

Scripted comments in JEA board meeting draw scrutiny over Sunshine Law

By Nate Monroe

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When JEA's chief executive officer walked into the Aug. 18 board of directors meeting, he had at least one reason to think it would be a good day.

Paul McElroy knew to a great degree of certainty that his boss, board chairwoman Helen Albee, would remark that the board "set some hefty goals for Paul, and he has met or exceeded all of them." McElroy knew she would then read through a list of many of his accomplishments, and he knew she'd end with this: "He is doing an excellent job in leading this organization and we are fortunate to have him at the helm during this very challenging time in our history."

Those words may have given him a well-founded confidence in what was going to happen in the next few minutes: The board would vote on a three-year contract extension to McElroy's contract, which would also come with a raise from \$404,227 to \$437,000 in base pay.

When the gavel did bang the meeting to a close, McElroy had indeed secured his job for three more years, thanks to a 6-1 board vote.

McElroy knew these details, the Times-Union learned examining hundreds of JEA emails obtained through a records request, because he coordinated with Albee and JEA marketing staffers days before that Aug. 18 meeting to produce and email to several board members a detailed, advance script of what Albee planned to say that day, a process that a leading state open-government advocate says subverted the Florida Government in the Sunshine Law.

"It's hugely problematic," said Barbara Petersen, president of the Florida First Amendment Foundation, a prominent open-government advocacy group. "It is a violation of the spirit and the intent of the law."

City General Counsel Jason Gabriel, whose office represents JEA, said Friday based on the limited information he had seen, it did not appear that JEA broke the law. However, Gabriel said the dissemination of the Aug. 18 script containing Albee's opinions to other board members should not be the way JEA routinely conducts its business.

The Times-Union discovered the Aug. 18 script, along with others from June and July, while reviewing emails JEA provided Friday morning and evening in response to the newspaper's broad request for nearly four months of emails among board members, McElroy and Melissa Charleroy, who works as an executive assistant for both the board and McElroy.

Asked Friday about the scripts, JEA officials said they had already made a decision this past week to change the way it handles scripts to ensure that detailed comments like the talking points Albee used for the Aug. 18 meeting would not be disseminated to other board members in advance.

That change, according to McElroy, was prompted by board member Husein Cumber and executive assistant Charleroy, who both recently questioned the process with McElroy. Likewise, Gabriel said his office was not aware of the script issue until a board member, whom he would not identify, recently met with an assistant general counsel about it. Cumber would not comment for the story.

At the Aug. 18 meeting, Cumber was the only board member to raise concerns over issues related to McElroy's contract extension and a JEA staff proposal for the board to authorize spending up to \$3 million studying how to address its aging downtown headquarters.

The Sunshine law is intended to allow citizens to view the entire deliberative process of legislative bodies overseeing government or public agencies. It does that by requiring communication between members of the body on official business that is expected to come up for action be done only in publicly noticed, open meetings. Board members can speak individually with staff, but the staff can't be used as a liaison to communicate opinions between two or more members. JEA, the city-owned water and electric utility, is a public agency subject to the Sunshine law.

The dissemination of a script containing the thoughts and opinions of the board chair to other members might be in conflict with the law's intention of ensuring that discussions in public meetings are genuine and not pre-planned in private.

The Aug. 18 script contained details ranging from trivial instructions - like telling Albee and other board members when to ask for public comments or to call upon a speaker - to in-depth talking points that reflected Albee's opinions on issues like McElroy's contract extension as well as other big-ticket issues that day: A pilot program that could lead to a major change in the way customers are charged for electricity and funding a study to determine whether JEA needs to tear down its downtown headquarters.

That script was then sent to board members Peter Bower, Cumber and Wyman Winbush before the meeting, according to JEA emails. That means, at a minimum, three of Albee's colleagues were given access to an early look at her scripted advocacy. During the meeting, Albee read many of those scripted comments verbatim.

The seven-member JEA board of directors is the utility's governing body, charged with hiring and firing the CEO and independently overseeing the executive's performance - decisions which are among the primary functions of the board. The mayor appoints JEA board members, who must be approved by the City Council. Albee, an attorney, was appointed to the board in 2012 and was unanimously selected as chair in February.

It's not clear who is primarily responsible for crafting Albee's talking points or how they originated. JEA emails show that, while Albee reviewed talking points in advance of meetings, McElroy and marketing staff also had input.

For example:

» In an Aug. 13 email with the subject line, "for talking points," McElroy passes along the following note to Jane Upton, JEA's director of customer and community engagement:

"Under Mr. McElroy's leadership the JEA team has:

Improved systems reliability

Dramatically improved customer satisfaction

Held costs to 2012 levels

Developed a number of new revenue streams to help offset declining sales"

» One minute later, Upton responds: "I am smiling. Those are exactly the ones we are focusing on."

The Times-Union requested to speak with McElroy and Albee, who was also emailed directly for response.

Only McElroy responded.

“My review is to look for accuracy,” McElroy said of his involvement in the scripted talking points. He also said the level of involvement from staff on drafting talking points varies from board member to board member and that Albee was getting the assistance she requested.

The board began discussions about renewing McElroy’s contract in February, and Albee, as chair, was tasked with heading those negotiations. The result of those talks was the contract up for a board vote Aug. 18. It was virtually identical to McElroy’s original 2012 contract, with minor updates to the offered salary and dates of employment.

Even during the negotiations, Albee was working in tandem with marketing employees who report to McElroy on talking points.

Judi Spann, JEA’s manager of corporate communications, drafted comments for Albee to read at the July meeting to update board members on the progress of negotiations, which Albee reviewed prior to the meeting:

“I have been carefully reviewing Paul’s contract over the last 6 (sic). As you can imagine, I have spent many hours in a thoughtful, deliberate process to review the contract in order to ensure that the negotiations are fair, open and transparent.”

THE SCRIPTS

It’s unclear if other board members - only one of whom responded to Times-Union requests for comments sent Friday afternoon - received the Aug. 18 script beyond Cumber, Winbush and Bower.

“I don’t have any personal knowledge about scripted talking points being used by JEA members, nor am I aware of any Sunshine Act violations by the Board,” board member Robert Heekin wrote in an email.

JEA officials say these scripts are part of a “long-standing practice for a decade or more.” The utility provided a year’s worth of scripts Friday afternoon at the newspaper’s request. The Times-Union is still reviewing those scripts.

It appears, however, that scripts for meetings created for previous board chairs lacked the kind of detailed opinions expressed in the Aug. 18 script and were restricted primarily to boilerplate notes about meeting processes or recaps from board members about the outcomes of public committee meetings. Those kinds of process-centered details would not be problematic when disseminated to board members ahead of time.

The utility said that traditionally these scripts have been sent in advance to the board chair as well as the chairs of the board's committees who are slated to give reports.

EXPECTING DISAGREEMENT

Petersen said the process of using staff to help create advanced, detailed comments for the board chair leaves an impression that decisions are being made to some degree before the meetings begin, outside of the Sunshine law.

"We go into these meetings expecting discussion. Expecting disagreement," she said. "What they're doing is deciding what is going to happen at a public meeting even before a public meeting occurs."

For instance, Albee walked into the July 21 meeting with talking points - also created with the help of the utility's marketing staffers - that assumed the board would pass a union employment contract up for a vote that day. In her prepared remarks, Albee thanks the human resources staff for their work in the negotiations, saying "it's great to see a final outcome that is satisfactory to everyone."

Albee made a slightly modified version of those remarks.

Emails don't indicate that other board members received those comments prior to the meeting, though it's not clear if hard copies were distributed.

Petersen also took issue with the involvement of JEA staff in writing or influencing Albee's talking points, saying it undermines the concept of open government. Board members, not staff, are supposed to be the ones entrusted with conducting the board's deliberative process, Petersen said. "Staff is there to provide information," she said.

And because these talking points were created behind closed doors, it's impossible to know what level of influence McElroy or his employees exerted over the process.

"We have a right of access to the entire deliberative process, and they're subverting that process," Petersen said. "Who writes the script? Who makes the decision?"

PAST PROBLEMS

This is not the first time JEA has been criticized in recent months over a Sunshine issue.

Late last year, a series of private meetings between JEA board members and an outside attorney resulted in the board's unanimous decision to award McElroy a \$43,169 bonus. The JEA board's then-acting chair, Lisa Strange Weatherby, made a motion to approve the bonus amount - which is discretionary. The board unanimously approved the motion, though there was no substantive public discussion about how that figure was decided.

The public was not notified of the vote in advance, and a Times-Union reporter was told a day before the meeting it didn't appear the issue would come up. Unlike in previous years, when some board members completed written evaluations, the only document readily available to ascertain how the bonus amount was arrived at was a written self-evaluation McElroy completed in November.

Petersen at the time called that process "extremely problematic" and an "end run around the Sunshine law."

Gabriel, the general counsel, said it did not appear that process violated the Sunshine law but recommended JEA change it - similar to his latest position on the Aug. 18 script.

In response, the JEA board has changed its CEO evaluation process this year. Board members this fall will fill out detailed scorecards on McElroy's performance. The discussion will take place in public at a noticed meeting.

Despite the changes, Weatherby - who is no longer the acting chair but remains a board member - has criticized the newspaper, sometimes indirectly, over the past year in public meetings for what she considered unfair reporting surrounding the issue.

The script for the December meeting during which the bonus was awarded makes no indication that was set to occur and contained largely boilerplate notes about meeting process.

OFF SCRIPT

The Aug. 18 meeting did go off script a few times.

After Albee walked through her scripted statement supporting her recommendation to extend McElroy's contract, Bower and Weatherby also praised McElroy's performance.

But Cumber - the board member who raised concerns about the script issue with McElroy - was frustrated that board members only had a market comparison of McElroy's pay compiled by JEA's human-resource staff. That work, which helped determine McElroy's proposed base pay for the next three years, should have been done without JEA staff involvement, he said.

"... I have a tough time voting on a contract when the only market analysis I have in front of me is whatever I have taken the time to do outside of this document prepared by JEA staff," he said.

"I kind of expected that we would, before we voted, have a market analysis worksheet that was done outside of the JEA HR process."

The study showed McElroy's compensation package falling below industry norms. McElroy's annual take-home pay could exceed \$500,000 if he were to take home the full 15 percent bonus he's eligible for under his new contract.

Cumber's dissent wasn't included in the script. He was the sole member of the board to vote against the new CEO contract, though he made it clear his opposition was about the process and not over McElroy's performance.

The meeting script also shows that Albee also had planned to speak in support of financing a study to help determine whether JEA should build a new tower or renovate its existing building and the neighboring customer-service center, which could cost between \$40 million and \$50 million no matter the option. JEA officials say the current tower is aging and suffers major structural issues that would be costly to fix.

Staff initially requested the board approve spending up to \$3 million for the study, and that recommendation was approved by the board's finance and audit committee.

According to the script, when Bower asked if any board members had comments about his committee's recommendation, Albee had planned to say that "now is an optimal time for the JEA Board to consider possible solutions so that it can allocate the necessary resources for a comprehensive feasibility study which will inform and assist with future decision-making."

But Cumber interjected.

He suggested a \$1 million limit on the study instead, arguing \$3 million was far in excess of what would be needed for a study of that kind. In the course of the discussion, McElroy said of the \$3 million request, “Well, I think that the number itself was arbitrary.” He said half that amount or \$1 million would be fine, and Cumber’s motion to reduce the maximum cost of the study to \$1 million passed in a 5-2 vote. Albee supported Cumber’s motion.

ONE WAY

Gabriel argued that a violation of the Sunshine law occurs if communication about a board member’s opinions or feelings on an issue becomes an active discussion among board members. The dissemination of the Aug. 18 script to several other board members, however, was only “unilateral,” and therefore not a violation, he said.

Nonetheless, Gabriel said, “We would not recommend that way of doing it.”

The Attorney General’s Office says “one-way” communications between members of legislative bodies is permissible as long as there is no response to that communication outside of a public meeting. That communication also must be preserved as a public record.

If the Aug. 18 script was intended to be one-way communication, no such indication was made in the script itself or in the emails sent with it attached.

None of the board members who received the Aug. 18 script in advance responded in email to any of Albee’s comments, though it’s not clear beyond that whether any responses were made. Albee, however, did revise the script after the board and CEO executive assistant emailed an earlier version to her, Cumber and Bower on Aug. 14. Albee emailed McElroy a slightly modified version Aug. 17.

“Paul, I’ve made some revisions to my part of the script under the CEO contract and the rate pilot program sections,” she wrote. “I am sending to you for review.”

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CRAFTING THE TALKING POINTS

It’s not clear who is primarily responsible for crafting JEA board Chairwoman Helen Albee’s talking points or how they originated, but JEA emails show that while Albee reviewed talking points in advance of meetings, JEA CEO Paul McElroy and the utility’s marketing staff also had input.