

Hopping Green & Sams

Attorneys and Counselors

September 10, 2014

Board of Supervisors
Harbor Bay Community Development District
via e-mail

Re: Applicability of Sunshine Law and Public Records Law to Social Media and Internet

Dear Board Supervisors,

Several of you have asked about the applicability of Florida's Sunshine Law and Public Records Law to social media websites such as Facebook, Twitter, and other online forums. Both laws apply to social media, and there are several best practices that you may want to consider when using social media to communicate with constituents.

Florida's Government in the Sunshine Law

Generally speaking, the Sunshine Law applies to all formal or informal gatherings of two or more Board Supervisors to discuss matters that may foreseeably come before the Board for official action. Section 286.011, Florida Statutes, contains three requirements for such meetings: (1) the meetings must be open to the public; (2) the meetings must be noticed; and (3) minutes of the meetings must be taken. Consistent with the Florida Supreme Court's broad interpretation of the Sunshine Law, the Sunshine Law extends to any discussion or exchange by two or more Board Supervisors regarding District business regardless of the means of communication, including but not limited to email, phone calls, social media websites, and blogs. Although the Sunshine Law does not specifically prohibit a Board Supervisor from using social media, Board Supervisors must be aware that any exchange of opinions relating to District matters as between two or more Board Supervisors, whether directly or indirectly via social media, triggers the requirements of the Sunshine Law. In addition, Board Supervisors should be aware of the potential for other third party users to trigger these requirements. For example, the Attorney General has expressed concern as to "the inherent availability of other participants or contributors to act as liaisons" for board members to discuss official matters that should properly be handled at a public meeting.

Public Records Law

Board Supervisors are also subject to the duties contained in Chapter 119, Florida Statutes, which creates certain retention and inspection requirements for public records. "Public records" are defined in Section 119.011(11), Florida Statutes, to include "all documents, papers, letters... or other material, regardless of the physical form, characteristics, or means of transmission, made or received... in connection with the transaction of official business by any agency." The nature of the record, rather than the form of the record, determines whether it is a public record subject to Chapter 119, Florida Statutes. Opinions or comments posted on social media websites or blogs by Board Supervisors regarding District matters or matters that may come before the Board are considered to be made "in connection with the transaction of office business" and are, therefore, "public records." This is true regardless of whether the posts are made on a private social media account, a public social media page, or on a public website.

Best Practices

While social media offers Board Supervisors a powerful means by which to communicate with constituents, use of social media by Board Supervisors presents the risk of violation of both the Sunshine Law and the Public Records Law (among other laws), and the best practice may be to not use social media at all but instead to work with the District Manager to communicate with the community about issues that are important to you and your constituents. That said, if you do use social media, here are some suggestions to minimize these risks:

1. Do NOT post on a social media page in response to another Supervisor's post. Also, do NOT direct others to make such a post on your behalf.
2. If you do post on a social media page, create a copy of that page, and submit it promptly to the District Manager's office, who will maintain the record as the District's records custodian. In an abundance of caution, you will also want to make sure that any "replies" to your post are captured in your copy, which can be difficult if the site is controlled by a third-party that has the ability to remove posts.
3. Maintain your own "CDD" e-mail account, separate and apart from any personal e-mail (or ask the District Manager to establish such an account on your behalf). Do NOT delete any such e-mail that you send or receive regarding District business, but instead preserve them consistent with the District's records retention policy (and regularly back up your copy).
4. Make sure that what you say in your post is 100% accurate. When in doubt, consult the District Manager prior to making a post. The best post is brief, and directs a constituent with a particular question to the District's web-site for information or the District Manager for follow-up.

Further, please note that this letter is not intended to provide a comprehensive overview of all issues that are potentially raised by the use of social media (e.g., First Amendment, campaign finance, libel/slander, etc.), and, as noted, there is the potential for both District and individual liability for communications in connection with District business. So if you have any questions regarding a particular use of social media, please speak with District Staff first before using any social media. I hope this information is helpful to you. If you have any questions, please do not hesitate to contact me.

Sincerely,



Jere Earlywine

cc: District Manager