FIRST AMENDMENT FOUNDATION

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November 20, 2012

VIA E-MAIL

William E. Reischmann Jr.
City Attorney, City of Palm Coast
160 Cypress Point Parkway
Suite B-106
Palm Coast, FL 32164

Re: Violation of Sunshine law in Electing Council Member

Dear Mr. Reischmann:

As general counsel for the First Amendment Foundation, Inc., I write to explain the Foundation's opinion that the Palm Coast City Council violated the Sunshine law in the course of selecting David Ferguson to replace Frank Meeker as a member of the Council. You and I have carried on an indirect conversation through the reporting of News-Journal reporter Frank Fernandez in stories published in the Daytona Beach News-Journal on November 12 and 13. Because the comments attributed to you in these reports evince a misunderstanding of the law, we hope this discussion will be helpful in future cases.

The news reports indicate that the Palm Coast City Council received 16 applications for appointment to fill the seat vacated by the resignation of Mr. Meeker. Council members individually submitted to the city clerk their evaluations of the applicants, and the clerk compiled from these a short list of four applicants, including Mr. Ferguson, which was submitted to the Council. On the 13th, the Council members individually interviewed these four persons in private and then selected Mr. Ferguson in a public meeting.

This process violated the Sunshine law because the Council did not create the short list in an open public meeting, The basis for our opinion follows.

Section 286.011(1), Florida Statutes, provides that all meetings of a board such as your City Council "at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as made at such meeting." In *Times Pub. Co. v. Williams*, 222 So.2d 470, 473 (Fla. 2d DCA 1969), the district court held: "Every step in the decision-making process, including the decision itself, is a necessary preliminary to formal action. It follows that each such step constitutes an 'official act,' an indispensable requisite to 'formal action,' within the meaning of the act." In *Wood v. Marston*, 442 So.2d 934, 938 (Fla. 1985), the Florida Supreme Court held that a search-and-

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screen committee performed an official act when it screened applicants and decided "which of the applicants to reject from further consideration." The failure to notice and open the meeting therefore violated the Sunshine law.

In *Leach-Wells v. City of Bradenton*, 734 So.2d 1168, 1171 (Fla. 2d DCA 1999), the City Council delegated to a committee the task of reviewing and short-listing contractors who proposed to construct a new city building. The plan was that the members would submit written evaluations to the city clerk and then meet to select the top three. Because the written evaluations listed the same three contractors, the city clerk decided no meeting would be held and submitted the three contractors to the City Council, which then selected one of them. The Circuit Court's denial of plaintiff's motion for a preliminary injunction was not appealed, and the construction proceeded during the litigation. By the time the district court rendered its decision, the building had been completed. Notwithstanding the case was practically moot, the court said:

> we write to correct what we perceive to be a misinterpretation of the Sunshine Law. [T]here is no question that the committee members' individual evaluations were tallied and acted upon, albeit by the unilateral action of the city clerk, which resulted in three bidders being selected to make presentations to the Council. Therefore, notwithstanding the somewhat unusual facts giving rise to the absence of a meeting, we conclude that the short-listing was formal action that was required to be taken at a public meeting."

Leach-Wells, 734 So.2d at 1171.

The Bradenton committee violated the Sunshine law in ranking the bidders, and because this ranking was an integral step in the decision making process, the Council's award of the contract likewise violated the Sunshine law. *Id.* (citing *Town of Palm Beach v. Gradison,* 296 So.2d 473 (Fla.1974); *Silver Express Co. v. District Board of Lower Tribunal Trustees,* 691 So.2d 1099 (Fla. 3d DCA 1997)).

For the same reason that the district court held that the Bradenton City Council violated the Sunshine law in the process of awarding that contract, the Palm Coast City Council violated the law in selecting Mr. Ferguson because its short-listing was integral to the final decision.. To be clear, the violation was committed by the Council and not by the clerk.

It is not correct to argue that the ranking did not violate the Sunshine law because the Council members did not actually discuss the ranking among themselves outside an open meeting. The court made this clear in *Leach-Wells* when it said, "it is clear that the committee members never discussed their task with one another and never held any secret meetings." *Id.* at 1171. The violation of the Sunshine law consists in the Council's taking official action outside of such a meeting.

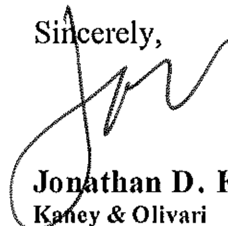
Nor can it be argued that the requirement that official action be taken in an open meeting applies only to a committee. It is the "*nature* of the act performed, not on the make-up of the committee or the proximity of the act to the final decision" that implicates the Sunshine law. *Marston*, 442 So.2d at 938. A city council can no more take official action outside an open meeting than can a subordinate committee.

Accordingly, it is our opinion that the appointment of Mr. Ferguson as a member of the Palm Coast City Council is void *ab initio*. See *Gradison, Silver Express Co.* Although this appointment might not be challenged immediately, the validity of this appointment will be subject to challenge when it becomes material to the counting of a quorum, to the determination of the outcome of a close vote, or to any other question on which the legitimacy of Mr. Ferguson's claim to this office is relevant.

We are aware that the Council took a perfunctory vote to ratify the short list during its meeting on November 13, 2012. This did not cure the violation because it was not an independent reconsideration of the decision to shorten the list. "A violation may be cured by an independent final action taken in the sunshine that is 'not merely a ceremonial acceptance of secret actions and not merely a perfunctory ratification of secret decisions at a later meeting open to the public.'" *Finch v. School Board of Seminole County*, 995 So.2d 1068, 1073 (Fla. 5th DCA 2008) quoting *Tolar v. School Bd. of Liberty County*, 398 So.2d 427, 429 (Fla. 1981).

If requested, we would be willing to discuss our view as to how the city might take action to cure this violation.. The resources of the Foundation always are available to public officials. In the future when such a question arises, we encourage you to contact the Foundation before advising the city to take action the lawfulness of which has been questioned.

Sincerely,



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