

**RESOLUTION NO. 2019- 2648**

**A RESOLUTION OF THE TOWN COMMISSION OF THE TOWN OF SURFSIDE, FLORIDA ESTABLISHING A POLICY FOR THE MAINTENANCE AND RETENTION OF TEXT MESSAGES SENT OR RECEIVED IN CONNECTION WITH TOWN BUSINESS CONSISTENT WITH THE REQUIREMENTS OF THE FLORIDA PUBLIC RECORDS LAW; PROVIDING FOR AUTHORIZATION; PROVIDING FOR IMPLEMENTATION; AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, the Florida Public Records and Public Meeting laws are among the strongest in the nation, and the constitution of the State of Florida mandates citizen access to records of government; and

**WHEREAS**, the transmission of any media related to official public business is considered a public record, regardless of whether the device is utilized for business or personal use, and regardless of the format of the message or the means of transmission; and

**WHEREAS**, technological advances in telecommunications have made the use of smart phones with the ability to send texts prevalent; however, without extra effort, text messages sent by cell phones or other devices may not be saved as required for public purposes; and

**WHEREAS**, the Town of Surfside desires to establish an official policy (“Text Messaging Policy”) applicable to Town officials and Town employees to define the guidelines for organizing, maintaining, retaining and destroying text messages sent or received in connection with official Town business to comply with requirements of Florida Public Records Law; and

**WHEREAS**, the Town of Surfside desires to adopt the Text Messaging Policy substantially in the form attached hereto as Exhibit “A” governing the organization, maintenance, retention and destruction of Town-related text messages.

**NOW THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF SURFSIDE, FLORIDA AS FOLLOWS:**

**Section 1. Recitals.** That the above and foregoing recitals are true and correct and are hereby incorporated by reference.

**Section 1. Section 2. Text Messaging Policy Approved.** The Text Messaging Policy attached hereto as Exhibit “A” is hereby approved in substantially the form attached, subject to final approval by the Town Attorney as to form, content, and legal sufficiency.

**Section 3. Implementation.** The Town Manager is authorized to take all action necessary to implement the Text Messaging Policy and the purposes of this Resolution.

**Section 4. Effective Date.** This Resolution will become effective upon adoption.

**PASSED AND ADOPTED** this 12<sup>th</sup> day of November, 2019.

Motion by Commissioner Karukin.

Second by Commissioner Paul

**FINAL VOTE ON ADOPTION**

Commissioner Barry Cohen	<u>No</u>
Commissioner Michael Karukin	<u>Yes</u>
Commissioner Tina Paul	<u>Yes</u>
Vice Mayor Daniel Gielchinsky	<u>Yes</u>
Mayor Daniel Dietch	<u>Yes</u>

  
\_\_\_\_\_  
Daniel Dietch, Mayor

**ATTEST:**

  
\_\_\_\_\_  
Sandra Novoa, MMC  
Town Clerk

**APPROVED AS TO FORM AND  
LEGAL SUFFICIENCY FOR THE TOWN OF SURFSIDE ONLY:**

  
\_\_\_\_\_  
Weiss Serota Helfman Cole & Bierman, P.L.  
Town Attorney

## **EXHIBIT A**

### **TEXT MESSAGING POLICY**

In accordance with Chapter 119, Florida Statutes (“Public Records Law”), subject to limited exceptions, Town-business related text messages must be retained by the Town. The purpose of this policy is to address the use of text messaging for Town-business and the retention requirements of these messages relating to Town-business received or transmitted on Town-owned cell phones or devices, stipend employee-owned cell phones or personally owned cell phones and devices. This policy is intended to assure the Town’s compliance with records retention and disclosure requirements. The failure to follow this policy may expose the Town to damages and attorney’s fees under the Public Records Law. Failure to follow this policy may subject the employee to disciplinary action and could result in criminal prosecution for egregious misconduct.

#### **A. DEFINITIONS**

The following terms shall have the meaning provided:

“Town-owned cell phone or device” means a cell phone or other device capable of sending or receiving text messages that is provided to an employee by the Town for the purposes of performing his or her job duties.

“Town business” in relation to text messages means a text message sent or received by a Town employee relating to the work of the employee or the business of the Town.

“Town employee” means an employee of the Town and also means, for purposes of this policy only, an elected official, committee or board member, intern, or appointee of the Town, or a person hired by the Town through a temporary placement agency to perform work that otherwise would be performed by the employee, or a Town contractor.

“Message” for purposes of this policy, shall mean text messages.

“Personal text message” means a text message sent or received by a Town employee that does not discuss a matter of town business.

“Personally, owned cell phone or device” means a cell phone or other device that may be used by the employee in part to send or receive text messages related to Town business, but is not owned by the Town.

“Stipend employee-owned cell phone” means a cell phone owned by the employee who receives a stipend from the Town for the purposes of transacting Town business and personal business on this phone.

“Text” or “text message” is a brief message that is composed and sent between two mobile phones or portable devices such as a computer or tablet.

“Transitory text” means a text message that only documents information of temporary, short-term value, and that is not needed as evidence of a business transaction. Examples of transitory texts includes, but are not limited to:

- a. Texts that set work meetings or request job-related phone calls.
- b. Texts that are akin to transitory voicemail messages.
- c. Texts noting the sender has completed tasks.
- d. Texts informing a coworker/supervisor that the sender will be late to work, late to a meeting, is taking the day off, or other similar message.
- e. Texts that ask another employee to take some sort of action

## **B. MESSAGES REGARDING TOWN BUSINESS ARE PUBLIC RECORDS**

Text messages regarding Town business constitute public records under the Public Records Law. Whether a text must be retained depends on whether it is transitory or non-transitory. Retained text messages, may be subject to disclosure under the Public Records Law. This applies whether the messages regarding Town business are sent or received on a Town-owned or personally-owned cell phone or device.

### **1. Town-Owned Cell Phone or Device**

There is an expectation that Town employees will use Town-issued phones or devices exclusively for Town business. All Town-owned phones or devices, including the messages transmitted or stored by them, are the property of the Town and the Town reserves the right to access, read, use, monitor, and disclose employee communications, files, and other use without prior notice, as the Town considers appropriate. Moreover, employees have no right to privacy regarding the information stored, sent, or received on Town-owned phones or devices. After receipt of a public records request, and upon request of the Town, an employee may be required to provide his or her Town-owned cell phone or device to the Town for inspection, and all information on the cell phone or device is subject to Town review, including personal texts. Alternatively, the Town will engage and implement a text message archiving system with its current carrier, AT&T (or any successor carrier or service provider), at the Town’s cost, for Town-owned cell phones and devices to enable the Town to store, retain and retrieve text messages from these phones and devices in order to comply with Florida law. All text messages on Town-owned cell phones or device will be automatically archived through the AT&T message archiving system, and all text messages pertaining to Town-business shall be accessible and retrievable by the Town in connection with a public records request.

## **2. Stipend Employee-Owned Phone**

There is an expectation that Town employees who opt for a Town stipend for their personally-owned cell phones will conduct Town business on these phones. In order to comply with the Public Records Law, the text messaging archive system employed by the Town to archive messages for all Town-owned cell phones or devices will also be utilized for stipend employee-owned phones. The Town realizes that the Town-subsidized phone may contain both Town-related messages and personal messages, but the AT&T messaging archiving system, described above, is not capable of distinguishing between Town messages and personal messages. Consequently, the Town would have access to all text messages on the stipend employee-owned phone by accessing via AT&T to the employee's phone service provider's archive server. However, in the event of a public records request, only those messages pertaining to Town business will be accessed and retrieved in connection with a public records request. The Information Technology department will not access the employee's phone service provider's archive server without a public records request and written approval of both the Town Manager and Town Attorney.

## **3. Personally Owned Cell Phone or Device**

Personal cell phones and devices are the private property of Town employees. Personal texts unrelated to Town-business, are not public records, and need not be retained on a personally owned cell phone or device. It is strongly encouraged that messages regarding Town-business are not sent or received on personally owned cell phones or devices. If, however, text messages are sent, received or stored on a personal cell phone or device and pertain to Town-business, these records must be stored, retained and accessible and retrievable by the Town or employee unless otherwise exempt under Florida law.

While the Town is generally not permitted to inspect an employee's personal cell phone or device without the employee's consent, an employee who uses his or her personal cell phone or device to send or receive text messages concerning Town-business shall be required to store, produce, transcribe, or note in another document, texts or messages relating to Town-business in accordance with this policy. Town employees shall cooperate with the Town and provide assistance in fulfilling the Town's duties and obligations under the Public Records Law.

### **C. TRANSITORY MESSAGES v. NON-TRANSITORY MESSAGES**

Text regarding Town business are of two types: (1) transitory and (2) non-transitory. In accordance with this policy, the user may delete transitory messages once the message has served its purpose. Non-transitory messages may not be deleted from a cell phone or device until they have been archived in some manner and must be retained according to the appropriate retention schedule.

### **Texting Should be Limited to Transitory Texts**

An employee should limit his or her texting regarding town business to transitory texts that can be deleted once the message serves its purpose. Texts of a non-transitory nature should be discouraged. Rather, such communications should occur in person, by telephone, by email, or by memorandum. Using this approach will avoid complications with archiving and producing texts for the purposes of responding to public records requests.

#### **1. Transitory Texts**

- a. Delete once no longer needed, unless a public records request is received.
- b. Transitory texts may not be deleted if there is a public records request.
  - i. In the event a public records request is received that may contain a request for text messages transmitted on *either* a Town-owned or a personally owned cell phone or device, the employee, once put on notice of the request, shall not delete any text messages from the cell phone or device, even if such text is transitory or personal. The employee must produce any message that is on a personally owned phone or device within the scope of a public records request and meets the definition of a public record.

#### **2. Non-Transitory Texts**

Employees should not send non-transitory texts relating to Town business through a cell phone or device. In the event an employee sends or receives a non-transitory text, it shall be preserved and produced in accordance with this policy.

### **D. EXPENDITURE OF FUNDS TO RETAIN TEXT MESSAGES FROM TOWN PHONES/DEVICES AND STIPEND EMPLOYEE-OWNED CELL PHONES.**

While discouraged as a primary means of communication for Town-business, the Town recognizes that using text messages to conduct Town-business may be unavoidable and both transitory and non-transitory messages will continue to be sent and received in an effort to efficiently conduct Town-business. In order to capture text messages sent or received on a Town-owned cell phone or device assigned to Town officials and employees, or a stipend employee-owned cell phone, the Town Commission is authorizing the Town Manager and Administration to work with the IT Department to implement a text message archiving system with AT&T (or any successor carrier or service provider), at the Town's cost, for Town-owned cell phones and devices and stipend employee-owned cell phones to enable the Town to store, retain and retrieve text messages from these phones and devices in order to comply with Florida law.