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October 28, 2017

Mr. Lewis B. Shelley, Esq., City Attorney
City of Tallahassee
300 S. Adams Street
Tallahassee, FL 32301

Dear Mr. Shelley:

We are writing to express our serious concerns regarding the City of Tallahassee's failure to comply with ch. 119, F.S., Florida's public records act.

The First Amendment Foundation has received a copy of a public record request made to the City by Jeff Burlew, a *Tallahassee Democrat* investigative reporter, on October 18, 2017. In that request, Mr. Burlew asked for "all of City Manager Rick Fernandez's text messages from Sept. 26, 2016, to Sept. 30, 2016." According to a report published in the *Democrat* on October 24, the City responded to the request by stating "no information was found." The *Democrat* followed up on its request with City spokeswoman Alison Faris and was told a second time there were no records responsive to the October 18 request.

The *Democrat* was able to obtain copies of text messages sent and received by City Manager Fernandez only after the Florida Commission on Ethics subpoenaed a lobbyist for the texts as part of an investigation into a complaint filed against Fernandez.

In the text exchange, City Manager Fernandez asked the lobbyist for four tickets to an upcoming FSU football game. According to the *Democrat* report, the box seat tickets were worth about \$2,000. It should be

noted that in previous interviews, Fernandez had denied receiving football tickets from the lobbyist.

The term “public record” is defined in s. 119.011(12), F.S. , as

all documents, papers, letters, maps, l 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. (emphasis added)

Florida’s Supreme Court has held that a “public record” is anything made or received by an agency “intended to perpetuate, communicate, or formalize knowledge” having to do with public business. [*Shevin v. Byron, Harless, Shaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)] City Manager Fernandez is an “agency” for the purposes of the Public Records Act. [Section 119.011(2), F.S.]

All text messages sent or received by a government employee or official that relate to public business are public records subject to disclosure and retention requirements under Florida’s public records law. [Inf. Op. to Browning, March 17, 2010] This includes public record text messages sent or received on a personal communication device. [*Butler v. City of Hallandale Beach*, 68 So. 3d 278 (Fla. 4th DCA 2011)]

The text messages, in which City Manager Fernandez solicited a valuable gift from a lobbyist who regularly represents his clients before the city, are directly related to evidence of the City Manager’s professional judgment and his ability to perform the duties of his job. They also directly contradict earlier public statements made by Fernandez and raise serious questions about his veracity.

These text messages are clearly public records regardless of whether Mr. Fernandez sent or received them on his private communication device, or one supplied by the City. When the City received the request from Mr. Burlew, the City had the affirmative duty to thoroughly search for the requested records.

Was City Manager Fernandez asked if he had text messages responsive to the request? If Fernandez was not asked, the City was derelict in its constitutional duty to provide access to public records and may be in violation of Florida’s public records law.

If Mr. Fernandez was asked and he denied having the requested records, Mr. Fernandez has certainly violated the law.

We ask you, as City Attorney, to perform a thorough investigation into this issue and report to the public the process by which city employees attempted to comply with Mr. Burlew’s public

records request. We also strongly suggest that all city employees and officials receive thorough training on the requirements and responsibilities of providing access to public records.

We don't think it an overstatement to say the reputation of the City of Tallahassee is in peril and its citizens are losing confidence in their government. The only way to regain that confidence, and change the climate within City Hall, is through transparency and accountability, not obfuscation and secrecy.

We ask for your immediate attention to this issue, Mr. Shelley.

Sincerely,

A handwritten signature in blue ink, appearing to be 'B.A.P.', with a stylized flourish.

Barbara A. Petersen, President

cc: The Honorable Andrew Gillium, Mayor, City of Tallahassee
James O. Cooke IV, Treasurer-Clerk, City of Tallahassee
Carol LoCicero, Chair, First Amendment Foundation