MEMORANDUM

TO: The Honorable Council Member John Crescimbeni

 Chair, Special Committee on the Potential sale of JEA

FROM: Office of General Counsel

RE: Implications of Executive Privilege for JEA Special Committee

DATE: April 18, 2018

1. Background

The Council President has established the Special Committee on the Potential Sale of JEA. At some of the meetings, Council members have inquired of JEA as to (1) when JEA first considered the potential sale, (2) who participated in those discussions, and (3) the nature of those discussions. This memorandum is prepared in anticipation of the possibility the legislative branch (i.e., the City Council or the Special Committee on the Potential Sale of JEA) will attempt to delve into discussions by members of the executive branch (i.e., the Mayor and/or his advisors) regarding the potential sale of JEA. It also discusses the same topics were a subpoena to testify be issued.

1. Issue Presented

When members of the executive branch appear at Council (or one of its committees)—by subpoena or otherwise: 1) what, if any, privilege(s) may members of the executive branch rely on should they decide not to answer some or all of a question; and 2) what process should City Council or its committee use to consider the asserted privilege(s)?

1. Short Answer

Whether or not a subpoena is issued, the Mayor or his advisors may, where appropriate, assert the executive privilege to protect communications had by members of the executive branch during its deliberative and decision-making process of the subject at issue.

If the privilege is properly asserted by the Mayor or one of his advisors, a presumptively valid privilege attaches to the communications. In the event a subpoena was issued and the witness asserted the privilege, the Council theoretically could consider whether to attempt to compel the disclosure in the face of the presumptively valid assertion of privilege.

1. Discussion

A) Executive Privilege

Generally, there are two subcategories of executive privilege: 1) the chief executive communications privilege (often referred to as the presidential communications privilege), and 2) the deliberative process privilege. *See Committee on Oversight and Government Reform, U.S. House of Representatives v. Lynch*, 156 F.Supp.3d 101 (D.C. 2016)*.*

B) Basis for Privilege

The deliberative process privilege is a common law doctrine based on constitutional separation of powers principles. Article II, section 3 of the Florida Constitution, states “The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” Florida has traditionally applied a “strict separation of powers doctrine.” *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

Article 4of the Charter contains strongly worded separation of powers provisions. Section 4.01 states, “The powers of the consolidated government shall be divided among the legislative, executive, and judicial branches of the consolidated government. No power belonging to one branch of the government shall be exercised by either of the other branches, except as expressly provided in this charter.” The General Counsel, for 50 years, has issued opinions applying separation of powers to various questions. E.g., GC Opinion 97-1 (concluding that separation of powers prohibited the Mayor from vetoing quasi-judicial decisions of the Council). Further supporting the abundant and independent power possessed by the City’s executive branch is the fact that the City follows a municipal government structure known as a “strong-mayor” model. *D.R. Horton v. Peyton*, 959 So. 2d 390, 397(Fla. 1st DCA 2007).

Article 6.04 of the Charter delineates the hefty powers of the Mayor:

“The executive power of the consolidated government (except such as is retained by the second, third, fourth, or fifth urban services districts) is vested in the mayor who is the chief executive and administrative officer of the consolidated government. He shall be responsible for the conduct of the executive and administrative departments of the consolidated government. The mayor shall administer, supervise, and control all departments and divisions created by this charter and all departments and divisions created by the council. The mayor shall appoint the directors and authorized deputy directors of each department and the chief of each division within each department, subject to confirmation by the council, and they shall serve at the pleasure of the mayor. The mayor is authorized to require any executive officer of the consolidated government to submit to him written or oral reports and information relating to the business and affairs of the consolidated government. The mayor shall from time to time submit reports and recommendation to the council with respect to the financial condition, business and general welfare of the consolidated government and all offices, departments, and divisions thereof. The mayor shall submit to the council an annual budget for the consolidated government.”

Thus, executive functions are reserved in Jacksonville for the executive branch. For example, professional service contracts are in the purview of the executive branch.[[1]](#footnote-1) So is Procurement.[[2]](#footnote-2) Chapter 21, Part 3 of the Jacksonville Ordinance Code explicitly describes the parameters whereby the Mayor “. . . can present his recommendations for the privatization of departments, divisions or essential public functions to the Council for Council review and approval.”[[3]](#footnote-3) Section 21.301(c) also provides that the decision to privatize should be undertaken only after careful legislative and executive appraisal. Thus, if “. . . the Mayor proposes to privatize . . . an essential public function, the Mayor must first submit a privatization plan to Council for its review and approval.”[[4]](#footnote-4)

The executive privilege serves the purpose of safeguarding the quality and integrity of governmental decisions by protecting communications between members of the executive branch had during its deliberative or decision-making processes. *Hopkins v. H.U.D., 929 F.2d 81, 84 (2d Cit. 1991); see also NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 44 L.Ed.2d 29, 95 S. Ct. 1504 (1975).* This privilege extends to the mental processes by which an executive reaches a decision. The United States Supreme Court has clearly stated that the mental process of executives should not be queried. *See U.S. v. Morgan, 313 U.S. 409, 422, L. Ed. 1429, 61 S Ct. 999 (1941).* One description of the rationale for this is as follows:

It necessarily follows - - and the Supreme Court so held in the *United States v. Nixon[[5]](#footnote-5)* – that communications among the [executive] and his advisers enjoy a “presumptive privilege” against disclosure . . . . The reasons for this privilege, the Nixon Court explained, are “plain.” “Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process.” *Id.* at 705. Often, an adviser’s remarks can be fully understood only in the context of a particular debate and positions others have taken. Advisers change their views, or make mistakes which other correct; this is indeed the purpose of internal debate. The result is that advisers are likely to be inhibited if they must anticipate that their remarks will be disclosed to others, not party to the debate, who may misunderstand the significance of a particular statement or discussion taken out of context. Some advisers may hesitate – out of self-interest – to make remarks that might later be used against their colleagues or superiors. As the Court stated, “[a] president and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” *Id.* at 708.

13 U.S.Op.Off. Legal Counsel 153, \*\*3(O.L.C.), 1989 WL 595843

 As mentioned in the Office of Legal Counsel opinion cited above, one landmark executive privilege case is *U.S. v. Nixon*, *supra.* In that case, the Supreme Court ruled that certain physical evidence, i.e., tapes, were not protected by executive privilege when the tapes were sought as part of a criminal trial. The court emphasized however, the importance of preserving executive privilege when properly invoked for top-level executive conversations. More important, and often forgotten, the United States Circuit Court for the District of Columbia relied on executive privilege concepts in refusing to enforce a Senate committee’s subpoena for those same tapes. So while executive privilege did not protect the tapes from being subpoenaed for a criminal case, it did protect the tapes from being subpoenaed by an important Senate committee. The Court explained as follows:

In approaching our judicial function, we have no doubt that the Committee has performed and will continue to perform its duties fully in the service of the nation. We must, however, consider the nature of its need when we are called upon, in the first such case in our history, to exercise the equity power of a court at the request of a congressional committee, in the form of a judgment that the President must disclose to the Committee records of conversations between himself and his principal aides. We conclude that the need demonstrated by the Select Committee in the peculiar circumstances of this case, including the subsequent and on-going investigation of the House Judiciary Committee, is too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena.

Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 733 (D.C. Cir. 1974)

C) Applicability of Privilege to Executives Other than President

While *Nixon* is not binding on the states, numerous states have cited to *Nixon* in both their acknowledgement of an executive privilege and their determining the parameters of applying the executive privilege to officials at the state level (e.g., governor, attorney general). Federal courts have also applied *Nixon* to federal executive branch officials other than the president. In re *The Attorney General of the United States,* 596 F.2d 58 (2d Cir. 1979); *U.S. v. Winner*, 641 F.2d 825(10th Cir. 1981)(allowing assertions of privilege by the Attorney General and Assistant Attorney General, respectively). In *Cheney v. U.S. Dist. Ct. for the Dist. Of Columbia, 542 U.S. 367 (2004)*, the Supreme Court again ruled that separation of powers principles justify proper invocations of executive privilege by the Vice President and that judicial confrontations over these principles should generally be avoided. In *Marisol A. v. Giuliani,* 1998 WL 132810 (S.D.N.Y. Mar. 23 1998), the court applied the executive privilege to bar the deposition of then Mayor Guiliani. *See also* *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cit. 2007), which cited to *Guliani* for the same proposition.

The First DCA, in *Florida House of Representatives v. Expedia, 85 So. 3d 517* (Fla. 1st DCA 2012), unequivocally held that public officials in both the legislative and executive branches are entitled to a testimonial privilege. The Court in *Expedia* cited to *United States v. Nixon, supra,* as authority for the proposition that executive privilege exists for state officials. A good example of the depth and breadth of the executive privilege can be found in *Dep’t of Health and Rehab. Servs. V. Brooke, 573 So. 2d 363 (Fla. 1st DCA 1991*). There, the First DCA held that executive privilege protected the head of an administrative agency of the State of Florida and that the department head could not be forced to appear in court and answer questions about funding of the agency.

D) Applicability of Executive Privilege to Chief Executive’s Advisors

It is well established that not only does executive privilege apply to the governmental entity Chief Executives, but also to “communications between high government officials and those who advise and assist them in the performance of their manifold duties,” *Nixon* at 705. “For, in many respects, a senior advisor [to the chief executive] functions as the [chief executive’s] alter ego, assisting him on a daily basis in the formulation of executive policy . . .” Subjecting a senior advisor to legislative subpoena power would be the same as requiring the chief executive to appear on matters relating to the performance of his assigned executive functions, which would violate separation of powers principles. *Attorney General Opinion for the United States (Assertion of Executive Privilege with Respect to Clemency Decision), 16 September 1999(Reno, J.).*

As mentioned above, Article 4.02 of the Charter expressly provides for the Mayor’s executive authority under a strong-mayor model: “All powers and duties which are executive in nature shall be exercised or performed by the mayor or such other executive officer of the consolidated government as the mayor may designate, except as otherwise specifically provided herein.”

Thus, there appears to be no question that the scope of the Mayor’s executive privilege extends, not just to communications with the Mayor, but also communications between the Mayor’s advisors. The privilege may even extend to the Mayor’s advisors regardless of whether they are in or out of the government. *Association of American Physicians and Surgeons, Inc. v. Clinton,* 997 F.2d 898, 909-10, 915 (D.C. Cir. 1993) (finding that a spouse or consultant could be considered an advisor subject to protection if their role is functionally indistinguishable from those of other advisors, regardless of whether they are compensated or exercise supervisory or decision-making authority).

If an adviser or a member of the Mayor’s staff is called to testify before Council, the adviser should be permitted to temporarily avoid testifying to any subjects he or she believes may fall with the scope of the privilege in order to preserve the issue. *Blumenthal v. Drudge,* 186 F.R.D. 236, 242 52 Fed. R. Evid. Serc. 149 (D.D.C. 1999).

E) Exceptions

There are, of course, some exceptions to executive-privileged information: Purely factual information is not privileged unless so “inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government’s deliberations.” *In re Sealed*, 121 F.3d 729, 737 (D.C. Cir. 1997); S*ee also EPA v. Mink*, 410 US 73, 87-91. Nor would the privilege protect against criminal misconduct. Also, the executive privilege doctrine has no application to otherwise public records. Florida has a broad public records law. 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.

F) Scope

The executive privilege applies to all executive communications that are predecisional and deliberative. Predecisional communications are those communications had before the adoption of an executive branch decision. *City of Colorado Springs*, 967 P.2d 1042, 1051 (Colo. 1998). Post-decisional communications may not fall within the privilege, but at least one court has said that predecisional communications remains protected by the privilege even once a decision has been made. *Capital Information Group v. Office of the Governor*, 923 P.2d 29, 35-36 (Alaska 1996).

A communication is deliberative if it reflects the “give-and-take of the consultative process,” *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). A one-way communication, however, does not mean that the communication does not satisfy the deliberative requirement. *Capital Information Group, supra at 35-36*.

G) Presumptive Privilege Attaches

Once the privilege has been properly invoked by the head of the relevant department or designee, a presumptive, qualified privilege attaches to communications. This presumption of validity for an invocation of the privilege is strong. Under D.C. Circuit precedent, a congressional committee may not overcome an assertion of executive privilege unless it establishes that the document and information are “demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974).In the City of Jacksonville context, should the privilege be invoked, the proper procedure would be to consult with the General Counsel, who would have the authority under the City’s Charter to make the legal determination as to whether the invocation of the privilege was or was not proper.

H) Conclusion

It should be the extremely rare occasion that Council issues a subpoena to testify to the Mayor or one of his advisors. Instead, out of respect for the Florida Constitution and Jacksonville City Charter’s separation of powers doctrine, information should be exchanged between the branches in a way that protects the deliberative process of the Mayor while providing information necessary for the fulfillment of Council’s investigative duties. The Council should avoid transgressing on executive communications regarding policy because of obvious separation of powers concerns. If a subpoena were to be issued, regardless of whether it is issued to the Mayor or one of his advisors, the executive privilege can be asserted. If that happens, the General Counsel’s Office should be consulted at the earliest possible moment to initially evaluate the propriety of the presumptively valid invocation of the privilege.

Whether the executive branch official chooses to assert the privilege on a question-by-question basis or whether the official chooses to assert a blanket privilege is asserted preventing even an appearance, depends on the propriety of the scope of inquiry. If it is evident that any questions asked would fall within the realm of the privilege, *i.e.,* the communications at issue are predecisional and deliberative in nature, a blanket assertion of the privilege in lieu of an appearance could be justified. Care should be taken to avoid interfering with an official’s duties. For example, there is no need to subpoena a high-ranking official if a lower-ranking official would have superior knowledge of the facts or issue. On the other hand, if the inquiry may pertain at least partially to matters purely factual in nature which only a particular official would know, then the official could appear and assert the privilege on a question-by-question basis.

Once the privilege is asserted, the communications become presumptively privileged – a presumption based on bedrock separation of powers principles. Of course, no assertion of privilege would occur except in the presumably unlikely event that members of the Council would be determined to inquire into predecisional conversations among high ranking officials that are obviously out-of-bounds. Any decision to challenge a colorable assertion of executive privilege in the current context, therefore, would be brought to the General Counsel who would need to carefully consider the principle of separation of powers, the relevance of communications, the availability of other sources of the information, the effect compelled disclosure would have on future City employees, , and the philosophical underpinnings of our consolidated government.

1. Chapter 126, Part 3, of the Jacksonville Ordinance Code. [↑](#footnote-ref-1)
2. Chapter 24 of the Jacksonville Ordinance Code. [↑](#footnote-ref-2)
3. Section 21.301(d), Jacksonville Ordinance Code. [↑](#footnote-ref-3)
4. Section 21.302(c), Jacksonville Ordinance Code. [↑](#footnote-ref-4)
5. The Nixon case referred to is *U.S. v. Nixon*, 418 U.S. 683(1974), in which the Supreme Court of the United States extensively discussed the importance of separation of powers and proper invocations of executive privilege. [↑](#footnote-ref-5)