

YOUNG QUALLS, P.A.
ATTORNEYS AND COUNSELORS AT LAW

216 South Monroe Street
Tallahassee, Florida 32301

Reply To:
Post Office Box 1833
Tallahassee, FL 32302-1833

Telephone: (850) 222-7206
Facsimile: (850) 765-4451

MEMORANDUM

To: Harmony CDD Board of Supervisors
From: Young Qualls, P.A.
Date: 09/19/2019 (Cites updated 11/20/2020)
Re: Recording Meetings and Public Record Storage Medium

Questions Presented

1. May Harmony CDD record and broadcast the Board of Supervisors' monthly meetings and if so, what are the legal considerations?
2. May a government use social media, such as Facebook, as a means of storing public records?

Answer

1. Yes, the CDD may record and broadcast public meetings (including broadcasting on Facebook), so long as the recording is maintained as a public record, the two-year retention schedule is kept, and the recording is in compliance with the Americans with Disabilities Act (ADA), namely providing closed captioning.
2. No, using social media as a means of storing public records does not adhere to Rule 1B-26.003, F.A.C. nor does it meet the Department of State, Division of Library and Information Services best practices.

Discussion

Public Purpose

Any expenditure for recording must be for a purpose that primarily benefits the public, with any private interest being incidental and secondary to the public purpose. *See O'Neill v. Burns*, 1998 So. 2d 1 (Fla. 1967). Here, the purpose is to provide residents within the CDD a means to watch the public meetings of the CDD Board of Supervisors. This serves a primarily public purpose and any private interest is incidental to such. Therefore, the CDD may record its public meetings, but it is not legally obligated to do so.

Sunshine Law

Florida's Sunshine Law does not require public meetings to be filmed but, if they are, then the recordings become public records. Rule 1B-24.003(1) of the Florida Administrative Code lists the retention schedule for items subject to public record laws. Under the schedule #424, video recordings of official meetings, as defined in § 286.011(1), Florida Statutes, require retention of ten anniversary years from the date of the official meeting. Additionally, as a public record, it must be readily available for inspection and copying if requested by a member of the public. § 119.07, Florida Statutes. Thus, filming the meetings is not required but doing so entails additional CDD statutory requirements and expenses to maintain the recordings as public records and retain them for the requisite number of 10 anniversary years.

ADA

The ADA requires public entities to ensure that a qualified individual with a disability is not excluded from participation in the public entity's activities. 42 U.S.C. § 12112. Additionally, public entities are required to furnish appropriate aids and services when needed to give disabled individuals an equal opportunity to participate in the public entity's services. 28 CFR § 35.160(b)(1). The definition given in the ADA regarding "auxiliary aids and services" includes interpreters or "other effective methods of making aurally delivered materials available to individuals with hearing impairments." 42 U.S.C. § 12103. Thus, any recording of the meetings must provide a means for a disabled individual to be able to watch the meeting with equal opportunity as a non-disabled individual. This means including closed captioning. *See Nat'l Ass'n of the Deaf v. Florida*, 318 F.Supp. 3d 1338 (S.D. Fla. 2018). This is a particularly important consideration given the increasing number of ADA-related lawsuits being brought against local governments for this exact issue. Furthermore, it is important to note that often, providing subtitles comes at considerable expense to the local government. Please refer to attached legal memorandum on ADA website compliance for further information.

Retention of Recordings

Public records storage and maintenance is governed by Rule 1B-26.003, F.A.C. First, subsection 6 outlines the duties of the government for public records. The government must ensure that the system used meets state requirements for public access under Chapter 119, F.S. Rule 1B-26.003(6)(g), F.A.C.

Another relevant portion, subsection 10, deals with the selection of electronic records storage media. When selecting a medium for public records storage, the medium should "permit easy and accurate retrieval in a timely fashion" and "retain records in a usable format until their authorized disposition and, when appropriate, meet the requirements necessary for transfer to the Florida State Archives." Rule 1B-26.003(10)(a)-(b), F.A.C.

Additionally, the rule lists factors that should be considered before a medium is selected. The factors include: "the authorized retention of the records, the maintenance necessary to retain the records, the costs of storing and retrieving the records, the access time to retrieve stored records, the portability of the medium. . . , and the ability to transfer the information from one medium to

another.” Rule 1B-26.003(10)(f), F.A.C. Additional standards apply for long-term records, which are kept for more than 10 years. *Id.*

The Attorney General has determined that placing material on a government Facebook page in connection with official business is subject to Chapter 119, Florida Statutes. Op. Att’y Gen. Fla. 09-19 (2009). When information on the government’s Facebook page is a public record, it must be maintained following the public records retention schedules. *Id.*

The Department of State, Division of Library and Information Services is statutorily tasked with creating rules and procedures for public records management. *See* §§ 257.14; 257.36, Fla. Stat. The Department issued a guide, which touches on posting public records on social media. The guide advises that if an agency posts a copy of a public record on a social media site, it is not necessary to maintain that web copy indefinitely. *Electronic Records and Records Management Practices*, Div. Lib. & Inf. Svcs., Dep’t of State. However, for this to apply, the government’s record custodian must retain a copy in accordance with any applicable retention schedules. *Id.* The guide also suggests disallowing comments on any Facebook posts, as the comments may become part of the public record and must subsequently be retained. *Id.*

Conclusion

Recording and broadcasting the Board of Supervisors’ monthly meetings is allowable. However, the legal considerations of public records retentions and ADA compliance must be weighed in making the decision to purchase a camera for the purpose of filming these meetings.

Additionally, while Facebook can be used as a medium for broadcasting public records, best practice for your District is to retain a physical copy in order to meet public records requirements. The Facebook posts should not allow commenting to ensure that the public does not comment and create more public records that must be retained. Finally, the storage medium must meet the requirements of Rule 1B-26.003, F.A.C.