

MEMORANDUM

TO: DeBary City Council

FROM: A. Kurt Ardaman, City Attorney
Dan Parrott, City Manager

DATE: 4/1/16

RE: Public Records Determination and Compliance

Background:

A number of public records requests have been made to the City and to Mr. Johnson for records related to various activities of Mr. Johnson. The City has acknowledged all of the requests to the City and has fully responded to the requests to the extent that the City staff has access to the records. To the extent the City has not been able to determine whether additional responsive records exist, Eric Frankton has advised the requestors that the City is attempting to determine such and to obtain any such records. On or about February 3, 2016, the City Council instructed us to take actions to determine 1) if the current public records requests have been properly responded to; and 2) what actions need to be taken to resolve the public records requests.

After performing initial review and analysis of the public records requests and the status of the City's responses to those requests, on February 25, 2016, we sent a request and memorandum to Mr. Johnson via e-mail and U.S. mail describing the instructions we received from the City Council, requesting certain records, and propounding a number of questions to Mr. Johnson intended to allow the City to fully respond to any unmet public records requests. We sent a follow-up email to Mr. Johnson on March 4, 2016 requesting a response by March 11, 2016, and a further e-mail to Mr. Johnson on March 15, 2016 asking Mr. Johnson whether he intended to respond to our requests. As of the date of this memorandum, Mr. Johnson has not responded to our requests.

We have also sent requests for records to each third party entity of which we are aware that either advertised in Mr. Johnson's "State of the City Address" flier or that was otherwise involved in the production and mailing of the flier. We have received responses from some of the entities.

The pending public record requests relate primarily to Mr. Johnson's "Mayor's Mailbox" project, his "State of the City Address" flier, posts made by Mr. Johnson to various websites and social media platforms, Mr. Johnson's recent bicycle tour, and other matters.

This Memorandum discusses the status of the pending public records requests and the City's options to acquire the requested documents.

Status of Pending Requests & Legal Analysis:

1) *Mayor's Mailbox*

STATUS:

Public records requests have been made for all surveys and other records placed into the Mayor's Mailbox, as well as records related to the third party entity or individual that Mr. Johnson purportedly hired to perform various services related to the Mayor's Mailbox. As of the date of this memorandum, the City is in possession of approximately 730 completed surveys from the Mayor's Mailbox, which have been made available to the relevant requestor for copying and review. However, it is our understanding that approximately 200 surveys and other records from the Mayor's Mailbox may not have been delivered to the City. We requested information from Mr. Johnson regarding the existence and location of any missing records, and other information related to the third party individual or entity that Mr. Johnson hired, but we have received no response.

LEGAL ANALYSIS:

Public records include all records "made or received pursuant to law or ordinance or in connection with the transaction of official business by an agency." Fla. Stat. 119.011(12). As a public officer, Mayor Johnson is an "agency" as defined by statute. Fla. Stat. 119.011(2). Accordingly, records created or received by Mayor Johnson in his official capacity constitute public records. *See* AGO 1977-141. Since Mr. Johnson is and was arguably acting in his capacity as mayor with respect to the Mayor's Mailbox project, all records related thereto that are "made or received" by Mr. Johnson or the City constitute public records. *See* Fla. Stat. 119.011(12). Since the completed surveys and other documents placed in the Mayor's Mailbox were "made" by private citizens, they do not constitute public records unless and until "received" by an agency. If Mr. Johnson has ever exercised physical control of or personally viewed the documents, he has "received" them within the meaning of the statute, even if he does not maintain possession of them. *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009). Further, to the extent that Mr. Johnson exercised control over the Mayor's Mailbox at the time a document was placed therein, a court may hold that he "received" such documents within the meaning of the statute.

The name and any contractual and financial records related to the hiring and payment for services to a private entity or individual purportedly hired by Mr. Johnson to exercise control over the Mayor's Mailbox and to perform other services have been requested. Such entity or individual could constitute an "agency" subject to the public records laws if "acting on behalf of any public agency," i.e. Mr. Johnson as Mayor, within the meaning of Fla. Stat. 119.011(2). Whether an entity or individual is "acting on behalf of a[] public agency" within the meaning of the statute depends on the relationship between the parties, the terms of their agreement, and other factors. Mr. Johnson's assertion to the City Attorney and the City Council that he hired an independent entity to collect and tabulate the survey results, and over which he contractually had no right of access to the surveys, was a significant factor considered by the City Attorney in issuing a legal opinion and on Mr. Johnson's assertion that the survey results were not public records.

Without the requested records from Mr. Johnson, we are unable to respond to the public records request made for the survey results and other documents deposited in the Mayor's Mailbox. The course of action most consistent with the City's interests would be for Mr. Johnson or the third party entity to deliver the records to the City and make them available for copying and viewing.

2) *“State of the City Address” Flier*

STATUS:

Public records requests have been made for various records related to Mr. Johnson’s “State of the City Address” flier, including agreements, receipts, and payment records related to the private companies whose advertisements appear in the flier and the company hired to mail out the flier. We requested all such records from Mr. Johnson, but he has not responded to our request. We also requested responsive records from the individual companies via letters mailed on March 2, 2016, and we followed up with non-responders by e-mail and telephone. As of the date of this memorandum, we have received responses from roughly half of the companies. The City has received the following records responsive to the public records request:

- An email from Mr. Johnson listing his cost for the flier totaling \$3,500.
- An email and invoice from the Henin Group in the amount of \$800.00, which was paid by Traderscove and MI Homes for a joint full page advertisement in the “State of the City Address” flier.
- An invoice evidencing \$3,500 paid by Mr. Johnson to Eastwood Marketing related to the mailing of the “State of the City Address” flier
- An email and letter from McBride Realty, LLC stating that \$600.00 cash was given to Mr. Johnson for a full-page advertisement in the “State of the City Address” flier
- A telephone call was received from the owner of Green for Miles Lawn Care, LLC, who stated that he paid Mr. Johnson \$100.00 in cash for an advertisement in the “State of the City Address” flier
- Danny Allen verbally replied he paid \$500 for his Ad in the Flier.

LEGAL ANALYSIS:

The Florida Attorney General’s Office has opined that a communication by a city commissioner regarding city affairs and directed to the general public constitutes a public record. *See* AGO 2008-07 (internet posts to privately maintained website). *See also* AGO 1977-141 (copies of letters received by mayor in his official capacity constitute public records). Mr. Johnson’s flier contains communications by Mr. Johnson as mayor regarding city affairs and is directed to the general public. Additionally, any private entity hired by Mr. Johnson to perform services related to the “State of the City Address” flier may be subject to the public records laws if “acting on behalf of a public agency” within the meaning of Fla. Stat. 119.011(2).

The documents from private parties responsive to the pending public records requests should be made available for inspection and copying to the relevant requestors.

3) *Website and Social Media Records*

STATUS:

Public record requests have been made for all posts made by Mr. Johnson “as mayor” to various private websites and social media platforms between January 1, 2015 and January 8, 2016. In an attempt

to comply with such requests, we requested from Mr. Johnson all posts in the relevant timeframe “which relate to issues facing the City or your position as mayor.” Mr. Johnson has not responded to our request.

LEGAL ANALYSIS:

The Florida Attorney General’s Office has opined that internet posts made by a city commissioner to a private website and directed to the general public discussing city affairs constitute public records. AGO 2008-07. *See also* AGO 1977-141 (communications received by mayor in his official capacity constitute public records). Thus, the requested posts likely constitute public records.

The course of action most consistent with the City’s interests is for Mr. Johnson to deliver the requested documents to the City and make them available for inspection and copying by the requestors.

4) *Mr. Johnson’s Bicycle Tour*

STATUS:

Public record requests have been made for various records related to Mr. Johnson’s bicycle tour, including records of donations received and purchases made during the trip. We have requested various records and information from Mr. Johnson with respect to the bicycle tour, but have not received a response.

LEGAL ANALYSIS:

Due to the clear nexus between the bicycle trip and Mr. Johnson’s position as mayor, there is a strong argument that some or all of the requested records constitute public records. Based on photographs posted by Mr. Johnson to his website and/or Facebook page, Mr. Johnson wore a vest during all or a portion of the bicycle tour displaying an emblem identifying himself as mayor of DeBary. It also appears that Mr. Johnson interacted with residents as mayor at certain times during the bicycle trip. For example, one photograph shows Mr. Johnson in his bicycle vest being handed a “Certificate of Appreciation” for “Mayor Clint Johnson.” Further, we understand that Mr. Johnson solicited and received charitable donations during the bicycle trip, and his position as mayor likely played a role in the publicity and donations he was able to obtain. *See* AGO 1977-141 (records made or received by mayor in his official capacity constitute public records).

The course of action most consistent with the City’s interests is for Mr. Johnson to deliver the requested documents to the City and make them available for inspection and copying by the requestors.

5) *Miscellaneous Requests*

Records have also been requested related to other matters, such as records related to donations received by Mr. Johnson as part of the “No Shave November” charity drive. For reasons similar to the ones cited above, the course of action most consistent with the City’s interests would be for Mr. Johnson to deliver the requested records to the City and make them available for inspection and copying and by the requestors.

Options:

1) Authorize legal counsel to file public records lawsuits to compel production of the requested records following a demand letter and opportunity to produce the documents.

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