

**From:** Gabriel, Jason  
**Sent:** Friday, August 21, 2020 4:18 PM  
**To:** Jackson, Brenda; DeFoor, Randle; Diamond, Rory; Wilson, Scott  
**Cc:** Sidman Martin, Margaret; Phillips, Jon; Garrett, Christopher; Steve Busey  
**Subject:** FW: T-U question about Stephen Durden memo

Dear SIC Members –

For your information, below are answers written to the TU today in response to questions on executive privilege. Hopefully it provides clarity.

Also, for ease of reference, I have attached the summary memo on executive privilege which was included in the Brian Hughes transcript package circulated to you last week.

Additionally, for greater context and research, I attach a memo prepared a few years ago in response to Council Member John Crescimbeni, who served as Chair to the Special Committee on the Potential sale of JEA at the time. The summary is generally consistent with the previous memo.

Please do not hesitate to contact me individually with any questions or concerns.

Have a great weekend!

-Jason G.

**From:** Gabriel, Jason  
**Sent:** Friday, August 21, 2020 3:08 PM  
**To:** 'Bauerlein, David'  
**Subject:** RE: T-U question about Stephen Durden memo

Hi David – In red below are my answers to your questions. Thank you, Jason G.

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Hi Jason:

I have a few questions about the Durden memo on executive privilege.

1. The memo says executive privilege covers "all communications." It does not distinguish between verbal and written communications. Under Florida law, written communications are public record. Is the Durden memo saying that if City Council asks for written documents from the mayor's office/executive branch, the mayor's office can refuse to provide them on grounds of executive privilege, notwithstanding state law for public records?

As you mention, Florida has a broad public records law and accordingly, the executive privilege doctrine has no application to otherwise public records.

It is well settled in Florida that public records cannot be withheld based upon a claim of a common law privilege. *Wait v. Florida Power and Light Co.*, 372 So. 2d 420, 423-24 (Fla. 1979). The court in *Florida House of Representatives v. Romo*, 113 So. 3d 117, 126-27 (Fla. 1st DCA 2013), stated that absent a

statutory exemption, public records cannot be withheld based on legislative privilege. By extension, the same is true for executive privilege.

2. The legal memo is not from you, but instead is in the form of a memo. Do you agree with Durden's conclusions?

Mr. Durden's memo, although in summary form, is generally consistent with the City's Charter (including Article 4) and its traditional separation of powers government model, as well as several previous GC opinions over the past several decades which interpret the Charter in favor of such divisions of power and allocation of duties, in a variety of scenarios.

It is also consistent with guidance given on this same topic a few years ago when the issue surfaced with respect to the previous Special Committee on the Potential Sale of JEA, in the spring of 2018 timeframe.

As noted by the First DCA in the case of *D.R. Horton v. Peyton*, 959 So.2d 390 (Fla. 1<sup>st</sup> DCA 2007), the City Charter employs a "strong-mayor" model. Article 4 of the City Charter says: "The powers of the consolidated government shall be divided among the legislative, executive, and judicial branches...No power belonging to one branch...shall be exercised by either of the other branches, except as expressly provided in this charter." Article 6.04 of the Charter unequivocally vests the executive power of the City in the Mayor.

Having said this, it should be noted that we are talking about a very narrow sliver of communications. That is, specifically, the verbal pre-decisional and deliberative conversations between the Mayor and his advisors in arriving at executive policy decisions.

Just like the Mayor and his staff cannot pry into and ascertain the mental prerogatives of how individual Council Members arrive at legislative proposals (or for that matter individual discussions between council members and their advisors), the reverse is also true.

There are solutions:

If, for example, the Council demonstrates that specific information from internal executive conversations is critical to the responsible fulfillment of a committee's functions and legislative purpose, then inquiry is not necessarily foreclosed. However, the information sought must be otherwise unobtainable and the inquiry must be no broader than necessary to support the legislative objective. In that event, the inquiry may be posed to the executive branch for further consideration.

Also, the Mayor on behalf of the executive branch can always waive executive privilege with respect to the given matter.

In any event, to the extent a dispute over such information arises – which I am not aware of at the moment – both political branches of our government would be advised to work together to resolve it and resist any pressure within each branch to exceed the outer limits of its respective power.

3. Why doesn't the memo have any analysis regarding the city's ordinance code that compels city employees to cooperate with investigations. It seems like that would be important to any analysis.

City officials absolutely have an obligation and are duty-bound to cooperate with investigations. As stated above, this discussion of executive privilege is dealing with a very narrow area of internal executive branch deliberation-type conversations.

Thus, just as a Florida Statute cannot trump the U.S. Constitution and a city ordinance cannot trump the State public records law, a city ordinance cannot trump separation of powers principles in the Florida Constitution and the City Charter.

I know these are substantive questions. If it will take more than a day to fully answer all of them, can you provide me an answer today on the first question about how Durden's memo would or would not affect the authority of state public records law.

Thanks

David

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