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NINTH JUDICIAL CIRCUIT  
ORANGE AND OSCEOLA COUNTY, FLORIDA

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REPORT AND CONCLUSIONS

The Office of the State Attorney was asked to conduct a thorough and independent investigation to determine if the Orange County Mayor, any Orange County Commissioner or anyone else violated Florida law in regard to events which occurred at a county commission meeting held on September 11, 2012.

Within weeks of taking office, I concluded that if any possibility existed that Florida Statutes were violated then only a full and unbiased investigation could uncover all of the relevant facts. I felt that the public had a right to know if their officials are acting within the law; and, if laws were violated, especially in the evolving area of law and technology, then such an investigation would hopefully lead to improved practices by public officials. Further, if laws were not violated then the investigation would remove the stain of unproven allegations and speculation. Therefore, I requested an investigation by the Florida Department of Law Enforcement ("FDLE"). FDLE graciously agreed to assist and assigned its Office of Executive Investigations stationed in Tallahassee to conduct the investigation. The citizens of Orange County owe the FDLE and the assigned investigator a debt of gratitude for their professionalism and diligence in the conduct of the investigation.

Over the following six months, the investigation included interviews with Orange County Mayor Theresa Jacobs, her chief of staff and all of the then-sitting Orange County Commissioners. While some of these individuals expressed very understandable concerns about certain privileged communications and general privacy, each of these individuals was extremely cooperative with the investigation. Each of the individuals either provided their phone to law enforcement for forensic examination or permitted their phone to be examined during the course of the investigation. Therefore I am satisfied that all pertinent information has been obtained from the relevant devices.

The investigators obtained available phone records for all of the devices in question. They interviewed those individuals involved in text communications with the elected officials whether identified by the phone records or through interviews with the elected officials themselves. The investigator obtained copies of some of the text messages deleted by elected officials from the individuals with whom they were communicating. The investigator also interviewed the attorney representing Citizens for a Greater Orlando, the primary proponents of the sick time initiative, regarding the attorney's investigation into these communications and his efforts to obtain the text messages in question.

The investigator maintained frequent communication with this office as to the progress of the investigation and responded to suggestions the office made as to the scope and direction of

the investigation. Upon its completion, I received the investigative summary on or about the ninth day of July, 2013. One particular group of related materials referred to in the reports was requested and submitted on August 9, 2013. These materials were reviewed with an eye toward two specific statutory schemes referred to generally as “Government in the Sunshine” and “Public Records”.

## GOVERNMENT IN THE SUNSHINE

The first concern expressed related to communications between elected officials prior to the September 11<sup>th</sup> meeting of the Orange County Commission regarding the sick time initiative. Florida law generally prohibits elected officials from communicating privately regarding matters that have or may come before them as a board or commission. These prohibitions also apply to those officials using others as conduits to facilitate any such communication. An example would be Commissioner A using a staff member to communicate his position on an issue to the staff member for Commissioner B, knowing that the information would find its way to Commissioner B. What the law does not prohibit, however, is private citizens soliciting information from one elected official and communicating that information to another elected official. Nor does the statute prohibit an elected official from accepting that information and considering it in his or her decision making process. The key issue is who initiated or solicited the communication.

The FDLE investigation reveals that this case is a prime and entirely legal example of the latter. In which a citizen, who felt the initiative was bad public policy, devised a method to essentially kill the measure by delaying it, thereby keeping it off the upcoming ballot. He then communicated his plan to a Commissioner he felt would be sympathetic, obtained that Commissioner’s support for the measure, then communicated the plan and the first Commissioner’s support to other commissioners to obtain their support and so on and so on. Whether the citizen’s plan was consistent with other laws related to the power and authority of the commission is a matter for the courts and not for this office to decide; but clearly the tactic violated no criminal statutes.

There was no evidence presented that any of the citizen’s efforts were solicited or suggested by any of the Commissioners or the Mayor. Nothing in the investigation demonstrates a violation of Florida laws related to open meeting or “Government in the Sunshine”.

## PUBLIC RECORDS

The second concern expressed and investigated related to the potential destruction or failure to maintain public records. Florida law is clear that “[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency” Florida Statute § 119.01 (2012). Any analysis of an issue involving public access to records maintained by a public agency, and by definition any public official, must be guided by this very simple statement of policy. Each of us, as elected officials, have a duty to maintain and provide public access to our official records. The definition of what is a public record is deliberately broad and intended to be virtually all encompassing.

While it is often burdensome on public agencies to provide public records, and the intricacies of the law sometimes bedevil those not schooled in the law, it is none the less an important obligation of all public officers. The advent of new forms of communication have only served to complicate the application of these rules, but once again the burden falls to us as elected officials to forever be mindful of the basic policy behind the law and to resolve any doubts in favor of the broader public policy. It is with these principles in mind that I have analyzed the facts revealed in the investigation.

We learned through the investigation that the citizen referred to previously communicated with Commissioners Edwards, Boyd, Martinez, Thompson and Mayor Jacobs about his plan to defeat the initiative be presented to the Board at its meeting on September 11, 2012. The citizen indicated that only Commissioners Brummer, Edwards and Martinez were sent text messages and that all communications with Commissioners Boyd, Thompson and Mayor Jacobs were by phone or in person. Fortunately, Commissioner Edwards retained the messages in question and provided them when public requests were made.

Commissioner Brummer acknowledges receiving the text messages in question but deleted them in the belief that they were not public records but were “transient electronic text messages.” There is nothing in the investigation to dispute that this was Commissioner Brummer’s true belief at the time, and there is no evidence of any nefarious motivation for his deletion of those text messages.

Former Commissioner Martinez also acknowledges communicating with the citizen about the plan to defeat the initiative, though he does not specifically acknowledge that any of the communication occurred via text message. A copy of a text message to Commissioner Martinez was provided to the investigator by the citizen, but it does not appear that the message was ever shown to Former Commissioner Martinez. Thus, whether he would acknowledge receipt of the message is unclear. Former Commissioner Martinez does acknowledge a discussion with a lobbyist for the Walt Disney Company regarding its opposition to the initiative. He also admits receiving text messages during the meeting from that same lobbyist, but states it was a general inquiry as to his wellbeing. Commissioner Martinez acknowledges those text messages he received during the meeting were deleted in the belief that they were not public records but were “transient electronic text messages.” There is nothing in the investigation to dispute that this was his true belief at the time or to imply any nefarious motivation for his deletion of those text messages.

Commissioner Boyd acknowledges exchanging text messages during the public hearing with several lobbyists, including those representing Disney, Mears Transportation, the Central Florida Hotel and Lodging Association, and Darden Restaurants, all of whom were opposing the initiative. While he was not able to produce the text messages, Commissioner Boyd acknowledges these messages concerned the sick leave matter before the County Commission. He also acknowledges deleting them for personal reasons but under the belief that they were not public records and did not contain any significant Orange County Government information. There is nothing in the investigation to dispute that this was his true belief at the time or to imply any nefarious motivation for his deletion of those text messages.

Commissioner Thompson acknowledges a regular practice of communicating by text messaging. She appears to have been the most prolific user of text messaging during the September 11th meeting. She admits to communicating with fifteen different people during the meeting. She refers to her communication with business owners as “transitory in nature” and deleted all of the communications. Commissioner Thompson stated at the time she was unaware the messages could be considered public records, and she would not have deleted them had she known they were public records. There is nothing in the investigation to dispute that this was her true belief at the time or to imply any nefarious motivation for her deletion of those text messages.

Mayor Jacobs does not appear from the investigation to have received the same number of text messages from opponents of the initiative as the Commissioners. One text she received during the hearing was from a personal friend, the president of the West Orange Chamber of Commerce, containing what the petitioners before the Board no doubt would have perceived as a substantive comment on the issue before the Board. Mayor Jacobs deleted these messages from her phone under the mistaken belief they would be obtainable from the provider. Immediately upon the request of Citizens for a Greater Orlando, she attempted to retrieve text messages receive during that period of time. The investigation also revealed, and Mayor Jacobs acknowledges, that she did exchange text messages with the County Attorney and with a personal friend, attorney and advisor, about the initiative before the board. These messages were deleted as well.

A public record is defined broadly in the statute to mean “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.” In assessing the application of this definition to the text messages sent and received by the elected officials in this case, one need only look to the clear language of the statute. Each of these officials received text messages the contents of which related to the official business of the Orange County Commission in regards to their decision whether to place the sick time initiative on the upcoming November election ballot. It is unlikely any of these officials would have destroyed a letter written by these same individuals with the same content, immediately identifying it as a public record. The apparent difficulty is with the form of the communication rather than the content. Yet, the public records statute does not differentiate based upon the form of the communication.

Many of the officials were of the opinion that the “transitory nature” of the communication excluded the text messages from the requirements of Chapter 119. I find no authority in the statute for that distinction. There is some use of the term “transitory records” in retention schedules produced pursuant to the statute, but the term is ill defined. Black’s Law Dictionary defines transitory records as “[c]orrespondence and routine documents that have a short life span or value and are not integral to operations.”

One can easily see that certain communications by or to a public official might meet this definition. A note from a staff member reminding a public official of an appointment is a

transitory record. A temporary draft of a letter or speech after the final version is sent or given is a transitory record. In the instant circumstance, the only thing which gave these messages a short life span was the ease with which they could be erased. It is also hard to defend a position that all of this information exchange, which brought about the defeat of a hotly debated initiative, can be considered not integral to operations.

**My conclusion, therefore, is that these text messages were public records and could only lawfully be disposed of pursuant to statute. The statutory procedures in this case were not followed and, therefore, all of the officials who deleted text messages related to this issue violated Florida law.**

Having made that determination, the issue becomes what action is required to further the interests of justice. It is important to note the public attention paid to this issue has already led to changes in the policies of the Board of County Commissioners that should prevent this violation from occurring in the future. The Mayor and all of the commissioners told the investigator that in the future they would either refrain from using text messaging as a mean of communication or treat those that do occur as public records. Subsequent remedial measures, however, do not preclude appropriate sanctions.

Florida Statute § 119.10 creates four levels of sanctions for violations of the various provisions of Chapter 119. The most serious level is inapplicable to this case. The next level of offense requires finding that the violation of 119 has occurred and was done “willfully and knowingly”. I find insufficient evidence in this investigation to conclude that the deletion of any text messages was willful. There is no evidence of any intent to hide the involvement of the citizen who devised the plan to defeat the initiative. In fact, the citizen seems rather proud of his accomplishment. The Mayor and each of the commissioners all freely acknowledged the communications with the citizen.

The third level of punishment requires proof that the failure to comply with the statute was done knowingly. Again, there is insufficient evidence to establish that when these officials deleted the text messages they knew they were public records. In fact, the evidence appears clear they all were under the mistaken impression the text messages were not public records. I have seen no evidence to suggest their statements are untruthful.

The last level of punishment creates what is referred to as a strict-liability offense. Violation of any provision of the statute, regardless of intent or knowledge, constitutes a civil infraction punishable by a fine of up to five hundred dollars. It seems very clear to me this is the correct statute to apply and the correct punishment to seek in response to the actions of Mayor Jacobs, Commissioner Boyd, Commissioner Brummer, Commissioner Thompson and former Commissioner Martinez.

I have assigned my Chief Assistant/Executive Director, Richard Wallsh, to contact the attorneys representing each of the above-named public officials to determine whether, in the interest of justice, each public official will agree to a payment of a \$500.00 civil fine to conclude this matter. If not, then my office shall prepare appropriate charging documents for submission

to the court and the matter can be resolved through the judicial system I am hopeful that will not prove necessary.