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MEMORANDUM

To: The Honorable Council Member John Crescimbeni

CC: Jason R. Gabriel, General Counsel
Margaret M. Sidman, Deputy General Counsel

From: Craig D. Feiser, Assistant General Counsel, Interim Manager of Public Accountability

Re: Public Records and Text Messages; Official Public Business

Date: November 20, 2017

I. Introduction

Although it is well-established that text messages concerning official agency business to and from government officials are public records, a question has arisen as to when a text message is considered official agency business and subject to disclosure versus when it is transitory in nature and/or private and can be withheld. This memorandum addresses the issue of when a message is considered “official business” and thus a public record, and when it is private.

II. Questions Presented

When is a text message “official business,” and thus subject to disclosure under the Public Records Law, versus private and not subject to disclosure, and are “non-substantive,” transitory texts still considered public records?

III. Short Answers

“Non-substantive” texts, such as transitory text messages concerning sports teams and how well or poorly they play, or asking someone to “call me” or “meeting me” with no other substantive official business, are not public records. Text messages are only public records when they are concerning official City business and intended to communicate official business and perpetuate or formalize knowledge. Determining whether a message is considered official agency business and hence a public record can

be best understood by having an understanding of what is transitory and private or personal in nature. For purposes of this memo the term “agency” and the term “City” may be used interchangeably. With respect to the public records law, the inquiry is always heavily fact-based and the answer depends on a host of circumstances analyzed on a case-by-case basis.

IV. Discussion

Long ago, the Florida Supreme Court specifically held that a public record, for purposes of section 119.011(1), Florida Statutes, is “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.” *Shevin v. Byron, Harless, Schaffer, Reid and Associates*, 379 So. 2d 633, 640 (Fla. 1980). In contrast, materials which “are not, in themselves, intended as final evidence of the knowledge to be recorded,” are not public records. *Id.* Just having a text message on a phone does not make the message a public record; it must be prepared in connection with official business of the agency and intended to perpetuate, communicate or formalize knowledge. *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 280 (Fla. 4th DCA 2011). Private, non-substantive text messages such as “call me” or “where are you” would not meet these criteria of official business and are not intended to formalize knowledge.

Due to their very nature as a quick method of communication, text messages are often transitory and convey information that is not intended to be formalized knowledge of official business in a permanent document. The Florida Department of State, Division of Library and Information Services, has stated that transitory, non-substantive messages would *not* be considered public records. The Division clarified as follows (noting that transitory records may be deleted as soon as the administrative value is lost¹):

ELECTRONIC COMMUNICATIONS

There is no single retention period that applies to all electronic messages or communications, whether they are sent by email, instant messaging, text messaging (such as SMS, Blackberry PIN, etc.), multimedia messaging (such as MMS), chat messaging, social networking (such as Facebook, Twitter, etc.), voice mail/voice messaging (whether in audio, voice-over-internet protocol, or other format), or any other current or future electronic messaging technology or device. Retention periods are determined by the content, nature, and purpose of records, and are set based on their legal, fiscal, administrative, and historical values, regardless of the format in which they reside or the method by which they are transmitted. Electronic communications, as with records in other formats, can have a variety of purposes and relate to a variety of program functions and activities. The retention of any particular electronic message will generally be the same as the retention for records in any other format that

¹ Florida Department of State, Division of Library and Information Services; General Records Schedule GS1-SL For State and Local Government Agencies, Effective August 2017, Item #146 Transitory Messages.

document the same program function or activity. For instance, electronic communications might fall under a CORRESPONDENCE series, a BUDGET RECORDS series, or one of numerous other series, depending on the content, nature, and purpose of each message. Electronic communications that are created primarily to communicate information of short-term value, such as messages reminding employees about scheduled meetings or appointments, or most voice mail messages, might fall under the “TRANSITORY MESSAGES” series.

TRANSITORY MESSAGES

Item #146

This record series consists of records that are created primarily to communicate information of short-term value. **“Transitory” refers to short-term value based upon the content and purpose of the message, not the format or technology used to transmit it.** Examples of transitory messages include, but are not limited to, reminders to employees about scheduled meetings or appointments; most telephone messages (whether in paper, voice mail, or other electronic form); announcements of office events such as holiday parties or group lunches; and recipient copies of announcements of agency sponsored events such as exhibits, lectures, workshops; and news released received by the agency strictly for informational purposes and unrelated to agency programs or activities. Transitory messages are not intended to formalize or perpetuate knowledge and do not set policy, establish guidelines or procedures, certify a transaction, or become a receipt.

The above referenced State retention provisions contain guidelines pertaining to transitory messages that are similar to those found in the Florida Rules of Judicial Administration pertaining to Administrative Records, as follows:

TRANSITORY MESSAGES

This record series consists of those records that are created primarily for the communication of information, as opposed to communications designed for the perpetuation of knowledge. Transitory messages do not set policy, establish guidelines or procedures, certify a transaction, or become a receipt. The informal tone of transitory messages might be compared to the communication that might take place during a telephone conversation or a conversation in an office hallway. Transitory messages would include, but would not be limited to: E-mail messages with short-lived, or no administrative value, voice mail, self-sticking notes, and telephone messages.

RETENTION: Retain until obsolete, superseded or administrative value is lost.

In short, if a text is intended to perpetuate or formalize knowledge regarding official business, it is public. If it is a non-substantive, transitory message (“where are you,” “call me,” etc.), it is not.

As mentioned above, the inquiry into whether a message is considered a public record is heavily fact-based and the answer depends on a host of circumstances on a case-by-case basis. Accordingly, should there be any question whether a particular message may be considered a public record, please contact our office for guidance.

Please let me know if you have any further questions.