v. Knight First Amend. Inst. At Columbia Univ.*, 209 L. Ed. 2d 519, 141 S. Ct. 1220 (2021). Even a private page can be opened to the public by virtue of the way it is used, triggering public records and sunshine issues. Deleting individual comments is just as problematic as blocking individual users. There are limited circumstances where off-topic comments can be deleted, but only if certain rules are established for the page *in advance*. See *Davison v. Plowman*, 247 F.Supp.3d 767 (2017).

Social media platforms also create an environment ripe for often accidental sunshine violations. Two or more board members discussing a City issue on social media can be a meeting if that issue is one that may come before their board. “While there would not appear to be a prohibition against a [Board]... member posting comments on the City’s Facebook page, members of that [Board]... must not engage in an exchange or discussion of matters that foreseeably will come before the [Board]... for official action.” Further, “Engaging in an exchange of ideas or discussion on such matters is a slippery slope – and comments made on the site by one member in reaction to the letters, emails or personal postings of another member may be broadly construed as such an exchange or discussion and thus constitute a violation of the Sunshine Law.” Attorney General Opinion 09-19, and see Attorney General Opinion 01-21. This can create a very difficult situation when a board member desires, or even has been asked, to utilize social media to help spread the word about a City program, activity or message. The most important thing to remember is that if a Board member posts anything about issues that might come before the Board, other Board members should not reply, respond in a separate post, or even address the issue in other forums. Even a “Like” has been found to be the expression of an opinion sufficient to trigger a Sunshine Violation.

If a Board member is posting about an event for which the Board has some responsibility, or has or will be discussing, any social media posts by a board member from that Board, about that event, will be considered government speech. That triggers both Sunshine and public record concerns. In addition, any comment or response to a social media posting that pertains to a public record is *also* a public record. All public records must be preserved! A Board member should NEVER delete a public record, including comments, likes, dislikes, or responses the Board member may disagree with, until the City Clerk has verified that the record is eligible for destruction (based on State statute).

In addition, images, text, video, audio, etc. used on social media sites must comply with U.S. Copyright Law, which protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Something may be copyrighted even if it doesn’t say “copyrighted.” Because there is not a sovereign immunity damages cap for local governments for violations of copyright law, violations can be VERY expensive.

Any time a public record is created, even those created on any social media platform, those records must be **retained** and **made available** to the public and the City must know about, have access to, and be able to actually search the board member's social media pages for posts *and responses*, if the City receives a public records request.

VII. Penalties for Violating the Law

Penalties for violating Florida's Sunshine, Public Records, and Ethics Laws may include criminal penalties, suspension or removal from office, public censure and reprimand, monetary fines, declaration of the official action as void, cost of opposing party's attorney's fees, and damages. See generally Sections 286.011, (Sunshine Penalties), 119.10 & 119.12 (Public Records Penalties), 112.317 (Ethics Penalties), 838.015 (Bribery), and 838.022 (Official Misconduct), *Florida Statutes*.

VIII. City's Lobbyist Registration Requirements

"Lobby," "Lobbying," or "Lobbying Activities" means a communication, by any means, from a lobbyist to a covered individual regarding any item that will foreseeably be decided by a final decision-making authority, which communication seeks to influence, convince, or persuade the covered individual to support or oppose the item. "Lobbying" does not include communications:

- a. Made on the record at a duly-noticed public meeting or hearing; or
- b. From an attorney to an attorney representing Broward County or any municipality within Broward County regarding a pending or imminent judicial or adversarial administrative proceeding against Broward County or against any municipality within Broward County. See City Code, Chapter 2, Article XIII, "Lobbyists".

A "Lobbyist " means a person who is retained, with or without compensation, for the purpose of lobbying, or a person who is employed by another person or entity, on a full-time or part-time basis, principally to lobby on behalf of that other person or entity. "Lobbyist" does not include a person who is:

- a. An Elected Official, employee, or appointee of Broward County or of any municipality within Broward County communicating in his or her official capacity;
- b. An individual who communicates on his or her own behalf, or on behalf of a person or entity employing the individual on a full-time or part-time basis, unless the individual is principally employed by that person or entity to lobby;
- c. Any employee, officer, or board member of a homeowners' association, condominium association, or neighborhood association when addressing, in his or her capacity as an employee, officer, or board member of such association, an issue impacting the association or its members; or
- d. Any employee, an officer, or a board member of a nonprofit public interest entity (e.g., Sierra Club, NAACP, ACLU) when addressing an issue impacting a constituent of that entity.

All lobbyists must properly register with the City Clerk prior to engaging in any lobbying activities, and must log every meeting (date/time/place) held with the City's public officers or certain City staff. To ensure compliance with the City's Ordinance, before accepting a meeting with someone seeking to influence your decision related to City business, please contact the City Clerk's Office at 954-973-6774 to verify if the individual is a lobbyist.

IX. Parliamentary Procedure – the Basics

Robert's Rules of Order are often used as a general guideline for meeting procedures. However, most boards will function in a very informal environment, remembering that in this role, you are first and foremost, a public servant. Strict compliance with procedural meeting rules is not the most important aspect of good parliamentary practice. The implementation of procedure must be done in a way which ensures open communication and a fair process. Following the principles and basic procedural guidelines below can help ensure your board develops into an efficient and effective organization. In addition, following these principles and maintaining an orderly and respectful meeting environment will help reduce the opportunity for unintentional or "perceived" sunshine violations.

Basic principles:

- a. Only one person speaks at a time (and no table talk once the meeting has started – this isn't just about being polite...it helps protect you and the City from allegations of Sunshine Law violations).
- b. Speakers (board members or guests) should wait to be recognized by the chair.
- c. Discussion and comments should be limited to the item on the agenda.
- d. Each proposition presented for consideration is entitled to full and free debate.
- e. Every member has rights that are equal to every other member.
- f. The will of the majority must be carried out; the rights of the minority preserved.
- g. The personality and goals of each member should be merged into the organizational unit – recommendations are a function of the board as a whole.
- h. Maintaining, *and demonstrating*, respect for the City as a whole, individual board members, staff, and the public, is crucial.

Role of the Chair: The chair is the presiding officer of the board. The vice-chair acts as the chair in the absence of the chair. A City staff member will act as secretary. The chair has the responsibility to:

- a. Decide in what order speakers are recognized
- b. Restrain speakers within the limits of the rules (for instance, a 3 minute per person public comment rule could be imposed – as long as it is imposed at the beginning of public comment, before anyone has spoken on the particular item)
- c. Enforce good decorum
- d. Decide points of order
- e. Vote
- f. Participate in discussions in a manner which promotes the open exchange of ideas without dominating or controlling the discussion. To this end, it is not uncommon (but not a requirement) for the chair to speak after all other board members have had a first opportunity to speak.
- g. Based on the size of the boards, the chair, while responsible for the orderly conduct of the meeting, is also permitted to participate in all discussion and may, if need be, make a motion or second a motion, and should always vote on an item, subject of course to conflict issues. In the event the chair desires to make, or second, a motion, he or she should first 'pass the gavel'. This is accomplished by saying, "I pass the gavel to the vice-chair." The chair should then physically pass the gavel to the vice-chair, make the desired motion or second, then reclaim the gavel, and thus control of the meeting.

Agenda: Each meeting will be publicly noticed and open to the public, will have an agenda prepared by staff, and minutes of the meeting will be taken. Adhering to the agenda will help the meeting run smoothly and efficiently. Diverging from the agenda could, in some instances, create Sunshine issues. In addition, Broward County imposes a rule requiring publication of the agenda and all backup at least 48 hours prior to a meeting, which limits discussion of non-agenda items, so it is always advisable to stick to the agenda. You will receive the agenda and possibly backup materials before the meeting. The City believes in living green and works constantly toward reducing our impact on the environment and to that end, the agenda and backup materials for your meetings will be provided electronically and we ask that, unless necessary, you work with the electronic documents. If you need assistance working with the electronic materials or do need hard copies, please let your staff liaison know ahead of the meeting and we can assist with training or will get you the necessary materials. But please, think before you print.

Attendance: In order for a meeting to occur, where the board can act, there must be a quorum of the board physically present at the meeting (this is different than what triggers a meeting under the Sunshine Law). Generally, this means 3 members of the board, one of which could be the alternate, must be physically present in order to hold an official meeting and take any official action. If a quorum is not present, the board can NOT hold an official meeting or transact any business (BUT, it could still trigger meeting issues under the Sunshine Law). For this reason it is of utmost importance that you communicate with your staff liaison about your attendance! Please respond promptly when you are notified of a meeting, to let staff know whether or not you can attend. While everyone recognizes that emergencies arise, please notify the City Clerk's office at least 48 hours prior to the meeting, or as soon as possible, if you cannot attend. If you have confirmed you will attend a meeting, event or activity, please ensure you do actually attend, or if something changes, notify the City Clerk or your staff liaison that you will not be able to attend. Both staff and your fellow board members are expending time, energy and resources to prepare for and attend each meeting and members of the public have been invited to attend as well. A meeting cancelled for lack of a quorum at the beginning of the meeting represents a significant amount of wasted resources in time, notice and materials that were utilized to prepare for the meeting. Currently, a board member who misses 25 percent of the regular board meetings within a 12-month period without notifying the City Clerk 48 hours in advance may be removed from the board.

Moving forward: Once an item is introduced by the chair or by staff, the item should be "moved". In informal settings discussion may occur prior to formally introducing a motion. However, definitive actions can be taken only by the board as a whole through approval or denial of motions. If items are brought before the board primarily for discussion in an open discussion format, any formal recommendations should still be made as a motion with a second and vote.

Motion: A board member, after being recognized by the chair, may propose that the board take a certain action by making a motion. A motion is a proposal statement, such as, *"I move that we recommend approval of the site plan application."*

Second: A motion must receive a second in order for the proposal to be discussed or voted on. Once there has been a motion, there should be no other discussion or motions

until a second has been made. A second can be made without being recognized by the chair first. If no second is made, the chair would say, "The motion dies for lack of second." At that point, a new motion could be made. *"I move that we recommend denial of the site plan application."*

Discussion: Once a motion and second have been made, the item is open for discussion. Board members should speak one at a time, after recognition by the chair.

Public input: It is important to remember that public input should be taken by the board prior to taking final action on an item. Public input can be taken at the beginning of the meeting on any item if there is a Public Comment section of the agenda, or it may be taken on each individual item. During an item, it can be taken before or after the board's own discussion. It is the chair's responsibility to allow and control public input. The chair can limit public speakers to certain time limits or to allow a person to address the board only once on any given item, however, the limits or rules should be established at the beginning of the item and applied equally to all present. Public input is not generally a question and answer session between the public and the board. It is intended for members of the public to give input, although the board may, through the chair, or with the chair's permission, ask questions of a member of the public who has spoken. Members of the public should be required to speak at the microphone in order to ensure their comments are heard as part of the required record and should state their name and address for the record before they address their item.

Amendments: During a discussion of an item a board member may wish to revise the proposal. This revision is achieved through a "motion to amend".

Motion to amend: A "Motion to Amend" can be stated as, *"I move to amend the motion to recommend approval of the site plan to include 2 additional trees on the street frontage."* Once made, the Motion requires a second. If seconded, then the amendment, *and only the amendment*, can be discussed by the board, after which the *motion to amend* is voted on. This is a vote only on whether or not to approve the amendment. After a formal Motion to Amend is made, seconded and approved, board discussion continues on the Motion AS AMENDED.

Vote: Once the board has completed discussion on the motion, or amended motion, and public input has been concluded, the chair may ask the clerk to call the roll on the motion or the motion as amended. For clarification, it is usually best for the chair or secretary to state the motion in full, with any amendments, prior to voting. Once the roll has been concluded, the chair should state the results, "The motion was APPROVED/DENIED by a vote of X to Y." It should be noted that making a motion, or seconding a motion, does not obligate that person to vote in favor of the item they moved or seconded.

Note also that formal action must be taken at a publicly noticed meeting. If a meeting is noticed as a workshop, rather than a meeting, formal action cannot be taken and the meeting format will be more informal.

X. Conclusion & Practical Tips

Please remember that all documents concerning City business housed anywhere, on any medium, are public records. Public records must be retained and made available for

copying and/or distribution upon request. You have a duty to preserve all e-mails, texts, social media posts and other documents in your possession that are public records. For your convenience, please forward all e-mails, texts and written documents to the City Clerk for safe-keeping by forwarding to publicrecords@coconutcreek.net. (In the subject line please reference the name of your board and "For Public Record.")

In addition to verbal communications, the Sunshine Law applies to all written communication if there is an exchange between two (2) or more board members concerning a matter that may reasonably come before the board for action. Take extra care not to communicate with fellow board members on those matters until you are at a duly noticed, public, and recorded meeting. As a friendly reminder, please refrain from whispering at meetings. To comply with the Sunshine Law, all responses must be audible for the record and loud enough for the public to hear. Public perception should always be considered – a whispered conversation about last night's football game, while sitting in a board meeting, can be *perceived* by the public as violation of the Sunshine Law.

As a general proposition, board members of the same City board may attend other City board meetings. However, when two (2) or more City board members from the same board are in attendance at a different City board meeting, any discussion or debate between the two (2) of them at that meeting may trigger the Sunshine Law. If you plan to attend another City board meeting or the City Commission meeting, please notify the City Clerk's Office in advance so that the City may properly notice your attendance in an abundance of caution to comply with the Sunshine Law, especially if you are planning to speak on any item which is related to your Board or which could potentially be addressed by your Board.

If you have any questions or are unsure of what to do in a particular scenario, please contact the City Attorney's Office at 954-973-6797.

Thank you.