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MEMORANDUM

To: Harmony CDD Board of Supervisors
From: Young Qualls, P.A.
Date: September 19, 2019
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. [See attached ADA Government Compliance Memorandum – Exhibit A]

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

Article VII, Section 10 of the Florida Constitution does not allow the expenditure of public funds unless the expenditure serves a 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, video recordings of official meetings, as defined in § 286.011(1), Florida Statutes, require retention of two years from the date of adoption of official meeting minutes. 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 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. § 12312. 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.

Exhibit A

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MEMORANDUM

To: Harmony CDD
From: Young Qualls, PA
Date: September 19, 2019
Re: Current State of the Americans with Disabilities Act Applied to the Harmony CDD Website

Questions Presented

What is the current state of website accessibility under the Americans with Disabilities Act and the requirements for local governments, including some practical options for a CDD to consider in order to make a good faith effort to comply with the ADA?

Answer

A public entity that provides services or communicates with constituents via the internet must ensure equal access except when doing so would result in an undue financial burden. 28 CFR Pt. 3, App. A. Case law is still unsettled in the area of government websites and ADA compliance. Therefore while following practical steps show good faith by the District, we cannot guarantee that the District will not be subject to ADA litigation. At a bare minimum, language should be added to the website directing the hearing and visually impaired to a phone number where the individual can request the documents in another format.[i] Practically, the Board should consider implementing one or more of the following.

1. Remove all documents from the website that are not required statutorily and then ensure remaining documents are in a format that is readable by screen readers. This means that the removed documents can only be retrieved via a public records request.[ii]

2. Leave everything on the website but convert what is statutorily required into a readable format.
3. A full conversion to WCAG 2.0 standards. *See* https://www.w3.org/TR/WCAG20/

Discussion

The Americans with Disabilities Act ("ADA") has three subchapters covering discrimination. Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities; and Title III prohibits discrimination by a place of public accommodation. *See* 42. U.S.C. §§ 12112(a), 12131, 12182(a). Recently, "tester" lawsuits have increased for both vision impaired and deaf individuals. When the tester lawsuit involves a vision impaired individual, the individual alleges a company website is inaccessible using a screen reader. When the tester lawsuit involves a deaf individual, the lawsuit alleges that closed captioning is unavailable when on videos archived or livestreamed on the website. Currently, these "tester" lawsuits are transitioning to local governments across the state, alleging that documents located on the websites are incompatible with screen readers or that videos archived for streaming do not have closed captioning. The individual sends a letter to the local governmental entity requesting accommodation. After the letter is sent, then the individual can initiate legal action.

Title II of the ADA states that no person "shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12312. To bring a Title II claim, a plaintiff must show that (1) he is a qualified individual with a disability; (2) that he was excluded from participation or denied the benefits of the services, programs, or activities of a public entity; (3) by reason of the disability. *Shotz v. Cates*, 256 F.3d 1007, 1079 (11th Cir. 2001). However, the

Eleventh Circuit of Florida case law regarding Title II cases involves only violations at specific government facilities. For example, in *Shotz*, the plaintiff sued Levy County because he was told he could not bring his service dog into the courthouse. *Id*. In *McCollum v. Orlando Regional Healthcare System, Inc*., the plaintiff sued the public hospital due to lack of a sign language interpreter. 768 F.3d 1135, 1138 (11th Cir. 2014). There is no specific Title II case law dealing with government entity websites. Thus, there is no precedent in the public arena to guide a CDD. However, there are cases in the private arena which are informative.

Title III prohibits discrimination by private entities at "places of public accommodation." 42 U.S.C. § 121812. This section of the ADA applies to both tangible barriers and intangible barriers to access at a place of public accommodation. *Rendon v. Valleycrest Prods., Ltd*. 294 F.3d 1279, 1283 (11th Cir. 2002). However, to successfully allege a Title III violation, there must be a nexus between the violation and a physical place of public accommodation. *Id.* at 1284. Thus, the main difference between Title II and Title III claims is that there must be a place of public accommodation for Title III claims, while there is nothing like this in the Title II realm.

Website accessibility case law centers around Title III violations. The case law involves the court making a determination of whether a website constitutes a place of public accommodation. *See Robles v. Domino's Pizza*, LLC, 913 F.3d 898, 903 (9th Cir. 2019). The courts do this by determining whether a sufficient nexus between the physical location and website exists, while recognizing a distinction between "an inability to use a website to gain information about a physical location and an inability to use a website that impedes access to enjoy a physical location." *Price v. Everglades College, Inc*. No. 6:18-CV-492-ORL-31GJK, 2018 WL 3428156, at *2 (M.D. Fla. July 16, 2018). The court held that it is only when the inability to use a website impedes enjoyment of the physical location does sufficient nexus exist.

Id. An example for CDD purposes would be a disabled citizen trying to access the CDD board meeting online and being unable too.

For damages to be awarded under the ADA, the plaintiff must show that the defendant acted with "discriminatory intent." *McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1146-47 (11th Cir. 2014). Discriminatory intent requires showing that the defendant was deliberately indifferent to statutory rights, which requires more than gross negligence. *Id*. The plaintiff can establish this by showing the defendant knew that harm to a federally protected right was substantially likely and failed to act on that likelihood. *Id.*

Courts throughout the Eleventh Circuit are struggling with how to apply Title II to website accessibility cases. Title II applies to websites – the DOJ explained that although the ADA does not explicitly cover website access, public entities that provide services online or communicate with constituents through the internet must ensure equal access for individuals with disabilities, unless doing so would be an undue financial burden. 28 C.F.R. § Pt. 35, App. A. Additionally, the legal obligations can be met by providing alternative access, "such as a staffed telephone information line." *Id*. However, there is a lack of guidance from the DOJ on how to apply Title II to meet these requirements for websites, leaving District Courts split on how to address website accessibility cases.

The Southern District of Florida has dismissed Title II cases by applying the Title III website case law. See *Gil v. Broward Cty., Fla.*, No. 18-60282-CIV, 2018 U.S. Dist. LEXIS 225828 (S.D. Fla. May 7, 2018). The court agreed with the plaintiff that the ADA extended to non-physical spaces. *Id*. at *6. However, the plaintiff did not allege the inability to use the website impeded access to defendant's physical buildings and only alleged that he was denied access to information that exists on the website. *Id*. at *7. The court pointed out that the ADA

does not require websites to be full-service for disabled persons and to require that all websites must interface with screen readers is too much of a leap for the court. *Id*.

However, recent rulings from the Middle District of Florida addressed the issue and found that the above analysis is incorrect in Title II cases. In *Price v. City of Ocala, Fl.*, the Court found that Title III case law was inapplicable to Title II cases and dismissed the case for lack of standing. 375 F.Supp. 3d. 1264 (M.D. Fla. 2019). The court stated that reliance on Title III case law would require a nexus between the physical location of the government and the website, which makes no sense given that Title II has no requirement that a violation be connected to a physical location. *Id*. at 1273. Additionally, the court found that the plaintiff did not state how the inaccessible information hindered his ability to be involved with the government. *Id*. at 1277. The court dismissed the case because the plaintiff's allegation is "akin to an allegation that he was harmed by the inaccessibility of the information itself." *Id*. *See also Gomez v. Marion Cty., Fla.*, 2019 U.S. Dist. LEXIS 89917 (M.D. Fla. May 10, 2019) (alleging inability to "learn about" the county is equivalent to alleging inaccessibility of the information is the harm).

Likewise, no standing was found in another case by the same plaintiff in the Middle District, following the reasoning of *Price v. Ocala*. *See Price v. Town of Longboat Key*, 2019 U.S. Dist. LEXIS 84086 (M.D. Fla. May 20, 2019). Additionally, the court reasoned that once aware of the plaintiff's need, the defendant acted to send the requested material to the plaintiff and because it did so, the plaintiff did not have a claim. *Id*. at *16.

CDD Website Best Practices

To avoid discriminating against individuals with disabilities, public entities must make reasonable modifications to procedures, unless it can be demonstrated that the modification

would "fundamentally alter" the nature of the service. 28 CFR § 35.130(b)(7)(i). 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). Additionally, the aid or service varies with the context in which the communication is taking place and must be given in an accessible format in a timely manner. 28 CFR § 35.160(b)2).

As mentioned above, DOJ believes that these accommodations apply to websites. A public entity that provides services or communicates with constituents via the internet must ensure equal access except when doing so would result in an undue financial burden. 28 CFR Pt. 3, App. A. Thus, the ADA only requires "reasonable modifications" and does not require a public entity to use any and all means to make the information accessible, only to provide reasonable modifications that do not fundamentally change the nature of the service or impose undue burden. *Bircoll v. Miami-Dade Co.*, 480 F.3d 1072, 1081 (11th Cir. 2007). However, the Eleventh Circuit also noted in *Bircoll* that what is "reasonable" is a highly fact specific determination relative to the specifics of the case. *Id*. at 1085-86.

An example of an application of the "reasonable modification" principle comes from the Middle District's decision in *Price v. City of Longboat Key*. There, the city mailed the plaintiff a thumb drive with the documents that were requested in the accommodation letter. 2019 U.S. Dist. LEXIS 84086 (M.D. Fla. May 20, 2019). The court found that although this may not have been the plaintiff's preferred method of delivery, the city met its legal obligations to provide an alternative accessible means to the information. *Id*. at *13. Thus, the determination of a reasonable modification must be made on a case-by-case basis.

In Title III cases, plaintiffs ask for, and some courts have required, public accommodations to meet the Web Content Accessibility Guidelines (WCAG) 2.0 criteria. *See*

Gil v. Winn-Dixie Stores, Inc. 257 F.Supp. 3d 1340 (S.D. Fla. 2017); *Andrews v. Blick Art Materials, LLC,* 286 F.Supp. 365, 370 (E.D.N.Y. 2017); *Robles v. Domino's Pizza, LLC,* 913 F.3d 898 (9th Cir. 2019). Winn-Dixie appealed the Southern District of Florida's decision to the Eleventh Circuit, and is awaiting decision. These guidelines are developed by a private group, the World Wide Web Consortium (W3C), and are considered the industry standard for web content.

The WCAG 2.0 standards require alternatives that allow the information to be perceivable, operable, readable, and robust enough to be interpreted reliably by a wide variety of assistive technologies. The guidelines are grouped under the above principles. The guidelines under the "Perceivable" principle are as follows: provide text alternatives for non-text content; provide alternatives for time-based media; create adaptable content; and distinguish foreground from background. Under the "Operable" principle, the guidelines are: make all functionality accessible from the keyboard; provide users enough time to read; do not design content in a way that is known to cause seizures; and provide ways to help users navigate. Under the "Understandable" principle: make text content readable; make web pages appear in predictable ways; and help users avoid mistakes. Finally, the "Robust" principle includes maximizing compatibility with current and future technologies. However, while WCAG has been recognized as industry standards as applied in Title III cases, and a public entity may receive the benefit of converting to these standards, this does not guarantee ADA compliance in the Title II context.

Conclusion

Under Title II of the ADA, what must be accessible online is the "services, programs, or activities" of the Harmony CDD, including any services offered through the website. Arguably, there are no services offered on the Harmony CDD website. However, in order to make a good

faith effort to comply with the ADA, the CDD should ensure that those items required under Chapter 189, Florida Statutes, be on the website. In addition, on the website's homepage citizens should be directed to a phone number where they are able to request access to any statutorily required CDD information.

[i] The Northern District of Florida recently found that the City of Pensacola showed a willingness to work with the visually impaired individual when it included the following language: "'If for some reason, your reader does not work in helping to view the information on our website, please let the Human Resources team know (850-435-1720) and we will work with you to ensure you receive/review the documents of interest." *Gil v. City of Pensacola*, 2019 U.S. Dist. LEXIS 145843 (N.D. Fla. Aug. 22, 2019) (Order Granting Motion to Dismiss, n. 1.)

[ii] A CDD website must include all the items set forth in section 189.016, Florida Statutes as follows: (1) The full legal name of the special district; (2) The public purpose of the special district; (3) The name, official address, official e-mail address, and, if applicable, term and appointing authority for each member of the governing body of the special district; (4) The fiscal year of the special district; (5) The full text of the special district's charter, the date of establishment, the establishing entity, and the statute or statutes under which the special district operates, if different from the statute or statutes under which the special district was established. Community development districts may reference chapter 190 as the uniform charter but must include information relating to any grant of special powers; (6) The mailing address, e-mail address, telephone number, and website uniform resource locator of the special district; (7) A description of the boundaries or service area of, and the services provided by, the special district; (8) A listing of all taxes, fees, assessments, or charges imposed and collected by the special district, including the rates or amounts for the fiscal year and the statutory authority for the levy of the tax, fee, assessment, or charge. For purposes of this subparagraph, charges do not include patient charges by a hospital or other health care provider; (9) The primary contact information for the special district for purposes of communication from the department; (10) A code of ethics adopted by the special district, if applicable, and a hyperlink to generally applicable ethics provisions; (11) The budget of the special district and any amendments thereto in accordance with s. 189.016; (12)The final, complete audit report for the most recent completed fiscal year and audit reports required by law or authorized by the governing body of the special district; (13) A listing of its regularly scheduled public meetings as required by s. 189.015(1); (14) The public facilities report, if applicable; (15) The link to the Department of Financial Services' website as set forth in s. 218.32(1)(g); (16) At least 7 days before each meeting or workshop, the agenda of the event, along with any meeting materials available in an electronic format, excluding confidential and exempt information. The information must remain on the website for at least 1 year after the event.